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Troy L. ADAMS & Mrs. L.L. ADAMS *v.* Dorothy Mayo PARKER & Roger Kelly MAYO

85-301 708 S.W.2d 617

Supreme Court of Arkansas
Opinion delivered May 5, 1986

Pryor, Robinson & Barry, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, Troy L. Adams, and the appellee, Roger Kelly Mayo, who were high school students at the time, were involved in a car accident in which both were injured. Mayo and his mother filed suit against Adams and his mother seeking $61,875 for loss of income, loss of a college scholarship, disability, medical expenses, pain and suffering, and property damage. The case was tried before a jury which returned a verdict in Mayo's favor, fixing his damages at $200.00. The trial judge found there was an error in the assessment of damages and granted Mayo's motion for a new trial. It is from that order that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(o). We affirm.

Arkansas R. Civ. P. Rule 59 provides that a new trial may be granted for "any of the following grounds materially affecting the substantial rights of such party: . . . (5) error in the assessment of the amount of recovery, whether too large or too small."

Where a motion for new trial is granted, the test on review is whether the trial court abused its discretion. *Ferrell* v. *Whittington*, 271 Ark. 750, 610 S.W.2d 572 (1981). The trial judge is vested with great discretion in ruling on a motion for a new trial and will not be reversed unless there is a manifest abuse of that discretion. *Roberts* v. *Simpson*, 275 Ark. 181, 628 S.W.2d 308 (1982). We have held that a showing of abuse of discretion is more difficult when a new trial has been granted because there is less basis for a claim of prejudice by the beneficiary of the verdict which was set aside than by one who has unsuccessfully moved for a new trial. *Roberts*, *supra.*

Here, evidence was offered that Mayo's medical bills alone totalled $2,854. From an examination of the record, we cannot say the trial court's finding, that an award of $200 was too small, was a manifest abuse of discretion. Accordingly, we affirm the action of the trial judge in granting a new trial on that basis.

Affirmed.

PURTLE, J., not participating.

Vera Joe DURHAM *v.* James M. DURHAM

85-321 708 S.W.2d 618

Supreme Court of Arkansas
Opinion delivered May 5, 1986

Mike Rothman and *Ben D. Rowland, Jr.* of *Rowland & Templeton*, for appellant.

Callahan, Crow, Bachelor, Lax & Newell, P.A., by: *C. Burt Newell* and *George M. Callahan*, for appellee.

GEORGE ROSE SMITH, Justice. This is a divorce case. The parties, both Arkansans, were married in Arkansas in 1971. He had entered the Marine Corps earlier that year. Their married life was spent at various military stations. One child, a daughter, was born in 1980. The couple separated in October, 1982, and Mrs. Durham filed this divorce action that December.

After a four-day trial, at which more than 15 witnesses testified, the chancellor granted a divorce to the wife on the ground of indignities and awarded her the custody of the child.

Her appeal, lodged in this court under Rule 29(1)(c), presents three primary issues relating to alimony or to the division of property.

The appellant first questions the chancellor's refusal to award her an interest in whatever military pension Major Durham may be entitled to receive in the future. The marital status existed for 13 years, from 1971 until the divorce in December, 1984. The contention is that Mrs. Durham should be declared to have an interest in Durham's pension in whatever ratio those 13 years bear to his total military service at the time he begins to receive a pension.

We agree with the chancellor. The proof is that Durham will not be entitled to a pension until he has served for at least 20 years. Until then, unlike the professor in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), Major Durham has no vested right that must be recognized as marital property. He is employed by the United States; so Congress could at any time change his retirement plan or abolish it. Durham's expectancy is more like the expectancy of termination pay that we considered in *Lawyer* v. *Lawyer*, 288 Ark. 128, 702 S.W.2d 790 (1986). The appellant relies upon the Uniformed Services Former Spouses' Protection Act, 10 USCA § 1408 (1983), but that federal statute merely provides that the military authorities may treat a serviceman's retirement pay as the property of him and his spouse in accordance with state law. No independent property right is created in the spouse by the federal act. In this instance no such right exists under Arkansas law.

Second, the chancellor held that a $13,500 money-market certificate that Mrs. Durham cashed during the pendency of the suit should be treated as having been marital property that was owned equally. She argues that the money used to purchase the certificate, or at least the greater part of it, was her separate property before the marriage; so the certificate should be declared to have been her property, in whole or in part.

The testimony of the parties about the source of the funds was in such conflict that the chancellor expressed his difficulty in making an equitable division. He noted that Durham's proof indicated that Mrs. Durham owed him more than the amount of the certificate. Without attempting the seemingly

impossible task of tracing all the funds that went into the certificate, the chancellor ended his discussion of the point by declaring that the certificate was marital property, to be divided equally.

We cannot say that his decision was clearly erroneous. The most important issue was that of credibility as between conflicting testimony, a matter upon which we must defer to the trial court's judgment. Moreover, in two respects the appellant's position is demonstrably unsound. One, she relies upon affidavits that were attached to a motion to amend the decree. The chancellor was justified in refusing to accept such inadmissible evidence, there being no showing that the asserted facts could not have been offered at the trial by testimony that would have been subject to cross examination. Two, the argument is made that since at one time a predecessor certificate of the one in issue had been payable to these two parties and to Mrs. Durham's parents, as joint tenants with right of survivorship, Durham's interest cannot exceed one fourth of the certificate. The flaw in this argument is that the owner of a certificate of deposit may direct the bank to add or remove other names as co-owners, but the real ownership does not change until the principal depositor surrenders the certificate or dies. "Due to the nature of a certificate of deposit and the law relating thereto, the purchaser has the right during his lifetime to change the certificate and cause it to be payable to different parties or even to cash it in." *Gibson* v. *Boling*, 274 Ark. 53, 622 S.W.2d 180 (1981).

Third, the appellant argues that we should extend the chancellor's allowance of alimony, which he fixed at $500 a month for six months. (There was also an allowance of child support of $350 a month.) The appellant, a school teacher, has a B.A. degree in education and taught school at the sixth-grade level for five years before her marriage. Her certificate as a teacher can be reinstated if she obtains six hours of credit and passes a test. She declines to resume teaching until her daughter, who was four years old at trial, starts to school. The child is now in kindergarten. The chancellor ruled that this mother is entitled only to alimony sufficient to enable her to renew her teaching certificate and go back to work. We find no reason to overrule the trial judge's decision on this point.

The appellant's fourth and fifth points were not raised below until after the decree had been entered; they require only a few words. The trial judge was justified in refusing to consider an income tax matter that could have been developed during the trial. Finally, it is insisted that Major Durham should be required to post a bond if he ever decides to take the child out of this country while he is exercising his visitation privileges. We agree with the chancellor's observation that this issue is too speculative to require a decision at this stage of the case.

Affirmed.

PURTLE and HAYS, JJ., not participating.

Kenneth Marsh McGIRT *v.* STATE of Arkansas

CR 86-60 708 S.W.2d 620

Supreme Court of Arkansas
Opinion delivered May 5, 1986

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

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant was found guilty of second degree forgery and sentenced as a habitual offender. We affirm.

On December 9, 1984, the appellant entered a Food 4 Less grocery store in West Memphis and placed $147.07 worth of groceries in his shopper's cart. He pushed the cart to the check-out counter where the bill for the groceries was electronically processed by the checker, Leslie Wheeler. The appellant presented to Wheeler a salary check drawn on the Bluff City Service Company, Inc., a Memphis business, payable to appellant in the amount of $412.21. It was purportedly drawn by John P. Johnson. Before she would cash the check, Wheeler took the check and appellant's driver's license to the store manager for approval. The store manager, Dan Brown, recognized the similarity between the check and some other forged checks. He called the security guard, Gary Gitchell, and together they went to the check-out counter where appellant was waiting. They asked appellant to go with them to the store office, where appellant made various statements to the effect that he should not have attempted to pass the check. He attempted to escape from the office but was caught. It is undisputed that the check had been stolen from the Bluff City Service Company, Inc., that appellant had never worked for the company, that he was not due any salary, and that John P. Johnson was not authorized to draw checks on the company. At trial, the checker, the store manager, and the security guard positively identified appellant. The evidence of guilt was simply overwhelming. The jury found appellant guilty, but, in a bifurcated proceeding, was unable to reach agreement on punishment. The trial court sentenced appellant, as a habitual offender, to twenty years, with eight years suspended. The Court of Appeals certified the case to this Court for interpretation of a statute.

The appellant argues that the trial court erred by refusing to instruct the jury on the lesser included offense of criminal attempt to commit forgery. The trial court was correct. The overwhelming

evidence shows that appellant possessed and attempted to pass, or passed, the stolen check. Forgery is defined in the relevant part as follows:

> 41-2302. *Forgery* — (1) A person forges a written instrument if with purpose to defraud, he draws, . . . *possesses* or *utters* any written instrument that purports to be or is calculated to become, or to represent if completed, the act of a person who did not authorize that act.
>
> . . .
>
> (3) A person commits forgery in the *second* degree if he forges a written instrument that is:
>
> (a) a deed, will, codicil, contract, assignment, *check*, commercial instrument, credit card, or other written instrument that does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; . . . .

(Emphasis added.)

"Utter" is defined in Ark. Stat. Ann. § 41-2301 (7) (Repl. 1977):

> "Utter" means to transfer, pass, or deliver, or cause to be transferred, passed, or delivered to another person any written instrument, *or to attempt to do so.*

(Emphasis added.)

In *Mayes* v. *State*, 264 Ark. 283, 571 S.W.2d 420 (1978), we explained:

> The crime of forgery is much broader in scope than under previous statutes and the crimes previously known as forgery and uttering, formerly held to be separate offenses, are now included under the broad category of "forgery." Consequently, when the state charged appellant with forgery, the charge was broad enough to cover the crimes previously known as forgery, uttering and possession of a forged instrument. See Commentary, § 41-2302. Any of these acts constitutes the single crime of forgery. See *State* v. *Morse*, 38 Wash. 2d 927, 234 P.2d 478 (1951). Under the statute, one forges a written instrument if with purpose

> to defraud, he draws, makes, completes, counterfeits, possesses or utters a written instrument that *purports to be* or is *calculated to become*, or *to represent if completed*, the act of a person who did not authorize the act. Sec. 41-2302 (1).
>
> One commits forgery in the second degree if he forges a written instrument that is a *check*. He also commits forgery if he forges a written instrument that *does* or *may evidence, create, transfer, terminate or otherwise affect* a legal right, interest, obligation, or status. As we interpret the trial judge's statements, he properly applied the statute and held that the evidence was not sufficient to show that appellant had drawn, made, completed, altered or counterfeited the instrument presented, but that it did show that he had uttered it. The meaning of the word "utter" in the applicable section is broad enough to cover the delivery, or attempted delivery, of a written instrument to another person. Ark. Stat. Ann. § 41-2301 (Repl. 1977).

Here, the appellant possessed a check which purported to be drawn by a person who was not authorized to perform that act, and he passed or attempted to pass that check. The crime of forgery was complete upon his being in possession of the forged instrument, or upon his attempt to pass the check; or upon his passing of the check. Appellant was either guilty of forgery or nothing. It was not error to refuse to instruct the jury on a lesser included offense when the evidence clearly shows that the defendant is either guilty of the greater offense or innocent. Ark. Stat. Ann. § 41-105 (3) (Repl. 1977); *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Appellant next argues that the record is insufficient to support an extended term under the habitual offender statute. Appellant has three prior convictions in Tennessee, but contends they are not felonies under Arkansas law. His contention is premised upon Ark. Stat. Ann. § 43-2329 (Repl. 1977) which treated conviction of an offense in another jurisdiction as a felony only if the offense would have been a felony if committed in Arkansas. While that statute has not been repealed, we stated in *Reeves* v. *State*, 263 Ark. 227, 564 S.W.2d 503 (1978), that it was superseded by Ark. Stat. Ann. § 41-1002 (Repl. 1977). The

appellant relies on our reference in *Atkins* v. *State*, 287 Ark. 445, 701 S.W.2d 109 (1985), to the old statute. That reference was incorrect and should have been to Ark. Stat. Ann. § 41-1002 (Repl. 1977), which treats conviction of an offense in another jurisdiction as a felony if the offense could result in imprisonment for a term in excess of one year in the foreign jurisdiction.

At trial, the evidence consisted of duly certified copies of the records of three judgments of conviction in the Criminal Court of Shelby County, Tennessee. Under Tennessee law, all three convictions were punishable by imprisonment of a term in excess of one year. The evidence was sufficient to support the extended term.

The trial court did not personally determine the number of prior felony convictions in accordance with Ark. Stat. Ann. § 41-1005 (2) (Supp. 1985), but instead, without objection, submitted the issue to the jury pursuant to an earlier version of the statute. During their deliberation, the jury returned and advised the court that they were having difficulty in determining whether the Tennessee offenses were felonies. Among the court's comments was the following: "In each case the judgment does provide at the bottom that the defendant is rendered infamous which is further evidence which you may consider in determining whether or not they are or are not felonies." The appellant contends the comment violated Article 7, Section 23 of the Constitution of Arkansas as the statement was a comment by the trial judge on a factual matter. The comment is not cause for reversal.

First, appellant had no right to have a jury decide the issue. Ark. Stat. Ann. § 41-1005(2) (Supp. 1985). Therefore, the appellant cannot show any prejudice by a supposedly improper comment to the jury.

Second, the issue of the number of prior convictions is a matter of law, not a matter of fact. *Shockley* v. *State*, 282 Ark. 281, 668 S.W.2d 22 (1984). Since the matter was an issue of law, rather than fact, the constitutional prohibition against commenting on a factual issue does not apply.

During the penalty phase of the bifurcated trial, the jury reported that they had unanimously agreed that appellant was a habitual offender, but they were split ten to two on the penalty.

The jury, at the time, had been in deliberation on the penalty phase of the trial for three hours and fifteen minutes. The following colloquy occurred:

THE COURT: Do you feel if given an additional period of time to deliberate that you would be able to reconcile or resolve that difference and reach an opinion? I see some shaking of the heads here so I gather you would not?

FOREMAN: We have been trying that and I don't think we could.

THE COURT: I'm going to accept that.

The appellant contends that the court erred by refusing to give AMCI 6004, the Allen charge, before taking the fixing of punishment away from the jury. We find no merit in the argument. Ark. Stat. Ann. § 41-802(2)(c) (Repl. 1977) authorized the trial court to fix the punishment when the jury cannot agree on the punishment. Determining when the jury cannot agree is a matter over which the trial court has considerable discretion. The trial court did not abuse its discretion under the facts of the case.

The appellant's last argument is that the trial judge did not give him credit for the time he spent in jail while awaiting trial. The trial court gave appellant 120 days credit for the time he spent in jail awaiting trial on this charge. *See* Ark. Stat. Ann. § 41-904 (Repl. 1977). He was not entitled to credit for time in jail for an unrelated charge. *Boone* v. *State*, 270 Ark. 83, 603 S.W.2d 410 (1980).

Affirmed.

PURTLE, J., not participating.

SAFEWAY STORES, INC. *v.* Owen WILLMON

86-3 708 S.W.2d 623

Supreme Court of Arkansas
Opinion delivered May 5, 1986

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

Dodds, Kidd, Ryan & Moore, for appellee.

ROBERT H. DUDLEY, Justice. The appellee, the plaintiff below, was a customer in the Safeway Store in Malvern and, while pushing a shopping cart down an aisle, slipped on a liquid substance and fell. At trial, the court overruled appellant's motions for a directed verdict, both at the close of the case-in-chief and at the close of all evidence. Appellant contends that the trial court erred in submitting the issue of negligence to the jury. The argument is well taken. We reverse and dismiss.

The law governing the liability of a store owner for injuries to a business invitee who slips and falls on a foreign substance on the premises is well settled. To establish liability of

the store owner to the invitee, the invitee must prove that the presence of the foreign substance on the floor was the result of negligence on the part of the store owner, or that the substance had been on the floor for such a length of time that the storekeeper knew, or reasonably should have known, of its presence and failed to use ordinary care to remove it. The mere fact that a patron slips and falls in a store does not raise an inference of negligence. The doctrine of res ipsa loquitur is not applicable. *Ledford* v. *Gas Mart Co., Inc.*, 259 Ark. 1, 531 S.W.2d 11 (1975).

Appellee slipped on a substance which was specifically identified as clear water by two of appellant's employees who made an inspection of the liquid. The only evidence indicating the foreign substance might be something other than plain water was when the appellee testified that some unknown store employee told him it looked like soapy water.

None of the witnesses knew the origin of the water. Appellee called the store manager as his witness, and the manager speculated that it might have been brought from the water fountain at the rear of the store to the place of the spill, or that someone could have spilled a soft drink cup filled with ice. A store employee testified that he at first guessed it came from one of the one gallon plastic jugs of distilled water which was shelved nearby. However, inspection of the jugs showed that none of them leaked. There simply was no substantial evidence about how the water came to be on the floor. There was only sheer speculation and rank conjecture. There was no proof that the water was on the floor as the result of negligence on the part of the storekeeper.

Similarly, there was no proof that the water had been on the floor for such a length of time that the storekeeper knew, or should have known of its presence and failed to use ordinary care to remove it. Appellant's records show that the aisle where the fall occurred had been swept an hour and fifteen minutes before the fall. Employees had been up and down the aisle in the interval between the time of sweeping and the time of the fall. There was no evidence that any employee knew of the spill or reasonably should have known of it. There was only evidence that if an employee had been working at the checkout counter at the end of the aisle, that employee would have been within fifteen feet of the spill.

Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence.

Reversed and dismissed.

PURTLE, J., not participating.

Ronnie Lee BIRCHETT *v.* STATE of Arkansas

CR 85-210 708 S.W.2d 625

Supreme Court of Arkansas
Opinion delivered May 5, 1986

William C. McArthur, was appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. On the evening of August 13, 1984 a man wearing a nylon stocking mask and carrying an automatic pistol entered a trailer owned by Thurl Harper where Harper and his employee, Gary Don Mason, were watching television. They were robbed of $2,300 in cash, wrist watches and a masonic ring containing a large diamond, and were struck several times with the pistol when they were slow to obey orders. When nearby employees responded to Harper's cries for help, the robber fired at them as he fled to a waiting automobile.

Harper's own investigation led to the name of Ronnie

Birchett and Harper gave that information to the police. When Harper and Mason were shown a photograph of Birchett they identified him as the gunman. In trial they were positive Ronnie Birchett was the man who robbed them. Birchett was convicted of aggravated robbery, theft of property, aggravated assault and felon in possession of firearms. He appeals from a sentence of thirty-four years.

Appellant's main argument is the trial court erred in allowing the state to call a witness in rebuttal whose name had not been given the defense under a discovery motion. Appellant urges that the witness was not a proper rebuttal witness. We sustain the argument.

When the state rested its case, based largely on the identification by the victims, Birchett took the stand in his own behalf. On cross-examination the prosecution elicited denials from Birchett that he had discussed the robbery with a former girlfriend, Pamela Goodrich, or that he had shown her a watch and ring taken in the robbery. In rebuttal the state called Pamela Goodrich to testify that Birchett had told her about the robbery, had given her $300 from the money and had shown her a watch and diamond ring matching the description of items taken from Harper. Appellant objected to this witness as not being a proper rebuttal witness and because her name had not been given the defense as requested under A.R.Cr.P. Rule 17.1. The prosecutor's argument that Goodrich was a rebuttal witness and therefore not subject to discovery was sustained by the court.

The prosecutor's contention that he did not know about Pamela Goodrich until the morning of trial is of no great importance. The police had had a statement from Pamela Goodrich for perhaps a month prior to trial, and the statement may even have been taken by a deputy prosecutor. In any event, under our cases the knowledge by the police that Pamela Goodrich had material information about the crime is imputed to the prosecutor's office. *Lewis* v. *State*, 286 Ark. 372, 688 S.W.2d 269 (1985); *Dupree* v. *State*, 271 Ark. 50, 607 S.W.2d 356 (1980). The issue then is whether the trial court was correct in finding Goodrich to have been a rebuttal witness and, as such, not subject to disclosure under discovery.

If a witness is proper for the state's case in chief, the

prosecution is required to notify the defendant of the name and address of that witness upon timely request. A.R.Cr.P. 17.1(a)(i). If a witness is a genuine rebuttal witness there is no such requirement. *Parker* v. *State*, 268 Ark. 441, 597 S.W.2d 586 (1980).

While we have said it is in the sound discretion of the trial court to allow rebuttal testimony which might have been properly introduced in the state's case in chief, *Kellensworth* v. *State*, 275 Ark. 252, 631 S.W.2d 1 (1982); *Pointer* v. *State*, 248 Ark. 710, 454 S.W.2d 91 (1970); *Bobo* v. *State*, 179 Ark. 207, 14 S.W.2d 1115 (1929); *Adams* v. *State*, 173 Ark. 713, 293 S.W. 19 (1927), we have an additional consideration before us when we take into account the requirements of Rule 17.1. If the witness is not a true rebuttal witness, the prosecution must comply with Rule 17.1 by notifying the defense that such witness will be called.

It is evident Pamela Goodrich was not a true rebuttal witness. Her testimony was not merely in response to evidence presented by the defense. See *Parker*, *supra*. Rather, this appears to be an instance of a witness who could have been presented in the state's case in chief being withheld until rebuttal. Her testimony impeached responses drawn from the appellant during his cross-examination. The questions asked of appellant during cross seem clearly designed to manufacture a rebuttal situation for a presentation of the state's evidence that belonged in its case in chief—evidence that was not genuinely in response to anything presented by appellant in his defense. Under these circumstances, the witness should not have been granted rebuttal status. While we do not intend by this opinion to abrogate the discretion of the trial court in deciding whether the testimony is rebuttal testimony, that discretion can not be exercised so as to undermine the purposes of Rule 17.1, which is to give the defendant adequate notice of the witnesses to be called against him in the state's efforts to present its case.

A similar situation was addressed in *State* v. *Manus*, 93 N.M. 95, 597 P.2d 280 (1979). The court first held that a true rebuttal witness did not come within the requirement of witness notification to the defendant. The court went on to discuss the issue of what was "true rebuttal" testimony.

> Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence *offered in reply to new matters*. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case. Ascertaining whether the rebuttal evidence is in reply to new matters established by the defense, however, is a difficult matter at times. Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief. Therefore, the question of admissibility of evidence on rebuttal rests largely on the trial court's discretion. Citing, *State* v. *White*, 74 Wash.2d 386, 444 P.2d 661 (1968).

The appellant in *Manus* was faced with the same situation as this appellant. The prosecution had elicited responses from him during cross-examination on two seemingly irrelevant questions. The state then brought in a surprise witness for rebuttal, to impeach the appellant's responses. The witness's testimony was not truly in rebuttal of anything the appellant had presented in his defense, and this witness too should have been presented in the state's case in chief. The court noted:

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966). . .In a criminal case, the district attorney should not hesitate to show his entire file to the defendant. It is not the primary duty of the district attorney to convict a defendant. It is his primary duty to see that the defendant has a fair trial, that justice be done.

We note that if the state had unexpectedly found itself with a witness for its case in chief after it had rested, the court could have granted a motion to allow the state to re-open its case and present new evidence. Ark. Stat. Ann. § 43-2114; *Lacy* v.

State, 240 Ark. 84, 398 S.W.2d 508 (1966). The defense could then make the proper requests for the opportunity to meet the exigencies of the surprise witness. See, *Lewis* v. *State*, *supra*.

This case is distinguishable from *Vasquez* v. *State*, 287 Ark. 468, 702 S.W.2d 411 (1985). In *Vasquez*, the nature of the rebuttal witness's testimony may well have precluded the state from calling her for its case in chief, on grounds of relevancy, until after the defense had presented its case. Here, the state clearly could have called the witness in its case in chief. The status of the witness in *Vasquez* was borderline and properly left to the discretion of the trial court.

Another point of error concerns an allegation of prosecutorial misconduct, claiming that at some point in the trial, a deputy prosecutor silently mouthed a phrase prejudicial to the defense. A motion for a mistrial was denied by the court with the comment that he had not seen nor heard the act complained of. The argument is rendered moot by this reversal and could not be expected to occur again.

Appellant also claims the evidence was insufficient to support the verdict. Although we reverse and remand this case on another issue, we must still review appellant's challenge to the sufficiency question, and in doing so we disregard other trial errors. See *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *Maples* v. *State*, 16 Ark. App. 175 (1985). In reviewing the sufficiency we view the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. The state presented two eyewitness victims of the crime who positively identified appellant. Additionally, Pamela Goodrich corroborated the testimony of the two victims. This evidence is of sufficient force and character to compel a reasonable mind to reach a conclusion and pass beyond suspicion or conjecture. *Glisson* v. *State*, 286 Ark. 329, 692 S.W.2d 227 (1985).

Reversed and remanded.

PURTLE, J., not participating.

HOWARD'S CLEANERS *v.* Ron MUNSEY, et ux.

86-6 708 S.W.2d 628

Supreme Court of Arkansas
Opinion delivered May 5, 1986

Shelby R. Blackmon, for appellant.

Friday, Eldredge & Clark, by: *William H. Sutton* and *William A. Waddell, Jr.*, for appellee.

STEELE HAYS, Justice. In this action to recover damages for drapes which shrank during cleaning, Mrs. Rita Munsey testified that after consulting several cleaning firms she gave three sets of drapes to Howard's Cleaners to be cleaned. Two sets of drapes were cleaned satisfactorily, but one set shrank some four or five inches and Howard's efforts to correct the problem were not successful.

The Munseys filed suit and in a bench trial the circuit court awarded judgment in the sum of $2,120.60. Howard's has appealed on the premise that it was error for the trial judge to find Howard's liable when the cause of the damage was due to a hidden or latent defect in the material known only to Mrs. Munsey.

The short answer to Howard's argument is we find no testimony whatever that Mrs. Munsey was aware of anything about the drapes bearing on their ability to withstand cleaning nor, for that matter, any proof that the shrinkage was due to a

latent defect. There was testimony that drapery material that had not been preshrunk was liable to shrink and, according to Howard's witnesses, Mrs. Munsey was warned of that possibility. However, Mrs. Munsey testified that she was not asked whether the drapes were preshrunk and could not have answered if she had been asked, because she simply did not know. She denied categorically that she was told the drapes might shrink. The trial court obviously accepted her testimony on this disputed issue and that finding could not be said to be clearly against the preponderance of the evidence. ARCP Rule 52. *Taylor* v. *Richardson*, 266 Ark. 447, 585 S.W.2d 934 (1979).

Although not offered as a point of error on appeal, Howard's argument asserts there was no proof that Howard's was negligent in cleaning the drapes. We addressed this issue in *Howard's Laundry and Cleaners* v. *Brown*, 266 Ark. 460, 585 S.W.2d 944 (1979), a case bearing particular resemblance to this case, and noted the general rule of bailments that where a bailee returns goods in a damaged condition which were not so damaged when received, an inference of negligence applies. The bailee may then go forward with proof that he exercised ordinary care in handling the bailed goods. That point not having been developed in the briefs, nor any objection before the trial court appearing in the abstract, we will not go to the record to seek the answer. *Ferguson* v. *City of Mountain Pine*, 278 Ark. 575, 647 S.W.2d 460 (1983).

The judgment is affirmed.

PURTLE, J., not participating.

Ross TROUT, et al. *v.* Charles MATHIS and Brenda MATHIS

86-7 708 S.W.2d 629

Supreme Court of Arkansas
Opinion delivered May 5, 1986

Ross Trout, pro se.

Gary Isbell, for appellees.

DAVID NEWBERN, Justice. We affirm in this case because the abstract of the record provided by the appellants, *pro se*, is flagrantly deficient. Rules of the Arkansas Supreme Court and Court of Appeals 9(e)(2).

The appellants appeal from a dismissal of their claim. They argue the case was improperly dismissed pursuant to Ark. R. Civ. P. 41. They contend the case was once dismissed voluntarily in an Arkansas court and then again by a United States District Court for lack of subject matter jurisdiction, and that the second dismissal was not of the sort, as provided in Rule 41, to preclude them from bringing the claim again. There is no abstract of the order of the court with respect to the voluntary dismissal. Nor are the federal court order and the order appealed from here abstracted. A justice reading the abstract supplied has no means of evaluating these actions of the courts in the context of the appellants' contentions with respect to Rule 41.

For this court to continue to operate efficiently each justice must be able to decide the case on the basis of the abstract

without having to refer to the record. We cannot do that in this case. The abstracting requirement is the same for parties who appeal *pro se* as it is for those who are represented by attorneys. *Bryant* v. *Lockhart*, 288 Ark. 302, 705 S.W.2d 9 (1986); *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984).

Affirmed.

PURTLE, J., not participating.

Michael B. JACKSON *v.* STATE of Arkansas

709 S.W.2d 400

Supreme Court of Arkansas
Opinion delivered May 5, 1986

Patrick H. Hays, for appellant.

No objection.

PER CURIAM. Appellant, Michael B. Jackson, by his attorney, has filed for a rule on the clerk.

His attorney, Donald K. Campbell, III, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

PURTLE, J., not participating.

Kenneth PARKER *v.* STATE of Arkansas

709 S.W.2d 399

Supreme Court of Arkansas
Opinion delivered May 5, 1986

Patrick H. Hays, for appellant.

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

PER CURIAM. Appellant, Kenneth Parker, by his attorney, has filed for a rule on the clerk.

His attorney, Patrick H. Hays, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

PURTLE, J., not participating.

Dennis ZOLPER *v.* AT&T INFORMATION SYSTEMS, INC. and CHASE COMMERCIAL CORPORATION

86-8 709 S.W.2d 74

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Henry, Walden & Davis, for appellant.

House, Wallace, Nelson & Jewell, P.A., by: *Lawrence E. Chisenhall, Jr.* and *John R. Clayton*, for appellee.

JACK HOLT, JR., Chief Justice. The question presented by this appeal is whether venue is proper in Craighead County for an action against a foreign corporation registered to do business in Arkansas and having a place of business in Craighead County where the cause of action arose. The Craighead County Circuit Court held that venue was proper only in Pulaski County, where the foreign corporation's principal place of business is and where it was served, and dismissed the action. We reverse and remand. Jurisdiction in this court is pursuant to Sup Ct. R. 29(1)(c).

Appellant, Dennis Zolper, purchased by contract a telephone system for his business from appellee, AT&T Information Systems, Inc. Appellant's business is in Jonesboro, the county seat of Craighead, and the purchase was from appellee's place of business in Jonesboro. The contract was later assigned to Chase Commercial Corporation, a Delaware corporation not registered to do business in Arkansas. Appellant brought this action in Craighead County against both AT&T-IS and Chase, alleging that the finance charge on the contract constituted a usurious interest rate of 18% per annum. Summons was served on AT&T-IS on its registered agent for service in Pulaski County. Chase was served by use of the Arkansas long-arm statute, Ark. Stat. Ann. § 27-2502 (Repl. 1979).

AT&T-IS and Chase jointly moved to dismiss the complaint, asserting that venue was proper only in Pulaski County where AT&T-IS has its principal place of business and agent for service. Chase also alleged that it lacked sufficient minimum contacts with Arkansas to be subject to the jurisdiction of Arkansas courts under the long-arm statute, however, this issue is not before us on appeal.

Appellant contends that the circuit court erred in holding that Ark. Stat. Ann. § 27-609 (Repl. 1979) does not establish venue in this situation and we agree. That statute provides:

> An action, other than those mentioned in sections 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1172, 1173, 1174, 1175 of Crawford & Moses' Digest of the Statutes of Arkansas, against a *person*, firm, copartnership or associa-

> tion engaged in business in this State which has or maintains more than one office or place of business in this State, may be brought in any county in which such *person*, firm, copartnership or association has or maintains any office, branch office, sub-office or place of business and service of process upon an agent of any such *person*, firm, copartnership or association at any such office, branch office, sub-office or place of business shall be service upon such person, firm, copartnership or association. (Emphasis added)

The circuit court ruled that this section does not apply to corporations, and that venue was set by Ark. Stat. Ann. § 27-613 (Repl. 1979) in the "county in which the defendant, or one of several defendants, resides, or is summoned." Arkansas Stat. Ann. § 27-109 (Repl. 1979), however, states that "the word person includes a corporation as well as a natural person." Other venue statutes, Ark. Stat. Ann. §§ 27-611 and 27-613—615 (Repl. 1979), have been held applicable to corporations based on this section. *Woodruff Elec. Coop. Corp.* v. *Weis Butane Gas Co.*, 221 Ark. 686, 255 S.W.2d 420 (1953); *East Texas Motor Freight Lines* v. *Wood*, 218 Ark. 211, 235 S.W.2d 882 (1951); *Harger* v. *Oklahoma Gas & Electric Co.*, 195 Ark. 107, 111 S.W.2d 485 (1937).

It is true that § 27-609's list of actions excluded from its coverage includes Ark. Stat. Ann. § 27-608 (Repl. 1979) (Crawford & Moses' Digest § 1174). This section purports to give venue for actions against non-resident individuals and foreign corporations "in any county in which there may be property of or debts owing to the defendant." We have held that this section does not control venue when a foreign corporation is doing business in this state and has a resident agent upon whom process may be served. *Cavette* v. *Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977). This is so because "venue cannot constitutionally be laid against a foreign corporation in any county where the venue would not be proper in a suit against a domestic corporation or a resident individual." *Power Manufacturing Co.* v. *Saunders*, 274 U.S. 490 (1927). Section 27-608 cannot be, and was never asserted as, the basis for venue in this action. Furthermore, Ark. Stat. Ann. § 27-605 (Repl. 1979), a venue statute for domestic corporations, is not excluded by the list in § 27-609. We see no

reason why the Legislature would intend to make domestic corporations and not foreign corporations subject to the venue of counties where the corporation has a place of business or office.

Appellee's only other argument pertaining to the application of § 27-609 is based on *Harger*, *supra*, which stated in dicta that, if not for Ark. Stat. Ann. § 27-347 (Repl. 1979), a corporation domiciled in one county, but having a branch office in another county, would not be subject to suit in the latter county. This case never mentioned § 27-609, and we do not find it necessary to follow its implications which likely resulted from a mere oversight.

The policy behind Act 74 of 1935, which created § 27-609, can be found in the preamble to that Act, which reads:

> WHEREAS, large and numerous business enterprises of various kinds are being operated in the State of Arkansas by individuals, firms, co-partnerships and association of persons and under the law as it now exists the venue for suits against them is fixed in the county of their residence or where such person or a member of the firm, co-partnership or association may be found, and in many instances this works to the disadvantage of those who deal with such person, firm, co-partnership or association by requiring the person so desiring to sue to go to the place of residence of such person, firm, co-partnership or association and it is the purpose of this Act to relieve against this situation.

The Legislature clearly intended that when a business enterprise, regardless of its form, maintains an office or place of business in counties other than its principal place of business, the business enterprise should be subject to the venue of those other counties. This policy is as equally applicable to corporations as it is to natural persons, firms, co-partnerships and associations. In the present case, the transaction took place in Craighead County; the appellant's business where the system was installed is there; the appellee has a place of business there; and presumably the witnesses and evidence are located there. The only connection with Pulaski County is that the designated agent for AT&T-IS was served there, which is permissible under Ark. Stat. Ann. § 27-350 (Repl. 1979) and Ark. Stat. Ann. § 64-1223 (Repl. 1979),

and AT&T-IS's principal place of business is there. These facts demonstrate the logical reasons for finding that the Legislature intended § 27-609 to create venue in an action against a corporation, foreign or domestic, in a county where the corporation elects to establish a place of business or branch office. Venue properly rests in Craighead County.

Reversed and remanded.

PURTLE and NEWBERN, JJ., not participating.

Daryl VAUGHN *v.* STATE of Arkansas

CR 85-224 709 S.W.2d 73

Supreme Court of Arkansas
Opinion delivered May 12, 1986

William R. Simpson, Jr., Public Defender; *Arthur L. Allen*, Deputy Public Defender, by: *Vicki J. Sandage*, Deputy Public Defender, for appellant.

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

GEORGE ROSE SMITH, Justice. The owner of a grocery in

Pulaski County was robbed on June 14, 1984, by the appellant Vaughn and an accomplice. The two men were captured within a few minutes, after the appellant had fired a pistol at an officer. Vaughn was charged as an habitual criminal with aggravated robbery, theft of property, attempted murder, and felon in possession of a firearm. The jury found Vaughn guilty of all the charges and sentenced him to life imprisonment for the aggravated robbery and to terms of years for the other three crimes. The severity of the sentences was presumably due to Vaughn's having ten prior convictions.

The only argument for reversal is that the court should have granted a defense motion for a mistrial on the ground that the trial judge, in identifying the lawyers for the jury panel, should not have mentioned that the defense attorney was from the Public Defender's Office. The theory is that the jurors might have inferred that Vaughn was indigent and likely to be a burden to society.

We think the objection to be speculative rather than practical. Jurors are ordinarily reasonably well-informed men and women. They know that indigency is widespread in this nation, as indicated by poverty programs, food stamps, public defenders, Medicaid, Salvation Army appeals, charitable drives, and countless other activities that daily attest the existence of indigence in the country and in Pulaski County. The probability that a jury's verdict in a case like this one would be affected by a remark such as the one complained of is insignificant. If defense counsel wanted the matter to be kept from the jury, he should have made his objection known to the judge before the trial began.

A similar point seems to have arisen in only three cases. In two of them the defense counsel himself told the jury that he was court appointed. Of course there was no objection, but in both instances the appellate court observed that the practice is not a good one. *United States* v. *Naylor*, 566 F.2d 942 (5th Cir. 1978); *Sanders* v. *State*, 429 So.2d 245 (Miss. 1983). The third case is somewhat similar to the case at bar. *Compton* v. *State*, 460 So.2d 847 (Miss. 1984). There the court told the jurors, during the voir dire, that the defendant's counsel was court appointed. The reviewing court held that there was no reversible error, but it added that caution should be taken in telling jurors that defense

counsel is court appointed. That is certainly the better practice.

A secondary argument is that after denying the motion for a mistrial the court should have given the jury an admonition to disregard the reference. Counsel, however, did not request such an admonition, perhaps because he did not want to magnify the incident in the eyes of the jury. We find no merit in the appellant's argument nor in any other objection that has been brought to our attention.

Affirmed.

PURTLE, J., not participating.

Richard S. COZZAGLIO *v.* STATE of Arkansas

CR 85-123 709 S.W.2d 70

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Darrell E. Baker, Jr., Deputy Public Defender, for appellant.

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

DARRELL HICKMAN, Justice. Richard Cozzaglio kidnapped a young teenaged female in Washington County and drove her to Madison County where he raped her. He was convicted of kidnapping in Washington County and sentenced to 20 years; he was convicted of rape in Madison County and sentenced to life. Initially the trial court scheduled one trial for both charges in

Washington County, but the state insisted on separate trials in separate counties. Cozzaglio made a timely motion before the first trial in Washington County to join both charges in one trial. The motion should have been granted because Cozzaglio was tried twice in violation of A.R.Cr.P. 21.3, which is based on the double jeopardy prohibitions in both the United States and Arkansas Constitutions.

The proof presented by the state was essentially the same at both trials. In the kidnapping trial in Washington County, the state proved that Cozzaglio picked up the victim beside a rural road about 8:15 a.m. on the morning of July 27, 1984; he pulled her into his car, had a knife with which he cut her, and drove 24 miles to adjoining Madison County where he raped her. He put her out of the car and she ran to a nearby store where she reported the rape. Cozzaglio notified the Springdale Police Department in Washington County that his car had been stolen that same day. That evening an officer talked to Cozzaglio ostensibly about the car theft, but then questioned him concerning the kidnapping and rape. At first, according to the officer, Cozzaglio said he was with a neighbor. The officer questioned the neighbor who denied this and, when confronted, Cozzaglio admitted that he had been with the victim but that she voluntarily went with him; later she tried to "back out" of having sexual intercourse so he "took it anyway." There was other corroborative evidence: identification of Cozzaglio by the victim, samples of hair, and a torn tee shirt the victim used to bandage her hand. Cozzaglio did not testify in Washington County. Approximately two months later, in the rape trial in Madison County, some medical testimony was added and Cozzaglio testified. He denied that he raped the victim but admitted they had sexual intercourse.

When the defense moved for a joinder of the offenses in Washington County, waiving any objection to venue, the trial judge refused. He reasoned that the two counties were separate jurisdictions and venue for the crimes were separate; that the charges were not the same and Madison County had a right to try him for the rape which occurred there, just as Washington County had a right to try him for the kidnapping which occurred there. While the charges were not the same, they arose from the same continuing course of conduct and both counties had jurisdiction and venue.

There is no doubt that the kidnapping occurred in Washington County, continued into Madison County and culminated with a rape in Madison County. En route the victim was physically harmed, fondled, and forced to commit oral sex on Cozzaglio. Ark. Stat. Ann. § 43-1414 (Repl. 1977) provides:

> Where the offense is committed partly in one (1) county and partly in another, or the acts or effects thereof, requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in *either* county. (Italics supplied.)

A.R.Cr.P. Rule 21.3 required the judge to grant the defense motion to join the charges in one trial.

Rule 21.3 has its basis in the Double Jeopardy Clause of the United States Constitution, contained in the Fifth Amendment, which provides: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." The United States Supreme Court has held this clause to contain three separate guarantees: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

This doctrine was explained in Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 266 (1965) as follows:

> . . . The courts understand these rules as expressions of self-evident moral principles: it is wrong to retry a man for a crime of which he previously has been found innocent, wrong to harass him with vexatious prosecution, and wrong to punish him twice for the same crime. Inquiry usually stops here. We are rarely told why it is wrong to retry for the same crime or punish twice. We never learn precisely what constitutes harassment, nor when it will bar reprosecution. The judiciary is content to apply the double jeopardy prohibition with only a reverent nod to its policies.
>
> Several policies underlie the double jeopardy prohibition. First, guilt should be established by proving the elements of a crime to the satisfaction of a single jury, not

> by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries. Thus reprosecution for the same offense after an acquittal is prohibited. Second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. Thus reprosecution after a conviction is prohibited. Third, criminal trials should not become an instrument for unnecessarily badgering individuals. Thus the Constitution forbids a second trial — a second jeopardy — and not merely a conviction at the second trial. Finally, judges should not impose multiple punishment for a single legislatively defined offense. Thus multiple punishment for the same offense at a single trial is prohibited.

Like many current legal questions, what once was simple has become complicated. Today a vast array of criminal charges can be brought for what is essentially one criminal act or episode; many times the charges are related or dependent upon each other.

For example the capital felony murder charge depends upon the felony underlying the murder. A death must have been caused while in the course of committing or attempting to commit one of seven specified felonies. Ark. Stat. Ann. § 41-1501(a) (Repl. 1977). To prove capital murder the state must first prove the felony, so the felony becomes an element of the murder charge. Because it is an essential element a defendant cannot be tried separately for these crimes or punished for both. This prohibition usually comes into play when double punishment is imposed. *Swaite* v. *State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Whalen* v. *United States*, 445 U.S. 684 (1980).

Related to the double jeopardy doctrine is the theory that the state ought to charge a defendant in one case with all possible charges arising out of a single episode. Justice Brennan of the United States Supreme Court articulated this principle best in his concurrence in *Ashe* v. *Swenson*, 397 U.S. 436 (1970):

> In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offense'

> not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.

Cozzaglio makes essentially two double jeopardy arguments. The first argument is that the state was required to prove rape to prove kidnapping and, therefore, they are the same offense. This argument is without merit. Kidnapping and rape are not lesser included offenses of one another. Each crime requires a different element of proof. *Hickerson* v. *State*, 282 Ark. 217, 667 S.W.2d 654 (1984). Each requires proof of a fact not required by the other. Ark. Stat. Ann. § 41-107(1)(b)(i) (Repl. 1977). Moreover, while kidnapping does require the restraint to be substantial for one of several *purposes*, one of which is the purpose of engaging in sexual intercourse, kidnapping does not require the act of sexual intercourse itself. Ark. Stat. Ann. § 41-1701 (Repl. 1977). Rape requires a sexual act by forcible compulsion; that force is not necessarily the same as that required to sustain a conviction for kidnapping. See Ark. Stat. Ann. § 41-1803 (Supp. 1985); *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Cozzaglio's argument that the trials should have been joined under A.R.Cr.P. Rule 21.3 does have merit. That rules provides:

> (a) Two (2) or more offenses are related offenses for the purposes of this rule if they are within the jurisdiction and venue of the same court and are based on the same conduct or arise from the same criminal episode.
>
> (b) When a defendant has been charged with two (2) or more related offenses, his timely motion to join them for trial shall be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion is granted. The defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was

charged.

(c) A defendant who has been tried for one (1) offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in subsection (b). The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

This rule has three requirements: the offenses must be within the jurisdiction of the same court, arise from the same conduct or criminal episode, and a timely motion to join must be made. All three requirements were met in this case and when that motion to join was made in Washington County, the trial judge should have granted it. Necessarily that means the second trial was barred; the conviction of rape must be reversed and the charge dismissed. See *People* v. *White*, 390 Mich. 245, 212 N.W.2d 222 (1973). Cozzaglio could have been tried in either county for both offenses, but not separately on separate charges.

Affirmed as to the Washington County conviction. Reversed and dismissed as to the Madison County conviction.

PURTLE, J., not participating.

Robert JENNINGS *v.* STATE of Arkansas

CR 85-229 709 S.W.2d 69

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Henry & Moore, by: *John R. Henry*, for appellant.

Steve Clark, Att'y Gen., by: *Jerome T. Kearney*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Robert Jennings was convicted of raping his ten year old stepdaughter and sentenced to life imprisonment. On appeal he makes one argument: the physician who examined the victim was improperly allowed to testify to her opinion on the ultimate issue, that issue being Jennings' guilt. That was not the opinion expressed nor was this precise objection made to the trial court. We affirm.

Dr. Yoland Condrey testified that her examination of the victim revealed an old, well-healed scar around the hymen, distension of the vaginal opening, and a small amount of white discharge. She said the victim's history and examination were consistent with penetration by an adult penis on more than one occasion. An objection was made to the doctor's basing this conclusion on medical history. No mention was made of "ultimate issue." The doctor later said a history of sexual abuse or penetration or attempted penetration was important in connection with such an examination. She concluded by giving her opinion that penetration occurred by an adult penis.

The defense, in part, was that the victim's 14 year old half-brother had had sexual intercourse with the victim. The argument on appeal is that Dr. Condrey's opinion that the victim was abused by an adult was an opinion on the ultimate issue since that opinion would negate the half-brother's involvement.

The opinion given was not the ultimate issue to be decided, that being whether Jennings was guilty. Unif. R. Evid., Rule 704 provides:

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

No argument is made on appeal that an expert could not form such an opinion on the basis expressed by Dr. Condrey. Moreover, the doctor testified that her findings might be consistent with intercourse with a 14 year old, depending on the maturity of the male.

Affirmed.

PURTLE, J., not participating.

Bob SCOTT *v.* The Honorable W.J. "Bill" McCUEN, et al.

86-52 709 S.W.2d 77

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Hilburn, Bethune, Calhoon, Forster, Harper & Pruniski, Ltd., by: *Sam Hilburn*, for appellant.

Cliff Jackson, for intervenor, Cliff Jackson.

Friday, Eldredge & Clark, by: *Herschel H. Friday, Paul B. Benham*, and *Robert S. Shafer*, for intervenors, Edward W. Davis, and The Arkansas Telephone Association.

Friday, Eldredge & Clark, by: *Michael G. Thompson, Paul B. Benham*, and *Robert S. Shafer*, for intervenor, Arkansas Power and Light Co.

Sam Bratton, Counsel to the Governor, for intervenor, Bill Clinton, Governor.

Steve Clark, Att'y Gen., *Mary B. Stallcup*, Deputy Att'y Gen., by: *Elizabeth A. Walker*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. This action is filed as an original action under Amendment 7 to the Arkansas Constitution. Its admitted purpose is to seek an early ruling on the ballot title for Initiated Act 1 of 1985. The Secretary of State certified the ballot title before any petition was submitted to him. We have no authority to decide the issue until petitions are submitted to the Secretary of State and he declares them sufficient or insufficient according to the power vested in him by Amendment 7. The Secretary of State had no authority to act prematurely and neither do we. Therefore this action must be dismissed.

Generally, the initiated act would revoke the franchise of Arkansas Power and Light Company. It contains other important features, including provisions affecting electricity, gas and telephone companies. This action began when the Attorney General reviewed the ballot title and popular name, found that the phrases "closed door deal-making" and "influence peddling" amounted to partisan coloring, and changed the phrases. Cliff Jackson, the sponsor of the amendment, filed a petition for a writ of mandamus

in this court to require the Attorney General to certify the title as originally proposed. We refused to issue the writ or bind ourselves on the question of whether the title was impartial or free of deception. *Jackson* v. *Clark*, 288 Ark. 192, 703 S.W.2d 454 (1986).[1]

Jackson then sought and obtained a certification from the Secretary of State that the proposed title was, indeed, sufficient, although no petitions had been filed with that office. As a result, this "friendly" lawsuit was filed by Bob Scott, a taxpayer, as an original action against the Secretary of State claiming the ballot title deficient in 26 respects. Cliff Jackson intervened asking us to expedite our decision.

The Governor intervened asking us, in the name of justice and public interest, to rule on the ballot title in advance of certification of the sufficiency of the petition. The Attorney General, representing the Secretary of State, asks us to approve the title. We ordered Arkansas Power and Light Company joined as a necessary party because its franchise is directly in issue. Edward W. Davis, executive vice-president of the Arkansas Telephone Association, and the association itself intervened. Arkansas Power and Light Company, Davis, and the Arkansas Telephone Association have filed motions to dismiss, claiming lack of jurisdiction and lack of case or controversy; the motions must be granted.

The parties all concede that previously we have only reviewed the sufficiency of the ballot title after the petitions have been certified by the Secretary of State. We are asked to approve the title before certification for two reasons: it is legal to do so and it would prevent the expenditure of state money in counting the signatures when it might prove futile were we to declare the title deceptive and enjoin its submission to the voters, and it would be best to rule before proponents spend time and money securing thousands of signatures and publicizing the proposition.

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[1] We did not reach the question in *Jackson* of whether Ark. Stat. Ann. § 2-208 (Supp. 1985) unconstitutionally extends our original jurisdiction. *American Party of Arkansas* v. *Brandon*, 253 Ark. 123, 484 S.W.2d 881 (1972); *Berry* v. *Hall*, 232 Ark. 648, 339 S.W.2d 433 (1960).

There is no question but that cases questioning the sufficiency of ballot titles have been difficult. They are difficult for those who propose and oppose constitutional change, and they are difficult for us. In *Westbrook* v. *McDonald*, 184 Ark. 740, 43 S.W.2d 356 (1931), we exercised our right to decide if a ballot title was sufficient and set a standard for that review. We held that a title should be free from any misleading tendencies, whether by amplification, omission, or fallacy, and it must contain no partisan coloring. That has been the law ever since. See *Leigh* v. *Hall*, 232 Ark. 558, 339 S.W.2d 104 (1960). Our practice of reviewing ballot titles to prevent deception has proven to be sound. The reports are replete with cases where the voters were being deliberately deceived by ballot titles. See *Johnson* v. *Hall*, 229 Ark. 400, 316 S.W.2d 194 (1958); *Moore* v. *Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958); *Walton* v. *McDonald*, 192 Ark. 1155, 97 S.W.2d 81 (1936); *Bradley* v. *Hall*, 220 Ark. 925, 251 S.W.2d 470 (1952).

There are many cases that have sharply divided this court. See *Ark. Women's Political Caucus* v. *Riviere*, 283 Ark. 463, 677 S.W.2d 846 (1984); *Becker* v. *Riviere*, 277 Ark. 252, 641 S.W.2d 2 (1982); *Dust* v. *Riviere*, 277 Ark. 1, 638 S.W.2d 663 (1982). The proposals are often controversial and involve the passionate feelings of special groups.[2] The mere difficulty of the issue however or the likelihood of last minute problems with the title does not provide us with a basis for hearing this case or any case prematurely. Our power is derived from Amendment 7. This case is predicated on the argument that since Amendment 7 permits the Secretary of State to certify the sufficiency of the petition and since that determination includes the sufficiency of ballot title, the determination can be made at any time, even before the petitions are filed.

Amendment 7 provides in pertinent part:

> Sufficiency — the sufficiency of all State-wide petitions shall be decided in the first instance by the Secretary of

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[2] Not all titles for constitutional amendments are challenged. Notably Amendment 59, proclaiming a cure for our decision in *Public Service Comm'n.* v. *Pulaski Co. Bd. of Equalization*, 266 Ark. 64, 582 S.W.2d 942 (1979), is being studied to determine what it does, in fact, mean. See Act 589 of 1985.

State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes. The sufficiency of all local petitions shall be decided in the first instance by the county clerk or the city clerk, as the case may be, subject to review by the Chancery Court.

We have repeatedly held that our original jurisdiction must be invoked pursuant to Amendment 7. See *Berry* v. *Hall*, *supra*; *Hargis* v. *Hall*, 196 Ark. 878, 120 S.W.2d 335 (1938); *Rambo* v. *Hall*, 195 Ark. 502, 112 S.W.2d 951 (1938). Our jurisdiction attaches only after the petition is declared sufficient and that determination must be of the sufficiency of both the title *and* the signatures. See *Bailey* v. *Hall*, 198 Ark. 815, 131 S.W.2d 635 (1939). The Secretary of State shall only determine the sufficiency of the petition after the petition is filed with the signatures, and not before. (Many petitions are necessary to gather the number of signatures required, but they are considered to be only one petition. *Czech* v. *Baer*, 283 Ark. 457, 677 S.W.2d 833 [1984].) In *Rambo* v. *Hall*, *supra*, the petitioner filed an original action in this court seeking to enjoin the Secretary of State from declaring the sufficiency of a proposed bill. We held that the action was premature, because, "until the Secretary of State shall have acted upon the sufficiency of the petition and his action therein shall have been properly challenged, we have nothing to review." Just as the Secretary of State had no authority to certify the ballot title, we have no right to rule on this case at this time.

We simply cannot create our own right to answer legal questions regarding initiated acts; that right must be given to us by the constitution. *American Party of Arkansas* v. *Brandon*, *supra*; see also *Berry* v. *Hall*, *supra*. Moreover, no controversy is presented. No genuine controversy will exist until the petition is filed and the Secretary of State declares it sufficient or insufficient. We do not give advisory opinions or rule on questions which may be moot. *McCuen* v. *Harris*, 271 Ark. 863, 611 S.W.2d 503 (1981); *Rambo* v. *Hall*, *supra*. If the proponents are unable to gather the requisite number of signatures, the question raised will be moot.

The argument for an early decision, primarily to save the

sponsors' time and money has another side. Should we devote the time, effort and financial resources of this court and the parties to decide an issue that may never be presented to the voters? What if the Secretary of State refuses to cooperate with a sponsor? Would we alter Amendment 7 and order him to do something clearly not required? Would a premature decision by us be binding for four, six or eight years? Who decides who the parties are to be in a friendly lawsuit? Friendly to whom? Our existing procedure does have a distinct advantage: it keeps us all honest. Sponsors know it is to their advantage to present an honest title so it will not be stricken at the last minute and we know that we are not rendering merely an advisory opinion which may become moot. We know our decision counts and we will be accountable for it. Any other course would discourage both honesty and responsibility; sponsors would be inclined to offer a misleading ballot title that might pass unnoticed and we would be deciding the case in the abstract.

Our legal procedure, indeed our legal system, is not necessarily quick or expedient but it has proven far better than one that rushes to premature judgments; one where the people and institutions affected can only be anticipated and one with only a hope that all pertinent issues have been addressed. It is our function to adjudicate not advise, and any deviation from that principle, however well-intentioned, is presumptuous. If the sponsors of this act gather sufficient signatures, if the Secretary of State certifies the petition as sufficient or insufficient, and if a court challenge is made of that decision, we will then decide the matter.

Dismissed.

PURTLE, J., not participating.

GREGG BURIAL ASSOCIATION *v.* Billy Joe EMERSON d/b/a EMERSON & SON FUNERAL HOME

85-320 709 S.W.2d 401

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Barrett, Wheatley, Smith & Deacon, for appellant.

Bradley & Coleman, for appellee.

STEELE HAYS, Justice. Appellee Billy Joe Emerson, doing business as Emerson & Son Funeral Home, brought this action against Gregg Burial Association to recover either merchandise and services or the face value of benefits due under burial policies (entitled Certificate of Membership) issued by Gregg to six decedents to whom Emerson had rendered burial services. Two of the six policies were for $300 and four for $500.

Emerson gave credit in the amounts provided in the policies against the overall cost of each funeral and took an assignment of benefits due under each policy. Gregg denied liability, contending any benefits which might have been due were forfeited.

Emerson and Gregg stipulated that timely notice of the death of the decedents was given Gregg in accordance with each policy and that Emerson was notified that benefits would be forfeited if Emerson was employed as servicing funeral director. The parties also stipulated that each decedent lived within a radius serviced by the funeral director customarily employed by Gregg, and that the bylaws of Gregg provided that funeral services and supplies would be furnished by the funeral home designated by Gregg.

Relying on the case of *Drummond Citizens Insurance Company and Roller Funeral Home* v. *Chester Sergeant, Executor*, 266 Ark. 611, 588 S.W.2d 419 (1979), the trial court awarded judgment for the face amount of each policy plus interest before judgment at 6% and thereafter at 10%. Gregg argues on appeal that *Drummond* is distinguishable on its facts and, alternatively, we should overrule *Drummond*. We disagree that *Drummond* is distinguishable and we decline to overrule it.

In *Drummond* we held that the same language as used in these policies was ambiguous and failed to inform the policyholder that the issuer of the policy had the exclusive right to furnish a complete funeral service and all supplies. While there is some variation among the certificates before us, all six contain the following language, identical to the language which the *Drummond* majority found to be ambiguous:

> Upon the death of a member of the Association, those in charge of the body of the deceased shall notify the

> Secretary-Treasurer, who shall have exclusive right to furnish services and supplies, to be selected by those in charge of the body of the deceased and of a value equal to the face amount of the Membership Certificate.

That wording prompted the trial court in this case to rule that *Drummond* was directly in point. The ruling was correct.

Burial policies are so similar to policies of insurance generally that the same rules of construction apply. *Anderson* v. *Frank Reid Burial Association*, 218 Ark. 817, 239 S.W.2d 12 (1951). That being so, any doubts about the meaning of a policy of insurance must be resolved in favor of the insured and against the insurer who prepared the policy and is answerable for its clarity. *Travelers Indemnity Company* v. *Imogene Hyde*, 232 Ark. 1020, 342 S.W.2d 295 (1961).

Appellant insists this language is clear and unambiguous and should be interpreted as proposed by the dissenting opinion of Justice Holt in the *Drummond* case. But we think the certificate holder is entitled to be told in a clearer fashion that the funeral home chosen by the association must furnish *all* the goods and services of a complete funeral, or else the benefits provided in the policy will be forfeited. It is enough to note that forfeiture is not favored in the law, and for good reason. We do not imply the law will deny the enforcement of a forfeiture per se, only that forfeitures are not favorites of the law, and that is particularly true of equity, but in any event such provision must be clear and express. *Ingram* v. *Kochitzky*, 282 Ark. 203, 668 S.W.2d 21 (1984); *Humke* v. *Taylor*, 282 Ark. 94, 666 S.W.2d 394 (1984); *Triplett* v. *Davis*, 238 Ark. 870, 385 S.W.2d 33 (1964); *Berry* v. *Cranford*, 237 Ark. 380, 373 S.W.2d 129 (1963); *Higgenbotham* v. *Harper*, 206 Ark. 210, 174 S.W.2d 668 (1943).

Appellant points to a difference in the evidence between *Drummond* and the case before us. In *Drummond* the rules and bylaws of the Arkansas Burial Association Board were not in the record, whereas they are in this case. Under Ark. Stat. Ann. § 66-1823 (Repl. 1980) the rules and regulations of the Board are given the force and effect of statute.

The Rules and Regulations of the Board state that the bylaws of a burial association may provide that when an associa-

tion is notified of the death of a policyholder, the association (through its Secretary-Treasurer) "shall designate a funeral director to prepare the body for interment according to the terms of the certificate held by the member at time of death." They also provide that if the funeral home customarily employed by the association cannot service the funeral, then the association shall pay at least 80% of the face value of the certificate to the servicing funeral director.

Appellant submits these provisions tell the policyholder what the policy itself fails to make clear. We are not persuaded they resolve the ambiguity found in *Drummond*, but we need not decide that, as the record does not tell us whether these Bylaws and Rules and Regulations were in effect when these policies were issued. Beyond that, it is settled that where an insured is not given the complete terms of a policy, the language in that portion of the policy he *is* given, will govern the transaction. *Lawrence* v. *Providential Life Insurance Company*, 238 Ark. 981, 385 S.W.2d 936 (1965). For the reasons stated, the judgment is affirmed.

Affirmed.

PURTLE, J., not participating.

Mark W. HINES *v.* STATE of Arkansas

CR 85-218 709 S.W.2d 65

Supreme Court of Arkansas
Opinion delivered May 12, 1986

John W. Settle, for appellant.

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

STEELE HAYS, Justice. On March 1, 1984 the body of Prince Scott was found in a pool of blood on the floor of a Ft. Smith pawnshop where he worked. He had been shot in the neck with a shotgun. The cash register drawer was missing, as well as a pistol from an open display case. Currency was scattered near the body.

In what then seemed an unrelated matter, Mrs. Mary Clark contacted the Ft. Smith police on May 23 complaining of a threat on her life. She reported that her son-in-law, Alan Hines, her daughter, Pamela Hines, and Alan's brother, Mark, had poured formaldehyde on furniture at her apartment. She was referred to the prosecuting attorney, Mr. Ron Fields. Fields interviewed Mrs. Clark, and satisfied her fears were genuine, he made inquiries about the capability of formaldehyde to cause death, if inhaled sufficiently. Mrs. Clark signed a blank warrant for the arrest of Alan Hines, Pamela Hines and Mark Hines for criminal mischief. Because family disputes sometimes resolve themselves and because he recognized Mark Hines's name in connection with the Scott murder, Fields concluded that caution was advised and he referred Mrs. Clark to the police for further investigation. At some point, Officer Rickman was sent to Mrs. Clark's apartment and observed formaldehyde on the furnishings. On Sunday, May 27, Mrs. Clark was interviewed by Sgt. Harlan Sweeten and Ron Fields later signed an information charging the Hineses with criminal mischief. On May 28 warrants of arrest were issued by Municipal Judge Harry C. Foltz.

On Monday the warrants were executed and only Pamela Hines was found. She was arrested and brought to police headquarters. She told the officers Mark Hines had told her he killed Prince Scott. A short time later Alan and Mark Hines appeared voluntarily at police headquarters where the Miranda warnings were given. Mark Hines was questioned simultaneously about the formaldehyde incident and the homicide, and without urging he gave a detailed statement to the police in which he admitted shooting Prince Scott at the pawnshop. He said Scott objected to his dating his daughter and had threatened to kill him if he continued. Hines described instances when Scott had tried to

assault him. Hines told of coming to the pawnshop on March 1 and when Scott drew a pistol Hines said he shot him with a 20 gauge shotgun. Hines grabbed the pistol and blood spattered cash drawer and left.

Mark Hines was charged with the murder of Prince Scott, convicted and sentenced to thirty-five years imprisonment. On appeal he argues the trial court erred in denying his motion to suppress his statement. We affirm.

Probable Cause

Mark Hines insists there was no probable cause to arrest him for criminal mischief and that his arrest was a mere pretext so he could be questioned on the more serious charge of murder. It follows, he argues, that if the arrest was unlawful then his statement should have been excluded as being "fruit from the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1965). We disagree that Mark Hines's arrest was unlawful, or that the misdemeanor charge was simply a pretext.

Mary Clark testified at the suppression hearing that she and her lawyer had gone to the office of the prosecuting attorney. She told him Alan Hines, Pam and Mark were at her apartment and put formaldehyde on a couch, chair, ottoman and a loveseat while she was asleep in a bedroom. Alan, she said, later admitted having done it and said he "wished it had killed me." Mark and Pam never admitted to any involvement. She said the formaldehyde belonged to Mark Hines. She signed blank warrants of arrest against all three individually, which were subsequently completed, charging each with criminal mischief. On May 28, the prosecutor executed a verified information and the warrants of arrest were signed by Judge Foltz.

We have examined the record carefully and are satisfied that reasonable cause, as defined by the Supreme Court and our own cases, existed for the issuance of the warrant for Mark Hines's arrest. A.R.Cr.P. Rule 7. Probable cause is said to be only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that a crime has been committed by the person suspected. *Coble* v. *State*, 274 Ark. 134, 624 S.W.2d 421 (1981). Probable cause does not require the quantum of proof necessary

to support a conviction, and arrests are to be appraised from the viewpoint of a prudent and cautious police officer at the time the arrest is made. *Reed* v. *State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983).

On appeal, all presumptions are favorable to the trial court's ruling on the legality of the arrest and the burden is on the appellant to demonstrate error. *Williams* v. *State*, 258 Ark. 207, 523 S.W.2d 377 (1975). Determination of probable cause is said to be based on factual and practical considerations of everyday life upon which reasonable and prudent men, rather than legal technicians, act. *Draper* v. *United States*, 358 U.S. 307 (1959); *Brinegar* v. *United States*, 338 U.S. 160 (1949). Thus, a non-technical approach has been said to afford the best compromise for accommodating the competing interests of the individual and of society, so that law enforcement officers will not be unduly hampered, nor law abiding citizens left to the mercy of the whim and caprice of overzealous police officers. *Beck* v. *Ohio*, 379 U.S. 89 (1964). In making the determination of probable cause the reviewing court should be liberal rather than strict. *Sanders* v. *State*, 259 Ark. 329, 532 S.W.2d 752 (1976).

In that light, we believe the record confirms the ruling of the trial court with respect to probable cause. There was some dispute between Pamela and Alan Hines, on the one hand, and Mrs. Clark, on the other, involving the couch; Alan, Mark and Pam were together at the Clark apartment at the time of the incident; the relational ties between the three individuals, the fact that Alan Hines admitted his own involvement, and the fact that the formaldehyde belonged to Mark Hines are circumstantial links to the crime. Clearly the two brothers were close, as Mark went first to Alan's apartment after shooting Scott, and Mark wanted Alan at his side when he gave the statement to the police. It is not unreasonable to assume if all three were at the apartment when the act occurred, an act one of them admits to, and the formaldehyde used to accomplish the crime was Mark's, that Mark Hines was involved.

Appellant points out that while Mrs. Clark was adamant in her accusations against Alan Hines, she was somewhat equivocal as to Mark and Pamela. But she admitted she wanted all three arrested if they were involved and according to Sgt.

Sweeten, she blamed all three. These discrepancies were for the trial court—the abiding fact is she signed warrants against all three and her testimony at the suppression hearing must be judged in light of its having been a year later, and long after she had dropped charges against all three. We think the trial judge was right to rule as he did.

Pretextual Arrest

Coupled with the probable cause argument is the contention that Mark Hines's arrest for criminal mischief was merely a pretext to enable the police officers to question him about the murder of Prince Scott. We disagree.

Pretextual arrests are not new to the law. *United States* v. *Lefkowitz*, 285 U.S. 452 (1932). We examined the law recently in *Richardson* v. *State*, 288 Ark. 407, 706 S.W.2d 363 (1986), where we found an arrest for public drunkenness to have been a pretext for the furtherance of a murder investigation. This case is readily distinguishable. In *Richardson*, pretext was demonstrated in that a search for evidence of murder had no relation to the nature and purpose of the arrest for public drunkenness, and by the fact that even before Richardson was charged with public drunkenness the officers testified he would not have been permitted to leave because he was a suspect in the murder investigation.

Claims of pretextual arrest raise a unique problem in the law—deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent. Professor La Fave, Criminal Procedure, § 3.1(d), p. 144, describes this as the correct result. Because the action would have been taken in any event, he states, "[T]here is no conduct which ought to have been deterred and, thus, no reason to bring the Fourth Amendment exclusionary rule into play." *Abel* v. *United States*, 362 U.S. 217 (1966). See *People* v. *Guido*, 95 Misc.2d 47, 407 NYS 2130 (1978).

We find no pretext here because the testimony convinces us the arrest on criminal mischief would have occurred in any event. Nor is this a case of the police making an arrest on a contrivance to gain evidence not otherwise available to them.[1] Mark Hines was arrested on the complaint of a private citizen, Mary Clark, and there was, as we have seen, a reasonable circumstantial basis for the charge of criminal mischief. The police did not seek out Mrs. Clark, nor encourage her to complain against Mark Hines and the other two. Indeed, she needed no prompting. The evident fact is Mrs. Clark was the instigator of the arrest, not the police. The police and prosecutor, if anything, were cautious in their dealings with her. It was she who pursued the matter, calling repeatedly on Sunday and Monday to see if any action had been taken. Finally, it must be noted the charge of criminal mischief was made on the sworn statement of the prosecuting attorney and the arrest authorized by a warrant signed by a judicial officer.

Appellant makes much of the fact that it was extraordinary for Judge Foltz to issue warrants of arrest. But the argument goes no farther, and offers no conclusion. Granted, it may have been a rare occurrence, but having said that, there is little left to say, except to observe that the warrants were issued on Memorial Day and Judge Foltz may have been the only judge available. His authority to issue warrants is not questioned and we cannot presume some impropriety on the bare allegation the procedure was unusual.

We find nothing improper about these procedures, nor anything to suggest the in-custodial statement was coerced. If this statement were suppressed the case would be a classic example of the unfortunate extreme to which the exclusionary rule has been extended.

The judgment is affirmed.

PURTLE, J., not participating.

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[1] For example see: *State* v. *Haven*, 269 N.W.2d 849 (Minn. 1978); *United States* v. *Carriger*, 541 F.2d 545 (6th Cir. 1976); *Amador-Gonzales* v. *United States*, 391 F.2d 308 (5th Cir. 1968); *McKnight* v. *United States*, 183 F.2d 977 (App. D.C. 1950).

Cynthia Ann Tinnon BESHEAR *v.* John AHRENS & Bob KNIGHT, Individually, d/b/a MOUNTAIN HOME BROADCASTING CORPORATION

85-303 709 S.W.2d 60

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Sanford L. Beshear, Jr., for appellant.

Leo J. Carner, for appellees.

DAVID NEWBERN, Justice. This appeal arises from an action for partition brought successfully by the appellant, Cynthia Beshear. She appeals from an award granted by the trial court to her two cotenants, the appellees, against her share of the partition proceeds. The appellees contended they had paid Mrs. Beshear's share of the mortgage, taxes, and insurance for a period in excess of three years. The court awarded the appellees an amount equal to one-third of the morgage, taxes, and insurance payments over a three-year period. The appellant claims it was error to require her to contribute one-third of these payments. She argues laches and contends she had been dispossessed of the property by her two cotenants and was thus entitled to a set-off for rent. She also urges it was error not to have awarded her attorney a fee. We affirm the decree.

The property in question was referred to by the witnesses as a lake cabin. It was purchased around 1976 by John Ahrens, Bob Knight and Gayland Pitts, each owning a one-third interest. In 1979, Ed Cunningham, the former husband of the appellant, purchased Pitts's one-third interest and began making one-third of the mortgage payments. Cunningham and the appellant were divorced in 1980. The divorce decree purportedly conferred upon the appellant the one-third interest in the property she and Cunningham had owned jointly and upon Cunningham the obligation to retire the debt. Cunningham made the payments for one-third of the mortgage, taxes and insurance until 1981. Upon Cunningham's death in 1982, the appellant inquired of the appellees what they were to do about the lake cabin. They assured her she need not worry about it. The payments on the mortgage, insurance, and taxes on behalf of the appellees were made by Mountain Home Broadcasting Corp., except that in 1982 the appellant was asked to make the annual insurance payment, and she did.

The appellant claimed the appellees were barred by laches from recouping the one-third they had paid on behalf of her interest in the property in view of their failure to make any demand of her, other than with respect to the 1982 insurance payment, or to claim against Cunningham's estate. She claims they are not entitled to subrogation because they made the payments as mere volunteers. She also says their claim is barred because they did not present the "best evidence" of having made the payments, i.e., documentary evidence. Further, she argues the condition in which the appellees maintained the cabin effectively dispossessed her, and she is entitled to rental value to an extent which would, when set off against the appellees' claim, reduce it to nothing.

1. Laches

There is no evidence that any demand, other than for the 1982 insurance payment, was made on the appellant from the time Cunningham stopped making the payments in 1981. The appellant says this silence estops the appellees from making the demand now, citing *Franklin* v. *Hempstead County Hunting Club*, 216 Ark. 927, 228 S.W.2d 65 (1950). The appellants' brief quotes this language from the *Franklin* case, which, in turn, quoted it from *Stewart* v. *Pelt*, 198 Ark. 776, 131 S.W.2d 644 (1939):

> "The doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. . . ." [216 Ark. at 930, 228 S.W.2d at 67]

After the ellipsis, the quotation, not included in the appellant's brief, continues as follows:

> "Mere lapse of time before bringing suit, without change of circumstances or in the relation of the parties, will not constitute laches. Not only must there have been unnecessary delay, but it must appear that, by reason of the delay, some change has occurred in the condition or relation of the parties to the property which would make it inequitable to enforce the claim. So long as the parties are in the same condition, a claim for land may be asserted within the time

allowed by law."

The quotation, in its entirety, is a correct statement of the laches doctrine. The appellant has shown no change, resulting from the delay, which would make enforcement of the appellees' claim inequitable.

2. *Subrogation*

The appellant contends the appellees made the one-third payments due with respect to her part of the property as "mere volunteers," citing *Moon Realty Co., Inc.* v. *Arkansas Real Estate Co., Inc.*, 262 Ark. 703, 560 S.W.2d 800 (1978). In that case, Moon Realty Co. had purchased at a foreclosure sale property belonging to Arkansas Warehouse Corp. and Rose Courts. The U. S. Government held a tax lien on the property. As to Arkansas Warehouse Corp. and Rose Courts, the specific lien was satisfied in the foreclosure action, but the foreclosure did not completely satisfy their tax obligation to the government or that of three other persons who were presumably somehow related to Arkansas Warehouse Corp. and Rose Courts but were not parties to the foreclosure proceeding. To avoid redemption by the government of the foreclosed property, Moon Realty Co. paid the outstanding tax liabilities of all five of the appellees. We held that subrogation was appropriate as to the amounts paid on behalf of Arkansas Warehouse Corp. and Rose Courts but not as to the other three. The difference was premised on our conclusion that as to Arkansas Warehouse Corp. and Rose Courts there had been a "valid tax lien" with respect to the property in which Moon Realty Co. was trying to protect its interest, but not as to the others whose taxes were paid.

In this case, the appellees had an interest in the property to protect. Had not complete payments (three-thirds as opposed to two-thirds) been made, the mortgage presumably could have and would have been foreclosed. The appellees' situation vis-á-vis the appellant is thus analogous to that of Moon Realty Co. vis-á-vis Arkansas Warehouse Corp. and Rose Courts, and subrogation was appropriate. *See also Cox* v. *Wooten Brothers Farms, Inc.*, 271 Ark. 735, 601 S.W.2d 278 (Ark. App. 1981).

3. Best Evidence

The appellant contends that because the appellees did not present documentary evidence of the payments they had made on her behalf their counterclaim should have been denied. We do have cases, such as *Morgan* v. *State*, 213 Ark. 493, 211 S.W.2d 108 (1948), holding that if primary evidence of a transaction is available, secondary evidence is inadmissible. Here, however, no objection was made by the appellant to the testimony presented by the appellees as to the amounts they paid. When no objection has been made at the trial level, we will not consider a question of admissibility of evidence on appeal. *Foote* v. *Jitney Jungle, Inc.*, 283 Ark. 103, 671 S.W.2d 186 (1984); *Arkansas State Highway Commission* v. *Newton*, 253 Ark. 903, 489 S.W.2d 804 (1973).

The dearth of evidence produced at the trial is remarkable. Not only did the appellant not produce her divorce decree by which she acquired her former husband's interest in the property, she showed no indicia of title whatever. Nor was the two-thirds interest of the appellees or the encumbrance demonstrated by any deed or mortgage. The entire proceeding was based on the testimony of the parties except for some pictures and a video tape introduced by the appellant to show the condition of the property.

This lack of evidence of title troubled the chancellor, and rightly so. But he ultimately concluded that neither side doubted or contested the fact that the propety was owned in thirds by the appellant and the two appellees, and that it was subject to a mortgage. He held that it would be unfair not to require the appellant to make contributions of one-third of the payments made by the appellees for the three preceding years. We agree.

The chancellor cited *Houston* v. *Griffin*, 227 Ark. 709, 300 S.W.2d 931 (1957). In that case we held that one who had paid off a purchase money mortgage and taxes was entitled to contribution from a cotenant. That the appellant may have had a claim against the estate of Cunningham for failure to have made the payments as required by the divorce decree does not detract from the uncontested facts that the appellant was a cotenant with the appellees, the property was subject to a mortgage, insurance, and taxes, and that the appellees made the full payments.

4. Possession

The appellant's testimony was devoted mostly to saying she was effectively dispossessed because of the dirty condition in which she found the cabin from time to time, forcing her to stay in a motel rather than clean the cabin. The chancellor found the actions of the appellees in this respect did not amount to dispossession of the appellant. He, therefore, denied her a rental value set off against the counterclaim.

While a tenant in common who excludes a cotenant may be liable for rent, *see Lawrence* v. *Lawrence*, 231 Ark. 324, 329 S.W.2d 416 (1959); *Hamby* v. *Wall*, 48 Ark. 135, 25 S.W.705 (1886), dispossession is largely a question of fact. We will not reverse the chancellor's determination absent a showing it was clearly erroneous. Ark. R. Civ. P. 52(a). That has not been shown here.

5. Attorney Fee

The appellant contends that she is entitled to have an attorney fee taxed as costs in the action as provided in Ark. Stat. Ann. § 34-1825 (Supp. 1985).

There are at least two reasons to deny the fee. First, although a fee was requested in the appellant's complaint, the matter was not raised with the chancellor at or after the trial. The chancellor made no ruling whatever on the matter of a fee because he was not asked to. Secondly, Ark. Stat. Ann. § 34-1825.1 (Supp. 1985) limits the court in the award of a fee to consideration of "only those services performed by the attorney requesting a fee which are of common benefit to all parties." There is no evidence of any such services having been performed by the appellant's attorney.

Affirmed.

PURTLE, J., not participating.

Daniel Price CLIFTON *v.* STATE of Arkansas

CR 85-216 709 S.W.2d 63

Supreme Court of Arkansas
Opinion delivered May 12, 1986

William R. Simpson, Jr., Public Defender, by: *Donald K. Campbell III*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted of rape and attempted rape and was sentenced to sixty and twenty years imprisonment, respectively, for these offenses. He appeals from the attempted rape conviction on the ground that the nine-year-old prosecuting witness was incompetent to testify. We affirm.

The rape conviction resulted primarily from the testimony of seven-year-old Shirley Bryans who told the jury about being at

home on the morning in question with the appellant, her sister Ritha, and a brother who was playing outdoors. Shirley testified that Ritha, then aged eight (nine at the time of trial) was being kept in the bathroom by the appellant as punishment for having tormented a kitten. The appellant lived with Shirley, Ritha, their brother, and their mother who was temporarily away from the home. Shirley testified as to how the appellant raped her on that morning and how she told her mother of the incident when the mother returned to the home. Shirley was examined by a doctor who found evidence of recent vaginal penetration. At an omnibus hearing, Ritha, the nine-year-old, at first said she did not know the difference between telling the truth and telling a lie but then, after some coaxing with examples, said she did know the difference and that she knew she would be punished for lying. She testified that "Daniel P. Clifton" locked her in the bathroom and, after moving her from the bathroom to the closet and back a time or two, came into the bathroom and "stuck his penis down my throat."

At the trial both girls gave substantially the same testimony as at the omnibus hearing except Ritha said the appellant "tried" to stick his penis down her throat. The physician's report, which was entered as a joint exhibit, stated that Ritha had told the doctor that the appellant had not succeeded in placing his penis in Ritha's mouth.

On cross examination at the trial Ritha said she had not liked the appellant both before and after the incident. He had punished her and she had wanted to get even with him. She then said that she had changed her mind and did not want to get even.

The appellant argues that it was only after Ritha was led to the answers the prosecutor wanted to hear that the court ruled she was competent. He contends her use of the full name "Daniel P. Clifton" and words such as "penis" further demonstrate that she was too easily led to be considered a competent witness.

We find no abuse of discretion in this case. With respect to Ritha, the original charge of rape was reduced to attempted rape. Her testimony was consistent with that of her sister concerning events of the morning in question. The inconsistencies in her testimony elicited when she was being examined for competency did not so exceed the bounds to be expected with a

juvenile witness as to make the decision to allow her testimony an abuse of discretion. Nor are we convinced that Ritha's use of words she has heard when discussing the case with adults indicates the trial court was wrong in assessing her competency.

We will not reverse a trial judge's exercise of the broad discretion to determine the competency of a witness absent a manifest error or clear abuse. *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980). The issue is one in which the trial judge's evaluation is particularly important due to the opportunity he is afforded to observe the witness and the testimony. As long as the record is one upon which the trial judge could find a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts, we will not hold there has been a manifest error or abuse of discretion in allowing the testimony. *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982); *Chambers* v. *State*, 275 Ark. 177, 628 S.W.2d 306 (1982).

Affirmed.

PURTLE, J., not participating.

Robert Steven OSGOOD and Anthony Gerald TEMPLE
v. STATE of Arkansas

CR 85-45 and CR 85-46 709 S.W.2d 401

Supreme Court of Arkansas
Opinion delivered May 12, 1986

Hani W. Hasham, for appellant, Osgood.

Gibson & Gibson, P.A., by: *R. Bynum Gibson*, for appellant, Temple.

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

PER CURIAM. The petitioners, Robert Steven Osgood and Anthony Gerald Temple, were charged with possession of a controlled substance with intent to deliver in violation of Ark. Stat. Ann. § 82-2617(a)(1)(iv). Both petitioners moved to quash the felony information, alleging that the crime charged was a misdemeanor, rather than a felony. The circuit judge denied both motions. The petitioners then filed writs of prohibition in this court, claiming that the Bradley Circuit Court was without jurisdiction to try them for a misdemeanor. We granted petitioners' motions to consolidate their cases since they presented the same issue. We then granted a temporary writ of prohibition on March 4, 1985, and allowed the parties to brief the issue.

Subsequently, the appellee filed a motion to reconsider the issuance of the temporary writ of prohibition. We granted that motion on April 1, 1985.

We decided the issue raised in this case in *Dollar* v. *State*, 287 Ark. 61, 697 S.W.2d 868 (1985) where we found the Legislature enacted § 82-2617 to upgrade the penalties for offenses which were already felonies, and the Legislature intended no change in the felony status of those offenses.

Accordingly, the temporary writ of prohibition is dissolved, the petitioners' motion for permanent writ of prohibition is denied, and the case is remanded to circuit court for trial on the merits.

PURTLE, J., not participating.

Joey PUCKETT *v.* Evietta PUCKETT

85-256 709 S.W.2d 82

Supreme Court of Arkansas
Opinion delivered May 19, 1986

James C. Cole, for appellant.

Terry P. Diggs, Central Arkansas Legal Services, for appellee.

JACK HOLT, JR., Chief Justice. The exclusive jurisdiction of county courts over bastardy cases is again being challenged in this appeal. Since we are being asked to construe the Arkansas Constitution, our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a).

The parties in this case have married and divorced each other twice. Between the first divorce and the second marriage, they had a child out of wedlock. During the second divorce hearing, the appellant asked that a determination as to custody of the child be made. The chancellor found he was without jurisdiction of custody, support or other matters relating to the child because the Arkansas Constitution gives county courts exclusive jurisdiction of all matters pertaining to bastards. In his appeal

from that order, appellant argues that chancery court is the historical forum for matters concerning minors, and art. 7 § 28 of the Arkansas Constitution, which confers bastardy jurisdiction on the county court, violates the equal protection clause of the United States Constitution. We find no merit in his argument and affirm the chancellor.

We have repeatedly held that original jurisdiction of all matters relating to bastardy is in the county court and that, although the reason for placing that jurisdiction with the county court no longer exists, until and unless the constitution is changed that is the law. *Jarmon* v. *Brown*, 286 Ark. 455, 692 S.W.2d 618 (1985); *Stain* v. *Stain*, 286 Ark. 140, 689 S.W.2d 566 (1985); *Rapp* v. *Kizer, Chancellor*, 260 Ark. 656, 543 S.W.2d 458 (1976); and *Higgs* v. *Higgs*, 227 Ark. 572, 299 S.W.2d 837 (1957). In *Jarmon* we specifically found that a lawsuit for custody of an illegitimate child must be heard in county court.

Appellant acknowledges our holdings on this issue, but claims that none of these cases presented the constitutional question of equal protection.

We need not reach appellant's constitutional argument, however, because we cannot ascertain from the transcript whether this issue was presented to the trial court. The record on appeal consists of the chancellor's decree and the notice of appeal. There is no mention in the decree of appellant's equal protection argument. The appellant had the burden of presenting a record and abstract sufficient to show the trial court was wrong. *City of Star City* v. *Shepherd*, 287 Ark. 188, 697 S.W.2d 113 (1985); *SD Leasing, Inc.* v. *RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983); and *King* v. *Younts, Chief of Police*, 278 Ark. 91, 643 S.W.2d 542 (1982). We have long held that assignments of error may not be raised for the first time on appeal and, accordingly, if the argument was not presented to the trial court, we do not consider it here. *Wasp Oil, Inc.* v. *Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

Accordingly, the judgment appealed from is affirmed.

PURTLE, J., not participating.

Leroy WILLIAMS *v.* STATE of Arkansas

CR 85-201 709 S.W.2d 80

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Q. Byrum Hurst, Jr., for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant was convicted of first degree murder for the shooting death of Johnny Lampkins at the Varsity Bar in Pine Bluff, Arkansas. He was sentenced to life imprisonment and, on appeal, challenges the sufficiency of the evidence and the trial court's denial of his motion for a new trial. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(b). We affirm.

On appellate review of a criminal case, we determine whether the verdict is supported by substantial evidence, which means whether the jury could have reached its conclusion without having to resort to speculation or conjecture. *Brown* v. *State*, 278 Ark. 604, 648 S.W.2d 67 (1983). In determining the sufficiency of the evidence it is permissible to consider only the testimony that tends to support the verdict of guilt. *Id.*

Here, the state medical examiner testified that Lampkins died of a shotgun blast to the chest. The state then offered the testimony of four eyewitnesses. The first, Rickey Winston, was with Lampkins when he was shot, and identified the appellant as the man who shot him. Lonzo Eans, who was sitting in front of his gas station located near the Varsity Club, testified he saw the appellant pull up in front of the club in a truck, get a shotgun from the truck, stick the gun in the door of the club, fire it, and then put the gun back in the truck and drive off. Curtis Thorns, who was with Eans, testified to substantially the same story. Irene Akins, the appellant's sister-in-law, testified she was standing near the Varsity Club, between Howlett's Diner and the street, when she saw the appellant, who was carrying a gun, walk between Howlett's and the Varsity Club to the door of the Varsity Club. She then heard a gunshot.

Appellant's argument as to the sufficiency of the evidence primarily concerns the credibility of these witnesses. We have repeatedly held that it is the province of the jury to determine the credibility of the witnesses and this court will not disturb their findings regarding credibility. *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 (1983). For these reasons, the appellant's contention is without merit.

The appellant further contends that the state did not meet its burden of proving premeditation. Inasmuch as premeditation, deliberation, and intent may all be inferred from the circumstances, such as the weapon used, the manner in which it was used, the wounds inflicted, and the conduct of the accused, *McLemore* v. *State*, 274 Ark. 527, 626 S.W.2d 364 (1982), we find the state met its burden of proof.

A collateral point discussed in the state's brief and the appellant's reply brief, is the trial court's refusal of appellant's request to take the jury to visit the crime scene. Appellant maintains that, had the jury been taken to the scene, it would have affected their view of the credibility of some of the testimony. A request to view a place pertinent to a material fact is a matter within the trial court's discretion and denial of the request is not a ground for reversal absent an abuse of that discretion. *Orsini* v. *State*, 281 Ark. 348, 665 S.W.2d 245 (1984). Appellant has not demonstrated such an abuse of discretion.

The final issue raised by appellant is styled as an objection to the trial court's failure to grant his motion for new trial because a necessary witness was absent from the trial. In his brief, however, appellant argues the trial court should have granted him a continuance until he could obtain the presence of this witness. No such continuance was ever sought and that issue, therefore, need not be addressed.

As to the motion for a new trial, the trial judge never ruled on this motion. We have held numerous times that the burden of obtaining a ruling is on the movant and objections and questions left unresolved are waived and may not be relied upon on appeal. *Collier* v. *Hot Springs Savings & Loan Ass'n*, 272 Ark. 162, 612 S.W.2d 730 (1981); *Phillips* v. *State*, 266 Ark. 883, 587 S.W.2d 83 (Ark. App. 1979).

Even if this issue were properly preserved for appeal, we would affirm the trial court's ruling. The absent witness was Lois Akins, the husband of Irene Akins. Appellant maintains Lois would have testified that he was with his wife on the day of the shooting and did not see the appellant walk between the two buildings carrying a gun as Irene testified. Evidence which only attacks the credibility of other testimony is not grounds for a new trial. *Orsini* v. *State*, *supra*; and *Williams* v. *State*, 252 Ark.

1289, 482 S.W.2d 810 (1972).

Pursuant to Sup. Ct. R. 11(f) and Ark. Stat. Ann. § 43-2725 (Repl. 1977) we have considered all objections brought to our attention in the abstract and briefs. We find no prejudicial error and accordingly the judgment appealed from is affirmed.

PURTLE, J., not participating.

Odis Donell THOMAS *v.* STATE of Arkansas

CR 85-195 709 S.W.2d 83

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Youngdahl, Youngdahl & Wright, P.A., by: *Thomas A. McGowan*, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. This prosecution for rape has now been in the state and federal courts for more than six years. On November 27, 1979, the prosecutrix reported to the police in Monticello, in Drew County, that she had been raped that morning. The police suggested that she and her husband ride around in the vicinity of the washateria where the attack occurred and look for the man. They did so. The next day the prosecutrix recognized the appellant, who was in a yard working on his car.

Thomas was arrested and charged with rape. At first he pleaded not guilty, but then he changed his plea to guilty in return for a negotiated 30-year sentence. After that he filed a Rule 37 petition asking to withdraw his plea of guilty, for ineffective assistance of counsel. In that proceeding we affirmed the trial court's denial of the petition. *Thomas* v. *State*, 277 Ark. 74, 639 S.W.2d 353 (1982). Thomas then sought relief in the federal courts, on the same ground. The district court's judgment setting aside the conviction was upheld by the court of appeals. *Thomas* v. *Lockhart*, 569 F.Supp. 454 (E.D. Ark. 1983), affirmed, 738 F.2d 304 (8th Cir. 1984).

The State elected to retry the case. The trial court granted a defense motion for a change of venue. The case was tried in Ashley County. The jury found Thomas guilty and sentenced him to life imprisonment. Upon this appeal from the ensuing judgment four arguments for reversal are submitted.

It is first argued that the court should have granted defense counsel a continuance to enable him to investigate the make-up of the jury panel. The defendant Thomas is black. Before the selection of the jury began, defense counsel looked at the jurors

and moved to quash the panel on the ground that it appeared to be 80% white; he said that the ratio of only 20% black was not a fair representation of the black population in the county. The court overruled the motion, because no supporting proof was offered. Counsel then asked for a continuance to enable him to investigate the matter. That request was also denied.

No basis for a continuance was shown. There was no offer of proof, the motion being supported only by counsel's observation of the assembled jurors. Counsel objected only to the make-up of "that panel," because it appeared to be 20% black. There was no assertion of systematic exclusion of blacks from the jury, nor any suggestion by counsel that he wanted to investigate the possibility of systematic exclusion.

Our statutes now provide for the random selection of prospective jurors from the current list of registered voters. The procedure is set forth in detail in Ark. Stat. Ann. § 39-205.1 (Supp. 1985). The lists do not show the voter's race. If the law is followed, as we must assume, there is no possibility of an intentional exclusion of blacks from jury panels. Counsel did not seek to investigate such a possibility. Instead, he requested an opportunity to show that the particular panel was not representative of the population. That showing, however, would not have supported the motion to quash the panel, for when the panel is drawn by chance a showing that its racial make-up does not correspond to that of the county does not in itself make a prima facie case of racial discrimination. *Turner* v. *State*, 258 Ark. 425, 527 S.W.2d 580 (1975). The requested continuance was properly refused.

A second argument is that the court should have suppressed Thomas's statement, which had been taken down by an interrogating officer and signed by Thomas. The police had already interviewed the prosecutrix when she reported the rape. She said, and later testified, that she had been in a washateria doing her laundry at about ten o'clock in the morning. A black man, whom she later identified as Thomas, came in and asked about how he could obtain drugs. She did not know. She had just drunk a Coke. The man offered to take the empty bottle back to the dispenser, which he did. When he came back inside, he walked over to her and asked if she had any children. She said she had one child. He

then grabbed her and forced her to the floor despite her screams and attempts to escape. He pulled a knife, held it to her throat, and made her take off her pants. At that point she blacked out for about five minutes. When she regained consciousness, Thomas was having sexual intercourse with her. When he finished, he threatened to kill her if she told anyone, and left. After waiting a few minutes the prosecutrix went to her mother-in-law's home and called the police.

Thomas was questioned on the following afternoon. At first he denied having been at the washateria or knowing anything about the matter. The officer then said that Thomas wouldn't have to worry about it if he hadn't been there, for they had a Coke bottle the perpetrator had had, and his fingerprints would be on it. Thomas became apprehensive and said he forgot about the Coke bottle. He admitted having been at the washateria and gave an account of the initial conversation similar to that the prosecutrix had given. Thomas said he had shown her the knife, but they had started holding hands, and she cooperated in the act of intercourse.

At the suppression hearing Thomas repudiated the incriminating parts of his statement. In his testimony he corroborated the statement's detailed account of how he had gone to work at seven that morning, had quit his job, and had stopped at several specified places before going to the bathroom at the washateria. He denied ever having seen the prosecutrix at all. He corroborated the statement's description of the route he took in walking home from the washateria.

Thomas testified that he had signed three statements during the interrogation, but the police had torn up the first two. He said the incriminating portion was not in the third statement when he signed it, though he admitted his signature. In effect he charged the officers had altered the statement either after he signed it or without his knowledge before he signed it.

Upon the totality of the proof we find that the trial court was right in holding the statement to be voluntary. The trial judge evidently concluded, as the jury must also have concluded, that Thomas had tailored his testimony to admit all the facts recited in the statement that were susceptible of being proved by third persons, but to deny what had happened during the compara-

tively short time when he and the prosecutrix were alone together. We hold that the written statement was properly received in evidence.

A third argument is that the State's proof was insufficient to support the conviction for rape. Overall, the prosecution presented a very strong case. The prosecutrix's identification was positive, the crime having taken place in broad daylight. She was able, by cruising the neighborhood, to find her assailant and point him out to the police the very next day. A search of Thomas's home, to which he consented, yielded clothing, a distinctive cap, and a knife, all similar to what the prosecutrix had described. Thomas's own written statement described an act of sexual intercourse at the time and place fixed by the prosecuting witness.

In questioning the sufficiency of the evidence the appellant argues that the State failed to prove the required element of force, in that the prosecutrix blacked out and did not regain consciousness until the act of intercourse was in progress. The young woman, however, had already resisted to the extent of her ability. Her lapse into unconsciousness cannot be said to have amounted to consent.

Lastly, it is insisted that the court should not have permitted the prosecutrix to testify about the effect the event had had upon her marriage. The testimony that is objected to was brought out by the State's attorney after the prosecutrix said that her marriage had been affected. The record continues:

> Q. In what manner?
>
> A. My husband had got to where he started beating on me. He couldn't stand to be around me half the time.
>
> Q. Did he get over what had happened to you?
>
> A. No, sir.

We agree that the trial judge should have excluded the quoted testimony. It doubtless had some slight relevancy, as the State argues, but we think its probative value was clearly outweighed by its possible prejudicial effect upon the jury.

Even so, we are not willing to order a new trial on the basis of the brief excerpt we have quoted. That excerpt comprises four typewritten lines in a record that exceeds 550 pages. The prosecutor made no effort to magnify the point in the eyes of the jury. To the contrary, his closing arguments are in the record; he did not mention the matter now in issue. We have followed the Supreme Court's lead in adopting the view that when the evidence of guilt is overwhelming, an error even of constitutional proportions may be found to be harmless beyond a reasonable doubt. *Pace* v. *State*, 265 Ark. 712, 580 S.W.2d 689 (1979). Here no constitutional issue is presented; the issue is one of judgment. The State's proof was so strong, especially when presented more than five years after the crime was committed, that we are convinced that the cause of justice would not be served by the granting of a new trial.

We have reviewed the case with care and find no reversible error in the points that are argued or in any of the other objections presented in the court below.

Affirmed.

PURTLE, J., not participating.

Rennard L. YUTTERMAN *v.* Gail WILLIAMS, et al.

86-15 709 S.W.2d 86

Supreme Court of Arkansas
Opinion delivered May 19, 1986

[redacted]

Pryor, Robinson & Barry, for appellant.

Person & VanWinkle, by: *John R. VanWinkle*, for appellees.

GEORGE ROSE SMITH, Justice. This action for personal injuries and property damage arises from a collision between cars being driven by one of the plaintiffs, Gail Williams, and by the defendant, Rennard Yutterman. Mrs. Williams's passenger was also a plaintiff. Each driver claimed damages against the other. The jury's verdict for $4,768.71 was in favor of the defendant Yutterman on his counterclaim. The trial judge granted the plaintiffs' motion for a new trial, finding the verdict to be clearly against the preponderance of the evidence. Civil Procedure Rule 59(a)(6); *Clayton* v. *Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982). The only question is whether the trial judge's action was an abuse of discretion. Our jurisdiction is under Rule 29(1)(o). We affirm.

Mrs. Williams testified that she was driving west on Race Track Road near Pocola, Okla., where the plaintiffs lived. The race track area and a parking lot were on the righthand side of the road. Driving at about 25 miles an hour, Mrs. Williams was approaching a lane or driveway that comes out of the parking lot to the road. There was a stop sign for drivers entering the road from the parking lot. Mrs. Williams saw Yutterman pulling out of the lane when she was about 25 or 30 feet from him. She said she put on her brakes and just slid right into him. She said that at the last minute he was in her lane; so "at the last minute I jerked my wheels to the left," hoping to avoid him. She testified that within seconds after the collision the Pocola police were there.

An investigating police officer testified that Mrs. Williams's car made 30 feet of skid marks to the point of impact. The skid marks were in her lane until they veered slightly to the left up to the impact. The skid marks were over the middle line for the last 5 or 10 feet. The officer said Yutterman left no skid marks, only scuff marks that were left when her vehicle pushed him. The officer said the point of impact was just left of center, with most of

the debris being in Mrs. Williams's (westbound) lane. Another witness, Jerry Lee, had been just behind Yutterman in the driveway. He said that Yutterman didn't see the stop sign and didn't stop; he just pulled right out in front of Mrs. Williams's car, "throwing gravel everywhere."

Yutterman, who lives at Alma, testified that he did stop at the stop sign and looked both ways. He said Mrs. Williams's car was 100 or 150 feet away, though in a deposition he had said 4 or 5 car lengths. He said he pulled out into the road and was entirely in his eastbound lane when the collision occurred. Even though Yutterman's testimony was apparently accepted by the jury, it is so much at variance with the skid marks and with the testimony of Mrs. Williams, the two officers, and Lee that the trial judge did not act improvidently or abuse his discretion in finding that the verdict was clearly against the preponderance of the evidence.

Affirmed.

PURTLE, J., not participating.

OAKLAWN BANK *v.* Robert C. BALDWIN, et al.

85-307 709 S.W.2d 91

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Atchley, Russell, Waldrop & Hlavinka, by: *Charles J. Hlavinka*, for appellant.

Honey & Rodgers, for appellees.

DARRELL HICKMAN, Justice. This is a conversion case. Oaklawn Bank, a Texarkana, Texas bank hired a professional to repossess a pick-up truck from Robert Baldwin, because Baldwin was delinquent in his payments. Baldwin and three others, Ellen Young, Emanuel Baldwin and Carl Baldwin, sued the bank for conversion of personal property which was located in the truck at the time of repossession. The case was tried without a jury. The judge found the bank had wrongfully repossessed the truck and converted the personal property. No award was made to Robert Baldwin, that question being deferred. But a judgment was entered for compensatory damages totaling $941.37: Ellen Young $874.37, Emanuel Baldwin, $22.00, and Carl Baldwin, $45.00. Punitive damages in the amount of $10,000 were also awarded.

On appeal the bank raises six allegations of error which may be consolidated into four arguments. First, the trial court erred in finding the repossession of the truck illegal; second, the personal property in the truck was not converted by the bank; third, there is insufficient evidence to support the damages awarded to Ellen Young; and fourth, punitive damages were improperly awarded. The first and main finding of the trial court was wrong, and the case must be remanded.

The bank had tried on May 23, 1984, to repossess the truck and Robert Baldwin resisted, brandishing a shotgun. Baldwin filed for bankruptcy and an automatic stay was issued by the United States Bankruptcy Court pursuant to 11 U.S.C. § 362.

Despite the order, the bank hired Leslie McClendon to repossess the truck. On August 10, 1984, at approximately 4 a.m., McClendon found the truck in Robert Baldwin's driveway. McClendon attached his wrecker to the truck and drove away without incident. He stopped shortly to be sure he had the right truck. When he was certain, he called the sheriff's office and advised them of the repossession. That office told him to return the truck. Instead, McClendon took the truck to Texarkana, Texas where it was stored on a lot belonging to Marshall Griffith. Griffith and John Johnson, an employee of the bank, inventoried the personal property in the truck. According to testimony, the sheriff's office called asking for a return of the truck and informing the bank that some of the property did not belong to Baldwin. The bank declined to return either. Four days later the bank, through its attorney, sent Robert Baldwin a letter stating that he could arrange for the return of the personal property by contacting John Johnson at the bank. Forty-eight items were on the list, including tools, construction equipment, radio, attache case, first aid kits, and a fire extinguisher. The property was finally returned on February 22, 1985. The appellees claimed several items were missing. Ellen Young reported the loss of a set of lady's wedding rings and a man's gold band; Emanuel Baldwin was missing a hammer and a nail bar; Carl Baldwin had lost electric tools, a square and a tape. These missing items were the basis of the suit for conversion.

Generally, it is not a violation of Arkansas law to repossess a vehicle from the driveway of the owner as long as it can be accomplished without a breach of the peace. Ark. Stat. Ann. § 85-9-503 (Supp. 1985); *Ford Motor Credit Co.* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979). The trial judge found a trespass in this case and a willful violation of Arkansas law by the bank. This finding is not supported by the evidence. The truck was repossessed from Baldwin's driveway. There is no evidence that McClendon entered any gates, doors, or other barricades to reach the truck. He just attached the truck to his wrecker in the dead of the night and drove away. There was no confrontation with Baldwin. He was asleep when the truck was repossessed. The repossession was accomplished without breaching the peace according to our cases. *Ford Motor Credit Co.* v. *Herring*, *supra*; *Teeter Motor Co.* v. *First National Bank*, 260 Ark. 764, 543

S.W.2d 938 (1976); *Rogers* v. *Allis-Chalmers Credit Corp.*, 679 F.2d 138 (8th Cir. 1982); *Williams* v. *Ford Motor Credit Co.*, 674 F.2d 717 (8th Cir. 1982).

The central question to our review is whether the trial judge was clearly wrong when he found the personal property of Young, Emanuel and Carl Baldwin had been converted. That means converted after it was known the truck contained personalty. This is a separate issue from the initial taking of the truck. Conversion is the "exercise of dominion over the property in violation of the rights of the owner or person entitled to possession." *Ford Motor Credit Co.* v. *Herring*, *supra.*

McClendon knew when he stopped to see if the truck was the right one that it contained considerable personal property. He called the sheriff's office to report the repossession. The sheriff told McClendon to return the truck. Someone in the sheriff's office called the bank demanding the truck and personal property be returned because some of it did not belong to Baldwin. The appellees made no personal demand for the return of the personalty, and there is no evidence that the bank was informed who, except Baldwin, owned the personalty. The bank's attorney wrote Baldwin four days later listing the property that was found in the truck and suggested that he contact John Johnson at the bank to make arrangements for its return. The appellees filed their suit for conversion on August 23, 1984. The property was finally retrieved on February 22, 1985.

The bank contends there was no intentional violation of the appellees' rights to the personalty. The trial judge made no specific finding there was an intentional conversion of the personalty separate from taking the truck. A finding of intentional conversion is required to support an award of punitive damages. *Ford Motor Credit Co.* v. *Herring*, *supra.* Since that specific finding is lacking and the trial judge undoubtedly based his finding of conversion, at least in part, on the premise the truck was wrongfully taken, the judgment must be reversed and the cause remanded for a new trial.

In view of our decision it is unnecessary to address the other questions raised.

Reversed and remanded.

PURTLE, J., not participating.

Kerry HICKS *v.* STATE of Arkansas

CR 85-214 709 S.W.2d 87

Supreme Court of Arkansas
Opinion delivered May 19, 1986
[Rehearing denied June 23, 1986.*]

* Purtle, J., would grant.

Morgan E. Welch, for appellant.

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

DARRELL HICKMAN, Justice. Kerry Hicks was convicted of the attempted rape of a ten year old girl. The jury sentenced him to 30 years imprisonment. During an extensive hearing on Hicks' motion for a new trial, the trial judge heard arguments about the alternative sentencing program, the Youthful Offender Act and possible expungement proceedings. The trial judge decided that Hicks did not deserve a maximum sentence but did deserve imprisonment. Hicks was sentenced to 30 years with nine years suspended as a youthful offender pursuant to Act 378 of 1975. He filed a petition for postconviction relief on April 29, 1984. After a hearing, the trial judge denied any relief. It is from that denial this appeal is taken.

Two arguments are raised on appeal: (1) that counsel's ineffectiveness at trial deprived Hicks of a fair trial, and (2) that the sentence should be reduced or a remedy fashioned to conform to the sentencing judge's real intentions. The main argument below was that the sentence should be reduced or a remedy fashioned under Rule 37.4 so Hicks can be released.

The ineffective assistance of counsel argument contains the usual allegations of inadequacy: the failure to prepare and investigate the case, the inaccessibility of the attorney, failure to call witnesses, failure to challenge a biased juror, failure to object to the prosecutor's remarks, failure to prepare for the hearing on the motion for a new trial, and failure to pursue an appeal. We will first consider the last allegation.

It was apparently the judgment of counsel that because Hicks was sentenced as a youthful offender, he would be released

in time to attend college in the fall, some eight months later, and certainly before an appeal could be decided. So an appeal was not pursued. While both Hicks and his mother testified they wanted to appeal, admittedly they relied on counsel's judgment and did not insist on an appeal. No evidence was offered that counsel was directed to file an appeal.

As it turns out Hicks was not released early. He claims he has not been released because he is stigmatized for the nature of his crime. No attempt was sought by Hicks to seek a belated appeal in accordance with A.R.Cr.P. Rule 36.9. Instead he sought relief under Rule 37. The requirements imposed on counsel after a notice of appeal is filed are not present in this case. *Nelson* v. *State*, 279 Ark. 362, 651 S.W.2d 98 (1983); *Lewis* v. *State*, 279 Ark. 143, 649 S.W.2d 188 (1983); *Surridge* v. *State*, 276 Ark. 596, 637 S.W.2d 597 (1982).

The other arguments regarding counsel's efforts are questions regarding strategy, tactics and judgment. We must bear in mind the standard for ineffective assistance of counsel set by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984). A defendant must show that counsel's performance is so deficient and the errors made by counsel so serious that the Sixth Amendment to the Constitution is violated and that a defendant is deprived of a fair trial. To show a denial of a fair trial, prejudice must be shown. The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. We adopted that standard in *Crockett* v. *State*, 282 Ark. 582, 669 S.W.2d 896 (1984). It is the defendant's burden to prove ineffective assistance of counsel and it is a heavy burden because counsel is presumed effective. *Rightmire* v. *State*, 275 Ark. 24, 627 S.W.2d 10 (1982).

Perhaps the most difficult case for counsel to defend is a molestation charge involving a minor. Hicks' counsel was faced with this task, and he decided the best defense was mental disease or defect. Counsel proved that Hicks was depressed because of his father's death and earlier had attempted suicide. Prior to the rape attempt, Hicks had taken an overdose of medication. The doctor testified that such an overdose could cause a person to go "out of his head." Hicks testified that he could not remember what

happened after he took the medicine. He was found several days later in the woods.

Hicks argues that more testimony should have been given about his troubled emotional background. He lists seven witnesses that should have been called or more extensively questioned: his brother who is a child abuse investigator/foster care case worker; a psychologist who treated him when he was 16 years old; two counselors at the Hope Mental Health Center; a psychologist who was treating Hicks at the time of the trial; and someone from the state hospital. The transcript of the trial was introduced into evidence at the Rule 37 hearing. There was considerable testimony regarding the mental condition of Hicks. The defense called Hicks' mother and uncle, the psychologist who treated Hicks when he was ten years old, the psychologist treating Hicks at the present time, a psychologist from the state hospital, and Hicks himself. Counsel must use his own best judgment to determine which witnesses will be beneficial to his client. *Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984); *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983). The extent to which a witness is questioned is a matter of trial tactics and does not justify Rule 37 relief. *Hayes* v. *State*, *supra*.

It is argued that a juror, a former deputy sheriff should have been challenged because he admitted having arrested Hicks' brother. The trial judge inquired and decided the juror could serve without bias. Hicks has not proved bias or actual prejudice arose from his attorney's failure to challenge this juror. *Isom* v. *State*, 284 Ark. 426, 682 S.W.2d 755 (1985). The same is true regarding the remarks made by the prosecuting attorney, which Hicks also argues were objectionable. Although the motion for a new trial was denied, the sentence was reduced due to counsel's efforts. Hicks now argues that his counsel failed to prepare for the hearing by not filing a brief with the motion or calling witnesses at the hearing. *Hayes* v. *State*, *supra*.

In summary, Hicks' arguments second guess the strategy and judgment of trial counsel. We have repeatedly held that such arguments are not the basis for reversal. *Tackett* v. *State*, *supra*. *Knappenberger* v. *State*, 283 Ark. 210, 672 S.W.2d 54 (1984). Hicks has demonstrated no prejudice that denied him a fair trial.

The second argument is somewhat unique. That argument is the sentencing judge did not intend for Hicks to receive the sentence that he did. The record clearly demonstrates otherwise. The original judge did not dispute that Hicks received the sentence he intended to impose; he merely indicated that if he were the sitting judge he might grant the relief sought, i.e. release Hicks. That is not to say that the judge's subjective intent would be binding in any event. He did intend to reduce the sentence imposed and did so by nine years. He intended to give Hicks the benefit of treatment under the Youthful Offender Act which he did. Under that act Hicks was eligible for parole immediately pursuant to the rules and procedures of the State Board of Pardons and Paroles. Ark. Stat. Ann. § 43-2342(c)(ii) (Supp. 1985).

Our standard of review on appeal is to determine if the judge's findings were clearly wrong. *Campbell* v. *State*, 283 Ark. 12, 670 S.W.2d 800 (1984). That we cannot say and affirm the trial court.

Affirmed.

PURTLE, J., not participating.

Thomas H. VAN BIBBER *v.* Sharon Gail LASTER

85-266 709 S.W.2d 90

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Thomas H. Van Bibber, Sr., for appellant.

Matthews & Sanders, for appellee.

DARRELL HICKMAN, Justice. On March 15, 1984, at approximately 9 p.m., appellant, Thomas H. Van Bibber, was hit by appellee's car while he was crossing the street. Dr. Van Bibber and his wife sued the appellee for injuries he suffered as a result of the accident. A jury verdict in favor of the appellee was returned, and the appellants appeal pro se.

We must affirm this case because the appellants have failed to abstract any of the testimony or the pleadings which are essential for us to review their case. See Rule 9, Rules of the Arkansas Supreme Court and Court of Appeals. The fact the appellants are pro se is immaterial. *Bryant* v. *Lockhart*, 288 Ark. 302, 705 S.W.2d 9 (1986).

Affirmed.

PURTLE, J., not participating.

George A. BROWN *v.* CHAPMAN FARMS, INC.

85-280 709 S.W.2d 404

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Wright, Lindsey & Jennings, for appellant.

Smith, Smith & Duke, for appellee.

ROBERT H. DUDLEY, Justice. A jury found that appellant, George A. Brown, trespassed and intentionally destroyed soybeans owned by appellee, Chapman Farms, Inc. The jury awarded actual damages of $26,202.00 and punitive damages of $55,000.00. The sole issue on appeal is whether there was substantial evidence to support the award for punitive damages. We affirm the verdict.

In 1979, appellant leased 926 acres of farmland to appellee. The consideration for the lease was one-quarter of the crops of appellant, the landlord. The lease was renewed in varying forms through the 1982 bean season, but by that time, appellant and Don Chapman, the sole stockholder of appellee, were having serious disagreements. In August 1982, Don Chapman told appellant that he would not farm the land in 1983. Appellant accepted the land back, and in October or November of 1982, planted wheat on 487 of the acres. While the wheat was growing, appellant tried to find someone who would lease the farm for the 1983 bean season which runs from about June through December, depending on the weather. In late October or early November 1982, appellant told Chapman he was unable to find a tenant for the farm, could not get financing to farm it himself, and, as a result, had decided to sue Chapman to make appellee farm it again. Suit was filed, but settled in November 1982 by execution of a new lease calling for $55,000.00 cash rent to be paid before March 31, 1983, with the term ending December 31, 1983, or at the conclusion of the fall harvest, whichever occurred first. The lease did not provide a right of entry or a right of inspection for appellant, the landowner, but the parties did contemplate, and the lease provided, that appellant would plant wheat after appellee had harvested its 1983 beans.

In June and July 1983, appellee planted 630 acres of soybeans and insured the crop with the Federal Crop Insurance Corporation, an agency of the United States Government. Under the terms of the insurance, appellee was assured of collecting for 26 bushels of beans per acre on all acres planted before June 15 and for 20.5 bushels per acre on all acres planted before July 5.

By late October it became obvious that the amount of bushels actually produced per acre would not equal the insured amount, and the F.C.I.C. would have to pay the difference. As an example, on the acreage insured for 26 bushels, if the harvest only amounted to 10 bushels per acre, the F.C.I.C. would pay for the 16 bushel difference.

In late October, appellant told Chapman that appellee's beans were not worth the cost of harvesting and he wanted to disk the fields (destroy the crop) in order to begin planting wheat. Chapman replied that it would be necessary to have the written permission of the F.C.I.C. in order for the insurance benefits to be collectible. Chapman also contacted his attorney to have appellant stopped from disking the beans. Chapman's attorney was unable to contact appellant's attorney immediately.

Shortly thereafter, on November 8, the attorneys and their clients met, and appellant agreed not to disk any more ground. In the meantime, however, between November 1 and November 6, appellant had destroyed 187 acres of beans. Witnesses from the F.C.I.C. testified that tests showed the destroyed crop would have yielded 12.3 bushels of soybeans per acre. If the beans had not been destroyed, appellee would have received from the F.C.I.C. an amount to equal the 13.7 bushel difference between the estimated 12.3 bushels actually produced and the 26.0 bushels insured. However, the F.C.I.C. refused to pay the benefits because they did not consent to the destruction of the crop. Appellee thus lost not only the value of its crop, but also the difference between that value and the insured amounts.

[redacted] Appellant contends that while his actions may have been ill-advised and precipitous, they were not malicious and he should not be liable for punitive damages. The argument is without merit. Malice does not have to be established by explicit proof, but may be inferred from a conscious indifference to the consequences of the act. *Olson* v. *Riddle*, 280 Ark. 535, 659

S.W.2d 759 (1983). Exemplary damages are proper where there is an intentional violation of another's right to his property. *Ford Motor Credit Co.* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979). Here, there was an intentional violation of appellee's right to its beans and a conscious indifference to the consequences of destroying them.

Appellant argues that he should not be liable for punitive damages because he acted under the honest, although mistaken, belief that F.C.I.C. would pay benefits to appellee. The argument is no answer for even if the F.C.I.C. had paid all possible benefits, appellee would have lost the value of the beans in the field. Appellant's testimony on the issue was, at best, evasive. At one point, on cross-examination, he admitted that he expected appellee to "eat" the loss on the destroyed beans. He patronizingly added that by destroying the beans he saved the appellee the cost of harvesting. Viewing the evidence, and its reasonable inferences, in the light most favorable to the appellee, there was substantial evidence from which the jury could find that appellant knew appellee would be damaged by the intentional trespass and was simply indifferent to those consequences.

Affirmed.

PURTLE, J., not participating.

Bobby Ray FRETWELL *v.* STATE of Arkansas

CR 85-208 708 S.W.2d 630

Supreme Court of Arkansas
Opinion delivered May 19, 1986

William J. Velek, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was charged with capital murder. He realized that at trial the proof of guilt would be overwhelming. Under Arkansas law only a jury may impose the penalty of death, so appellant attempted to plead guilty to the court, but the prosecutor would not assent, and the court would not accept the plea. After the jury had been picked, appellant tried to plead guilty to the jury, skip the guilt or innocence phase of the trial, and proceed immediately with the sentencing phase of the bifurcated trial. The prosecutor objected and insisted on making his proof during the guilt or innocence phase. The trial court allowed the prosecutor to do so. The jury found appellant guilty and began deliberations on the penalty. After two and one-half hours, the jury reported that they stood eleven to one. The trial court erroneously gave them AMCI 6004, the Allen instruction. Shortly thereafter, the judge corrected the instruction. The next day, the jury fixed punishment at death by electrocution. Appellant appeals from the sentence of death, and not from the finding of guilt. We affirm the sentence.

Appellant first contends that it was within the court's discretion to accept his plea of guilty to the court, even without the prosecutor's assent, and that the court's refusal to exercise any discretion at all denied him due process and equal protection. Appellant's first premise is fallacious, and the argument is without merit because in Arkansas a felony defendant is not

entitled to a trial to the court without the assent of the prosecutor.

The Rules of Criminal Procedure are precisely in point. A.R.Cr.P. Rule 31.1 provides:

> *Waiver of Trial by Jury: Assent by Prosecutor.*
>
> No defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.

The rule is clear. Criminal cases which require trial by jury *must* be so tried unless (1) waived by the defendant, (2) assented to by the prosecutor, and (3) approved by the court. The first two requirements are mandatory before the court has any discretion in the matter. Here, the second requirement, assent by the state, was not had and the court was without discretion to allow the plea. Rule 31.1 is augmented by Rule 31.4 which provides:

> *Waiver of Trial by Jury: Capital Felonies.*
>
> No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:
>
> (a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; *and*
>
> (b) the prosecuting attorney with the permission of the court, has waived the death penalty; *and*
>
> (c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

(Emphasis added.)

Again, the rule sets out the conditions which must be met before a defendant charged with a capital felony may waive a trial by jury. The conditions are separated with the conjunctive word "and", not by the disjunctive "or." If all of the conditions are not met, then the court has no discretion.

The appellant similarly argues that the trial court erred

in refusing to allow him to plead guilty to the jury. The trial court did not err. Under the rules set out, the prosecutor had the right to present his case to the jury.

We recognize that the rules in some states give a defendant the absolute right to waive a jury trial. *See* Note, 38 Texas L. Rev. 928 (1960). Arguments exist for a rule which allows the accused alone to determine the mode of trial. *See* Commentary to American Bar Association Standards For Criminal Justice, Standard 15-1.2 (Supp. 1986). In promulgating our rules, this Court adopted the rule which we deem to be the better one. It is in accordance with Standard 15-1.2 of the American Bar Association Standards for Criminal Justice:

> Waiver of Trial by Jury
>
> (a) Cases required to be tried by jury should be so tried unless jury trial is waived, with the consent of the prosecutor.

It is also in accordance with Rule 23(a) of the Federal Rules of Criminal Procedure. *See* Note, *Government Consent to Waiver Of Jury Trial Under Rule 23(a) Of The Federal Rules of Criminal Procedure*, 65 Yale L. J. 1032 (1956).

Appellant's next argument concerns the Allen charge, or dynamite instruction, which was erroneously given during the sentencing phase of the trial.

Initially, the court correctly instructed the jury on the procedure for fixing the sentence, and the jury retired to the jury room at 3:12 p.m. At 5:46 p.m. they returned to the courtroom, and the foreman asked:

> We have gone through the forms which you provided us, Your Honor, sir, and have made decisions, and we're down to the punishment—the bottom line, so to speak—and we're eleven to one. And we wondered what you would instruct us to do at this point.

[redacted] Appellant's attorney asked if they were deadlocked, and the jury foreman responded, "We did not take a vote on whether or not we were deadlocked. We have just made several test votes." The trial judge then gave them AMCI 6004, the Allen charge. The charge was obviously erroneously given since, if the

jury did not unanimously agree on the death sentence, their verdict would automatically stand at life without parole and there would not be a retrial. The jury went back to the jury room at 5:52 p.m. They deliberated under the Allen charge for one hour and at 6:52 p.m. returned to the courtroom with the following request:

> Your Honor, sir, we voted that we would like to go to dinner and then return for some more deliberations this evening. We are eleven to one, and I detected a reluctance to declare that it was impossible to move from that.

The court declared a recess for dinner and instructed the jury to be back in the jury box at 8:00 p.m. When the jury returned from recess, the court corrected his earlier mistake by instructing the jury as follows:

> Earlier I read you the instruction that's commonly referred to as the dynamite instruction which tells you to decide this case if at all possible. And a part of that instruction says that the case might have to be tried again by another jury. That's incorrect. This case will never be heard by any other jury than yourselves.
>
> If you are unable to unanimously agree to the answers to the questions contained in form number three, then your verdict has already been and will be decided for you by the instructions included in form three.
>
> Now, with that information, please return to the jury room and begin redeliberating.

The jury retired at 8:00 p.m. and returned at 9:20 p.m. with the following request:

> The situation remains at eleven to one. The person that is the one is requesting, and the jury endorses that request—subject to your order, of course—that we be permitted to allow that person to sleep on it over night, reflect on it, pray on it and then come back in the morning sir, at your convenience and make one more attempt.

The court granted the request and directed the jury to return at 9:30 a.m. At 9:30 a.m. the next morning, the jury returned to the jury room for further deliberations and returned at 11:10 a.m. with its verdict.

The appellant argues that the erroneous reading of AMCI 6004 subjected the jury to deliberation under the pressure of coming to a unanimous decision and encouraged a penalty of death. He also argues that the court should have imposed a sentence of life without parole because the jury demonstrated its lack of unanimity by taking several votes. The appellant, in conclusion, urges this Court to reverse his sentence and find that he is entitled to be sentenced to life imprisonment without parole.

Appellant is partially correct in the first argument. Clearly, the giving of the Allen charge was erroneous as it would encourage unanimity and possibly encourage a penalty of death in order to avoid a retrial. However, the jury deliberated under the erroneous instruction only from 5:52 p.m. to 6:52 p.m. They then went to dinner, and upon returning were correctly instructed at 8:00 p.m. The fact that the jury did not change its vote during the one hour deliberation under the Allen charge demonstrates that the error was harmless. The vote changed the next day, only after the instruction was corrected, and the one juror was granted his request to "sleep on it overnight, reflect on it, pray on it and come back in the morning. . . ."

The appellant argues that the trial court should have taken the case from the jury after their preliminary votes. The argument is without merit. The jury never reported that it was deadlocked. In fact, they asked for more time. They only deliberated a total of about six and one-half hours before being able to fix the sentence. There simply is nothing to indicate that the trial judge abused his discretion in letting the jury decide the matter. There is no reversible error in any of appellant's points of appeal.

Pursuant to Rule 11(f) of the Rules of the Supreme Court and the Court of Appeals, the state has raised two issues, death qualified juries and double counting.

The use of death qualified juries was declared unconstitutional in *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983). The decision of the district court was affirmed by the Eighth Circuit Court of Appeals in *Grigsby* v. *Mabry*, 758 F.2d 226 (8th Cir. 1985). This court, in *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983), and in many subsequent cases, held that such juries were constitutional. The Supreme Court of the United

States ended the matter by holding that such juries are constitutional in *Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986).

Double counting, as explained in *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), violates the eighth and fourteenth amendments to the United States Constitution because it allows an element of the underlying crime, pecuniary gain, to be counted again as an aggravating circumstance, and thus fails to narrow the class of persons already guilty of robbery-murder. This court has never decided the issue, and we do not now reach it because there was no objection at trial to the instructions which allowed double counting. As we said in *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980), "in hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court." We have long held, under Rule 11(f) and Ark. Stat. Ann. § 43-2725 (Repl. 1977), that when life is at stake, we will make our own examination of the record and reject or accept on their merits all objections made at trial, whether or not argued on appeal, but we do not consider a matter in the absence of an objection. We have made exceptions where there were egregious circumstances, such as where the trial court apparently failed to tell the jury that it had the option of imposing a life sentence. *Smith* v. *State*, 205 Ark. 1075, 172 S.W.2d 248 (1943). Appellant asks us to make such an exception in this case because:

> To require an objection where there is no established legal basis for the objection, but, rather, only the hope that existing law will be changed, would require an attorney to constantly make objections any time he has an argument to change the existing law, including even those arguments which have been unsuccessful in the past.

The argument reaches the heart of the matter, for it is our intention to require one who wishes to change the law to raise the matter in the trial court and give his adversary notice of the matter and opportunity to make a timely record. To allow any other procedure would be to allow endless and untimely litigation.

Finally, we compare the wickedness, inhumanity, and heinousness of this capital case with other capital cases in order to be certain that the death sentence is not freakishly, capriciously,

or whimsically applied. After such a comparison, we find no reason to alter the jury's view that the death penalty was proper. In the very early morning, appellant and two accomplices saw a truck which they wanted to steal. It was parked beside a service station. They planned to wait until the station attendant came to work, and then take the keys and kill the attendant. They lay in wait but the attendant did not come to work. They soon located another truck outside a nearby home. They saw a man inside the house and planned to get his truck key and kill him so he could not identify them.

To complete the plan, appellant, armed with a loaded pistol, knocked on the victim's front door. The victim answered the door knock and offered assistance. Appellant then took the victim's money, the key to his truck, and shot him in the temple. Appellant left the victim to die and took the truck. The murder in the course of the robbery was especially egregious, and the death penalty was not freakishly or arbitrarily applied.

Affirmed.

PURTLE, J., not participating.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I concur to update the history of our review of capital cases contained in my concurring opinion in *Ruiz* v. *State*, 280 Ark. 190, 193, 655 S.W.2d 441 (1983) (Hickman, J., concurring). Since *Ruiz* we have reviewed the death penalty in six cases. Including Fretwell's sentence, affirmed today, we have upheld the death penalty in four cases. *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2370 (1984); *Fairchild* v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 2346 (1985), *petition for postconviction relief granted in part; stay of execution denied*, 286 Ark. 191, 690 S.W.2d 355 (1985); *Pruett* v. *State*, 282 Ark. 304, 669 S.W.2d 186 (1984), *cert. denied*, 469 U.S. 963, 105 S.Ct. 362 (1984), *petition for postconviction relief denied*, 287 Ark. 124, 697 S.W.2d 972 (1985).

In *Miller* v. *State*, 280 Ark. 551, 660 S.W.2d 163 (1983), the death sentence was reduced to life imprisonment without parole.

In another case the decision was reversed and remanded for a new trial. *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985). It has not yet been presented on a second appeal. Neither have two cases we previously reversed and remanded, before *Ruiz*, come before us again. *Penelton* v. *State*, 277 Ark. 225, 640 S.W.2d 795 (1982); *Rhodes* v. *State*, 276 Ark. 203, 643 S.W.2d 107 (1982). We reversed the death sentence in *Harmon* v. *State*, 277 Ark. 265, 641 S.W.2d 21 (1982). On retrial Harmon was found guilty of first degree murder and received a life sentence, which we affirmed at 286 Ark. 184, 690 S.W.2d 125 (1985).

During this period of time from July 18, 1983, until May 12, 1986, we have reviewed 15 cases in which capital murder was the finding and the death penalty was sought but not imposed. To date we have affirmed the death penalty for 24 persons. Fifteen are white, eight are black and one is hispanic. All are males. In none of the four recent death cases which we have affirmed can there be any doubt that the crime warranted the most severe sentence allowed by law.

In the nine years we have reviewed these cases, no decision in which we have approved the death penalty has been reversed or modified by the United States Supreme Court. At the same time no decision in which we have affirmed the death penalty has been affirmed by the Court of Appeals for the Eighth Circuit. Recently, in *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), the Eighth Circuit reduced Carl Albert Collins' death sentence to life without parole because the state used one of the aggravating circumstances (murder committed for pecuniary gain), presented in the penalty phase, as one of the elements of the crime itself (that the murder was committed in the course of a robbery). In *Ruiz* v. *Lockhart*, 754 F.2d 254 (8th Cir. 1985), the Eighth Circuit reversed the district court's denial of Paul Ruiz's and Earl Van Denton's petition for habeas corpus relief and remanded the case with orders that the writ be granted or the petitioners be retried. The basis for the reversal was the holding that death qualification of a jury creates a conviction prone jury. That decision was recently reversed in *Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986), where the United States Supreme Court held that death qualified juries are constitutional.

Several conclusions could be drawn from all these statistics.

The most obvious is that the review process for death cases is far too long and involves too many courts. Are we playing legal games with capital punishment? If the review process, which is directed and controlled by the federal courts, continues to require about ten years and at least seven or eight separate reviews to approach finality, then the process is not just inefficient, it is a failure. A legal system, such as ours which fails to honestly, directly, and efficiently address legal questions of this magnitude will lose the most important foundation stone of that system—the respect of the people.

ADDENDUM

In the following cases this court has affirmed the appellants' death sentences:

Rector v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983) *cert. denied*, 466 U.S. 988, 104 S.Ct. 2370 (1984). (Rector shot and killed a policeman.)

Pruett v. *State*, 282 Ark. 304, 669 S.W.2d 186 (1984); *cert. denied*, 469 U.S. 963, 105 S.Ct. 362 (1984); *petition for postconviction relief denied*, 287 Ark. 124, 697 S.W.2d 972 (1985). (Pruett has been called the "mad dog killer". He kidnapped and murdered a convenience store clerk.)

Barry Lee Fairchild v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984); *cert. denied*, ___ U.S. ___, 105 S.Ct. 2346 (1985); *postconviction relief granted in part, stay of execution denied*, 286 Ark. 191, 690 S.W.2d 355 (1985). (Convicted of murder, rape, robbery and kidnapping. He was sentenced to die by electrocution. This court granted his petition to allow him the choice between dying by electrocution or by lethal injection.)

The court reduced the sentence from death to life without parole in *Miller* v. *State*, 280 Ark. 551, 660 S.W.2d 163 (1983). (Insufficient evidence of crimes to go to the jury as aggravating circumstances in the penalty phase of Miller's trial.)

In the following case where the appellant received a death sentence, the court reversed and remanded and on retrial the appellant was convicted of first degree murder and received a life sentence. *Harmon* v. *State, rev'd.* 277 Ark. 265, 641 S.W.2d 21

(1982); *aff'd*, 286 Ark. 184, 690 S.W.2d 125 (1985).

The court has reversed the following death penalty cases but they have not yet come up on appeal: *Penelton* v. *State*, 277 Ark. 225, 640 S.W.2d 795 (1982); *Rhodes* v. *State*, 276 Ark. 203, 643 S.W.2d 107 (1982); *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985).

In the following cases capital murder was charged and found, the death penalty was sought but not imposed:

Breault v. *State*, 280 Ark. 372, 659 S.W.2d 176 (1983); *Hogan* v. *State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *Love* v. *State, rev'd and rem'd*, 281 Ark. 379, 664 S.W.2d 457 (1984); *Cessor* v. *State*, 282 Ark. 330, 668 S.W.2d 525 (1984); *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984); *cert. denied*, ___ U.S. ___, 105 S.Ct. 1778 (1985); *Owens* v. *State*, 283 Ark. 327, 675 S.W.2d 834 (1984); *Metcalf* v. *State, rev'd and rem'd*, 284 Ark. 223, 681 S.W.2d 344 (1984); *Hall v. State*, 286 Ark. 52, 689 S.W.2d 524 (1985); *Williams* v. *State*, 286 Ark. 492, 696 S.W.2d 307 (1985); *Sullivan* v. *State*, 287 Ark. 6, 696 S.W.2d 709 (1985); *Snell* v. *State*, 287 Ark. 264, 698 S.W.2d 313 (1985); *Novak* v. *State*, 287 Ark. 271, 698 S.W.2d 499 (1985), *petition for postconviction relief denied*, unpublished opinion issued April 28, 1986. *Shelton* v. *State, rev'd and rem'd*, 287 Ark. 322, 699 S.W.2d 728 (1985); *Zones* v. *State*, 287 Ark. 483, 702 S.W.2d 1 (1985); *Holland* v. *State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

WILSON-PUGH, INC. and Gay Gibbs TIPPS *v.* Honorable H.A. TAYLOR and NATIONAL BANK OF COMMERCE OF PINE BLUFF

86-11 709 S.W.2d 93

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Griffin, Rainwater & Draper, by: *Richard E. Griffin*, for appellant.

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

DAVID NEWBERN, Justice. A permanent writ of prohibition is sought to prohibit the Jefferson County Circuit Court from trying this conversion action. We previously granted a temporary writ. The issue is whether the holder of a security interest in a crop may bring an action for conversion of that interest in the county of his residence pursuant to Ark. Stat. Ann. § 27-611 (Supp. 1985). We hold he may not, and thus the writ is made permanent.

Craig Shackleford Farms, Inc., (Shackleford) borrowed money from appellee National Bank of Commerce of Pine Bluff (NBC). NBC obtained a security interest in Shackleford's cotton crop. Shackleford filed bankruptcy proceedings in March, 1985. At some time in 1985 NBC learned that appellant Wilson-Pugh had written checks to Shackleford with respect to the cotton in question without including NBC as a payee. NBC alleged in its complaint that this was a sale of the cotton resulting in a conversion of their interest. Petitioner Gay Gibbs Tipps was alleged to be the bookkeeper for Wilson-Pugh and for Shackle-

ford. NBC asked for compensatory and punitive damages from the petitioners, jointly and severally.

The petitioners moved to dismiss on the basis of improper venue, contending that Wilson-Pugh, a domestic corporation, has its principal place of business in Ashley County, that Gay Gibbs Tipps resides there also, that both were served there, and that there is no basis for laying venue in Jefferson County. The motion to dismiss was overruled.

Ark. Stat. Ann. § 27-611(a) (Supp. 1985) is as follows:

> Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought either in the county where the damage occurred, or in the county where the property was converted, or in the county of residence of the person who was the owner of the property at the time the cause of action arose.

The contention of respondent NBC is that it had a sufficient ownership interest to permit venue to be properly laid in Jefferson County, the county of its residence.

Whether NBC can sustain its contention of having an ownership interest and whether it can state facts sufficient to show a conversion of that alleged interest need not be decided at this stage of the litigation. As we pointed out in *FirstSouth, P.A.* v. *Yates*, 286 Ark. 82, 689 S.W.2d 532 (1985), which thoroughly discussed the history of § 27-611, the opening words of the statute, "[a]ny action for damages to personal property . . . ." had not been changed for thirty-eight, now thirty-nine, years. In the *FirstSouth* case, we held the statute did not apply where a misrepresentation resulting in an investment and subsequent loss of money were alleged. We said it was not the intent of the General Assembly to permit a plaintiff alleging an injury to an intangible, or an economic injury, to bring it in his home county. We pointed out the long line of decisions holding strictly that the statute extended venue to the county in which the owner of property resides only when there was a statement of "physical damage to tangible property."

Although it could be argued that *FirstSouth* is distinguishable because it was not a conversion case, and that the General

Assembly, by adding "conversion" actions to § 27-611, must have intended it to apply to all conversion actions, we cannot agree. The statute remains one in which venue is prescribed for actions for damages to personal property.

If the General Assembly had intended to allow any conversion action, whether of tangible or intangible personalty, to be brought in the county of the residence of the owner of the alleged converted interest, it could easily have said so without tying conversion to the "damages to personal property" language which has been the subject of such consistent and strict interpretation.

The temporary writ of prohibition is made permanent.

PURTLE, J., not participating.

W. WILLIAM GRAHAM, INC. *v.* The CITY OF CAVE CITY

85-217 709 S.W.2d 94

Supreme Court of Arkansas
Opinion delivered May 19, 1986

Wright, Lindsey & Jennings, for appellant.

Blair & Stroud, by: *H. David Blair* and *Keith Watkins*, for appellee.

RICE VAN AUSDALL, Special Justice. This is a breach of contract case. Appellee entered into a contract with appellant for the purpose of preparing plans for a wastewater treatment facility. The contract provided that the plans were to be completed within 135 days. It was clearly understood by both contracting parties that failure to have the plans ready and submitted to a certain governmental agency within the time frame, would result in a reduction of the appellee's entitlement, from a 75% funding to a 55% funding. Appellant's obligation was to have these plans ready for submission in such a manner, and in due course of events, so that the 75% funding would be available. Appellant failed to perform as agreed, its performance being after the deadline, resulting in a reduced funding, such reduction being in the amount of $338,935.00.

The contract further provided as follows:

> The OWNER [appellee] agrees to limit the ENGINEER'S [appellant's] liability to the OWNER and to all Construction Contractors and Subcontractors on the Project, due to the ENGINEER'S professional negligent acts, errors or omissions, such that the total aggregate liability of the ENGINEER to those named shall not exceed Fifty Thousand Dollars ($50,000.00) or the ENGINEER'S total fee for services rendered on this project, whichever is greater.

Appellant contends that because of this limitation of liability proviso, appellee cannot recover more than $99,214. (This sum was the appellant's fee for services.)

Appellee contends as a threshold matter, that Appellant has not preserved the issue for appeal, by its failure to have the trial court rule on its motion for a directed verdict at the conclusion of all the evidence. However, the record shows clearly that the trial court was made aware of the specific contract language being relied upon, and what action was requested. This was initially raised by motion for summary judgment, ruled upon again by entry of an order in response to a motion in limine, and raised again at the end of all the proof. We agree with Appellant that where the record shows, as here, that the trial court was adequately presented with the question, and specific objection was made, substantial compliance has been made, and the issue is preserved for review by this Court. See 4 C.J.S. Appeal & Error §320.

Appellant urges the limitation of liability clause is valid and enforceable, and the Court must give effect to such provision, where, as here, it was voluntarily entered into. The issue, however, is not the enforceability of such clauses, but the construction of the present clause. Clearly, if the clause limits liability, it is the duty of this Court to give effect to such clause. *Miller* v. *Dyer*, 243 Ark. 981, 423 S.W.2d 275 (1968). However, the clause hereinabove cited restricts and limits recovery to damages based upon ". . . professional negligent acts, errors, or omissions. . . ." No mention is made of liability for breach of contract, and the resultant damages that might flow from such a breach.

As noted in *Cincinnati Gas & Electric Co.* v. *Westinghouse Electric*, 465 F.2d 1064 (6th Cir. 1972), prior authority is often not very helpful due to the difference in language employed:

> In cases involving the interpretation of contract language, extensive examination of precedent is of little value since the controlling rhetoric will vary from case to case.

Here, the language pertains to ". . . negligent acts, errors or omissions. . . ." The jury found, on substantial evidence, and under proper instruction, that appellant had breached its contract duty to perform within the time frame mutually agreed upon. Whether this delay was occasioned by inefficient use of time, poor management, or whatever, is not for the Court to divine. If

appellant had desired to limit its liability for breach of contract, it could have done so, and doubtless this Court would have enforced such contract proviso, as it has many times in the past. *Green* v. *Ferguson*, 263 Ark. 601, 567 S.W.2d 89 (1978); *C. & A. Construction Co.* v. *Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974). However, having failed to do so, and having contented itself with limiting its liability only for its negligent acts, errors or omissions, the Court cannot engraft onto the contract a limitation not set forth. For while it is quite true this Court must give effect to such clauses, it is equally true this Court cannot rewrite a contract for the parties. *Pope* v. *Shannon Brothers*, 199 Ark. 1148, 138 S.W.2d 382 (1940); *Christmas* v. *Raley*, 260 Ark. 150, 539 S.W.2d 405 (1976); *Rector-Phillips-Morse* v. *Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973). Moreover, it must also be remembered that such clauses are not the favorite of the Court, and they will be strictly construed against the party relying on them and be limited to their exact language. *Middleton & Sons* v. *Frozen Food Lockers*, 251 Ark. 745, 474 S.W.2d 895 (1972); *Armco Steel Corp.* v. *Ford Construction Co.*, 237 Ark. 272, 372 S.W.2d 630 (1963).

The Court is not unaware of the other issue raised by appellee, having to do with, in the first instance, the dichotomy of professional negligence vis-a-vis simple negligence; and in the second instance, the public policy contention. It will suffice to say that the foregoing analysis disposes of the cause, and in keeping with its time honored custom, this Court will not reach and decide issues not necessary for the complete disposition of the litigation. *Russell* v. *Miller*, 253 Ark. 583, 487 S.W.2d 617 (1972); *Lytle* v. *Zebold*, 227 Ark. 431, 299 S.W.2d 74 (1957); *Davis* v. *Strong*, 208 Ark. 254, 186 S.W.2d 776 (1945).

Affirmed.

PURTLE, J., not participating.

NEWTON COUNTY, ARKANSAS & Donald J. ADAMS, Special Adm'r of the Estate of Sue S. MORAK, Deceased *v.* Dwight DAVISON & Kathleen DAVISON

85-284 709 S.W.2d 810

Supreme Court of Arkansas
Opinion delivered May 27, 1986
[Rehearing denied June 30, 1986.]

[redacted]

Karen B. Walker, for appellant Newton County.

Donald J. Adams, for appellant Estate of Sue S. Morak.

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

JACK HOLT, JR., Chief Justice. This is the second appeal concerning the estate of Sue S. Morak, deceased. In the first, we were asked by Newton County to decide whether the probate court erred by failing to remove the administrator of Mrs. Morak's estate because of a conflict of interest and misadministration. *Newton County* v. *West*, 288 Ark. 432, 705 S.W.2d 887 (1986). This court found that, based on the incomplete record before us, we could not say that the probate court erred as a matter of law. Although it was argued at the probate court hearing in that case that Newton County was an interested party because of the possibility that the estate would escheat to the county, no such argument was made in the appeal. In the appeal before us now, Newton County is arguing that the chancery court erred in finding that it was not a necessary party and that it had no standing to participate in the proceedings. The special administrator of the estate, Don Adams, has also appealed, arguing that the findings of the chancery court were contrary to the law and evidence. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) and (j).

Because this case presents two different appeals, they will be discussed separately. The appeal brought by Newton County solely concerns the question of the standing of the county to participate in the proceedings. A hearing was held on May 2, 1985, in Newton Chancery Court to determine the ownership of the contents of a lock box in which the decedent had placed U.S. Savings bonds. At the hearing, the attorney for Newton County appeared and asked the court to find it was entitled to notice of the proceedings and also entitled to be a party to this action, based on the possibility that the estate would escheat to the county pursuant to Ark. Stat. Ann. § 61-150 (Supp. 1985). The court ruled orally that the county was not an interested party. That finding, however, was not made a part of the judgment entered May 10, 1985. In addition, the county never filed a written

petition to intervene. On May 22, 1985, Newton County filed a motion to vacate the May 10 judgment which was denied by the trial court for lack of standing on July 16, 1985. That order was not appealed. Instead, Newton County's notice of appeal to this court states that the county is appealing the judgment entered May 10.

Newton County's appeal is not properly before this court. The county cannot object to the failure of the trial court to allow it to intervene in the matter because no motion to intervene was ever filed as required by Ark. R. Civ. P. 24(c). Similarly, the county cannot object to the denial of its motion to vacate the judgment because an appeal was not taken from that judgment. Rules of App. P. 3(e). *Mears, Judge* v. *Little Rock School Dist.*, 268 Ark. 30, 593 S.W.2d 42 (1980). Finally, Newton County had no standing to appeal the May 10 order specified in its notice of appeal. It was not a party to that action and no ruling was made in that order touching its status as a party. *See Frazier* v. *McHaney, Receiver*, 117 Ark. 394, 178 S.W. 419 (1915).

The second appeal concerns the trial court's award of the contents of the safe deposit box to the appellees. The decedent, Mrs. Morak, died on July 8, 1984, intestate and with no known heirs. On January 4, 1985, Dwight and Kathleen Davison, appellees, filed a petition alleging they were joint tenants with a right of survivorship in the contents of a safe deposit box which Mrs. Morak had rented on June 11, 1981. The lock box contained U.S. savings bonds worth $324,987.35 and $4,020 in currency. The bonds show Mrs. Morak and various members of her family, all of whom are apparently deceased, as the owners. The administrator of the estate filed an answer alleging that the agreement of joint tenancy with right of survivorship between the appellees and the decedent was merely for the use of the box and not for the disposition of the contents.

The chancellor found that the appellees and Mrs. Morak were good friends and neighbors and that the Davisons took care of Mrs. Morak and her family for several years prior to her death. The court further found that about three years prior to Mrs. Morak's death, she and the Davisons agreed to lease a safe deposit box as joint tenants with right of survivorship so that each would be a joint owner of all of the contents of the box and the survivors

would be the complete owners of those contents.

[redacted] Although we do not set aside such findings of fact by a chancellor unless they are clearly erroneous, *Farris* v. *Farris*, 287 Ark. 479, 700 S.W.2d 371 (1985); Ark. R. Civ. P. 52, we find that the agreement between the parties was only for the rental of the safe deposit box and not for the disposition of its contents.

The only evidence offered indicating that the Davisons had a right to the contents of the lock box was provided by the Davisons. Mr. Davison testified that Mrs. Morak told him he and his wife were to become joint owners of what was in the box. He also stated, however, that he did not know what the box contained, that he never entered the box during Mrs. Morak's lifetime, he and his wife were not to receive any benefits from the contents of the box until after Mrs. Morak's death, and Mrs. Morak was to receive all benefits from the bonds during her life. Mr. Davison admitted there was no agreement as to the use of the bonds themselves. There was further evidence that Mrs. Morak stated her intention to make a will but she died before she was able to do so.

Based on the foregoing evidence we are unable to say that Mrs. Morak clearly intended to make a gift to the Davisons of the contents of the safe deposit box. In *Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940), we noted that there is a presumption of ownership in favor of the surviving lessee of a safe deposit box which can be rebutted by testimony to the contrary. In that case, however, the lease agreement signed by the parties renting the box specifically stated that the property placed in the box is joint property and upon the death of either joint tenant the property passes to the survivor. Such an agreement as to the contents is missing here.

Again in *Miller* v. *Riegler*, 243 Ark. 251, 419 S.W.2d 599 (1967) this court considered the contents of a joint safe deposit box. In *Miller* the box contained several hundred shares of stocks which had been transferred before the testator's death to the joint names of the testator and the beneficiary with a right of survivorship. Accordingly, we upheld the transfer of the stock. Here, the savings bonds were not transferred to the joint names of Mrs. Morak and the Davisons. Rather, they still reflect Mrs. Morak and several of her deceased relatives as owners.

Other courts have held that the deposit of articles in a jointly leased safe deposit box of itself works no change in title, absent an express agreement that the contents of the box shall be joint property. Annotation, 14 A.L.R.2d 948, 954 § 2 (1950). This is so even if the language in the lease describes a joint tenancy with the right of survivorship, unless it specifically refers to the contents. *Id.* Similarly, it is generally held that a joint lease of a safe deposit box in and of itself is insufficient to support the contention that a gift has been made of the contents. Annotation, 40 A.L.R.3d 462, 465 § 2 (1971).

In finding the language of the lease and Mr. Davison's testimony insufficient to establish ownership of the contents of the lock box, we announce our intention to require an affirmative showing that the owner of a lock box intended to give the contents of the lockbox to another. Such an intention cannot be demonstrated without a specific written reference to the disposition of the contents of a lock box and is not indicated by an agreement only to rent the box in two or more names with a right of survivorship.

Accordingly the judgment awarding the contents of the lock box to the Davisons is reversed.

PURTLE, J., not participating.

JIM PAWS, INC. *v.* EQUALIZATION BOARD OF GARLAND COUNTY, ARKANSAS

86-13 710 S.W.2d 197

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Wootton, Glover, Sanders, Slagle, Parkerson & Hargraves, P.A., by: *Richard L. Slagle*, for appellant.

Robert Ridgeway, Sr., Prosecuting Attorney, for appellee.

JACK HOLT, JR., Chief Justice. The Velda Rose/Ramada Inn Hotel was reappraised and assessed by the Garland County Assessor at a total valuation of $5,444,700 in June, 1981. The appellant, Jim Paws, Inc., purchased the hotel for $1,000,000 in July, 1981. Appeals of the assessment to the Garland County Equalization Board and the Garland County Circuit Court resulted in a reduction of the assessed value to $4,458,750. Appellant argues on appeal to this court that the method of assessment used by the county appraiser was arbitrary and unreasonable and did not reflect the true market value of the property. Appellant also contends that the circuit court should have excluded testimony by the county's expert witness because it had no reasonable basis. This appeal was certified to the Supreme Court by the Court of Appeals because it involves methods of reappraising property, an issue of significant public interest under Sup. Ct. R. 29(4)(b).

The assessment and appraisal of appellant's property was based solely upon the "replacement cost new, less depreciation", approach. Upon appellant's petition for review, the circuit court reduced the assessment because of incorrect evaluations of the effective age and depreciation of appellant's property. Appellant contends that the reappraisal is arbitrary and unreasonable and grossly exceeds the true market value of the property and that the purchase price of $1,000,000 is its true market value. We agree that the assessment was clearly erroneous and arbitrary and exceeded the true market value of the property.

[redacted] In reversing the circuit court, we are aware that it is only in the most exceptional cases that an appellate court will grant a reassessment of property. In *St. Louis-San Francisco Ry. Co.* v. *Arkansas Pub. Serv. Comm'n*, 227 Ark. 1066, 304 S.W.2d 297 (1957), this court discussed the standard of review in these cases:

> The purpose of any Court appeal from an assessment or equalizing agency is to see that the assessment is neither erroneous in figures, nor arbitrary in measuring, nor

> confiscatory in results. In 84 C.J.S. 1123, the effect of the holdings is summarized in this language: "On an appeal from an assessment, the Court will not disturb the decision of the assessors unless it is clearly erroneous, or, unless, as required by Statute, the assessment is manifestly excessive, fraudulent, or oppressive. . . ."

Nevertheless, property must be assessed according to its "value". Article 16, § 5 of the Arkansas Constitution, as it reads after amendment 59, states that "[a]ll real and tangible personal property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." Prior to amendment 59, the pertinent part of article 16, § 5 read much the same, requiring that all property be assessed according to its value.

Arkansas Pub. Serv. Comm'n v. *Pulaski County Equalization Bd.*, 266 Ark. 64, 582 S.W.2d 942 (1979), held that Act 411 of 1973 and Act 188 of 1969 were unconstitutional in that they violated the longstanding interpretation by the Supreme Court and the legislature that value meant "current market value". That opinion reviewed the Arkansas case law and statutory authority which established the premise by which assessment statutes and methods must be measured. This premise is that property must be assessed according to its "real and true value"; the "true and full market or actual value". In calculating the market value, many factors must be considered, and the type of inquiry will depend on what type of property is involved, but "all of these questions are to be considered for the purpose at last of ascertaining the market value of the tract in question, and that is the value which must be adopted for the purposes of assessment when it has been ascertained." *Id.*, at 76, quoting *American Bauxite Co.* v. *Board of Equalization*, 119 Ark. 362, 177 S.W. 1151 (1915).

In the present case, the county appraiser did not consider several factors, particularly the type of property involved, i.e. income-producing property, in determining real and true value. To the contrary, the county appraiser limited its evaluation of appellant's property to the cost of replacement or "new cost" of the hotel, including the restaurant and parking facilities, with the

estimated depreciation of the property subtracted.

The appellant, in support of his claim that the reappraisement exceeds the true market value, introduced testimony from C.V. Barnes, an appraiser with more than 40 years of experience, concerning the three different approaches used in appraising this type of property. In addition to the "new cost" approach used by the county appraiser, there are the market data approach and income approach. The market approach compares sales of similar properties in the community and looks at any arms-length transactions involving the subject property. The income approach estimates the fair market rental of the property, determines what the net income for the property would be, and then capitalizes the net income to obtain the dollar value of the property. Although both the county appraiser and the expert witness for the county stated that the Public Service Commission manual, published for use by county appraisers, recognizes all three methods, only the "new cost" method was used in this instance.

Barnes testified that, according to the market approach, using the actual sale of the property as the primary source, the property's estimated value was between $1,150,000 and $1,250,000. Using the facility's historical occupancy rate of 40%, Barnes estimated the value of the hotel to be $1,365,000 based on the income approach. Barnes stated that with this type of property, the income approach is the most reliable, because its value to an owner is determined by the future income the property can produce. He did an estimate based on the cost approach, but did not consider that to be a viable appraisal because it was so out of line with what he concluded from the other two approaches. Although the replacement cost figure used by the county appraiser was reasonable, he said the final conclusion was not because the depreciation figure did not account for the physical, functional and economic depreciation which should have been deducted, and because it did not consider the income and market approaches. Barnes emphasized the economic obsolescence of the property, caused by occupancy rates in Hot Springs dropping from between 70% and 80% twenty years ago to between 40% and 50% now.

The county appraiser who was involved in the reappraisal in

August, 1981, testified that the building was classified according to the type of construction in accordance with the manual, and given an actual age and effective age due to the condition of the property for depreciation. No consideration was given to the income approach, but some market research was done, although there was no indication that this had any effect on the assessment. On cross-examination, he said he has no experience in the construction of monolithic concrete, high-rise structures. He said he did not consider the location of the hotel in making his appraisal.

John Zimpel, the research, information and education officer and realty appraiser supervisor for the Assessment Coordination Division, also testified for appellee as an expert witness. Zimpel valued the property at $5,211,576 using the new cost approach. Using national occupancy rates of 50% and 60%, and various estimates of revenue and operating expenses, his income approach appraisals ranged from $3,225,909 to $8,375,765.

Appellant objected at trial to the testimony of Zimpel because his income method estimates were "based on some sort of fantasy occupancy rate and phantom expenses" that had no relationship to the area or the historical evidence presented regarding the subject property. Appellant argues that Zimpel's testimony should have been stricken for this reason, along with the fact that he admitted on cross-examination that he had no personal knowledge of typical hotel expenses or capitalization rates used in this type of property; he could not remember any other hotels he had appraised in Arkansas; he deducted expenses that were incurred during a year when the hotel was operating at a 41% occupancy rate while at the same time projecting an income for 50% occupancy; he had no evidence of what the typical occupancy rate was in Hot Springs; and he made no allowance for any kind of maintenance or replacement of expendable items as he should have.

If there is no sound and reasonable basis for expert testimony, the testimony will be stricken. *Ark.-Mo. Power Co.* v. *Sain*, 262 Ark. 326, 556 S.W.2d 441 (1977). If the cross-examination shows that the testimony has a weak or questionable basis, however, then that goes to the weight and credibility given to the testimony rather than to the admissibility. *Arkansas State*

Hwy. Comm'n v. *Russell*, 240 Ark. 21, 398 S.W.2d 201 (1966). Further, the decision of the admissibility of such evidence rests largely within the sound discretion of the trial court and will not be reversed unless an abuse of discretion is found. *Dildine* v. *Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984).

[redacted] We find no abuse of discretion in the admission of the evidence, particularly in light of the fact that any objections to the reliability of the testimony were adequately addressed upon cross-examination of the witness. We do find, however, that the appellant was able to show at trial that the estimates of its expert based on the income approach and the acquisition of the property adequately demonstrated that the appraisal did not reflect the true value of the property and that the county's assessment based on the "new cost" approach was excessive and clearly erroneous.

[redacted] We have recognized in cases involving condemnation of property by the State Highway Commission that use of reproduction costs, less depreciation, as a means of determining the true market value of property is a method that is inherently unreliable, especially when dealing with income-producing property. In *Arkansas State Hwy. Comm'n* v. *Mahan*, 249 Ark. 1022, 463 S.W.2d 98 (1971), the court stated:

> Nichols points out that evidence of reproduction costs, though admissible in most jurisdictions, should be received with caution, "because the reproduction cost of a structure sets an absolute ceiling on the market price of that structure, a ceiling which may not be, and frequently is not, even approached in actual market negotiations. When this inherently inflationary attribute of reproduction cost evidence is considered in light of the misleading exactitude which such evidence almost invariably imparts to a jury unsophisticated in the niceties of economics, the justification for placing substantial safeguards upon its admission is apparent." Nichols, Eminent Domain, § 20.2 (3d ed., 1969).

We reversed an approval of an assessment by the Board of Equalization in *Lile* v. *Pulaski County Equalization Bd.*, 252 Ark. 508, 479 S.W.2d 856 (1972). In *Lile*, the assessor valued a lot by establishing a front foot value in each block of downtown Little Rock and applying it to the property being assessed. He

never testified as to what he considered to be the "true market value in money". We held there that the method used did not accurately establish the value of the property and that the appellant had produced substantial evidence that the property was worth considerably less than the assessment.

In this case, appellant produced extensive testimony and a report prepared by Barnes using actual figures from the operation of the hotel and restaurant, in support of a much lower estimate of the value of the property. The actual sale of the property was for less than one-fourth of the appraisal even after it had been reduced by the equalization board and the circuit court. The method used by the county appraiser seems to be the least reliable of the three methods approved by the manual for appraising this type of property. Zimpel himself testified that the definition used by the state of fair market value is "the most probable price expressed in terms of money that a property will bring on the open market in a transaction between a willing and knowledgeable seller and willing and knowledgeable buyer in an arms-length transaction." Appellant's evidence that the purchase of the hotel was an arms-length transaction between two businessmen, both knowledgeable in the hotel business, and under no compulsion to buy or sell, was unrebutted by the county.

We do not hold that the new cost approach to appraising property is a method that will always lead to an excessive appraisal. When income-producing property is assessed, however, and the new cost approach is exclusively used without any consideration of the cost of acquisition or of the value of the property in terms of the income that property will generate for the owner, then the appraisal is not aimed at determining the property's true market value. A hotel generally has two primary measures of value to an owner — cost of acquisition and how much income it can produce. These values will often be totally irrelevant to the cost of replacing the hotel twenty years after it was originally built. The county appraiser admitted he did not consider the income approach, and the judgment and findings of the circuit court gave no indication that the income or market approaches were accounted for in reaching its decision. To the contrary, the circuit court judgment merely followed the approach used by the county appraiser, using the same replacement cost estimate. The only change was in the depreciation, which the

circuit court increased by requiring the assessor to estimate depreciation based on the hotel's actual age rather than the "effective" age the assessor had originally given it. Regardless of the method used for appraisal, the burden remains on a challenging party to show it resulted in a clearly excessive valuation. In this instance, appellant has met that burden.

Although it is clear that the appraisal in this instance was arbitrary and manifestly excessive, it is not within the province of appellate courts to assess property. *Cook* v. *Surplus Trading Co.*, 182 Ark. 420, 31 S.W.2d 521 (1930). We therefore remand to the circuit court to set a true market value on the property which considers the income and market approaches to assessment.

Reversed and remanded.

PURTLE, J., not participating.

Jerry Ray FRANKS *v.* STATE of Arkansas

CR 86-5 709 S.W.2d 406

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Chet Dunlap, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. This is a postconviction proceeding under Criminal Procedure Rule 37. In 1982 the appellant, Jerry Ray Franks, was charged with three counts of burglary and three counts of theft, plus a charge that he was an habitual criminal with three prior felony convictions. The trial began on January 20, 1983. During the testimony of the State's first witness Franks told his attorney that he desired to withdraw his claim of innocence and enter a plea of guilty.

The trial judge excused the jury and determined, after having fully complied with Criminal Procedure Rule 24, that the plea was voluntary and that Franks admitted having committed each of the offenses charged. The judge also determined from the record that Franks had been committed to a mental health center and found to be free from any mental illness or defect and to understand the charges against him. Franks stated that he was not under the influence of alcohol or drugs. During a recess Franks signed a Guilty Plea Statement after it had been explained to him by his attorney. The court then accepted the plea of guilty and imposed sentence.

Two years later Franks filed the present handwritten petition, acting pro se. He asks that his conviction be set aside and that he be granted a new trial. The trial judge denied the petition on the basis of the record, without an evidentiary hearing. The only argument for reversal is that a hearing should have been held.

[redacted] The argument is without merit. When the plea was accepted Franks stated that he was guilty, and the court so found. In his present petition Franks does not say that he was not guilty. He alleges ineffectiveness of counsel without stating any facts: "My lawyer did not help me at all on my case. He just tried to get me to cop out, and told me I was going to get a lot more time. He confused me and my father, that's the only reason I pleaded mercy to the court." In view of Franks's admissions of guilt, no possible prejudice is shown. *Welch* v. *State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

The petition also alleges: "I was badly on drugs, but didn't want to admit it because I felt it would be even worse on me. I pleaded to the Court because I didn't know what I was doing at the time, and I was thinking of too many things at once." These

allegations are conclusory and assert nothing that was not before the court when the plea was accepted. The prior record being essentially undisputed, no reason for an evidentiary hearing has been shown.

Affirmed.

PURTLE, J., not participating.

Ernie J. AMBORT, Jr. *v.* Zerle NOWLIN et ux.

86-22 709 S.W.2d 407

Supreme Court of Arkansas
Opinion delivered May 27, 1986

G. Ross Smith & Associates, P.A., for appellant.

Laser, Sharp & Mayes, P.A., for appellees.

DARRELL HICKMAN, Justice. The appellant Ernie Ambort, Jr., was bitten by the appellees' dogs. He sued and a verdict was returned in his favor for $5,043.50. However, Ambort claimed over $7,000 in medical bills and $3,000 in lost wages. He appeals claiming the trial court erred in instructing the jury and that he should be given a new trial. The trial court instructed the jury to determine whether Ambort was at fault in the incident. The jury was also instructed that an owner of a domestic animal, known to be vicious, does not owe the same duty to the injured person if he were a trespasser or licensee. Both of these instructions were supported by the evidence. We affirm.

Ambort, currently a resident of Texas, was in Little Rock on business and decided to return to the neighborhood where he grew up. While walking in the area, he saw Mrs. Ann Nowlin, an elderly woman, on her front porch. He thought he recognized her and approached the house. There was a public sidewalk in front of the house with a private walk leading to the house. The front yard was enclosed with a chain link fence about four feet high. Ambort stepped off the public walk, approached the fence, and spoke to Mrs. Nowlin. He noticed two barking dogs within the fenced yard and admitted being somewhat apprehensive. He said he watched them from the corner of his eye as he was talking. Ambort testified that he did not lean over or touch the fence, but one of the dogs, an Airedale, jumped up and bit him on the face. The dog actually bit off a portion of Ambort's nose. Ambort, undoubtedly frightened and shocked, asked Mrs. Nowlin to put the dogs in her house. Finally, she did, and Ambort entered the yard and searched for the missing part of flesh, hoping it could be

reattached by a surgeon. While he was searching, one of the dogs came out of the house and bit him again.

Mrs. Nowlin, it developed, had a mental problem. According to her husband, she just did not "have any mind at all." He acquired the two dogs to protect her and his property which was entirely enclosed by a fence: a high one in the back yard and the four foot fence in the front. He denied knowing the dogs had bitten anyone. He denied knowing that a postman had previously been bitten and had marked the Nowlins' mail as "delivery delayed — animal hazard." However, he did admit that at one time he had placed signs on the fence warning people of the dogs. They had been torn down, and he had not replaced them.

The appellant contends that the judge erred in submitting the case to the jury on the basis of comparative fault instead of on the theory of strict liability; that is, that the owner of a known vicious domestic animal is liable for all damages caused by the animal regardless of the fault of the owner, or the fault of the injured person.

The judge was entirely correct, using instructions from AMI Civil 2d 1602 and 1604 (Revised). These revised instructions were drafted after our decision in *Strange* v. *Stovall*, 261 Ark. 53, 546 S.W.2d 421 (1977). The reporter's note to No. 1602 (Revised) reads in part: "If there is an issue of fact as to whether the plaintiff is a trespasser, licensee, or invitee, this instruction should be appropriately modified." There was a fact question of whether Ambort was trespassing or a licensee since he was on private property and had not been expressly invited there.

There was also a fact question of whether Ambort was guilty of negligence in approaching the fenced yard on private property with two dogs, which were barking and causing him apprehension. He had not been in the neighborhood since his childhood. A jury could conclude that he did not use good judgment, he was negligent, and partly at fault for his injuries. AMI 1604 (New), drafted after *Strange* v. *Stovall, supra*, is to be used if there is an issue of the plaintiff's negligence or other fault. The comment to AMI 1602 (Revised) reads: "Despite the rule of strict liability, the plaintiff's recovery may still be diminished by the statutory doctrine of comparative fault." The instructions were correctly given.

The judge substituted the word "fault" in three places for the word "conduct" in this instruction. It was argued that this was misleading in a strict liability case, because it would lead the jury to conclude the defendant must be found at fault, an unnecessary factor in strict liability.

The appellant's theory of strict liability imposed on the owner of a domestic animal, known to be vicious, was repudiated in *Strange*, and the AMI instruction as revised correctly states the law. Although an owner can be held strictly liable, it does not follow he is liable in every conceivable case; perhaps not where a trespasser or licensee may be injured and perhaps not when a person, through his own fault, causes the accident. In this case it was a fact question for the jury as to whether the owner should be held strictly liable.

The appellant raises another argument about the cross-examination of Mr. Nowlin being restricted but that objection was abandoned at trial.

Affirmed.

HAYS and PURTLE, JJ., not participating.

Doyle DYER *v.* Harold WOODS

86-4 710 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Hubbard, Patton, Peek, Haltom & Roberts, by: *George L. McWilliams*, for appellant.

Mathis & Childers, by: *Travis Mathis*, for appellee.

DARRELL HICKMAN, Justice. The trial judge set aside a jury verdict for the appellant, defendant below, in this truck collision case and granted the appellee a new trial. On appeal we look to see if the trial judge abused his discretion in so acting. *Yutterman* v. *Williams*, 289 Ark. 77, 709 S.W.2d 86 (1986); *Clayton* v. *Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1983). The judge is permitted to weigh the evidence and if he finds that a verdict is clearly contrary to the preponderance of the evidence, he may set it aside and grant a new trial. ARCP Rule 59 (a) (6).

The accident occurred at the intersection of Highways 29 and 19 in Pike County. There is a stop sign on Highway 29. The appellant was preparing to turn left from Highway 29 onto Highway 19. The appellee was proceeding on Highway 19 and preparing to turn left onto Highway 29. As appellee approached his turn, he saw appellant applying his brakes and looking both ways. Appellee turned into the proper lane of Highway 29. The appellant conceded that at the time of the collision the entire tractor of his rig and half of the trailer was in the appellee's lane. A photograph introduced into evidence demonstrates very clearly that the accident occurred in appellee's lane. The appellant contended at trial that he had to be in that lane to see to his right before making his turn.

While only the testimony of the parties is abstracted, that testimony and the photograph strongly support the appellee's claim. The judge concluded that the clear preponderance of the evidence was in favor of the appellee, and we find no abuse of discretion.

Affirmed.

PURTLE, J., not participating.

Norma Francis MILLIGAN, Individually, and as Administratrix of the ESTATE of James Edward MILLIGAN, Deceased *v.* COUNTY LINE LIQUOR, INC.

86-18 709 S.W.2d 409

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Odom, Elliott & Martin, by: *Don R. Elliott, Jr.*, for appellant.

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

ROBERT H. DUDLEY, Justice. Vincent Paul Vulpi, a minor, purchased six bottles of beer from the appellee, County Line Liquor, Inc. Immediately after purchasing the beer, Vulpi left appellee's premises and, while opening a bottle of beer, lost control of his vehicle and struck an oncoming vehicle. As a result of the collision, appellant's husband was killed.

Appellant sued both Vulpi and appellee. She contends that appellee was negligent in selling beer to a minor in violation of Ark. Stat. Ann. § 48-901 (Repl. 1977) and that appellee's negligence was the proximate cause of the accident. Appellee moved for summary judgment pursuant to ARCP Rule 56, arguing there was no genuine issue of material fact and that it was entitled to a summary judgment as a matter of law. The trial court granted the summary judgment in favor of the appellee liquor store. We affirm.

In *Carr* v. *Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965), we stated: "It may be that a Dramshop Act is to be desired, but such a measure should be the result of legislative action rather than of judicial interpretation." The primary purpose of this appeal is to see if we will reverse our position and now adopt such a measure by judicial fiat. The facts are not squarely before us for a redetermination of the issue since there is no allegation that Vulpi ever consumed any of the beer, but, even so, we decline to change our position because of the essential soundness of the common law rule. That is, it is the consumption of intoxicants, not the sale standing alone, which is the proximate cause of injuries.

Appellant next argues that the trial court erred in ruling that as a matter of law there was no proximate cause between violation of the statute prohibiting the sale of beer to a minor and the accident. The argument, in essence, is simply another way to contend that Ark. Stat. Ann. § 48-901 (Repl. 1977) is a Dramshop Act. We have previously rejected the argument. In *Carr* v. *Turner, supra*, we stated it is clear that in enacting Ark. Stat. Ann. § 48-901 the General Assembly did not intend to change the common law rule of nonliability.

Affirmed.

PURTLE, J., not participating.

Benny Ray HATLEY *v.* STATE of Arkansas

CR 85-192 709 S.W.2d 812

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Joe N. Peacock, and *Robert F. Meurer*, for appellant.

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

STEELE HAYS, Justice. On July 13, 1984 the Chief of Police and a patrolman for the City of Cotton Plant, Arkansas, were shot and killed while investigating the theft of a motorcycle. At 4:00 a.m. on the 14th appellant Benny Hatley was arrested in Des Arc for those murders. He was taken to the Des Arc police station where he later gave a statement admitting shooting the two officers. Hatley was convicted and sentenced to life imprisonment without parole on each charge of capital felony murder. On appeal, Hatley raises eight points of error, the primary contention being that his confession should have been suppressed because he was questioned after he had invoked his right to remain silent, in violation of the Miranda rule. We affirm.

Officer Stice, who arrested Hatley, had no experience in interrogation. When he brought Hatley in he had no intention of interrogating him, and had orders to wait until others arrived before any interrogation began. Stice read Hatley the Miranda warnings as a precaution, and when he asked Hatley to sign the Miranda form Hatley told Stice he didn't want to say anything. Hatley was immediately taken to a cell.

Two hours later Hatley was brought downstairs for trace metal tests. By then Officer Gage of the State Police had arrived. He had not been told what Hatley had said, but was told he might not talk. Gage said, "I'm Bill Gage with the State Police. Benny, you're in a lot of trouble. You want to tell me about it?" and Hatley replied, "Yes, sir, I'll talk to you." Hatley does not dispute Gage's statement. At that point, Gage read the Miranda warnings again and went over each right individually. Hatley then told his story, readily admitting shooting the two officers.

[redacted] Whether renewed questioning after a suspect has invoked his Miranda right to remain silent will constitute a violation of the Miranda principles has not previously been dealt with by this court, but was first addressed by the United States Supreme Court in *Michigan* v. *Mosley*, 423 U.S. 98 (1975). The opinion points out the court was considering only the procedures involved in a request to remain silent, noting a difference between a request for counsel and a request to remain silent, distinguished in Miranda by the procedural safeguards triggered by each.

Mosley at 101, n. 7, 102, n. 10. Police interrogation is more severely restricted after the suspect asserts his right to counsel than after he asserts his right to silence. *Edwards* v. *Arizona*, 451 U.S. 477 (1981). See also *Anderson* v. *Smith*, 751 F.2d 96 (2nd Cir. 1984). In *Mosley* (as in this case) no attorney was requested so the issue was limited to what restrictions are placed on the police after a request to remain silent had been made.

In *Mosley*, the defendant was arrested for several robberies, and told his Miranda rights at the station. He refused to say anything and no further efforts were made to question him. Two hours later another officer questioned him about an unrelated murder. Mosley was again told his rights under Miranda and he then gave an incriminating statement. The Supreme Court rejected a literal reading of Miranda that would require "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances." Identifying the critical passage in Miranda, the Supreme Court concluded that admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was "scrupulously honored." On that basis, the *Mosley* court found no violation of *Miranda*. The police immediately stopped the interrogation, resumed questioning after the passage of a significant period of time, provided defendant with a new set of Miranda warnings and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation. The Court pointed out that, "[t]his was not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance or make him change his mind."

The Eighth Circuit has had occasion to review the question presented here and in *Mosley*, where the renewed interrogation involved the same crime. That Court has found that questioning about the same crime is not necessarily crucial but rather whether the defendant's right to cut off questioning was scrupulously honored. In *United States* v. *Finch*, 557 F.2d 1235 (8th Cir. 1977), the Eighth Circuit found no violation where the police immediately stopped questioning the defendant on his request and twenty hours later approached him again. New warnings

were given and the defendant made a statement. The court found no efforts by the police to wear down the defendant's resistance and concluded the defendant's right to cut off questioning was scrupulously honored. See *Jackson* v. *Wyrick*, 730 F.2d 1177 (8th Cir. 1984) (no evidence that officers attempted to induce the defendant not to invoke his right to remain silent); *United States* v. *Udey*, 748 F.2d 1231 (8th Cir. 1984); *Stumes* v. *Solem*, 752 F.2d 317 (8th Cir. 1985). These courts have interpreted *Mosley* rather broadly.

In contrast, other jurisdictions have taken a more limited approach to *Mosley*, either with a greater restriction of the case to its facts or by more caution in the application of the "scrupulously honored" test. In *United States* v. *Olof*, 527 F.2d 752 (9th Cir. 1975) the Ninth Circuit found a defendant's rights were violated when questioning was resumed about the same crime three hours after he had refused to make a statement. The defendant was interrogated a second time while in handcuffs, one of the two agents present knowing of the defendant's prior refusal. He was again advised of his Miranda rights and though the second attempt to interrogate was of short duration the court found the defendant's rights violated. The defendant was urged to cooperate and told his cooperation would be called to the attention of the United States Attorney.[1] The agent then confronted the defendant with a description of federal prison, that it was a "dark place" where they "pumped air" to the prisoners. Relying on *Mosley*, the court found the defendant's right to cut off questioning was not scrupulously honored where the two interrogations were based on the same crime and the object of the second interrogation was to wear down the defendant's resistance. See also *Commonwealth* v. *Walker*, 470 Pa. 534, 368 A.2d 1284 (1977); *Anderson, supra*; *State* v. *Greene*, 92 N.M. 347, 588 P.2d 548 (1978); and see LaFave, Criminal Procedure § 6.9 (1984); see also *People* v. *Mattson*, 37 Cal.3d 85, 207 Cal.Rptr. 278, 688 P.2d 887 (1984).

Apart from how broadly or narrowly *Mosley* is applied, emphasis on interrogation about a *different* crime is, we believe, misplaced. The majority in *Mosley* provides only limited and

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[1] The court noted this was permissible under other circumstances, but would be reviewed in the context of renewed questioning.

dubious explanation as to why the renewed questioning on a different crime gave any greater justification for its lowering of the Miranda requirements than if the same crime were involved. See the dissent in *Michigan* v. *Mosley, supra*, which we find persuasive, for further elaboration on this point.

Given that, we think the importance in *Mosley*, as the Court itself recognized, drawing on Miranda, is on strict adherence to its dictates of scrupulously honoring the defendant's right to remain silent.

To "scrupulously honor" the defendant's "right to cut off questioning" means simply that once the defendant has invoked his right to remain silent, his will to exercise that right will remain undisturbed; there must be no attempt to undermine his will and he must be secure in the knowledge he is under no compulsion to respond to any questions. Such a determination will, of course, depend on the facts in each case relative to the conduct of the police and of the defendant.

We believe Hatley's right to cut off questioning consistent with the *Mosley* standard was not transgressed. There is nothing to suggest there were efforts to wear down his resistance or to prevail on him to change his mind. When Hatley was brought to the station there was not even an attempt to question him after the Miranda warnings were given, and Gage's comment to him two hours later in the radio room was the first and only time Hatley was asked whether he had anything to say regarding the charges. Having been fully informed that he had a right to remain silent, Hatley readily responded that he did wish to talk and the single fact that he had volunteered the earlier comment when the Miranda warnings were given cannot and should not void a statement clearly shown to have been made willingly.

We note, too, that Hatley's detention prior to Gage's question was about two hours, of sufficient length to produce more than a momentary lull before being approached again, thus avoiding the effects of repeated questioning. See *Anderson, supra*, and *Mosley, supra*. Yet the interval was not so long as to produce an inference that his cooperation was the result of lengthy "incommunicado detention." *United States* v. *Pheaster*, 544 F.2d 353 (9th Cir. 1976). Nor do we think Gage's comment objectionable. It was direct and reasonable stating only the

obvious, but lacking the quality of coercion and threat found in *Olof, supra.*

After Gage's comment and Hatley's affirmative response, there was no further questioning by Gage until the Miranda rights were again explained. When Hatley responded to Gage's question, it was an immediate and unequivocal "yes," and when he told his story it was in narrative fashion and not in response to a series of questions by the interrogator. See *Wilson* v. *Henderson*, 584 F.2d 1185 (2nd Cir. 1985). The total time that Gage talked to Hatley, including the taking of the statement, was about fifteen minutes.

[redacted] Hatley's next point is that his right to remain silent was not voluntarily and intelligently waived. Factors to be considered in determining the voluntariness of the waiver include age, education and intelligence of the accused, advice or lack of advice of constitutional rights, length of detention, repeated or prolonged questioning and the use of mental or physical punishment. *Douglas* v. *State*, 286 Ark. 296, 692 S.W.2d 217 (1985). Hatley was sixteen years old and had at least a sixth grade education. He could read, although the psychologist who evaluated him found him mildly retarded with limited reading ability and thought these factors would prevent him from understanding his rights. However, Hatley testified at the suppression hearing and indicated he was well acquainted with his rights and understood them. He said the rights had been explained to him at least ten times and maybe more in the last five years, that he'd "heard them over and over again" and understood them on the occasion of this arrest. A low intelligence quotient will not in itself render a waiver involuntary, see *Hignite* v. *State*, 265 Ark. 866, 581 S.W.2d 552 (1979), where the evidence shows the waiver was knowing and voluntary. Additionally, as noted earlier, Hatley's rights were gone over carefully by the interrogating officer and thoroughly explained. Nor is there any indication here of a long detention or repeated and extended questioning, and appellant himself testified at the suppression hearing that he was not threatened, coerced nor coaxed by anyone but that he was treated "like a gentleman." The evidence clearly supports a finding that the waiver was voluntarily and intelligently given.

[redacted] Hatley next maintains that photographs of the victims should have been excluded as their probative value was out-

weighed by the danger of unfair prejudice. No objection was raised below and we will not consider arguments not presented to the trial court. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

Hatley also argues that information concerning parole was improperly brought to the attention of the jury during deliberation. The jury foreman had brought with him into the jury room a short newspaper article listing recent parolees from the Arkansas Department of Correction, listing the names of inmates, their crimes and the beginning dates of their sentences.

The argument is without merit. We have previously considered this question and held that a reference to the possibility of parole by a juror would not constitute reversible error. *Veasy* v. *State*, 276 Ark. 457, 637 S.W.2d 545 (1982). In that case, one of the jurors approached the defense attorney in the courthouse a few days after the trial and said that the jury had assumed the defendant would serve considerably less than thirty-five years in prison because of the parole system. Citing *Ashby* v. *State*, 271 Ark. 239, 607 S.W.2d 675 (1980) we said:

> . . . If the jury or any of them did take the possibility of parole into consideration in their determination of appellant's sentence, any information they had concerning parole was independent knowledge which they had prior to trial.
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> . . . It would be highly unrealistic for this court to think that jurors do not consider the possibility of parole in arriving at a sentence in a criminal case. The outward expression of that by a juror is not grounds for a new trial.

Here, the juror stated the article contained no information that was not already a part of his common knowledge and the article was not circulated. There is no indication the information was used to improperly influence any juror.

A final point concerns four objections to the death qualified jury, all which have been rejected by this court. See *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983). On the day this case was submitted the question of the constitutionality

of death-qualified juries was conclusively settled by the United States Supreme Court in the case of *Lockhart* v. *McCree*, ___ U.S. ___ (Slip Op. 84-1865, decided May 5, 1986). The arguments that death-qualified juries are unconstitutional were rejected.

Under 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 points argued or in the other objections abstracted for review.

The judgment is affirmed.

PURTLE, J., not participating.

Curtis WATSON *v.* STATE of Arkansas

CR 85-221 709 S.W.2d 817

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Linda P. Collier, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted of capital murder and sentenced to life in prison without parole. His two points for reversal are (1) that by virtue of his having to use two of his peremptory jury challenges to remove jurors who should have been dismissed for cause, he was forced to allow two jurors objectionable to him to be seated, and (2) that the evidence was insufficient to show he acted with deliberation and premeditation when he killed his wife and father-in-law. We affirm because the appellant did not make a record showing the manner in which the jurors of whom he complained were objectionable, and because we regard the evidence of premeditation to have been sufficient.

1. The Jurors

The appellant was forced to exercise two of his peremptory challenges to exclude from the jury two jurors who should have been excluded for cause. To preserve this error for appeal, we require the appellant to show prejudice, i.e., that he was forced to accept a juror against his wishes. *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980). No such record was made at the close of the jury voir dire.

During the trial, one of the seated jurors was dismissed for misconduct. An alternate juror was seated. At that point, counsel for the appellant told the court he would have peremptorily challenged the last two jurors seated if he had had any peremptory challenges remaining, although he conceded the last two jurors seated could not have been successfully challenged by him for cause. The court noted that the defense should have made a record of his objection to the two jurors at the close of the jury voir dire, and it was too late to register the objections once the trial had begun.

Whether or not the objection came too late, the appellant did not present to the trial court and has not presented to us any possible basis for finding the last two jurors to have been objectionable. Despite the lack of any abstract of the voir dire of these jurors, we have, in the process of reviewing the record

pursuant to our Rule 11(f), read their responses to questions on voir dire. We find nothing in those responses which could conceivably have been objectionable to the appellant.

2. Sufficiency of the Evidence

The appellant contends the state's evidence was insufficient to show a "premeditated and deliberated purpose of causing death," an element of capital murder under Ark. Stat. Ann. § 41-1501(c) (Repl. 1977) which defines the offense with which he was charged. The appellant admitted on the witness stand that he went to a rent house into which his estranged wife was moving and waited inside the house until his wife and her father arrived. He and his father-in-law argued, and he picked up a pine knot and hit his father-in-law one or more times and then struck his wife as he was leaving. He said he threw the pine knot into a briar patch as he went back to the place where his truck was parked. He admitted having been at the same house the previous day waiting for his wife and her father, but they did not appear.

The state's evidence showed that a moist wood-splitting maul was found in the appellant's pick up truck shortly after the offense occurred and that the maul was clean and was lying in damp leaves in the bed of the truck. It appeared to have been washed and laid there to dry. Photographs and photographic overlays showed that the wounds to the victims were consistent with having been made by the blunt edge of the maul.

Other state's evidence showed that the appellant's wife feared she would be killed by him and that the appellant had angrily confronted her and her father on numerous occasions.

The appellant presented psychological expert testimony to the effect that he was a "reactor, not a thinker," and was not, by virtue of a mental disorder, capable of planning a murder. The jury could have agreed, but it did not.

The evidence from which the jury could have determined premeditation and deliberation was ample. Testimony showed that on the day of the murder the appellant parked his truck about a quarter mile from the murder scene in a place where the truck could not be seen from the house where the murders occurred. From the evidence of the presence and condition of the splitting maul, the jury could have concluded the appellant carried it from

his truck into the house to use as a weapon, then carried it back outside and washed it before returning it to the bed of his truck. The appellant's wife had told her mother that the appellant had threatened to kill her, and there was testimony from which it could have been concluded the appellant had physically abused his wife over the period of time they were suffering marital difficulties including a dispute over custody of their daughter.

The appellant argues the evidence relied upon by the state to show premeditation was equally supportive of the appellant's testimony that he impulsively killed the victims, having gone to his wife's house just to confront her and her father over custody of the child. In *Jones* v. *State*, 269 Ark. 119, 590 S.W.2d 748 (1983), we said the substantial evidence test is not satisfied if the evidence gives equal support to inconsistent inferences. Here, we view the evidence from which the jury could have concluded the appellant carried the maul into the house from his truck parked a quarter of a mile away and lay in wait for the victims for the second consecutive day as not supportive of any inference other than premeditation and deliberation. It was sufficient.

Affirmed.

PURTLE, J., not participating.

Glenn Lloyd WILSON *v.* STATE of Arkansas

CR 85-149 712 S.W.2d 654

Supreme Court of Arkansas
Opinion delivered May 27, 1986

Gordon L. Cummings, for appellant.

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

ZIMMERY CRUTCHER, JR., Special Justice. Glenn Lloyd Wilson, appellant, was charged with Battery in the First Degree for causing serious physical injury to Lloyd Stewart on or about June 24, 1984, by means of a deadly weapon or under circumstances manifesting extreme indifference to human life, in violation of Ark. Stat. Ann. § 41-1601.

The case came on for trial on February 25, 1985, before a jury duly impaneled, and after opening statements, the State called the prosecuting witness as its first witness. On cross-examination, appellant's attorney asked about a $1,000,000 civil suit which the prosecuting witness had filed against appellant arising from the alleged battery. The attorney implied by one of

his questions that, had appellant paid the prosecuting witness $18,000, the criminal charges would have been dismissed. Before this question was answered, the prosecuting attorney objected and asked for a mistrial. A mistrial was declared over appellant's objection and the jury was discharged.

The trial court set the case for retrial on the following morning, February 26, 1985, and ordered a new jury called to which the appellant objected on the basis of double jeopardy.

Appellant filed a Notice of Appeal alleging for reversal that the trial court erred in granting a mistrial and in denying appellant's motion to dismiss on the ground of double jeopardy.

We agree with the appellant that the trial court erred in granting a mistrial. The trial judge has considerable discretion in determining the scope of cross-examination. Rule 403 of the Uniform Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Also, Rule 408 of the Uniform Rules of Evidence states:

> Evidence of (1) furnishing, offering or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

However, this court has consistently taken a broad view of the right of an accused in a criminal prosecution to be confronted with the witnesses against him. *Simpson* v. *State*, 274 Ark. 188, 623 S.W.2d 200 (1981). Cross-examination can serve as a means

to test the truth of the witness's direct testimony and the witness's credibility. A broad view of cross-examination is especially important where it might reveal bias on the part of a key witness. *Klimas* v. *State*, 259 Ark. 301, 534 S.W.2d 202 (1976); *Haight* v. *State*, 259 Ark. 478, 533 S.W.2d 510 (1976).

Here, if the cross-examination had been allowed, the jury would have been informed that the prosecuting witness may have been biased due to a financial interest. On the other hand, the jury may have thought that the civil complaint and damages sought were well founded and that the evidence supported the prosecuting witness's testimony. *Boreck* v. *State*, 277 Ark. 72, 639 S.W.2d 352 (1982).

The sequence of questions on cross-examination of the prosecutor's chief witness by appellant was as follows:

MR. CUMMINGS:	Did you get a lawyer and sue Mr. Wilson?
MR. STEWART:	Yes.
MR. CUMMINGS:	Have you gone over the facts and your testimony with your lawyer?
OBJECTION (PROSECUTING ATTORNEY):	Now, Judge, I am going to object again. I don't think that has any relevance, not that civil suit, to this criminal action.
THE COURT:	Not what he has gone over with an attorney not a party to this action. That would not be admissible.
MR. CUMMINGS:	You have a definite financial interest in the outcome of this case, don't you, Mr. Stewart?
MR. STEWART:	Well, not financial, I want justice done.
MR. CUMMINGS:	Uh huh. As a matter of fact, if Mr. Wilson had had $18,000.00 to pay you, we wouldn't be here today, would we?

This court has always held that pecuniary interest, personal affection or hostility, a quarrel or prejudice may always be shown to discredit a witness. *Wright* v. *State*, 133 Ark. 16, 201 S.W. 1107 (1918).

Therefore, the trial court was in error in granting a mistrial.

The appellant's second point of contention is that the trial court erred in overruling his motion to dismiss the charges on the ground of double jeopardy.

Article 2, Section 8 of the Arkansas Constitution says, ". . . and no person, for the same offense, shall be twice put in jeopardy of life or liberty."

When the jury is finally sworn to try the case, jeopardy has attached to the accused and when, without the consent of the defendant, expressed or implied, the jury is discharged before the case is completed, then the constitutional right against double jeopardy may be invoked, except in cases of "overruling necessity" *Jones* v. *Ark.*, 230 Ark. 18, 320 S.W.2d 645 (1959). We have found overruling necessity in cases where the defense counsel was intoxicated or a juror was ill. *See Franklin and Reid* v. *State*, 251 Ark. 233, 471 S.W.2d 760 (1971) and *Atkins* v. *State*, 16 Ark. 568 (1855).

We find no such overruling necessity here.

Therefore, since a mistrial was improperly granted and jeopardy has attached, the appellant cannot be retried.

Reversed and dismissed.

PURTLE, J., not participating.

NEWBERN, J., concurs.

HOLT, C.J., dissents.

HAYS, J., dissents.

DAVID NEWBERN, Justice, concurring. The majority opinion fully states my view in this case. I feel compelled, however, to respond briefly to the dissenting opinion. Its fallacy is demonstrated by these words taken from the second paragraph:

> Thus, on the basis of a question Wilson's counsel should not have asked the State of Arkansas is deprived of the opportunity to try an individual for a serious breach of the criminal laws.

It was not the question asked by the defendant's lawyer that deprived the state of the opportunity. Rather, it was the overreaction of the court to that question. As the majority opinion points out, our cases require that an accused not be subjected to double jeopardy unless the mistrial occurred on the basis of an overruling necessity.

The dissenting opinion goes to some length to argue that the question asked by the defense counsel was improper. Even if the cases cited are somewhat supportive of the contention that the question was improper because it was merely cumulative or, on balance, more prejudicial than probative, the point is that the court was hardly confronted with a situation which could not have been handled by a means other than a mistrial.

STEELE HAYS, Justice, dissenting. Glenn Lloyd Wilson was charged with first degree battery in the stabbing of Lloyd Stewart. Stewart had filed a civil suit against Wilson seeking damages of $1,000,000, which was pending while the criminal case was being tried. When counsel for the defense asked Stewart on cross-examination whether, in effect, Stewart would have dropped the criminal charges if Wilson had paid him $18,000, the prosecution moved for a mistrial and the trial court subsequently granted the motion.

On these proceedings the majority concludes the appellant cannot now be tried at all because of double jeopardy. Thus, on the basis of a question Wilson's counsel should not have asked the State of Arkansas is deprived of the opportunity to try an individual for a serious breach of the criminal laws. I respectfully dissent.

I don't question the defendant's right to bring out the fact that the prosecuting witness is also suing the defendant in a civil case. But that was amply done here. Defense counsel in voir dire, opening statement and questioning had told the jury that Stewart was suing Wilson for a million dollars, providing all the basis necessary to argue bias. When counsel then implied that Stewart

had not only offered to settle for $18,000 but that the criminal charges would also be dropped in the process, I believe he went too far and the trial court was well within its prerogative in ruling the question improper and, if it deemed the fairness of the trial sufficiently impaired, to grant a mistrial.

The majority declares that to deny the defendant that question is reversible error. I believe it was within the trial court's discretion by any of several rules of procedure and evidence and the fact the defense tacitly agreed is found in the record — after the prosecution moved for a mistrial, defense counsel asked the court to admonish the jury to disregard the question. This was cumulative evidence, which is properly excludable. Rule 403, Unif. R. Evid., *Lee* v. *State*, 266 Ark. 870, 587 S.W.2d 78 (1979). Moreover, even relevant evidence may be excluded if its probative value is substantially outweighed by unfair prejudice, delay, waste of time, confusion of the issues or having a tendency to mislead the jury. *Pitts* v. *State*, 273 Ark. 720, 617 S.W.2d 849 (1981).

In holding the evidence admissible under Unif. R. Evid. Rule 408 to show bias or prejudice, the majority overlooks the express intent of Rule 403 to exclude evidence otherwise admissible where its probative value is overcome by its prejudicial effect.

The question, I believe, has obvious prejudicial overtones, implying that the defendant is being prosecuted at public expense simply to enrich the prosecuting witness, whereas the probative force, over and above the facts already brought out, has only limited value. In *Boreck* v. *State*, 277 Ark. 2, 639 S.W.2d 352 (1982), we reversed a trial court's refusal to permit the defense to ask the prosecuting witness in a rape trial if she had agreed to drop the charges in payment of the medical bills. But there was no pending civil case, and no other means of proving bias, no civil case being involved. Furthermore, there was no uncertainty as to the witness's extrajudicial agreement — she had actually agreed to drop the charges in consideration of an agreement to pay her medical bills and had dictated a statement to the police avowing those terms. In contrast, there is nothing here to show that Stewart has agreed to drop either the civil or the criminal case, assuming he has the power, nor any proffer that he has offered to settle the civil case for *any* amount. At the very least, the

defendant should be required to proffer a factual basis for his question before we brand it error, otherwise we have held reversible error and, hence, double jeopardy to have occurred purely on theoretical grounds. *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985); *Williams* v. *State*, 258 Ark. 207, 523 S.W.2d 377 (1975).

I believe the incident in this trial was prompted by the excessive advocacy of defense counsel, rather than by any abuse by the prosecution or the trial judge. The record reveals that during opening statement defense counsel told the jury Mr. Stewart had hired Mr. Walter Niblock to file a civil suit, prompting an objection that a civil action had no bearing on criminal charges, which the court sustained. Thereafter during cross-examination of Stewart defense counsel renewed the topic:

> Q: Did you get a lawyer and sue Mr. Wilson?
>
> A: Yes.
>
> Q: Have you gone over the facts and your testimony with your lawyer?
>
> PROSECUTOR: Now, Judge, I am going to object again. I don't think that has any relevance, not that civil suit, to this cause of action.

When the judge sustained the objection again, defense counsel continued:

> Q: You have a definite financial interest in the outcome of this case don't you Mr. Stewart?
>
> A: Well, not financial, I want justice done.
>
> Q: Uh huh. As a matter of fact if Mr. Wilson had had $18,000 to pay you, we wouldn't be here today would we?

The majority opinion focuses on the question about the $18,000 and ignores entirely the preceding question which came after the judge had sustained an objection for the second time.

The question created an obvious inference that Stewart would benefit financially if Wilson were convicted. That, of course, is patently incorrect, as the outcome of the criminal case would have no bearing whatever on the civil case. *Wright* v. *Wright*, 248 Ark. 105, 449 S.W.2d 952 (1970); *Smith* v. *Dean*, 226 Ark. 438, 290 S.W.2d 439 (1956). That, I believe, was the more offensive question and the follow-up question about the $18,000 was simply the finishing touch.

Many courts have recognized, properly I believe, that where it is the conduct of the defendant or defense counsel that occasions the mistrial, the defendant will not be heard to complain on double jeopardy grounds. *McDaniel* v. *State*, 604 P. 2d 147 (C.A. Okla. 1979); *United States* v. *Dinitz*, 424 U.S. 600 (1976). *Haight* v. *State*, 259 Ark. 478, 533 S.W.2d 510 (1976).

In *McDaniel* v. *State*, *supra*, the Oklahoma Court of Appeals said:

> To dispense with any ambiguity that might exist we expressly hold that in the absence of evidence of bad faith conduct by the prosecutor or trial court, intended to harass or prejudice the rights of an accused, a defendant will not be heard to complain of the proximate result of his own misconduct at trial. See *Pierce* v. *State*, Okl.Cr., 383 P.2d 699 (1963). See also *Shimley* v. *State*, 87 Okl.Cr. 179, 196 P.2d 526 (1948). We hold that nothing in the United States Constitution requires that the defendant be allowed to benefit from the exposure of his intended fraud. Were the defendant to prevail in his argument, it would reduce the constitutional prohibition against double jeopardy to a continuing invitation for criminal defendants to intentionally introduce extreme provocation into the trial in the hope that the prosecutor or trial court would be induced to misconduct necessitating a mistrial. We decline to hold that the United States Constitution extends such an invitation.

In *Ferby* v. *Blankenship*, 501 F. Supp. 89 (E.D. Va. 1980) defense counsel, while cross-examining a police officer, asked if the defendant had offered to take a lie detector test. The prosecution moved for a mistrial which the court granted. The District Court held the defendant had not been subjected to

double jeopardy.

In *People* v. *Bell*, 283 N.W.2d 763 (C.A. Mich. 1979), defense counsel in opening statement told the jury that a prior judicial declaration of the defendant's incompetency to stand trial had already been made by the trial court. This was held on appeal to be incorrect and while incompetency was an issue, the claim that defendant had been so declared was not: "It is one thing to refer to evidence of a claimed fact. It is another thing to refer to a judicial declaration of that fact." The Court of Appeals determined that a manifest necessity had occurred.

In *Barnett* v. *Florida*, 382 So.2d 412 (C.A. Flor. 1980), the trial court declared a mistrial after an outburst by the defendant in the presence of the jury which related to exculpatory matters allegedly told to a witness by a third party. The trial court found the remarks were so prejudicial to the state's case that a fair trial would be impossible and an admonition ineffective. The Florida court found "manifest necessity.":

> Although the defendant has a valued right to have his trial completed by a particular tribunal, such right is subordinated to the public's interest in fair trials designed to end in just judgment; thus the double jeopardy protection does not preclude a second trial when the initial trial is discontinued under circumstances manifesting necessity for so doing, and when the failure to discontinue should affect the ends of justice. *Wade* v. *Hunter*, 336 U.S. 684 (1949).

In *Jones* v. *Commonwealth*, 400 N.E.2d 242 (S.C. of Mass. 1980), while the Supreme Court found the mistrial was chargeable to the trial judge, rather than defense counsel, the opinion states:

> The Commonwealth also argues that a defendant who misbehaves should not be able to escape retrial if the judge thereby declares a mistrial. We agree. "It would be a reproach to the administration of justice if a defendant, through his counsel, could pollute the atmosphere of a trial and then turn this to his own advantage on appeal. *Commonwealth* v. *Lewis*, 346 Mass. 373, 379, 191 N.E.2d 753, 758 (1963), cert. denied, 376 U.S. 933 (1964).

Our own cases have recognized the soundness of this policy.

In *Haight* v. *State, supra*, defense counsel told the jury in opening statement that there had been plea bargain discussions and even mentioned length of sentence the prosecutor had recommended. Without phrasing it in terms of "manifest necessity," we said the remarks were prejudicial and an admonition would not have been sufficient.

I submit this case is plainly governed by *Haight*. If mention of a plea bargain is too damaging for correction, I believe the prejudice which surely accompanied counsel's telling the jury, incorrectly, that the prosecuting witness would gain financially by a conviction is of the same stripe. Some indication of that appraisal is found in the fact that defense counsel asked the court to admonish the jury to disregard his own question.

The obvious and alarming effect of this decision is that while the defense can move for a mistrial with impunity, the prosecution can ill afford to do so, for unless the prosecution prevails on appeal the defendant is discharged. This strikes me as patently unfair, as the state is entitled to a fair trial, too, yet it can not move for a mistrial where the stakes are an outright dismissal of the charges, even though the defense may have prejudiced the jury. "Neither side has a right to have his case decided by a jury which may be tainted by bias." *Arizona* v. *Washington*, 98 Sup.Ct. 824 (1978).

This opinion should not end without repeating the cogent view of Justice Harlan in *United States* v. *Tateo*, 377 U.S. 466, 84 S.Ct. 1589, 12 L.Ed.2d 451:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in

protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

HOLT, C.J., joins this dissent.

Joseph R. (Buz) HOOPER, Boyd BOND, and The HOOPER-BOND COMPANY *v.* Don RAGAR and HOOPER-BOND LIMITED PARTNERSHIP FUND III

86-62 711 S.W.2d 148

Supreme Court of Arkansas
Opinion delivered June 2, 1986

Mitchell, Williams, Selig, Jackson & Tucker, by: *W. Christopher Barrier* and *Tracy A. Barger*, for appellants.

Wilson, Wood & Hargis, by: *David M. Hargis*, for appellees.

GEORGE ROSE SMITH, Justice. The primary argument submitted by the appellants on this appeal is that the circuit court was so lacking in jurisdiction of the subject matter that its judgment was void and should be set aside. We find no merit in this argument, or in the appellants' subordinate contentions, and affirm the judgment.

In 1979 the two individual appellants, Hooper and Bond, as general partners, organized a limited partnership for the purpose of buying, subdividing, and selling a 20-acre tract of land west of Little Rock. The limited partners were a number of investors in the venture, which was to be managed by the two general partners, both being realtors. One of the investors was the appellee Don Ragar, who had a 7.5% interest in the venture as a limited partner. He filed this suit as a derivative action on behalf of the limited partnership and its limited partners. The defendants are the two general partners and the corporation that was organized to handle the real estate transactions.

The complaint alleged, and the plaintiffs' proof sufficiently showed, that the general partners had been guilty of fraud in obtaining the investors' approval of sales at below market value and in obtaining for themselves, in violation of their fiduciary duties, secret profits as developers of the property in question. The general partners filed a counterclaim asserting that Ragar had

slandered them and had tortiously interfered with their business relationships.

There is no need for a detailed narration of the extensive testimony considered by the jury. The causes of action asserted in the complaint and the counterclaim for slander were submitted to the jury. The court's instructions explained the law with respect to the allegations of fraud, negligence, and violation of fiduciary obligations and with respect to the general partners' counterclaim for slander. The jury returned a general verdict for the plaintiffs for $150,000, refused to award them punitive damages, and refused to award damages on the counterclaim. This appeal is from the ensuing judgment for $150,000.

The appellants argue that Ragar's suit is essentially one for an accounting and settlement of the partnership affairs, as to which the jurisdiction of the chancery court is practically exclusive. *Tankersley* v. *Patterson*, 176 Ark. 1013, 5 S.W.2d 309 (1928). Hence, it is said, the circuit court had no jurisdiction of the subject matter, so that the entire proceeding in that court was a nullity. There was no objection in the lower court to its jurisdiction, but the argument is that a lack of subject matter jurisdiction may be raised at any time.

We have discussed this issue at some length in another case decided today and need not repeat what was said there. *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). As we explained, subject matter jurisdiction in one sense means power and may be exclusively vested in a particular court. For example, the circuit court has exclusive jurisdiction of election contests, the chancery court of divorce cases, and the probate court of the probating of wills. No other court has the power to entertain and decide such cases.

The present litigation, however, does not come within that category. No doubt the complaint might have been drafted as a suit for an accounting and have been filed in chancery. That was not done. The complaint asserted causes of action in tort for fraudulent misrepresentations and for negligence. By counterclaim the general partners sought damages for slander, another tort. As so often happens, the case might have been tried either in the circuit court or in chancery. In such situations the choice of forum is usually made by the parties and the trial court. More

often than not it is made without discussion. Here the lawyers and the trial judge tacitly recognized the jurisdiction of the circuit court and went ahead with the trial. The appellants have had their day in court and are not entitled to a second chance.

Another argument is that the trial judge should have directed a verdict for the defendants, because the plaintiffs failed to prove the element of proximate cause. As abstracted, the only motion for a directed verdict was worded as a renewal of the defense motion for summary judgment. That motion was based on a supporting affidavit which is not abstracted. Civil Procedure Rule 50 states: "A motion for a directed verdict shall state the specific grounds therefor." The appellants now argue proximate causation, but it is not shown that such a contention was made below. In fact, there is no showing that either the motion for summary judgment or the motion for a directed verdict was ever ruled upon. We conclude that the case was allowed to go to the jury without the sufficiency of the evidence having been properly questioned. Actually, there were issues of fact for the jury. No error on the part of the trial court is shown.

The appellants' third argument is based on a novel attempt by defense counsel to have witnesses testify by power of attorney. Before the trial a number of the limited partners executed affidavits in which each one set forth his understanding of certain facts and then appointed Larry Wilson "to express my views on these subjects." At the trial counsel for the defendants, instead of calling the limited partners to testify, proffered their affidavits and sought to have Wilson testify for them. The trial court was right in refusing the proffer. Wilson's testimony about what the partners would have said would obviously have been hearsay, with the affiants not being subject to cross-examination.

A final argument is that the trial court should not have admitted testimony about a transaction that occurred so long before the filing of the suit as to be within the statute of limitations. There was no such objection in the trial court. The point cannot be raised for the first time on appeal.

Affirmed.

HOLT, C.J., and PURTLE, J., not participating.

MAYBERRY DRAINAGE DISTRICT OF JACKSON COUNTY, ARKANSAS *v.* Josephine GRAHAM, et al.

85-292 711 S.W.2d 147

Supreme Court of Arkansas
Opinion delivered June 2, 1986
[Rehearing denied July 7, 1986.]

Pickens, McLarty & Watson, by: *Tim F. Watson*, for appellant.

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

ROBERT H. DUDLEY, Justice. The appellant drainage district sought to annex additional lands into the district under the authority of Ark. Stat. Ann. § 21-534 (Repl. 1968). It filed a petition for annexation in which it alleged that the construction of improvements had been completed, and that sloughs, marshes, and lakes on appellees' lands were drained as a result of those improvements. The appellees moved to dismiss the petition on the ground that it did not state facts upon which relief could be granted. The trial court granted the motion to dismiss. We affirm.

The trial court interpreted the statute at issue, Ark. Stat. Ann. § 21-534 (Repl. 1968), as providing a method for annexing lowlands to a drainage district where the improvements have been completed and where the owners of the lands to be annexed have taken some affirmative action to drain sloughs, marshes, or lakes into the completed improvement. Since the petition did not contain an allegation of affirmative action by the owners of the lands to be annexed, the trial court held that no cause of action had been stated.

The appellant contends that the trial court misconstrued the statute, and that it does not require affirmative action by the owners of the outside lands before annexation can be granted. The contention is without merit. The preamble to the act unequivocally recites that the purpose of the act is to provide equitable relief to drainage districts when owners of lands outside the district dig private ditches to drain their lowlands into the district. It provides:

> WHEREAS, into the ditches of some drainage districts of the State, after the ditches were completed, other lands have been drained *by digging private ditches, thereby draining sloughs, marshes and lakes that could not otherwise be drained*, and
>
> WHEREAS, in certain instances, sanitary sewer

> lines have made use of such drainage ditches to procure an emptying outlet, thereby saving the sanitary sewer district large sums of money, and
>
> WHEREAS, it is right and just that *such lands* as make use of and are benefited by such drainage ditches of any such drainage districts should stand their just portion of the costs of the construction and maintenance of such drainage ditches in proportion to the benefits received:

(Emphasis added).

The statute by its language contemplates some affirmative action by the outside landowner since it refers to annexing lowlands which have been drained into the drainage ditches after completion of the construction, not drained as a result of the construction. The statute is as follows:

> Where any slough, marsh or lake *has been drained* into the drainage ditches of any drainage district *which has completed its work of construction*, lands benefited by the draining of such slough, marsh or lake may be added to such drainage district in the manner provided by Section 3 of this Act. . . .

(Emphasis added).

Twice before we have stated the purpose of the statute. In the latest case, *Williams* v. *Village Creek, White River & Mayberry Levee & Drainage District*, 285 Ark. 194, 685 S.W.2d 797 (1985), involving an attempt by the appellant to annex these same lands, we stated:

> 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.

In an earlier case, *Pendleton* v. *Stuttgart & King's Bayou Drainage & Irrigation Dist. No. 1*, 235 Ark. 513, 360 S.W.2d 750 (1962), we stated:

> It is perfectly clear from Act 180 of 1927 that the purpose

> of Section I [Ark. Stat. Ann. § 21-534] is to prevent owners of sewer lines, sloughs, marshes and lakes, from making use of the drainage district's improvements without just compensation.

Our interpretation of the statute also retains the symmetry of the entire statutory scheme for the creation of drainage districts. Under ordinary circumstances, the landowner must be given notice that he will be assessed for the benefit of the proposed improvement. He then has the opportunity to protest the construction of the proposed improvement before his land is affected. Ark. Stat. Ann. § 21-514 (Repl. 1968); *Williams* v. *Village Creek, White River & Mayberry Levee & Drainage District, supra.* However, the landowner has no right to notice and the opportunity to object to the benefit when he affirmatively takes advantage of the construction by draining his lowlands into a ditch "of any drainage district which has completed its work of construction." Ark. Stat. Ann. § 21-534 (Repl. 1968).

Affirmed.

Tommy LILES and Dave Wisdom HARROD *v.* Barbara LILES

85-252 711 S.W.2d 447

Supreme Court of Arkansas
Opinion delivered June 2, 1986

[redacted]

Junius Bracy Cross, Jr., and *Deborah Davis Cross*, for appellant Tommy Liles.

Wright, Lindsey & Jennings, for appellant Dave Wilson Harrod.

Thomas, House & Smith, by: *Douglas House*, for appellee.

DAVID NEWBERN, Justice. This case involves an action by a former wife, the appellee, Barbara Liles, to set aside a property settlement into which she had entered with her former husband, the appellant, Tommy Liles, in contemplation of divorce. She sued to set aside the agreement and to recover her expenses related to the action, including her attorney's fee. The chancellor set aside the property settlement and entered a new property division order. He awarded Barbara Liles an additional amount of money, which he characterized as both damages and an attorney's fee, jointly and severally against Tommy Liles and attorney Dave Wisdom Harrod, the other appellant, whose fraudulent conduct the chancellor determined to have been responsible for the improperly induced agreement. Both of these remedies were appropriate, and we affirm.

The following is a summary of the facts as found by the chancellor: Barbara and Tommy Liles were married in 1970. She had two children from a previous marriage. In 1976 Barbara engaged Dave Wisdom Harrod to represent her in divorce proceedings against Tommy. A divorce was granted. Barbara and Tommy reconciled, and the divorce was annulled in 1977.

In 1978, Tommy was injured while working for an off-shore oil driller, Rowan Drilling Co. His personal injury claim was covered by the Jones Act, 42 U.S.C. § 688. He and Barbara consulted Harrod about Tommy's possible personal injury remedies, and they were told by Harrod of the expertise of a Texas attorney, Benton Musslewhite, in Jones Act litigation. Harrod

and Musslewhite associated to bring a claim against Rowan on behalf of Tommy. When the claim was filed in the U. S. District Court in Texas, Tommy's workers' compensation payments ceased, and Musslewhite loaned $500 to the Liles. Later, Barbara learned of the involvement of Newton Schwartz, another Texas lawyer, when Musslewhite wrote Harrod about splitting the prospective attorney fee with Schwartz.

Tommy's Jones Act claim against Rowan resulted in a judgment in Tommy's favor of 2.5 million dollars. Although it was not stated by the chancellor in his findings, it is undisputed that Aetna Insurance Co., Rowan's carrier which handled the litigation, threatened to appeal. On May 2, 1981, a structured settlement agreement was reached. The settlement required Aetna to pay Tommy a lump sum of $400,000; $2,000 per month for life with a thirty-year guarantee beginning June 1, 1981; $65,000 on June 1, 1986; and $35,000 every five years from June 1, 1991 through 2001. The monthly and incremental lump sum payments were to be made to Harrod as trustee of the Tommy R. Liles trust.

Returning to the facts found by the chancellor: Marital problems between Barbara and Tommy arose during the negotiations with Aetna. Tommy, Harrod, and Bryce Marler, a private investigator and former bail bondsman, were making plans to set up a company called Southern Investment Corporation. A purpose of the business was to be the financing of Jones Act litigation on behalf of injured employees of off-shore drilling companies. Tommy was to have an airplane so he could fly up and down the coastal area looking for potential claimants. Barbara's objection to this scheme led to further marital difficulties. Barbara decided to seek a legal separation, and she and Tommy went together to Harrod's office where Harrod prepared a separation agreement. Barbara and Tommy again reconciled, and she accompanied him to Houston, Texas, where they signed the settlement documents on or about May 2, 1981.

On May 8, 1981, Tommy was staying at a lake cabin, away from the marital home in Drasco, Arkansas, because he was upset over Barbara's objection to the Southern Investment Corporation plan. On May 10, 1981, Tommy appeared at the house and ran Barbara away, threatening her with a shovel. Barbara went to a

nearby store. Harrod appeared there and instructed Barbara to come to his office the following day.

Barbara spent all day May 11, 1981, in Harrod's office. She asked him what her rights would be in the event of a divorce. Harrod told her what Tommy would give her. She understood Harrod to be representing her. Harrod told her that he was her attorney and would take care of her. He telephoned Tommy several times that day and ultimately prepared an addendum to the trust, a property settlement agreement, and an entry of appearance, all of which were signed by Barbara. The trust addendum contained a clause stating that if any party challenged the trust he or she would forfeit his or her interest in the proceeds. Harrod told Barbara that the addendum was not valid unless filed and that it would not be filed unless it was necessary to protect her interest.

As Barbara left Harrod's office on May 11, 1981, Harrod informed her he would no longer represent her but would be representing Tommy. He filed Tommy's divorce petition. Even prior to the May 11, 1981, discussion between Barbara and Harrod, Harrod had hired Marler to investigate Barbara's "drug habits" in contemplation of a contested divorce proceeding. Marler sent Harrod a bill, dated May 7, 1981, in the amount of $1,575 for those services.

On June 12, 1981, Barbara returned to Harrod's office and asked him to delay the divorce. He replied he could not do so. The divorce was entered on June 15, 1981.

The trust addendum named Harrod as trustee. It was his duty to distribute the $2,000 monthly payments from Aetna. He did so for some five months until he resigned and appointed Barbara's daughter from her previous marriage as trustee. The daughter had married Tommy after Barbara and Tommy were divorced.

Other undisputed facts are that the trust monies were to be distributed among Barbara, Tommy, and the attorneys to cover their fee percentage of the award, and Harrod was to withhold $80 per month as a fee for handling the trust funds. During the five months he acted as trustee, Harrod failed to account for $20 per month or $100.

It is also undisputed that of the $400,000 initial payment to Tommy from Aetna, the attorneys were paid $355,542.63. Tommy later petitioned the federal court for a reduction in the amount approved to be paid to the attorneys, and $114,800.43 was remitted to him. The remission occurred after the divorce.

Harrod charged a $10,000 fee for representing Tommy in the uncontested divorce. Barbara and her son, James Ezell, testified that when they asked Harrod why the fee was so high he said it represented not only the divorce, which Tommy "could afford," but other services previously rendered to Tommy and Barbara.

The chancellor reached the following conclusions of law:

1. On May 11, 1981, Dave Harrod owed a fiduciary duty to Barbara Liles to represent and protect her interests in the divorce action against Tommy Liles.

2. Harrod breached his fiduciary duty to Barbara Liles by entering into a conspiracy with Tommy Liles to defraud Barbara Liles of her marital assets. Specific evidence of fraud includes the following acts:

(a) Harrod and Tommy Liles established an attorney-client relationship before May 11, 1981

(b) David Harrod attempted to secure evidence of drug abuse by Barbara Liles

(c) Tommy Liles and Harrod permitted Harrod to represent Barbara Liles when both knew that she trusted and relied upon Harrod's judgment and advice

(d) Neither Tommy Liles nor Harrod advised Barbara Liles of Harrod's representation of Tommy Liles in the divorce proceeding until after the execution of documents on May 11, 1981

3. Because of the conduct of Tommy Liles and Harrod, Barbara Liles was not properly represented in the divorce action and did not receive nor have an opportunity to receive proper consultation as to her rights in the

proceeding.

4. As a result of the conspiracy to defraud Barbara Liles of her marital assets, the property settlement agreement of May 11, 1981, shall be set aside and the marital property shall be returned to the marital corpus and distributed in accordance with the Court's final judgment and decree of this date.

5. [Here the court discussed the condition of the parties in the light of the factors listed in Ark. Stat. Ann. § 34-1214(A)(1) (Supp. 1985)]

6. For the reasons set forth in paragraph 5 above, the marital corpus shall be divided equally, except as stated below. The corpus shall include all proceeds from the Rowan settlement, including the remitted attorneys' fees and expenses; all real property owned by the parties as of May 11, 1981; and all personal property except personal items, mementos, effects and clothing, these items being the personal property of the respective party. In addition to his personal items, Tommy Liles shall be credited $10,000 as a set-off for future medical expenses and shall be credited $6,928.63 as a set-off for amounts paid on behalf of Barbara Liles and/or payments of marital debts since May 11, 1981.

7. The "in terrorem" clause in the addendum to the trust agreement shall be set aside because of the conspiratorial and fraudulent acts of Tommy Liles and Harrod.

8. A court of equity cannot award punitive damages and, therefore, the punitive damages claim of Barbara Liles shall be dismissed.

9. Harrod was not negligent in failing to calculate the amount of attorneys' fees and expenses that should have been paid from the initial $400,000 lump sum settlement payment.

10. Harrod and Tommy Liles did not commit fraud or enter into a conspiracy with the intent to defraud Barbara Liles of her marital assets by consenting to the structured settlement on May 2, 1981.

11. Because of his dual representation and fraudulent conduct, Harrod shall be required to return to the marital corpus the $10,000 fee he received for preparing the property settlement agreement, addendum to trust, and entry of appearance.

12. Because he did not account for $20 a month in disbursed trust proceeds, Harrod shall be required to return $100 to the marital corpus.

13. As a proximate result of Tommy Liles and Harrod's conspiratorial and fraudulent acts, Barbara Liles has sustained compensatory damages in an amount equal to her attorney's fees, costs and expenses in litigating this action. The court finds that the reasonable amount of Barbara Liles' fees, costs and expenses is $31,318.09.

14. These findings of fact and conclusions of law shall be incorporated by reference into the Court's final judgment and decree of this date.

1. Tommy Liles's Appeal

Tommy contends the evidence was insufficient to support the chancellor's finding of fraud by him or Harrod in the procurement of the property settlement agreement. He contends it was thus error to set aside the earlier decree which incorporated the agreement. He also contends reversal is in order because neither the Jones Act award, to the extent it represents reparation for a loss of Tommy's physical health, nor the remitted attorney's fee is marital property. Even if they are marital property, he argues, the virtually equal division was inequitable. He also contends it was error for the chancellor not to have upheld the forfeiture clause in the trust addendum.

a. Evidence of Fraud

The appellant, Tommy Liles, misperceives the standard of review on this issue. We affirm the factual determinations of the chancellor unless they are clearly erroneous. Ark. R. Civ. P. 52(a).

Given the showing that Harrod was having Barbara's conduct investigated in preparation for representing Tommy in a divorce action while assuring Barbara he was her lawyer, we can

hardly say evidence of fraud on Harrod's part was lacking. As he was acting as agent of Tommy, Tommy is liable also. W. Seavy, *Agency*, § 91 (1964), notes that a principal is liable for statements by his attorney or other agent upon matters concerning which he is employed or held out to be the spokesman of the principal. *Providence-Wash. Ins. Co.* v. *Owens*, 207 S.W. 666 (Tex. Civ. App. 1918); *Chamberlin Co. of America* v. *Mayes*, 101 S.E.2d 728 (Ga. App. 1957); *Bituminous Cas. Corp.* v. *J. B. Forrest & Sons*, 209 S.E.2d 6 (Ga. App. 1974). While Harrod was not being "held out" as Tommy's agent when the misrepresentations were committed, the chancellor's finding that Harrod was representing Tommy was certainly not clearly erroneous.

b. Forfeiture Clause

[redacted] We will not address the issue of whether the forfeiture clause in the trust addendum was valid. The trust addendum was one of the items agreed to and signed by Barbara in Harrod's office just before he informed her he was representing Tommy in the divorce. The appellant correctly notes that we need not consider the question whether a chancellor may enforce a forfeiture clause if we affirm the chancellor's finding of fraud on the part of Tommy Liles.

c. Jones Act Settlement As Marital Property

The appellant, Tommy Liles, contends that, to the extent the Jones Act award compensates him for injury resulting in reparations for his personal, physical loss of his previously healthy body, it does not constitute marital property. By phrasing his point in this way, he apparently concedes that, to the extent the award represents losses other than to Tommy's physical health, e.g., lost wages or medical expenses incurred, it does constitute marital property.

[redacted] The appellant contends we should be guided by our decision in *Lowery* v. *Lowery*, 260 Ark. 128, 538 S.W.2d 36 (1976), in which we held that a Jones Act claim was not "personal property" and thus was not subject to division pursuant to the predecessor of the current Ark. Stat. Ann. § 34-1214 (Supp. 1985). In *Goode* v. *Goode*, 286 Ark. 463, 692 S.W.2d 757 (1985), we noted that *Lowery* v. *Lowery, supra*, no longer governs with respect to the question whether a personal injury judgment could

be marital property, as it was decided long before the landmark case of *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), where we emphasized that all property acquired by either spouse subsequent to marriage becomes marital property unless it is specifically excepted by the statute. Moreover, in *Lowery* v. *Lowery, supra*, we were considering whether a wholly unliquidated Jones Act claim was subject to the marital rights of the spouse of the claimant upon divorce. Here, the claim is liquidated, but part of the judgment is to be received in the future pursuant to the structured settlement. The amount to be received from Aetna is more "liquidated" than was the workers' compensation claim we held to have been marital property in *Goode* v. *Goode, supra.*

Nor does it concern us that some of the money comprising the judgment may have been to compensate Tommy for the harm to his body, as opposed to lost wages and medical expenses. We pointed out in *Goode* v. *Goode, supra*, that the chancellor may take into consideration the health of the parties in dividing marital property in accordance with the statute. If we were to hold, as some jurisdictions, *see*, e.g., *Amato* v. *Amato*, 180 N.J. Super. 212, 434 A.2d 639 (1981), that the portion of a personal injury damages award specifically attributable to pain and suffering and bodily harm is so personal to the injured person that it may not be considered marital property, the chancellor would be faced with parsing a general, personal injury verdict to determine its parts, an often impossible task. What if the personal injury judgment occurred some years before the divorce; could we reasonably expect the chancellor in the divorce litigation to trace the portion specifically attributable to other than lost wages and medical expenses? Should we hold that an accompanying spousal loss of consortium recovery is personal to the spouse whose right to consortium was violated and thus not marital property? To do these things would effectively create another exception to add to the list in § 34-1214(A)(1), and we are not empowered to do so. In *Gan* v. *Gan*, 83 Ill. App. 3d 265, 404 N.E.2d 306 (1980), an Illinois court of appeals was faced with the same question while interpreting a statute much like § 34-1214. The court said "[t]he husband's personal injury settlement does not fit within any of the exceptions to marital property enumerated in the Act [404 N.E.2d at 309]." Responding to the husband's argument that his wife was, in effect, being allowed to take a part of his "being," the

court said:

> We think the husband misreads the purpose of the statute. It does not declare, in this case, that the personal injury settlement proceeds are to be awarded to the wife, in whole or in part. It provides merely that those funds are marital property. [404 N.E.2d at 309.]

d. Remitted Attorney Fees

Several months after the divorce, Tommy sought and received a remittitur of attorney fees through the U. S. District Court in which his Jones Act case was tried. Although we do not have the federal court order before us, it is clear from the appellant's brief that the fees were paid out of the judgment. They, therefore, were a part of the judgment to which the attorneys were mistakenly held to have been entitled until Tommy pursued the remittitur.

In his initial brief, Tommy cited only *Lowery* v. *Lowery, supra*, as his basis for claiming the returned fees belonged solely to him. We need not repeat what we said above with respect to that case. In his reply brief, Tommy again argues the fees were no more than a contingent claim during the marriage and not to be considered marital property, citing our decision in the first appeal of *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983). There we held that fees earned by an attorney during marriage but not collected by him until after divorce were not marital property. Again that opinion preceded *Day* v. *Day, supra*, and was based on cases overruled by *Day* v. *Day, supra*. Given the same situation, we might now reach a different decision. However, we need not make that determination in this case because the fees remitted here were no more than a part of the Jones Act judgment which the federal court found should have been awarded to Tommy while he was still married to Barbara. The chancellor was thus correct to include them in the marital property with the rest of the judgment proceeds.

e. Almost Equal Division

Tommy Liles contends the chancellor abused his discretion by dividing the assets between him and Barbara equally. He cites the chancellor's finding that while Barbara is able to continue working as a nurse, Tommy may not be able to return to work as a

seaman. He contends that, to the extent the chancellor considered Barbara's contribution in nursing Tommy back to health, it was not a "factor [which] should entitle her to receive half his income for the rest of his life."

Section 34-1214(A)(1) provides, in part:

> All marital property shall be distributed one-half [½] to each party unless the court finds such a division to be inequitable, in which event the court shall make some other division that the court deems equitable taking into consideration (1) the length of the marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker; and (9) the federal income tax consequences of the Court's division of 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.

The chancellor did not divide the Jones Act award precisely equally. He allowed $10,000 to be set aside for Tommy's future medical expenses. The chancellor's excellent and thorough letter opinion included discussion of each of the statutory factors to be considered upon unequal division. One of the statements in the opinion was as follows:

> Age, health, and station in life of the parties: Barbara Liles was 45 years old and Tommy Liles was 42 years old at the time of this hearing. The health of both appears to be average, although Tommy Liles may be unable to perform some manual labor because of his injury. However, he intended to buy and restore antique cars, invest in grocery stores, and pilot an airplane up and down the U. S. coast in search of similarly injured seamen. Barbara Liles is a nurse and apparently has the health to continue this type of work. The station in life of both parties has been enhanced by the

personal injury award and it appears that both would enjoy the same station in life with an equitable division of the settlement.

The chancellor did not abuse his discretion. His finding that the equal division of the property, with the one exception noted, would result in equality of lifestyles for the parties despite Barbara's continuing ability to engage in her profession and Tommy's probable inability to engage in his likewise fully supports the decree, and we will not disturb it. *See Ford* v. *Ford*, 272 Ark. 506, 616 S.W.2d 3 (1981).

2. Dave Harrod's Appeal

Harrod contends the judgment in Barbara's favor in the amount of her costs and attorney fee must be set aside because her claim was a deceit action of which the chancery court lacked subject matter jurisdiction. He also argues there was no substantial evidence to show his actions were the proximate cause of any injury suffered by Barbara and that, absent statutory authority, a tort claimant cannot recover her attorney's fee from a tortfeasor.

a. Subject Matter Jurisdiction

Harrod suggests that the chancellor lacked jurisdiction to award damages to Barbara for the fraud he was found to have perpetrated against her in connection with the divorce litigation. He made no motion to transfer the claim to the circuit court and did not demand a trial by jury. He contends he may nevertheless raise the issue on appeal because the question is one of subject matter jurisdiction which may be raised at any time.

For the proposition that a tort claim may not be tried in chancery court, Harrod cites *Spitzer* v. *Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964), and *Gorchik* v. *Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984). In the *Spitzer* case the plaintiff sued in chancery court, asking that certain allegedly fraudulent conveyances be set aside. He also asked the chancellor to adjudicate his tort claim against the defendant who was apparently trying to get rid of all his property in anticipation of a judgment in the tort action favorable to the plaintiff. The chancellor issued a temporary order restraining the defendant

from conveying his property other than in the normal course of business and then transferred the tort claim to the circuit court. On appeal, the plaintiff-appellant contended the chancellor erred in transferring the tort claim to the circuit court.

Our opinion in the *Spitzer* case interpreted Ark. Stat. Ann. § 68-1308 (Repl. 1979), which states:

> In suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony so that only one (1) suit shall be necessary in order to obtain proper relief.

The appellant argued the statute required the chancellor to hear the tort claim, citing *Horstmann* v. *LaFargue*, 140 Ark. 558, 215 S.W. 729 (1919), which had so interpreted the statute. We overruled the *Horstmann* case in the *Spitzer* case and said:

> Upon reconsidering the matter we are convinced that our conclusion in the *Horstmann* case was wrong. Before the adoption of the statute in question it was necessary for a plaintiff to obtain a judgment at law before he could bring suit in equity to avoid a fraudulent conveyance. We think it clear that the statute was concerned only with the avoidance of fraudulent conveyances and was intended only to permit the plaintiff to obtain that relief (described in the act as "the proper relief") in a single suit. If the legislature had intended to bring about such a drastic change in our law as that of permitting personal injury actions to be tried in equity *as a matter of right*, we think that intention would have been stated in language too plain to be misunderstood. It certainly was not so stated. [237 Ark. at 528, 374 S.W.2d at 813; emphasis added]

Thus, in the *Spitzer* case, we were considering whether a statute made a tort action triable in the chancery court as a matter of right. That is not the issue before us now. Here the chancellor took jurisdiction of the fraud claim. We are not considering whether the plaintiff had a right to have the claim in chancery rather than the circuit court; rather the issue is whether the chancellor had the *power* to determine the matter.

The power issue, i.e., subject matter jurisdiction, was the issue in *Gorchik* v. *Gorchik, supra.* In that divorce case, a chancellor had awarded a sum to the husband which partially represented his claim against his wife for having shot him during the pendency of the divorce proceedings. Neither party raised the issue but the court of appeals, on its own motion, reversed that part of the decree. The court correctly cited *Hilburn* v. *1st State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976), for the proposition that the question of subject matter jurisdiction is always open and may be raised by the court on appeal. However, the court then concluded on the basis of *Spitzer* v. *Barnhill, supra*, that the chancery court could not, through exercise of the equity clean-up doctrine, have subject matter jurisdiction of a tort claim as noted above. That was not the holding of *Spitzer* v. *Barnhill. Gorchik* v. *Gorchik, supra*, is thus overruled.

An ancillary citation in *Gorchik* v. *Gorchik, supra*, was *Chamberlain* v. *Newton County*, 266 Ark. 516, 587 S.W.2d 4 (1979). That case was somewhat more on point. The plaintiff-appellant at first sought to enjoin the county from using a road it had recently constructed on her land without permission from or compensation to her. She ultimately amended her complaint to ask only for damages. Our opinion went to some length to point out that she no longer claimed the right to an equitable remedy, and thus the chancery court lacked jurisdiction because she was merely asking for tort (trespass) relief. There was no equitable relief being sought to which the tort claim might have been considered incidental for the purpose of exercising the clean-up doctrine.

With *Chamberlain* v. *Newton County, supra*, we must compare *Bierbaum* v. *City of Hamburg*, 262 Ark. 532, 559 S.W.2d 20 (1977). In that case, the appellant gave the city land on which to build a pumping station, but the city built it on other land owned by the appellant. The appellant sought an injunction to prevent the city from continuing to operate the pumping station. The city counter-claimed to condemn the land on which the station had been built. The chancellor denied the injunction and, recognizing that the only issue was the amount of compensation to which the appellant was entitled, transferred the case to the circuit court for a determination of the appellant's damages. The appellant contended on appeal that the chancellor should

have retained the case to determine the damages. We said:

> Normally a landowner should not be denied the right for a jury to assess damages in a condemnation case. However, there are circumstances where a chancery court may assess damages in a condemnation case. This is such a case. First, the landowner filed a proper lawsuit in chancery court and, therefore, jurisdiction was properly obtained. Second, the public condemning authority, in this case the city, asked the court to condemn the land and assess damages. There was no objection by the landowner to the chancellor setting damages although damages were not what the landowner wanted. Third, the court on its own motion transferred the case to circuit court; the landowner did not ask for a jury trial on damages. We feel all these reasons were good cause for the chancellor to maintain jurisdiction and decide all issues in the case under the doctrine that once a chancery court acquires jurisdiction for one purpose it may decide all other issues. This doctrine is commonly referred to as the "clean-up" doctrine. *Selle* v. *City of Fayetteville*, 207 Ark. 966, 184 S.W.2d 58 (1944). [262 Ark. at 534; 559 S.W.2d at 21 and 22.]

Thus we held that the chancellor not only may determine the damages, or action-at-law, aspect of the case but must do so absent any request that the case be transferred, and must do so despite the prospect of granting any equitable remedy having long since faded away.

As we pointed out most recently in *Crittenden County* v. *Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984), when the issue is whether the chancery court has jurisdiction because the plaintiff lacks an adequate remedy at law, we will not allow it to be raised for the first time on appeal. We noted it is only when the court of equity is "wholly incompetent" to consider the matter before it will we permit the issue of competency to be raised for the first time on appeal. *See also Whitten Developments, Inc.* v. *Agee*, 256 Ark. 968, 511 S.W.2d 466 (1974).

Viewed together, these cases demonstrate that we have come to the position that unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to

be one of propriety rather than one of subject matter jurisdiction. We will not raise the issue ourselves, and we will not permit a party to raise it here unless it was raised in the trial court.

Of course, where the exclusive jurisdiction to adjudicate a matter has been placed by the constitution or by statute in some other court, such as probate matters in the probate court or bastardy proceedings in the county court, the question of subject matter jurisdiction may not be waived and the chancery court is totally without power.

Harrod contends the jurisdiction of the chancellor to set aside the property settlement agreement between Barbara and Tommy cannot be used to support hearing the tort claim against him because he was not a necessary party to that action. While that is so, it overlooks the other actions taken by the chancellor. The chancellor set aside the trust addendum and conducted an accounting of Harrod's actions as trustee. We do not hold, or even consider, whether the tort claim was so incidental to these clearly equitable remedies as to fall within the chancellor's power pursuant to the clean-up doctrine. See *Stolz* v. *Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975). We hold that the question is not one of subject matter jurisdiction, and the failure of Harrod to move for a transfer of the case or otherwise question the propriety of the chancellor hearing the case waived the issue, and it may not be raised for the first time on appeal.

b. Proximate Cause

Harrod argues that his misconduct, as described by the chancellor, was not the proximate cause of the expense to which Barbara was put in having the property settlement set aside. His contention is that because this court had not yet decided *Day* v. *Day, supra*, Barbara got a really good deal in the property settlement he had arranged, as she was to receive $20,000 in cash which came from Tommy's Jones Act settlement to which she was not entitled.

That argument misses entirely the point that Harrod's fraud and professional misconduct were the bases for setting the property settlement agreement aside. Whether Barbara was getting a good deal, in Harrod's opinion, under the law as it existed in 1981, is irrelevant to the setting aside of the agreement

in 1985. The damages awarded to Barbara were to compensate her for the expense she incurred in having the agreement set aside. The reason for setting aside was the fraud perpetrated by Tommy Liles and Harrod upon her in the procurement of the agreement. The causal relationship between the conduct of Harrod and the injury to Barbara is obvious.

c. Attorney Fee Recovery

In arguing that Barbara may not recover her attorney's fee against him, Harrod cites cases, *e.g.*, *Clawson* v. *Rye*, 281 Ark. 8, 661 S.W.2d 354 (1983), in which we have adopted the familiar "American rule" that a litigant may not recover an attorney fee in a tort action unless it is authorized specifically by statute or rule of court. In this case, however, Barbara does not seek to recover her attorney's fee and costs expended to pursue damages in a tort claim against Harrod. Rather, the attorney fee and costs sought here comprise the damages she seeks. Her claim against Harrod results from her having to sue Tommy as a result of Harrod's misconduct.

[redacted] The Restatement (Second) of Torts, § 914(2) (1979), after stating the "American rule" in subsection (1), provides:

> (2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

We have applied the same principle in breach of warranty title litigation. *Fox* v. *Pinson*, 182 Ark. 936, 34 S.W.2d 459 (1930). *Cf. May* v. *Edwards*, 258 Ark. 871, 529 S.W.2d 647 (1975). *See also Wilshire Oil Company of Texas* v. *Riffle*, 409 F.2d 1277 (5th Cir. 1969). Thus, if the action against Harrod were merely one in tort for deceit, we would allow Barbara to recover her attorney's fee and costs incidental to her suit against Tommy made necessary by Harrod's tortious conduct. In some jurisdictions it has been held that damages may not be recovered for costs and attorneys fees unless they are pursued in a subsequent, separate litigation. *See McNeill* v. *Allen*, 534 P.2d 813 (Colo. App. 1975); *Powell* v. *Narried*, 463 S.W.2d 43 (Tex. Civ. App. 1971). We see

no need to apply that requirement here, because, as we will note below, there are ample reasons for awarding the amount of the fee against both Tommy and Harrod.

There are other reasons to allow the fee even to the extent it represents the expenditure to which Barbara was put not just in her suit against Tommy but in suing Harrod along with Tommy. The chancellor conducted a fiduciary accounting with respect to Harrod's performance as trustee of the Tommy Liles trust. When an action is brought successfully against a trustee for breach of his trust, the award of an attorney's fee to the plaintiff is proper. *McPherson* v. *McPherson*, 258 Ark. 257, 523 S.W.2d 623 (1975).

While it is not relevant to Harrod's appeal, we note that the effect of Barbara's action to set aside the property settlement agreement was to reopen the divorce action against her. The award of her attorney's fee against Tommy was thus also appropriate, as such an award is within the chancellor's discretion in a domestic relations case. *Lytle* v. *Lytle*, 266 Ark. 124, 583 S.W.2d 1 (1979).

We find no error in awarding damages in the amount of Barbara's costs and her attorney's fee against Tommy and Harrod jointly and severally.

Another good reason for subjecting Harrod to liability is his departure from the ethical standards to which the court requires its officers to adhere. Harrod's attorney informed us during oral argument of this case that Harrod had been disciplined by our Committee on Professional Conduct as a result of his actions in the matter before us. While the letter of reprimand mentioned by Harrod's attorney hardly seems a sufficient punishment for Harrod's actions, we do not know the evidence our committee had before it, and that matter is not before us now for adjudication. We point out, however, that if there were no other reason whatever for sustaining the damages award against Harrod, we would do so on the basis of the chancellor's inherent authority to hold an officer of the court liable for an injury caused by his professional malfeasance.

Affirmed.

PURTLE, J., not participating.

Larry STOKES and Sylvia STOKES d/b/a THE WESTERN SHOP *v.* Sybil HARRELL, d/b/a THE HARRELL AGENCY

85-204 711 S.W.2d 755

Supreme Court of Arkansas
Opinion delivered June 2, 1986

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellants.

Norwood Phillips and *Laser, Sharp & Mayes, P.A.*, for appellee.

STEELE HAYS, Justice. Larry and Sylvia Stokes have appealed from a directed verdict on behalf of Sybil Harrell, doing business as The Harrell Agency.

In 1980 the Stokeses borrowed $25,000 and opened The Western Shop in Hampton, Arkansas. At the same time the

Stokeses insured the contents for $20,000 from loss by fire through The Harrell Agency and a policy was issued by Granite State Insurance Company. About three years later Mr. Stokes told Mrs. Harrell that he wanted to increase the coverage to $50,000 and on April 11, 1983 a new policy was issued by Granite State in the amount of $50,000. On April 27 the shop was totally destroyed by fire.

The Stokeses and Granite State were unable to agree on the value of the contents and the Stokeses filed this action against Granite State and Sybil Harrell. The complaint asserted the plaintiffs had requested The Harrell Agency to obtain coverage based on the replacement cost of the contents, whereas the coverage provided was based on actual cash value. It alleged that if the recovery against Granite was less than the replacement cost of $50,000 the Stokeses were entitled to judgment for the difference against Sybil Harrell. At the close of the trial the court granted a motion for a directed verdict on the complaint against Sybil Harrell and the jury returned a verdict against Granite for $39,977.50.

On appeal the Stokeses urge that the trial court should not have granted a directed verdict on behalf of Sybil Harrell, but should have submitted that issue to the jury. We find no merit in their contention.

Appellants cite the rule that a directed verdict will be upheld on appeal only if reasonable minds could not reach different conclusions as to the proof, which must be judged in a light most favorable to the party against whom the motion is granted and after all reasonable inferences are drawn consistent with such proof. *Bussey* v. *Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (1980); *Bird* v. *Bird*, 254 Ark. 858, 497 S.W.2d 659 (1973).

The testimony revealed the Stokeses never asked for replacement coverage, but merely assumed that is what they had received when they took out the policy. The Stokeses amended their complaint during trial to allege negligence on the part of Mrs. Harrell for failing to inform them of the difference between replacement coverage and coverage based on actual cash value. Hence, the issue on appeal is whether Mrs. Harrell was under a duty to inform the Stokeses of replacement coverage, under the circumstances of this case.

We have not dealt with this question previously, but in some jurisdictions, under appropriate circumstances, courts have found such a duty on the part of the agent. See *Bicknell, Inc.* v. *Havlin*, 9 Mass. App. 497, 402 N.E.2d 116 (1980); *Hardt* v. *Brink*, 192 F.Supp. 879 (W.D. Wash. 1961). However in those cases there was an established and ongoing relationship between the insured and the agent over a period of time, with the agent actively involved in the client's business affairs, and regularly giving advice and assistance in maintaining the proper coverage for the client. It was reasonable under those circumstances to find a special relationship, where the insured had come to expect and to rely on such advice, with a corresponding duty by the agent to advise. Other examples of "special circumstances" may be found in Barnett, Responsibility of Insurance Agents and Brokers (Matthew Bender & Co. 1979) § 3.12[3].

In general, those cases have not found a large following among the courts, rather, there is some tendency to adhere to the long established rule placing a responsibility on the insured to "educate himself concerning matters of insurance coverage." *Nowell* v. *Dawn-Leavitt Agency, Inc.*, 127 Ariz. 48, 617 P.2d 1164 (1980). The court in *Nowell* said:

> An insurance contract arises out of the insured's desire to be protected in a particular manner against a specific kind of obligation. It is his responsibility to adequately convey, albeit in laymen's terms, the nature of his wishes, in order to obtain the protection requested . . . An agent may point out to him the advantages of additional coverage and may ferret out additional facts from the insured applicable to such coverage, but he is under no obligation to do so; nor is the insured under any obligation to respond. *Nowell, supra*, citing *Hill* v. *Grandey*, 132 Vt. 460, 321 A.2d 28 (1974).

See also Appleman, Insurance Laws and Practice (1981) V. 16A § 8831, p. 64. (Ordinarily there is no duty to advise the insured merely because of the agency relationship).

Under the circumstances of this case, we find nothing in the nature of a special relationship and we conclude there was no duty on the part of Mrs. Harrell to advise the Stokeses. The evidence revealed there had been no previous dealings between

them, and when the insurance was applied for there was only minimum contact. Mr. Stokes testified he had a brief conversation with Mrs. Harrell when he first applied for insurance, telling her he wanted coverage for $25,000, that "she said okay, and that was the end of it." He testified that when he raised his coverage about three years later, he briefly stopped by the agency on his way to the bank, told Mrs. Harrell to cover him for $50,000 and she just said "okay." He made no inquiries about coverage, he simply asked that his policy limits be raised to $50,000 and made no further comments to her regarding the insurance. We also note that Mrs. Harrell testified that while replacement coverage was available at a higher premium, it was her custom to obtain coverage based on actual cash value.

There is no merit in appellant's contention that the jury would have any basis for finding a duty on the part of Mrs. Harrell to advise. Under these circumstances, any responsibility to obtain further information as to coverage was on the Stokeses. See *Nowell, supra.* The trial court was correct in granting a directed verdict.

Affirmed.

PURTLE, J., not participating.

GRIFFIN-PAYNE, INC. *v.* UNION BANK OF BENTON

85-304 710 S.W.2d 201

Supreme Court of Arkansas
Opinion delivered June 9, 1986

Mitchell, Williams, Selig, Jackson & Tucker, by: *James E. Smith, Jr.* and *Susan Gunter*, for appellant.

House, Wallace, Nelson & Jewell, P.A., by: *James M. Wegener*, for appellee.

JACK HOLT, JR., Chief Justice. Union Bank of Benton, appellee, was granted a summary judgment in its lawsuit over a promissory note against Griffin-Payne, Inc., appellant. Appellant does not argue the merits of the action on the note, but rather contends that the trial court erred in striking its answer pursuant to Ark. Stat. Ann. § 27-1142 (Supp. 1985), and that a local court rule pertaining to motions for summary judgments was not followed by the appellee. We affirm the trial court because none of the issues argued on appeal were raised below. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c).

Appellant was given ten days to respond to appellee's motion to strike appellant's answer and for summary judgment. No response was made and appellant's counsel did not attend the hearing on the motion. We have repeatedly held that we will not consider issues raised for the first time on appeal, and that we do not have the plain error rule. *Sun Gas Liquids Co.* v. *The Helena National Bank*, 276 Ark. 173, 633 S.W.2d 38 (1982); *Wilson* v. *Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980).

To avoid confusion, it should be noted that § 27-1142, which allowed a trial court to strike the answer of a defendant if it failed to include an affidavit of merit in response to a plaintiff's affidavit of no defense, is no longer the rule in Arkansas. We recently held that this statute does not conform with Ark. R. Civ. P. Rule 8, and is therefore deemed to be superseded. *Borg-Warner Acceptance Corp.* v. *Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986). No challenge to the summary judgment was made by appellant on this basis at trial or on appeal.

Affirmed.

Robert HOFFMAN *v.* STATE of Arkansas

86-14 711 S.W.2d 151

Supreme Court of Arkansas
Opinion delivered June 9, 1986

Evans & Evans, by: *James E. Evans, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. On February 24, 1984, the appellant offered a plea of guilty to theft by deception which was taken under advisement by the trial court for a period of seven years conditioned upon the following: good behavior, payment of

court costs and restitution in the amount of $57,040.03 payable in $1,000.00 monthly installments. On April 1, 1985, the state filed a motion for revocation of the advisory sentence because of the appellant's failure to make all of the scheduled restitution payments. On July 9, 1985, the court conducted a hearing at which time it found the appellant had violated the terms and conditions of the court judgment of February 24th. The court ordered that five and one-half years of the seven year sentence to the Arkansas Department of Correction, theretofore deferred, be pronounced upon the appellant. It is from that decision that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29 (1)(c), as we are being asked to interpret an act of the General Assembly.

The appellant claims that the trial court's finding that he failed to pay restitution as ordered by the court, and that said failure was willful and without good cause, is clearly against the preponderance of the evidence, and that the revocation violated his right to equal protection.

The evidence demonstrates that when appellant entered his plea of guilty on February 24, he and his attorney set up a payment schedule for restitution of $1,000.00 per month, that figure coming from his calculations and that of his attorney. It was acknowledged by appellant that he wanted to pay at that rate. At the time of his plea, the appellant executed and tendered a plea questionnaire to the trial court in which he acknowledged that, upon his plea of guilty, the prosecuting attorney would recommend that the court take such plea "under advisement for seven years, paid at $1,000.00 a month then dismissed when paid off." Thereupon, the trial court entered its judgment stating that the appellant "offered a plea of guilty, which plea was taken under advisement by the Court". The court further:

> ORDERED AND ADJUDGED that the plea of guilty of Theft by Deception be and is hereby taken under advisement by the Court for a period of (7) year(s), and upon recommendation of the Prosecuting Attorney and conditioned upon the following:
>
> (1) That the defendant pay restitution in the amount of $57,040.03, with $1000.00 due 2-24-84, and the

> balance payable at $1000.00 per month, beginning 4-1-84.
>
> . . . .

On April 1, 1985, the state filed its motion for revocation of the advisory sentence, stating that the defendant has willfully and knowingly failed to pay all the restitution ordered, thereby violating the terms of his advisory sentence. A hearing was held on said motion on July 9, 1985 at which time the state offered evidence that the payments made by the appellant were irregular and have resulted in a total paid of $6,711.92, which is $7,288.08 less than the amount due under the payment schedule.

Appellant offered evidence that his ability to make restitution payments was limited inasmuch as his income for 1984 from his job with National Home Improvement, Inc., as evidenced by a W-2 form, was $8,211.75, and of that amount, $5,811.92 was paid in restitution. The owner of National Home Improvement, Inc., testified that appellant was a good employee and worked for him in 1984 until April of 1985. According to the owner, appellant earned approximately $1,500.00 between January and April of 1985, and $900.00 of that was sent to the court in January for payment of restitution. He further explained that in 1985 the appellant had several sales fall through because the title loans used by the company were discontinued. After April, 1985, when appellant left National Home Improvement, Inc., the owner testified that appellant tried to find a job with two car dealerships but failed. National Home Improvement, Inc., has offered to let appellant come back to work. The owner testified appellant could earn $12,000.00 to $15,000.00 during 1985.

The appellant testified that he is married and lives in Rogers, Arkansas. He owns a 1984 Toronado and a 1981 pickup truck. Previously he had another truck and two Cadillacs and sold them to apply to the loan on the car and truck. The two Cadillacs were apparently owned prior to incurring the restitution debt. The Toronado was bought in June, 1984, during the period of restitution, for $17,000. Appellant testified his wife is now unemployed and has been for two months and that he lived on her income before she lost her job. Since April, he stated he has looked for jobs in the auto sales field at car dealerships in Arkansas and Missouri. Appellant, his wife, and stepson lived in a large, rented house with a pool for $475 per month. Appellant

said his stepson paid $275 of the rent and, when he moved out, appellant and his wife moved to Rogers where they now rent a duplex for $300 a month.

Appellant asked that his sentence not be revoked and that he be allowed to pay $300 per month instead of $1,000.

[redacted] In *Culpepper* v. *State*, 268 Ark. 263, 595 S.W.2d 220 (1980), this court specifically noted that all sentences are controlled by the provisions of Ark. Stat. Ann. § 41-803 (Repl. 1977), which provides in part that "[i]f a defendant pleads . . . guilty of an offense other than capital murder, the court may suspend imposition of sentence or place the defendant on probation, in accordance with . . . [Ark. Stat. Ann.] §§ 41-1201—41-1211." Any provisions of the prior law that are inconsistent are repealed by implication. In this instance, the trial court ignored the specifics of *Culpepper* by substituting a form of court probation under the label of an "advisory sentence." Court probation, apart from that authorized by statute, is no longer available as a sentencing alternative inasmuch as it was codified under the Arkansas Criminal Code (Act 280 of 1975) in Ark. Stat. Ann. §§ 41-801—41-1351 (Repl. 1977 & Supp. 1981). *English* v. *State*, 274 Ark. 304, 626 S.W.2d 191 (1982). The same is true of "advisory sentences", and all other unauthorized forms of sentencing where the trial court takes the defendant's plea under advisement subject to conditions, which are in essence, terms of probation or suspended sentences. The trial court was in error in its sentencing. However, the sentence was not objected to below or made a subject matter of this appeal. Since we do not have the plain error rule, we will not base our decision on the improper sentence. It is the proper subject matter for a petition for Rule 37.

Accordingly, we will view the court's findings as though the court intended to sentence the appellant to seven years, which were suspended conditioned upon payment of restitution. This is a logical assumption in light of the fact the court, in its order of July 9th ordered and adjudged "that five and one half (5 ½) years of the seven (7) year sentence to the Arkansas Department of Correction heretofore deferred be pronounced upon the defendant."

[redacted] Arkansas Stat. Ann. § 41-1209 (Repl. 1977) provides in pertinent part:

> (4) If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.

In a hearing to revoke the burden is upon the state to prove the violation of a condition by a preponderance of the evidence, and on appellate review the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Cavin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984); *Pearson* v. *State*, 262 Ark. 513, 558 S.W.2d 149 (1977). A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony. In those areas we defer to the trial judge's superior position. *Cavin, supra.*

The trial court's decision is not clearly against a preponderance of the evidence. Appellant's failure to make the ordered payments, in light of his standard of living, his purchase of a $17,000 car, and the fact that he did not search for a job outside the field of auto sales, can be construed as an inexcusable failure to comply with the conditions of his suspension.

Appellant's equal protection argument is based on holdings by the U.S. Supreme Court that the state cannot "impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate* v. *Short*, 401 U.S. 395, 398 (1971); *see also Williams* v. *Illinois*, 399 U.S. 235 (1970). The Supreme Court has also held, however, that:

> [I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment. . . .

Bearden v. *Georgia*, 461 U.S. 660, 672 (1983). Here, the appellant, with the assistance of counsel, tendered his own schedule of payment for restitution in exchange for a suspended sentence and then made sporadic payments. The trial court

found, in essence, that appellant "failed to make sufficient bona fide efforts legally to acquire the resources to pay." Accordingly, there was no equal protection violation.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion clearly and correctly states that the original plea by appellant was *taken under advisement* on February 24, 1984. The exact words of the trial court were, "[T]he plea of guilty of theft by deception be and is hereby taken under advisement by the Court for the period of (7) year(s), and upon recommendation of the prosecuting attorney, and conditioned upon the following . . . . "One of the conditions was that the appellant pay restitution at the rate of $1,000 per month."

The appellant did not pay the scheduled payments in full and the state filed a motion to revoke the *advisory sentence*. On July 9, 1985, a hearing was held and the court announced that "five and one half (5 ½) years of the seven (7) year sentence to the Arkansas Department of Correction heretofore deferred be pronounced upon the defendant."

Both this Court and the trial court have changed horses in the middle of the stream. The appellant was not sentenced to any term in the Department of Corrections. Sentence was unequivocally and unmistakably deferred—not pronounced. How can a court revoke a sentence which has not been imposed? The majority attempts to wade the illegal sentence issue on the grounds that it was not objected to below. There was no sentence to object to until the present sentence was pronounced. The appellant fought the revocation as hard as he could in the trial court then lodged this appeal. How could he object more?

The factual issues are not stated as fully as I would like. Therefore, I will enumerate additional facts which I think should be considered. From the date of the plea, February 24, 1984, until the end of the year, the appellant earned (according to his Form 1099) $8,211.75 and paid $5,811.92 into the trial court as restitution. The balance of his wages, $2,399.83 as paid to other creditors. Appellant did not receive any of these funds. During 1985, up to the time of the hearing, the appellant earned

$1,500.00 and $900.00 of it went directly to the restitution fund and the balance, except for $100, was garnished by another creditor. Between the time of the agreement to pay $1,000 per month and the date of the unauthorized revocation, the appellant earned $9,711.75 and all of it except $100 went to creditors, including the restitution fund.

It is true appellant was unemployed during part of 1985. However, his former employer supported appellant's statement that the unemployment was due to lack of business and not by fault of the appellant. Appellant testified that he had been trying to find work in the automobile sales field but had been unsuccessful. He was reemployed by his previous employer at the time of the hearing and it was this employment which paid him $1,500 to 1985.

During part of the appellant's unemployment he lived in a house, which had a swimming pool. His wife paid part of the $475 monthly rent and a relative, who also lived in the house, paid the balance of the rent. Appellant had two Cadillacs when he pled guilty but has since disposed of them for the balance owed on them. His wife purchased another automobile in 1984, but it was on credit and she used it in her business. The majority opinion erroneously indicates that the vehicle was transferred to the appellant.

On page four of the slip opinion the court correctly sets forth the controlling Arkansas Statute relevant to revocation of suspension, which did not occur in this case. The Statutory requirement is that there be an *inexcusable failure* by the defendant to pay what he has agreed to pay. Otherwise such revocation would amount to imprisonment for debt. *Bearden* v. *Georgia*, 461 U.S. 660 (1983). Also, see *Tate* v. *Short*, 401 U.S. 395 (1971). The appellant herein may have entered into the agreement voluntarily but the prosecuting attorney and the court were parties to the agreement.

The remarks and finding of the court clearly reveal this revocation was not based upon the facts and the law. The trial court stated in part as follows:

> All right, gentlemen, let me start by saying this Court is not in the collection business, the civil debt collection business.

> It never has been; I do not intend to ever put it in that position at this time.
>
> . . . .
>
> Now, as you gentlemen know, it has been the position of this court that nonpayment of restitution is looked at very seriously and very critically by this court . . . .
>
> . . . .
>
> [I] guess what I am trying to say is, it is apparent to me, at this juncture of the case, Mr. Hoffman overstated his position or ability when he entered his plea. He had a job and he has not incurred more debts, he says.
>
> I think it is simply a case of perhaps attempting to bore with too big of an auger, continuing to live in a lifestyle he has enjoyed, and perhaps it was just too high for his present situation, and he continued in this manner until the wheels just fell off. It is just as simple as that.
>
> . . . .
>
> [T]here was no way under the sun that he was going to be able to make $1,000 restitution payments back when he entered the plea in '84, and I think he knew it or should have known it.
>
> . . . .

The court went on to say that appellant was unemployed and had been unable to find a job in the car sales business but that there must be other jobs out there he could get. The court further allowed that it was a hopeless statement from the beginning and restitution was like spitting in the wind.

It is my opinion the court should have allowed the appellant an opportunity to make payments within his range of ability. If the court knew from the beginning that the payment schedule could not be kept another one should have been approved. In my opinion there has been absolutely no showing that appellant willfully refused to pay his obligation under the agreement. Now, nobody will receive anything and the state will be out much time and expense in keeping the appellant. There are no winners in this case—everyone, including the taxpayers, loses.

I would reverse and remand to the trial court for consideration of alternatives to the imprisonment of the appellant.

Timmy TARRY *v.* STATE of Arkansas

CR 86-18 710 S.W.2d 202

Supreme Court of Arkansas
Opinion delivered June 9, 1986
[Rehearing denied July 14, 1986.*]

* Holt, C.J., not participating.

L. Gene Worsham, for appellant.

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

GEORGE ROSE SMITH, Justice. The amended information in this case charged the appellant, Timmy Tarry, with burglary, robbery, and two counts of rape. The jury returned four separate verdicts, finding Tarry guilty of burglary, robbery, rape by deviate sexual activity, and rape by sexual intercourse. The jury fixed the sentences at 20 years each for the burglary and robbery and forty years each for the two rapes. The judge allowed the two 20-year sentences to run concurrently, but otherwise the sentences are to run consecutively.

For reversal it is argued that there should have been only one conviction for the crime of rape and that the judge committed reversible error in communicating with the jury outside the presence of the accused. We agree with the appellant's argument on the second point, but we must discuss the first point to the extent that the same issues will arise at a new trial.

Each side called several witnesses, but the testimony relevant to the first issue is that of the prosecutrix. She testified that she awoke at about 2:00 a.m. to find Tarry standing nude beside her bed. She recognized him, having known him for several years. When she screamed, he put his hand over her mouth and started slapping her. He got in bed with her and began feeling her body. She fought him, but he raised her gown and tore off her underwear. He tried to rape her, but could not get an erection. He sat there for awhile and then raped her with his finger, putting it in her vagina.

The prosecutrix said that Tarry then went into the bathroom. She thought about trying to get away, but she would have had to get past him and then open three locks to get out the front door. Tarry came back and lay on top of her. She said that this time he got an erection. "He penetrated me. He raped me." He returned to the bathroom and put on his shirt and pants. After

that he twisted her arm and tried to make her give him money. Eventually she managed to escape through a door into the garage and ran next door and called the police. The State introduced a statement in which Tarry admitted that he had entered the house through an ash box connected with the fireplace, but he denied the rape. At the trial he denied having been in the house at all. The jury evidently accepted the State's version of what happened.

It is argued that since there was only one continuous episode there was only one offense of rape, not two. We do not agree. The Criminal Code provides that when the "same conduct" of the defendant may establish the commission of more than one offense, the defendant may be prosecuted for each offense. Ark. Stat. Ann. § 41-105(1)(e) (Repl. 1977). The Commentary explains that the same conduct is intended to connote the same criminal transaction. The defendant may not be convicted of more than one offense if the conduct constitutes an offense defined as a continuing course of conduct. The Commentary explains that a continuing offense is one such as nonsupport or promoting prostitution.

Rape is not defined as a continuing offense. It may consist of engaging in sexual intercourse or deviate sexual activity with another person by forcible compulsion. § 41-1803. Rape is a single crime that may be committed in either of two ways. *Cokeley* v. *State*, 288 Ark. 349, 705 S.W.2d 425 (1985). Here the prosecutrix testified that she had been raped in two different ways, and the jury so found by separate verdicts. There was not a continuing offense, for the two acts of rape were of a different nature and were separated in point of time. A separate impulse was necessary for the commission of each offense. There were two offenses. See *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980), cert. denied, 450 U.S. 1043 (1981).

It is argued that the State did not prove that the second rape was accomplished by force. Additional details may be developed at a second trial. It is also argued that the information was defective in that each of the two counts of rape charged the offense as having been committed by sexual intercourse or by deviate sexual activity. The defendant did not ask for a bill of particulars, as he could have done, and he now knows what the State's proof will be at a second trial.

The remaining issue arises from the judge's having entered the jury room. The trial was bifurcated, Tarry being charged as an habitual offender. The record shows that the jury retired for the second time, to fix the penalties. While the jury was out, the judge overruled an oral motion, not pertinent here, and then the record shifts abruptly to the subject at issue, as follows:

> The Court: With the agreement of counsel, after the jury had indicated that they had a question for the Court, the Court entered the jury room and received two questions from the foreman. The first being, the jury wants to know whether or not the sentences were to run concurrently or consecutively. Secondly, they want to know about parole eligibility of this defendant. What says the State?

For the next five pages of the record the court reporter sets out a long colloquy in which the two lawyers expressed their offhand views about what the judge should tell the jury. Both lawyers thought no information about parole could be given. The State wanted the judge to tell the jury that he would decide whether the sentences were to be concurrent or consecutive. Defense counsel thought that no information should be given. At that point the report of the incident ends as abruptly as it began. The reporter next notes that the jury returned from its deliberations with the verdicts fixing the penalties, which were handed to the judge and read into the record.

We think the implication given by the incomplete record is that the reporter recorded the colloquy in its entirety as long as the lawyers and the judge were speaking, but there is no indication of what happened when the colloquy ended. Since the whole interchange had to do with how the judge should answer the jury's two questions, we must infer that the judge went back into the jury room and answered the questions in some fashion; we do not know exactly how.

The procedure was improper and must be deemed prejudicial to the defendant. For more than a century we have had a statute which reads:

> After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must

> require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties. [Ark. Stat. Ann. § 43-2139 (Repl. 1977).]

For some years our decisions about how the trial courts should comply with the statutes were to some extent in conflict. Finally, in a unanimous opinion by Chief Justice Harris, we reviewed some of our earlier cases and declared that thenceforth the statute would be regarded as mandatory and should be strictly followed. When additional instructions are to be given, all the jurors must be called to the courtroom, with counsel being present or having been notified. *Andrews* v. *State*, 251 Ark. 279, 472 S.W.2d 86 (1971). That warning was repeated in more detail in *Jackson* v. *State*, 256 Ark. 406, 507 S.W.2d 705 (1974):

> Although we have not held, and do not intend to hold, that this right of defendant cannot be waived, we take this means of giving notice that we will carefully scrutinize every case tried after the date of our decision in *Martin* (July 23, 1973) to determine whether there has been a waiver of defendant's right to have such proceedings held only in open court, and that all reasonable doubts will be resolved by us against waiver.

Soon after the *Andrews* case we held that strict compliance with the statute was waived where the attorneys went with the judge to the jury room, everything that happened was reported in the record, and there was no possibility of prejudice. *Martin* v. *State*, 254 Ark. 1065, 497 S.W.2d 268 (1973). On the other hand, we have held that non-compliance with the statute gives rise to a presumption of prejudice and have recognized that the State has the burden of overcoming that presumption. *Williams* v. *State*, 264 Ark. 77, 568 S.W.2d 30 (1978).

In the case at bar the judge should not have gone into the jury room, even by agreement of counsel. After his first such visit he put into the record an account of what had happened, which we have copied above. If the record stopped there, it might be possible for the error to be considered harmless, for the jury's questions had not been answered. But, as we have shown, the necessary inference from the incomplete record is that there was a second visit, during which the jury's questions were answered in

some manner. Since the State has not met its burden of showing what occurred, the trial judge's violation of the statute must be deemed to have been prejudicial to the defendant.

Reversed and remanded.

WASHINGTON REGIONAL MEDICAL CENTER and Its Board of Governors *v.* MEDICAL CARE INTERNATIONAL, INC., d/b/a SURGICARE CORPORATION, et al.

85-305 711 S.W.2d 457

Supreme Court of Arkansas
Opinion delivered June 9, 1986

Gill, Skokos, Simpson, Buford & Graham, P.A., by: *Harold H. Simpson, II*, and *John W. Fink*; and *Burke & Eldridge*, by: *Thomas B. Burke*, for appellant.

Steve Clark, Att'y Gen., by: *George A. Harper*, Spec. Asst. Att'y Gen., for appellee Arkansas Dept. of Human Services and Arkansas Health Planning and Development Agency.

Hilburn, Bethune, Calhoon, Forster, Harper & Pruniski, Ltd., by: *Sam Hilburn* and *Dorcy Kyle Corbin*, for appellee Medical Care Int'l, Inc., d/b/a Surgicare Corp.

GEORGE ROSE SMITH, Justice. For the past few years there has been in progress a national effort to limit the construction of new hospitals. The movement was initiated by Congress and has been supported by legislation enacted in Arkansas and in other states, all of which participate in the program and receive federal funds for health care. In the present case we need not review the statutes, which we considered in some detail in an earlier case. *Statewide Health Coordinating Council* v. *General Hospitals of Humana*, 280 Ark. 443, 660 S.W.2d 906 (1983), cert. denied, 104 S.Ct. 2386 (1984).

The case at bar began in 1983 when the appellee, Surgicare Corporation, applied to the West Arkansas Health Planning and Development Agency for a Certificate of Need to construct an outpatient surgical center in Fayetteville. Surgicare's proposed center is to consist of three operating rooms and such recovery rooms and allied facilities as would be necessary for outpatient surgery, which means surgery that does not require the patient to spend the night at a hospital. Outpatient surgery is also referred to as ambulatory or one-day surgery.

Surgicare's application for authority to build the proposed outpatient center was opposed by the appellant, Washington Regional Medical Center, which operates a hospital in Fayetteville. That hospital has several operating rooms, in all of which both inpatient and outpatient surgery is performed. None of Washington Regional's operating rooms is dedicated solely to outpatient surgery. Consequently scheduling problems may arise, with an outpatient being "bumped" to make way for emergency surgery. Most outpatient surgery is elective and not life threatening.

Washington Regional opposed Surgicare's application on the ground that under the governing law and regulations there are already a sufficient number of operating rooms in the service area,

consisting of Washington and Benton counties. Washington Regional submitted proof, which is not disputed, of the total number of operations performed during the base year in its operating rooms and of the number of those operations that it classifies as outpatient surgery. On that basis a certain percentage of Washington Regional's operating rooms is said to be used for outpatient surgery.

Surgicare's application was disapproved by the West Arkansas Health Systems Agency, the lowest administrative level. On appeal, however, the Arkansas Health Planning and Development Agency, after a public hearing, granted the application. That action was upheld by an independent reviewing agency selected by the Governor and was affirmed on appeal to the circuit court of Washington county. Washington Regional's appeal comes to this court under Rule 29(1)(c).

Washington Regional's principal argument, presenting an issue of law, is that the administrative agency misinterpreted its own regulations in determining the existing number of "outpatient surgery operating rooms." The agency held that the only existing operating rooms to be counted are those dedicated solely to outpatient surgery. There being no such operating rooms in the area, the three operating rooms in Surgicare's proposed center will not exceed the total that is permissible for the area. Washington Regional argues that a fractional part of its multipurpose operating rooms should be counted, which would result in the new center's exceeding the permissible limit.

The controlling question is simply whether the agency's interpretation of its regulations is a reasonable one, bearing in mind that the courts concededly attach much weight to an administrative agency's interpretation of its own regulations.

The governing regulations were adopted in 1980 by the State Health Planning and Development Agency, in consultation with the Statewide Health Coordinating Council. We quote the pertinent regulations in full, down to the mathematical computation by which the basic determination is made, there being no dispute about those figures.

CRITERIA AND STANDARDS FOR OUTPATIENT SURGERY CENTERS

1. Proposed Criteria and Standards for estimating a community's need and requirements for outpatient surgery centers.

2. Proposed Criteria and Standards for reviewing proposals for changes in outpatient surgery centers.

DEFINITION:
Outpatient surgery is defined as the provision of surgical services, other than minor dental surgery, which requires the use of general or intravenous anesthetics or a period of postoperative observation, or both, and where in the opinion of the attending physician, hospitalization is not necessary.

An OUTPATIENT SURGICAL CENTER (OSC) is any facility, or part of a facility, dedicated solely to the provision of outpatient surgical services. An OSC may be either freestanding, that is, independently-operated, or hospital-operated.
A FREESTANDING, INDEPENDENTLY-OPERATED OUTPATIENT SURGICAL CENTER (FREESTANDING) is one which is physically and organizationally separated from a hospital.
A HOSPITAL-OPERATED OUTPATIENT SURGICAL CENTER is one which is organizationally controlled by a hospital. Two general types of hospital-operated OSC's are as follows:
1) HOSPITAL-OPERATED SATELLITE (SATELLITE) which is separate from the inpatient program and contained in a satellite facility located some distance from the hospital, and
2) HOSPITAL-OPERATED (HOSPITAL) which is located on hospital grounds. This type need not be physically remote from other operating rooms, but to be constructed as an outpatient surgery center it must be dedicated solely to ambulatory surgery and the facility or institution should have an organized program for the provision of outpatient surgery service in that (those) unit(s).

1. Planning

A. Determination of Need
In keeping with the requirements of P.L. 93-641, as amended by P.L. 96-79, Section 1523 (a) (1) (B) the State Agency, in consultation with the Statewide Health Coordinating Council, has determined that there is a statewide need for dedicated outpatient surgery facilities in locations throughout the State where there are sufficient number of surgical procedures to justify the existence of one or more dedicated outpatient surgery units.

Next there is a detailed methodology for an 8-step computation by which the need for outpatient surgery centers is to be determined. We emphasize that the purpose of the calculation is to determine the need for outpatient surgical centers, not for multipurpose operating rooms such as those at Washington Regional's hospital. The computation is to begin with the best obtainable information as to the population of the service area and the total number of all surgical operations performed in the selected base year. Except for those two basic facts all the computations amount to theoretical predictions for the future. The percentage of total operations that could be on an ambulatory basis is supplied by the regulations and increases by one percent a year from 1980 through 1990. The first seven steps in the computation accomplish a determination of the "estimated number of outpatient surgery operating rooms needed." There follows the eighth step, upon which the present appeal centers:

8. The number of outpatient surgery operating rooms existing is subtracted from the number shown as needed in any given year to arrive at the number of additional units needed.

When the computation is completed through step seven as to the service area now in question, the estimated number of outpatient surgery operating rooms needed is approximately four. The parties differ as to the precise figure, but the variance is immaterial. Surgicare insists that no outpatient surgery operating rooms now exist in the area; so the need exceeds the three it seeks to construct. Washington Regional argues that its proportionate use of its multipurpose operating rooms must be deter-

mined and subtracted, leaving a remainder of less than three. Washington Regional cites a recognized study of the problem, which is listed in the bibliography at the end of the regulations. That study cautions that ignoring such multipurpose facilities may inappropriately falsify the estimate of available resources. The regulations, however, do not include that factor in the computation of need.

Upon the principal question at issue we are firmly of the opinion that the agency's construction of the regulations is the only reasonable interpretation. We regard Washington Regional's argument as being without merit.

The national program for limiting the construction of hospitals had been in force for some years before lawmakers turned to outpatient surgery as a means of promoting competition and presumably reducing the overall cost of surgical operations. The regulations now in question have nothing to do with the need for multipurpose operating rooms. The regulations mention *outpatient surgical centers* again and again; their thrust is directed solely toward determining the need for centers of that nature, and in later sections of the regulations not pertinent here, toward making it certain that the centers will be adequately financed and properly operated. The appellant's entire approach, that the hospital is adequately providing outpatient surgical facilities, is outside the perimeters of the real problem.

We should mention that existing hospitals are apparently free to create their own outpatient surgical centers within their own buildings. The last of the definitions at the beginning of the Criteria and Standards defines a hospital-operated outpatient surgical center as one that need not be physically remote from other operating rooms but which must be dedicated solely to ambulatory surgery. The regulations were adopted in 1980; so Washington Regional during the ensuing three years before Surgicare filed its application might have taken steps to create its own outpatient surgical center. It did not see fit to do so.

The appellant also complains that the record does not contain a transcript of two public hearings that were held in the course of the administrative proceedings. An agency rule requires that the agency "maintain" a verbatim record of the hearing. The hearings were recorded on tape, but the tapes have not been

transcribed. The independent reviewing agency decided that the record, without the transcriptions, contained sufficient information for the issue to be determined. The appellant asks that the case be remanded for the inclusion in the record of a transcription.

There is no real merit in the appellant's contention. The tapes were maintained, but the appellant does not appear either to have requested their transcription or to have tried to obtain the tapes themselves. No question of fact is presented by the appeal. There has been not even a suggestion that a transcription would provide anything material to the issue presented. This application has already been in progress for three years. We see no reason to delay it further by a useless remand.

Affirmed.

Hal O. LEE, et al. *v.* CITY OF PINE BLUFF

85-312 710 S.W.2d 205

Supreme Court of Arkansas
Opinion delivered June 9, 1986

[redacted]

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

Robert Tolson, Jr., for appellee.

DARRELL HICKMAN, Justice. This is an annexation case involving the City of Pine Bluff. Pine Bluff sought to extend its boundaries to conform to the actual growth of the city beyond its legal limits and to encompass land needed for municipal purposes. The proposal, by way of an ordinance, included eight separate tracts of contiguous land spaced around the existing city limits. The area encompasses 9,147 acres and includes over 6,000 people. The annexation was approved at an election and a map was duly filed reflecting the new city limits. Several landowners from some of the annexed tracts filed suit protesting the annexation.

The trial court found that each tract of land in one respect or another was proper land for annexation according to Ark. Stat. Ann. § 19-307.1 (Repl. 1980). That statute provides:

> Any municipality may by vote of two-thirds of the total number of members making up its governing body 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 or horticulture purposes and the highest and best use of said lands is for agriculture or horticulture purposes; or (2) are lands upon which a new community is to be constructed with funds guaranteed in whole or in part

> by the federal government. . . . Provided, further, that if any lands are annexed which are being used exclusively for agricultural purposes, such lands may continue to be used for such purposes so long as the owner desires and shall be assessed as agricultural lands.

Land that satisfies any one of the statutory criteron may be annexed. *Holmes* v. *City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985).

Some lands used exclusively for agricultural purposes and some lands located in flood plains were included. Expert witnesses and landowners, who testified for the appellants, pointed out tracts of land or parts of tracts that were not properly annexed in their opinion. Primarily the witnesses focused on land south of the city limits. Opinions were offered that this area was too sparsely populated, did not need city services, or was a flood plain, and agricultural land not subject to annexation. Witnesses supporting the city's annexation testified at length about the characteristics of the land, its suitability, and the need for attachment to the city. A comprehensive land use plan prepared by the City Planning Commission was introduced. Testimony was given concerning the city officials' consideration of the annexation prior to its approval. In a detailed judgment, the trial judge found that the landowners failed to prove the lands were not subject to annexation. A question regarding the legal description of the land to be annexed was resolved in favor of the city.

This appeal raises three contentions: (1) not all lands comply with the criteria of Ark. Stat. Ann. § 19-307.1; (2) agricultural lands were improperly included in violation of Ark. Stat. Ann. §19-307.1; and (3) the legal description of the annexed lands failed to comply with Ark. Stat. Ann. § 19-307.2. We find no merit to appellants' arguments.

It is perhaps significant that the appellants rely in part on *Saunders* v. *City of Little Rock*, 262 Ark. 256, 556 S.W.2d 874 (1977). This case reviewed the proposed annexation of 55 square miles to the City of Little Rock. We rejected the proposed annexation on the narrow ground that the inclusion of mining lands voided the entire proposal. Our decision in *Saunders* was sharply limited in *Holmes* v. *City of Little Rock*, *supra*, and expressly overruled in *Chappell* v. *City of Russellville*, 288

Ark. 261, 704 S.W.2d 166 (1986). (In *Chappell*, we incorrectly cited *Saunders* v. *City of Little Rock*, 257 Ark. 195, 515 S.W.2d 663 (1974) [*Saunders I*] as being overruled; it should have read *Saunders* v. *City of Little Rock*, 262 Ark. 256, 556 S.W.2d 874 (1977) [*Saunders II*]. When we overruled *Saunders II*, we also abandoned the strict approach taken by us toward annexation. No longer do cities seeking annexation carry an undue legal burden. Our rules for review are clearly stated in *Holmes* v. *City of Little Rock, supra*:

> The rules controlling appellate review of annexation cases in Arkansas are well settled. A majority of electors voting in favor of annexation makes a *prima facie* case for annexation, and the burden rests on those objecting to produce sufficient evidence to defeat the *prima facie* case. (Cites omitted). 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 (Cite omitted). 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.

Our decisions since reflect a consistent application of these standards. *Chappell* v. *City of Russellville, supra*; *Gay* v. *City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985). With the standard set forth in *Holmes* in mind, we review the trial court's findings regarding each tract. They deserve verbatim recitation, for it is the appellants' burden to prove them clearly wrong; those findings of fact are included as an addendum to this opinion.

[redacted] The appellants mainly attack the annexation of tracts which include flood plains and agricultural lands. They are tracts 2A, 2B, 2C, 4 and 6. These tracts are south, southwest and southeast of the city limits of Pine Bluff. All include some residential property, some more than others; some include small farms of 2 ½ to 20 or 30 acres. Tract 6, which straddles the main traffic arteries southwest of the city and the intersection of Highway 65 and 65B, includes several trailer parks and a 750 acre farm. That land is directly in the path of city growth toward the airport and is adjacent to a new industrial mall. Some of the

appellants' witnesses conceded the mall will make all adjoining property more valuable for development including part of the farm. Even the owner of the farm conceded the farm and along the highway next to the mall would be enhanced in value. No one proposed a line where that increased value would begin or end on the farm. Thirty-eighth Street cuts through this farm. The fact that the land is agricultural and the owner does not want it developed does not determine its fate as to annexation. *Planque* v. *City of Eureka Springs*, 243 Ark. 361, 419 S.W.2d 788 (1967). The owner will not have to abandon its use and its assessment for taxation shall be as agricultural land. Ark. Stat. Ann. § 19-307.1 (Repl. 1980).

In *Holmes*, when we approved annexation of land that included a pecan orchard, we said:

> . . . .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.

Simply because land is in a flood plain does not exclude it from consideration for annexation. *Holmes* v. *City of Little Rock, supra.* In this case the flood plain generally separates the existing city limits from a growing residential area beyond the flood plain. If a city could not encompass a flood plain, it would mean its legal boundary could not be extended beyond a low lying area, creek or swampland, although the growth of the urban area continued on the other side; or it would mean the city limits would somehow have to jump or go around the flood plain. The trial court found the proposal in this respect in compliance with the statute. The court listened to the testimony, observed the witnesses, saw the exhibits, and determined the flood plain did not prevent annexation.

Altogether, the city's proposed annexation proves to be an honest effort by Pine Bluff to extend its boundaries to encompass the actual growth of the city and land needed for municipal purposes as defined by law. That does not mean we will recognize annexation proposals that are essentially land grabs beyond the actual growth of the city with no serious goal of responsible land

use planning. *Gay* v. *City of Springdale, supra.*

We find that the appellants have failed to meet their burden of demonstrating that the trial judge was clearly wrong. There is ample evidence to support all his findings.

[redacted] The argument regarding the legal description of the land is a question of law. Ark. Stat. Ann. § 19-307.2 provides "[t]he annexation ordinance shall (1) contain an accurate description of the lands desired to be annexed." Rather than specify each tract separately with a legal description encompassing the proposed land, the city described all the land by metes and bounds as "the area included in the following description not currently in the City of Pine Bluff." The description encompassed the existing city limits and the eight tracts to be annexed. One expert witness testified for the appellants that the description could not be drawn to satisfy the statutory requirements; one expert for the city said that while it was not the best description, he could, with the aid of the map referred to in the ordinance, plat the new city limits. In *Parrish* v. *City of Russellville*, 253 Ark. 1000, 490 S.W.2d 126 (1973), we held that a legal description, which described merely a line, did not comply with statutory requirements. That case is distinguishable. Here a map was referred to in the ordinance, undoubtedly one of the exhibits at the trial, and was duly filed with the circuit clerk after the election. The trial court found that ". . . although the method of description used herein may not be the most desirable it does properly and sufficiently describe the property sought to be annexed." That conclusion is not clearly wrong.

Affirmed.

PURTLE, J., dissents.

ADDENDUM

The plaintiffs own land or live in one of the following areas being annexed, viz, Area 1, 2, 6 or 8. Areas 1 and 2 extend from the northeast part of Pine Bluff to the southwest part of Pine Bluff. Northwest, west and southwest represents the direction of city growth for residential, considerable commercial and some major industrial growth. There is no question that these areas sought to be annexed are largely platted and held for sale or use as municipal lots; and/or whether platted or not, are held to be sold

as suburban property. They furnish the abode, in much of the area, for densely settled communities, or represent the actual growth of the municipality beyond its legal boundaries. The flood plain area which divides the city is needed for proper municipal purposes such as proper development regulation, police and fire protection and flood control. The lands' highest and best use is for something other than agriculture or horticulture.

No one who owned land or lived in areas #3, #4, or #5 has opposed the annexation. Areas #3 and #5 are almost solely residential and clearly lands held to be sold as suburban property and do represent the actual growth of the municipality beyond its legal boundaries. Both are fast growth areas for residential development. Area #3 is located in close proximity to the Rosswood Country Club and many new residential developments. Area 5, on the south end of Ohio Street is relatively small with several new dwellings and is an extension of the city beyond the city limits.

Area #4 encompasses land on either side of Highway 15 South with the west boundary thereof being the present city limits and the east boundary running, more or less, parallel with Highway 15 South. On the north end of this area we find a rather wide flood plain and from there south several commercial businesses and many homes. There are some residential developments on and off Highway 15 South in this area. Highway 15 South constitutes the only reasonable route for access to the extreme southern part of Pine Bluff which is immediately west of Area #4. Emergency vehicles must go outside the city limits to serve the southernmost part of Pine Bluff. This southernmost area of Pine Bluff (between area #3 and area #4 sought to be annexed) is well developed subdivisions of family dwellings. This area #4 definitely represents the actual growth of the city beyond its legal boundaries and is needed for proper municipal purposes as for the extension of police and fire protection, flood control and proper land management and planning in this area.

Area #6, a part of which is platted, is located on both sides of Highway 65 South and a small strip east of the Martha Mitchell Expressway. Thirty-eighth Street from the present city limits intersects Highway 65 near the middle of this area. These transportation arteries, which are major ones in the City of Pine

Bluff merge near the center of area #6. Approximately 600 people live in this area. There are quite a few residential type homes, four rather large mobile home parks and several commercial businesses. The municipal airport is located just south of this area. There has been rapid development of residences and commercial business in the immediate area, and in the vicinity of area #6, an industrial mall costing millions is being constructed at this time adjoining this area immediately between Highway 65B and Highway 65. The present city limits move back and forth across Highway 65 in this area. Emergency vehicles move in and out of the city limits when going from northeast Pine Bluff to southeast Pine Bluff or vice versa. This area #6 furnishes the abode for an area that is partially a densely settled community, and the whole area represents the actual growth of the city beyond its legal boundaries. Also the strip of land on the east and north of Highway 65 are lands needed for proper municipal purposes such as for the extension of needed police and fire regulation and protection, proper land use planning, sewage and drainage.

Area #7, a part of which is platted, is land between Lake Langhoffer (Slackwater Harbor) and Cotton Belt Shops which is already in the city limits. This area includes the Pine Bluff Industrial Park on the Slackwater Harbor. There are eleven or more industrial businesses within the park and others near the southern end of the area. There is a densely settled community at the southernmost end of this area. This whole area distinctly, in part, furnishes the abode for a densely settled community and all of it represents the actual growth of the city beyond its legal boundaries.

Area #8 includes Lake Pine Bluff (which is presently surrounded on three sides by the city limits) and lands along both sides of Highway 79 North extending north of the city limits. Highway 79 and University Street are one and the same within the city limits. The present city limits weave back and forth across Highway 79 North (University Street) in this area and there are many residences and numerous commercial establishments included in the area sought to be annexed. This area represents, without doubt, the actual growth of the city beyond its legal boundaries and also the lands along University, Oliver, and Spruce Streets are needed for proper municipal purposes such as the extension of needed police and fire protection in these and

adjoining areas. This would alleviate the necessity of emergency vehicles going outside the city limits to gain access to certain areas which are fairly densely populated.

The city has complied with Ark. Stat. Ann. §19-307.1, and all the lands sought to be annexed were adequately described and meet at least one of the criteria required for annexation.

JOHN I. PURTLE, Justice, dissenting. In Arkansas, cities are creatures of the General Assembly and exercise only those rights and privileges conferred upon them by law. Likewise their responsibilities are generally defined by statute. The legislature has granted cities the right to annex contiguous territory under certain circumstances. The majority opinion correctly identifies the appropriate statutory authority as Ark. Stat. Ann. § 19-307 et seq. This statute specifies the five conditions for annexation. Any one of the five grounds qualifies the area for possible annexation. However, Ark. Stat. Ann. § 19-307.1 states:

> [C]ontiguous 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; or (2) . . . .

The other statute pertinent to this dissent is Ark. Stat. Ann. § 19-307.2 (1) which requires the municipality to enact an ordinance containing an *accurate description* of the lands proposed to be annexed. It is my opinion that much of the nine thousand acres to be annexed were agricultural and that there was no accurate description of the annexed area contained in the ordinance of annexation.

One of the exceptions to contiguous lands which may be annexed is lands which have a fair market value of lands used only for agricultural or horticultural purposes, and their highest and best use is for such purposes. See Ark. Stat. Ann. § 19-307.1. Annexation of excluded lands is void. *Saunders* v. *City of Little Rock*, 262 Ark. 256, 556 S.W.2d 874 (1977). I realize this Court trampled on *Saunders* to some extent in *Holmes* v. *City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985). However, the law has not changed. We clearly stated the law in *Chappell* v. *City of*

Russellville, 288 Ark. 261, 704 S.W.2d 166 (1986), when we stated, "If a part of the proposed area does not meet one of the requirements, then the entire area is voided in toto." In *Holmes* we stated, "There was an abundance of testimony in this case that all the land being annexed was best suited for residential and commercial purposes rather than for agricultural purposes. Before 1975, lands used for agricultural purposes could not be annexed." Also, in *Gay* v. *City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985), we held, as in *Holmes*, that farmlands may be annexed if their highest and best use is for a purpose other than agricultural.

The area annexed in the present case contains one dwelling unit per 5 acres of land. Mr. Ben Pierce testified he had a sod farm containing more than 100 acres. This farm land was located in the floodway where there was no potential other than for agricultural purposes. Mr. Dean Parker testified that there was a 160 acre farm adjacent to his residence. In addition, Robert W. Phillips testified that he and his family had owned 750 acres of land since 1814 and it had always been used as farm land. This farm was also located in the flood plains. His testimony was that the highest and best use of the land was for agricultural purposes and that it had no fair market value for any other use. This testimony was not disputed except by generalization and inference of employees of the City. The law has not changed since *Chappell, Holmes, Gay* and *Saunders*. In none of these cases have we held that farmlands, which are used as such, and such use is the highest and best use, are subject to involuntary annexation. Nor does the law permit it. There is no basis in the record to support the finding by the trial court that the highest and best use of these farm lands was for some other purpose. The vote in the areas of annexation in the present case was 9 to 1 against the proposal. The ratio of population in the annexed area and the existing City is about 65 to 1. In my opinion the majority is granting unlimited power to municipalities to annex any and all lands so long as they are contiguous to the municipality or contiguous to contiguous land even if the highest and best use is for agricultural purposes. I submit such was not the intent of the legislature when it enacted the annexation statutes.

The description of the annexed lands was contested in the trial court. I believe the description of the lands proposed for

annexation is not accurate. Basically the description commenced at a point on the existing city boundary and encircled all the areas proposed for annexation, including the already incorporated area of the City, and purportedly returned to the point of beginning. None of the tracts proposed for annexation were described to the extent one could identify the individual tract. In *Parrish* v. *City of Russellville*, 253 Ark. 1000, 490 S.W.2d 126 (1973), this court held that a description was inaccurate when it commenced at a point on the existing city boundary and terminated at another point on the city boundary. The description in *Parrish* was exactly as it is in the present case as it relates to each of the ten areas proposed for annexation. No single area is encircled by the proposed boundary. As to each tract the description is incomplete and inaccurate. We had a similar situation in *City of NLR* v. *Garner*, 256 Ark. 1025, 511 S.W.2d 656 (1974), wherein we held the description to be inaccurate. In *Garner* the description started at a point on the existing city boundary and ended at the Arkansas River. Clearly, as in *Parrish*, a geographical area was identified but we nevertheless held such description to be *inaccurate*. The annexing ordinance did not at any time describe the geographic boundary of any area to be annexed. I have searched the record and find no evidence that a map of the area proposed for annexation was filed until after the election. It would not have been possible for the average citizen to have determined the areas included in the proposal by looking at the ordinance. The metes and bounds description was defective in my opinion. A "land grab" of this magnitude should not be allowed without full compliance with the law. A city cannot annex another city and certainly common sense and the law tells me it cannot annex itself. The finding that the description properly and sufficiently described the lands to be annexed did not rise to the legal requirement that the area be "accurately" described.

I would reverse and dismiss.

IN THE MATTER OF THE ESTATE OF Florence S. CAISSON, Deceased

Carlos HOUSTON, Kenneth HARP and Nancy CLARK, et al., Natural Heirs of Florence S. CAISSON *v.* Charles E. MOORE and Mary J. HALL, et al., Adoptive Heirs of Florence S. CAISSON

86-29 710 S.W.2d 211

Supreme Court of Arkansas
Opinion delivered June 9, 1986

Laws & Swain, P.A., by: *Ike Allen Laws, Jr.*, and *Timothy W. Murdoch*, for appellants.

Gardner, Gardner & Hardin, by: *Robert W. Hardin*, for appellee.

JOHN I. PURTLE, Justice. The only question presented in this appeal is whether the adoptive or blood heirs of an intestate decedent inherit the estate of an adopted child. The trial court

held that the law pertaining to descent and distribution at the time of decedent's death controlled. We agree with the trial court.

Decedent was adopted in 1918. The adoption is not challenged in this proceeding. The intestate did not have issue and her adoptive parents predeceased her. There is no factual dispute to be decided.

The current adoption statute, Ark. Stat. Ann. § 56-215 (a)(1)(Supp. 1985) states in part as follows:

> A final decree of adoption . . . terminate all legal relationships between the adopted individual and his relatives, including his natural parents, so that the adopted individual thereafter is a stranger to his former relatives for all purposes including inheritance. . . .

[redacted] Appellants rely on *Dean* v. *Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950), and *Dean* v. *Smith*, 195 Ark. 614, 113 S.W.2d 485 (1938), to support the contention that the law in force at the time of the adoption is controlling on matters of inheritance. Both of the above cases dealt with the right of inheritance by an adopted child. Neither treated the matter of the inheritance from the estate of an adopted child. It does not appear that we have decided this issue previously. We do not hesitate to hold that the law in effect at the time of the death of the adopted child is controlling on matters of inheritance. To hold otherwise would create a myriad of problems and confuse the law.

[redacted] The right to inherit property does not vest until the death of the owner and the devolution of property is controlled either by common law or statute. The state has sovereign political power to regulate succession to intestate property. *Irving Trust Company* v. *Day*, 314 U.S. 556 (1942); *Couch* v. *Couch*, 248 S.W.2d 327 and *Moody* v. *Hagen*, 162 N.W. 704, Aff. 245 U.S. 633 (1917). The Arkansas General Assembly has enacted Ark. Stat. Ann. § 56-215(a)(1) which clearly states that a decree of adoption terminates all legal relationships between the child and his relatives to the extent that the former (blood) relatives become strangers even for the purpose of inheritance.

[redacted] We therefore hold the law in effect at the time of the death of an adopted child controls the distribution of his estate. Under our statutes in force at the time of the death of the

intestate, the heirs of the adoptive parents inherit to the exclusion of the blood relatives.

Affirmed.

COOPER, INC. *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, et al.
and
Vernon BLOCK *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, et al.

85-248 711 S.W.2d 155

Supreme Court of Arkansas
Opinion delivered June 9, 1986

Charles R. Easterling, for appellants.

Barrett, Wheatley, Smith & Deacon, for appellee Farm Bureau Mutual Insurance Company of Arkansas, Inc.

Friday, Eldredge & Clark, by: *Michael G. Smith*, for appellees Continental Grain Company, Pillsbury Company, Cargill, Inc. and Archer-Daniels-Midland Company.

STEELE HAYS, Justice. Appellants Vernon Block and Cooper, Inc. are farmers. Appellee Harrisburg Elevators, Inc. is a licensed, public grain warehouseman. During October and November, 1982, Cooper delivered a total of 24,648 bushels of soybeans to Harrisburg and Block delivered 2,179 bushels. After the beans were stored and commingled Cooper and Block entered into contracts with Harrisburg which gave the "sellers" the right to conclude the sale at some future date of their choosing by receiving a final price based on the market value of the soybeans as of that day. After the contracts were signed Cooper and Block received an advance payment of $4.50 per bushel.

The soybeans were eventually sold by Harrisburg to four grain companies, appellees Continental Grain Company, The Pillsbury Company, Cargill, Inc. and Archer-Daniels-Midland Company. In March, 1983 Harrisburg's license was suspended following an audit by the Arkansas State Plant Board and the

warehouse filed in bankruptcy.

In separate actions, Cooper and Block brought suit against Harrisburg Elevators, Arkansas Farm Bureau Insurance Company, surety on Harrisburg's bond, and against the four grain companies. The complaints alleged that because of deficiencies in the written contract, title to the soybeans remained in Cooper and Block until the final price was determined and since that had not occurred the sales by Harrisburg to the grain companies were conversions. Cooper and Block contend the soybeans had a market price of $6.63 per bushel and Harrisburg's inability to perform its contract has damaged them accordingly.

The defendants filed motions for summary judgment based on the pleadings, exhibits, affidavits and responses to interrogatories, contending there were no genuine issues of material fact. The defendant grain companies also pled estoppel and alleged any damage Cooper and Block may have sustained was the proximate result of their own negligence in delivering their soybeans to Harrisburg under an appearance of title. The trial court sustained the motions for summary judgment upon a finding that by entering into the contracts and receiving a $4.50 per bushel advance, Cooper and Block conveyed title to their soybeans and, hence, no action in conversion exists as a matter of law. Summary judgment on behalf of Farm Bureau was granted on the admitted fact that Cooper and Block held no warehouse receipts, a necessary condition under Farm Bureau's bond. Cooper and Block have appealed and the two cases were consolidated for purposes of appeal. We affirm as to Farm Bureau and reverse as to the remaining appellees.

[redacted] The issue of liability under the bond of Farm Bureau can be quickly disposed of. The trial judge held correctly that the bond was intended only for the protection of holders of warehouse receipts. Ark. Stat. Ann. § 77-1315(a) (Repl. 1981); *Farm Bureau Mutual Ins. Co.* v. *Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985). Since Cooper and Block admittedly hold only unpriced scale tickets and not warehouse receipts, there could be no recovery under the bond and, hence, no cause of action against Farm Bureau. Appellants' argument that Act 264 of 1983 amends Section 2 of The Public Grain Warehouse Law (Ark. Stat. Ann. § 77-1301 through 1342), by including an "unpriced

scale ticket" within the definition of a warehouse receipt can be answered by noting that these transactions occurred in October and November 1982, well before the February 25, 1983 effective date of Act 264. Appellants do not contend the amendment should be given retroactive effect. Accordingly, the summary judgment and order with respect to Farm Bureau Mutual Insurance Company of Arkansas, Inc., is affirmed.

We begin our consideration of the propriety of granting summary judgment to the remaining defendants, the appellees, by noting that summary judgment is an extraordinary remedy. *Windham, Inc.* v. *Reynolds Insurance Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983); *Talley* v. *MFA Mutual Insurance Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981). It is, by definition, difficult to sustain. "Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothesis might reasonably be drawn and reasonable men might differ." *Clemens* v. *First National Bank*, 286 Ark. 290, 692 S.W.2d 222 (1985).

Both sides cite us to Act 401 of 1981 (Ark. Stat. Ann. § 77-1340):

> 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.* (Our italics.)

Appellants point out that the contracts signed by Cooper and Block fail to contain a provision specifically conveying title to the soybeans, which the enactment plainly requires. Appellees concede the absence of such language, but urge that the words "We (referring to Harrisburg Elevators) confirm purchase from you

of:", followed by a description of the soybeans, suffices. We disagree. The contract is a printed form bearing the letterhead of Harrisburg Elevators and is entitled "Deferred Price Purchase Contract." It is composed of a single page and includes printed general terms and typed special terms reading as follows:

> Seller understands the grain may or may not be physically stored at buyer's warehouse. Seller must price grain on or before open at buyer's daily price.

Harrisburg is identified as the buyer and Block (or Cooper) as the seller in several places.

In *Farm Bureau Mutual Insurance Company* v. *Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985) we examined this statute and recognized its purpose—to protect farmers who have stored their grain in public warehouses. That case differs from the one before us in that Wright had admittedly made a "spot sale" at his farm to the warehouse, and the issue was whether Act 401 applied to grain that was sold outright and never stored or commingled with other grain. Thus *Wright* has only general relevance to this case.

[redacted] The case more nearly resembles *Tucker* v. *Durham*, 285 Ark. 264, 686 S.W.2d 402 (1985), where the appellant urged we should not be guided by Act 401 because its only purpose was to limit the warehouseman in selling stored grain to third parties and voiding such sales when title has not been specifically conferred in writing by the producer upon the warehouseman. We said:

> 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.

[redacted] Appellees argue that the words "we confirm purchase from you . . ." constitute sufficient compliance with Act 401, since they tell the owner in common parlance that he is selling his grain. In the context of routine transactions we might agree, but the legislature has seen fit by the enactment of Act 401 to leave nothing to doubt, and has declared that no title shall be transferred unless title is *specifically conveyed* to the warehouseman

by a written document signed by the owner. We think that language must be taken literally, to do less would be to disregard the plain intent and purpose of the statute. Some analogy can be found in the Freedom of Information Act, Ark. Stat. Ann. § 12-2801 et seq., wherein the legislature has declared that all public records are subject to inspection, "[e]xcept as otherwise *specifically* provided by laws now in effect, or laws hereafter specifically enacted to provide otherwise" (our italics). We have held that such imperatives require literal compliance. *Ragland* v. *Yeargin*, 288 Ark. 81, 702 S.W.2d 23 (1986); *Baxter County Newspapers, Inc.* v. *Medical Staff of Baxter General Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981).

Other factors support this view: appellants offered proof that in October of 1981 the Arkansas State Plant Board notified Harrisburg that its contracts for deferred pricing should include a statement that the farmer understands he is transferring title to the buyer. The Plant Board spelled out the requirements of Act 401 in the following language:

> The undersigned seller of grain indicated on this deferred pricing contract fully understands that he is *transferring title of said grain to the buyer* and is relinquishing all control of the grain to the buyer. The seller further understands that the buyer can sell and move the grain at any time before the seller receives actual payment for the grain. (Our italics.)

Despite this, the contracts between Harrisburg and Cooper and Block, prepared nearly a year later, failed to contain the crucial language. Had Harrisburg followed the Plant Board's directive, there would be little basis for any misunderstanding between the parties.

Too, Cooper and Block tendered affidavits in opposition to the motions for summary judgment, asserting that they were never told they were relinquishing title to the soybeans, but were told by representatives of Harrisburg that when the final price was determined Cooper and Block would be charged $.03 per bushel per month for storage. This arrangement, if true, weighs in favor of the premise that Cooper and Block were still the owners of the soybeans until the final price was determined, for if Harrisburg were the owner, why would Cooper and Block be

answerable for storage? Nor do we think these contracts were so complete and unambiguous in their terms as to withstand parol evidence to determine the intent of the parties. *Peevy* v. *Bell*, 255 Ark. 663, 501 S.W.2d 767 (1973); *Kyser* v. *T. M. Bragg & Sons*, 228 Ark. 578, 309 S.W.2d 198 (1958). These contracts leave a good deal to speculation. There is no stated formula for determining future price, and the special terms, set out above, state merely the "Seller" must price the grain on or before a date referred to only as "open." In short, we think it would be difficult indeed to enforce these contracts without reference to parol evidence. *Jefferson Square, Inc.* v. *Hart Shoes*, 239 Ark. 129, 388 S.W.2d 902 (1965); *Smock* v. *Corpier*, 226 Ark. 701, 292 S.W.2d 260 (1956).

We conclude that since the contracts failed to comply with Act 401, the appellees cannot argue successfully that the title was transferred.

Affirmed as to Farm Bureau Mutual Insurance Company, reversed and remanded as to the remaining appellees for trial on the remaining issues.

Affirmed in part, reversed and remanded in part.

PURTLE, J., not participating.

Jimmie WILBURN *v.* STATE of Arkansas

CR 86-7 711 S.W.2d 760

Supreme Court of Arkansas
Opinion delivered June 9, 1986

William R. Simpson, Jr., Public Defender, *Arthur L. Allen*, Deputy Public Defender, and *Jerry Sallings*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted of first degree murder and sentenced to life imprisonment. He alleges three errors: (1) that he was improperly denied the opportunity to present certain expert testimony; (2) that evidence of a juvenile conviction was improperly admitted; and (3) that the prosecutor was allowed to make an improper and prejudicial

remark on closing argument. We find no merit in these contentions, and thus we affirm.

The appellant confessed to having killed his former employer. The killing occurred in April, 1984. The decedent had discharged the appellant from his job in 1981, and the evidence showed the appellant had harbored a grudge through ensuing marital and financial hard times. He went to his former place of employment with a pistol and shot the victim five times. In his statement, he admitted to having gone to the scene to do some bodily harm to the victim, and ultimately the appellant said he guessed he wanted to kill the victim.

1. Expert Testimony

As he admitted having done the killing, the appellant's evidence was aimed at convincing the jury he should be convicted of an offense other than the capital murder with which he was charged. He hoped to show he should be convicted only of manslaughter because he had caused the death "under circumstances that would [have been murder but for] . . . the influence of extreme emotional disturbance for which there is a reasonable excuse." *See* Ark. Stat. Ann. § 41-1504(1)(a) (Repl. 1977). To demonstrate his mental condition the appellant proffered the testimony of Dwight Merritt, director of the Little Rock Veterans Counseling Service. Merritt was prepared to testify as to the symptoms of post-traumatic stress syndrome. While Merritt had not counseled the appellant, the appellant wanted Merritt to be allowed to give his opinion about the effects the appellant's combat experiences in Vietnam could have produced on his mental state. Merritt's opinion was to have been based on records of counseling the appellant received from 1981-1983 at the counseling center operated by Merritt.

When the evidence was proffered, a long discussion among the court and counsel, out of the jury's presence, occurred. Ultimately, the court suggested the appellant's counsel place Merritt's proffered testimony on the record. Appellant's counsel asked Merritt if, on the basis of the veterans center records, he could say if the appellant was under the influence of extreme emotional disturbance during the time he was being counseled. Merritt said the appellant was under such influence and that it was not the sort of disturbance likely to disappear rapidly. The

court ruled that, although Merritt could testify as to the literal contents of the center's records, he would not be allowed to give such a diagnostic opinion. He said (1) the records upon which Merritt's opinion was based were too remote in time from the offense, and (2) while Merritt had demonstrated his qualifications as a social worker, he was not a doctor qualified to make a medical diagnosis on the basis of the records.

When the trial resumed, the appellant did not put Merritt on the witness stand but called Ken Stout, a readjustment counselor assistant at the center. Stout testified as to the contents of the records pertaining to the counseling of the appellant at the center. He was allowed to testify about the code markings placed on the records by the counselor who worked with the appellant, but while they showed areas of concern, such as alcohol and drug abuse, they showed nothing about the appellant's contention of extreme emotional disturbance at the time the counseling occurred.

The test as to whether a witness qualifies as an expert is whether, on the basis of his qualifications, he has knowledge of the subject at hand which is beyond that of ordinary persons. *Dildine* v. *Clark Equipment Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). We will not reverse the trial court's determination absent a showing of an abuse of discretion. *Dixon* v. *State*, 268 Ark. 471, 597 S.W.2d 77 (1980).

The question here is simply whether Merritt, who was concededly an expert in the field of social work, was qualified to diagnose the appellant's mental condition. The appellant cites us to the legislative definition of the "practice of social work." Ark. Stat. Ann. § 71-2803(b) (Supp. 1985). It says, in its most relevant part, that social work is "a professional service which effects change in social conditions, human behavior and emotional responses of individuals." The statute cited says nothing about diagnosis.

In *Robinson* v. *State*, 274 Ark. 312, 624 S.W.2d 312 (1981), we held the court did not err in refusing to allow a psychological examiner to give an expert opinion as to the mental condition of an accused. We cited the statutes defining the roles and responsibilities of variously qualified psychologists and noted that nothing in the statutes clearly said that a psychological examiner was

qualified to offer his own opinion on mental illness absent supervision by a consulting or clinical psychologist. We held there, as we do here, that the trial court did not abuse his discretion in refusing the evidence proffered.

2. The Juvenile Record

The wife of the appellant testified first for the state and was then called as a defense witness, whereupon she was asked if she were aware of the appellant's "ever having been convicted of a crime." She answered "no." Before cross examination, counsel approached the bench, and the prosecutor told the court he planned to ask whether the witness knew the appellant had been sent to the training school for burglary when he was fourteen or fifteen years of age. The appellant's counsel objected, contending he had not opened the character of the appellant to cross examination and that juvenile offenses are "off limits." The court ruled that the defense had inquired as to the appellant's character and that a general question about the incident would be proper. The prosecutor asked if the witness knew that as a juvenile the appellant was convicted and sent to Boys' Training School. She replied "yes."

Uniform Rule of Evidence 609(d) precludes use of a juvenile adjudication to attack the credibility of a witness. The appellant concedes that rule does not apply here, as it applies only when the witness is being examined about his own prior convictions rather than those of the accused. Uniform Rule of Evidence 609(a); *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

Rule 405(a) deals with methods of proving character. It says that on cross examination a character witness may be asked about relevant specific instances of conduct. We pointed out in *Reel* v. *State*, *supra*, that if a witness does not know about a specific instance her credibility suffers. If she knows but disregards it, that may go to the weight to be given the character witness's opinion of the accused. We also noted we would not, by analogy, import a limitation appearing in Rule 609 into Rule 405. We held that by producing a character witness the appellant had opened the door to evidence which might otherwise have been inadmissible.

While the facts before us now are different, the principle we

enunciated in *Reel* v. *State*, *supra*, applies. The witness gave no opinion as to the character of the appellant, but she was asked if she knew of his having ever been convicted of a crime. The only purpose that question could have had was to show the appellant was a person not disposed to commit crimes. She was thus a character witness. The door was open. The appellant's argument is essentially that with respect to juvenile adjudications the door is never open because of Ark. Stat. Ann. § 45-444 (Repl. 1977) which provides:

> *Evidence not admissible in other courts—*
>
> No evidence adduced against a juvenile in any proceeding under this Act [§§ 45-401—45-449], nor the fact of adjudication or disposition, shall be admissible evidence against such juvenile in any civil, criminal, or other proceeding. Provided: such evidence shall be admissible, where proper, in subsequent proceedings against the same juvenile under this Act.

We can ascertain from the record that the incident with respect to which the witness was questioned occurred long before 1975, the year Act 451 containing the above quoted section was passed. Even if the statute applies to the "conviction" to which the cross examination was directed, it does no more than make it inadmissible. Certainly the state could not have elicited the testimony on direct examination. Our point here, however, is that by asking a question going to the appellant's character, the appellant's counsel made admissible that which would not otherwise have been admissible.

We applied the same principle in *Pursley* v. *Price*, 283 Ark. 33, 670 S.W.2d 448 (1984), a civil case in which damages were awarded as the result of a shooting incident. The appellant testified on direct examination that he had never shot at anybody and had never had any problem in his life other than a speeding ticket. The arresting officer then was allowed to testify that the appellant had a reputation for violence when he was drinking. Had that evidence been offered by the state before the appellant gave character testimony, it would clearly have been inadmissible. *See* Rule 404(a)(1). However, we said, "[w]hen a proponent opens the door to a line of questioning, the opposing party may fight fire with fire by introducing rebuttal testimony on that

issue." 283 Ark. at 33, 670 S.W.2d at 449.

3. Closing Argument

[redacted] In his closing argument the prosecutor said this to the jury:

> . . . In opening statement, the defense attorney also told you that no one knows what happened out there that night, not us, not him, not his client, not you, not the court, not the police department, nobody. There's people that do. Von Andrews did and he's been killed to keep him from telling what he knows about it. The defendant does. He's told part of it but he's not going to tell us the rest. Common sense tells you, ladies and gentlemen, that actions speak louder than words. In fact, in Arkansas, I think it was a former politician that made the phrase, "Just because I said it doesn't necessarily make it so." And, ladies and gentlemen, just because the defendant said he didn't remember or didn't plan doesn't necessarily make it so. Intent in a criminal case is always circumstantial. You compare and contrast his actions with his statements. Let us remember, too, that in his statement, he finally does admit, "Well, I guess I went out there with the intent to do some bodily harm."
>
> I can say I don't mean to come over here and pick up this pen, but a person is presumed to know the consequences of their action. It's a purposeful act to pick that up, to pick up the copy, to pick up the paper. It's a purposeful act to go to the pawn shop and get your .44 caliber Magnum . . .

The appellant objected contending this argument shifted the burden of proof on the issue of intent from the state to the appellant. We have no quarrel with the notion that the burden may not be shifted or with the cases saying that would be a violation of the appellant's right to due process. *See Francis* v. *Franklin*, 471 U.S. ___, 105 S. Ct. 1965 (1985); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). However, we do not believe the statement by the prosecutor had any such effect. The cases cited by the appellant dealt with improper instructions. Here we are concerned only with argument.

The argument could have been perceived by the jurors as

meaning that by going to the pawn shop to reclaim his pistol on the day of the killing the appellant exhibited forethought or a plan to kill the victim. The other inference, i.e., that the appellant killed the victim and therefore must have intended to do so was not necessitated by the prosecutor's language.

Our court of appeals was faced squarely with this problem in *Weddle* v. *State*, 15 Ark. App. 402, 695 S.W.2d 840 (1985). It was held, correctly, that when the court has told the jury, as it did in the case before us now, that it must decide on the evidence, that the lawyers' arguments are not evidence, and that the decision must be in accordance with the court's instructions, the argument did not have the effect of an instruction on the burden of proof.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The appellant argues the trial court erred in refusing to qualify Mr. Merritt, the Director of the Little Rock Veteran's Counseling Service, as an expert. The appellant sought to introduce testimony from Merritt to explain the symptoms of post-traumatic stress disorder (PTSD). One theory for the defense was that the accused was suffering from severe stress since his service in Vietnam and, therefore, the homicide was committed "under circumstances that would be murder but for the influence of extreme emotional disturbance . . .", i.e., manslaughter (Ark. Stat. Ann. § 41-1504(1) (a)).

The appellant has correctly stated that whether a witness qualifies as an expert is largely within the trial court's discretion, citing *Dixon* v. *State*, 268 Ark. 471 (1980). The decision of the trial court will not be reversed in the absence of abuse of such discretion. The appellant has cited the case of *Dildine* v. *Clark Equipment Co.*, 282 Ark. 130 (1984), for the proposition that a liberal interpretation should be given by the trial court in determining whether a witness qualifies as an expert. In *Dildine* the appellant brought a products liability suit to recover for personal injuries sustained when he was thrown from a front end grain loader. At the trial, the court refused to allow the appellant's witness, Dr. Robert Mink, to testify as an expert. This

Court held that this case required reversal under U.R.E. 702, which states:

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

In reversing, we based our decision largely on the fact that Dr. Mink's background showed that he possessed significant experience and training in the field of mechanical engineering. In *Dildine*, the witness had a Ph.D., a masters degree in machinery design, and was the Chairman of the Engineering Department of A.S.U. We noted that there was no evidence to the contrary to show that the witness was not qualified to testify as an expert.

In the instant appeal, the witness had a masters degree in social work, had extensive training in stress disorders and had five years experience in counseling with Vietnam Vets who experienced symptoms of PTSD. Therefore, I think the trial court erroneously denied the appellant's request to qualify this witness as an expert. To hold otherwise would in fact render U.R.E. 702 meaningless and allow only educational achievement to qualify a witness as an expert. Without saying so it seems to me the majority opinion requires a witness in this field to possess a medical degree before he may testify as an expert.

It is my opinion that Mr. Merritt was qualified as an expert by knowledge, skill, experience, training and education. He should have been allowed to testify. The denial deprived the appellant of one of his best defenses, and amounted to an abuse of the trial judge's discretion.

I also agree with appellant's argument that any evidence that he was sent to a reform school as a juvenile should have been excluded. Arkansas Stat. Ann. § 45-444 specifically proscribes the introduction of a juvenile record in any civil or criminal proceeding, except other proceedings under the Act. Appellant's wife was a factual witness on behalf of the State. The defense also called the wife as a witness. She was not called as a character witness. As a defense witness she stated that she had been married to appellant since 1971 and that she was not aware that the

defendant had been convicted of any crime. During cross examination the State asked, "Are you aware of Jimmie ever having been convicted of a crime?" She replied, "No." The state was then allowed to ask the witness if she knew the appellant had been sent to the Boys Training School twenty-five years ago, at the age of 15. The witness replied, "Yes."

Arkansas Stat. Ann. § 45-444 (Repl. 1977), in pertinent part states, "No evidence adduced against a juvenile in any proceeding under this Act (45-401—45-449) nor the fact of *adjudication or disposition*, (emphasis added) shall be admissible against such juvenile in any civil, criminal, or other proceeding. . . ."

The state argues appellant invited the question by asking if the witness was aware of a prior conviction of the defendant. The state cites *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986), as authority. I think *Reel* is inapposite because it dealt with testimony of a character witness pursuant to U.R.E. 405(a). In the case before us the witness had not given an opinion about appellant's reputation or truthfulness. We held in *Kellingsworth* v. *State*, 275 Ark. 252, 631 S.W.2d 1 (1982), that the state cannot, under the guise of rebuttal evidence, impeach a witness on a collateral matter. The reason for the rule, we stated in *Kellingsworth*, is that to permit such tactic would only distract the jury from the main issue, waste time and prejudice a defendant. In my opinion the state asked the question solely to prejudice the appellant before the jury. Furthermore, there is no evidence that appellant was ever convicted of a "crime." Twenty five years ago, when appellant was 15 years of age, juveniles were routinely sent to "training schools" upon request of a parent or other interested person.

The state is also in error in stating that U.R.E. 609(d) would allow the admissibility of the testimony in question. This rule states in part, "The Court may in a criminal case allow evidence of a juvenile adjudication of a witness *other than the accused* . . . ." (Emphasis added). The evidence here was that the *accused* had been adjudicated as a juvenile. The appellant himself, in the absence of Ark. Stat. Ann. § 45-444 and U.R.E. 609(d) might have been properly subjected to cross-examination. *Gustafson* v. *State*, 267 Ark. 278, 590 S.W.2d 853 (1979). Even then the probative value of such question must be weighed against

the prejudical effect. *Floyd* v. *State*, 278 Ark. 432, 645 S.W.2d 690 (1983).

For the reasons above stated I would reverse the case and remand it for a proper trial.

STATE of Arkansas *v.* Scotty SCOTT

CR 84-198 710 S.W.2d 212

Supreme Court of Arkansas
Opinion delivered June 9, 1986

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

John Wesley Hall, Jr., for appellee.

HERBERT C. RULE III, Special Justice. This case comes before us on appeal by the State of Arkansas under Arkansas Rules of Criminal Procedure 36.10(c) to review the decision of

the trial court granting a new trial to Scotty Scott ("Scott") based on newly discovered evidence. We affirm the grant of a new trial.

Scott was convicted of first degree murder and aggravated robbery in the death of Betty Thornton on November 6, 1981. While that judgment was on appeal to the Arkansas Court of Appeals, counsel for Scott discovered new evidence in the form of a confession by Henry Lucas ("Lucas"). The Court of Appeals remanded the case to the trial court to consider Scott's petition for a writ of error *coram nobis.*

On remand, the trial court reviewed the transcripts of Scott's two prior trials, heard the testimony of numerous witnesses, including Lucas, and concluded, under our holding in *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984), that, despite the presumed validity of the jury verdict against Scott and the heavy burden borne by him, the writ ought to be granted to prevent a miscarriage of justice.

The standard of review by this Court is whether the lower court abused its discretion in granting the writ and a new trial. The State argues that the trial judge applied an erroneous standard of proof to the evidence presented. From a review of the entire record, we believe that the trial court properly applied the legal standards announced in *Penn* v. *State, supra*, and did not abuse its discretion. *Newberry* v. *State*, 262 Ark. 334, 557 S.W.2d 864 (1977).

Under our decisions, the writ of error *coram nobis* is a closely guarded remedy. In *Penn* v. *State, supra*, we said:

> By granting the right to petition the trial court, we do not in any way enlarge the other restrictions attendant to granting the writ. The trial court has the discretion to grant or deny it. The petitioner has a heavy burden to meet, especially in a case like this which must be approached with some skepticism for confessions by others are not uncommon. A written confession by another would not, alone, be grounds for relief. . . .
>
> We emphasize that we do not open the door to other petitions beyond those that would qualify under the facts in this case, especially the fact that it is presently between trial and appeal and can easily provide for an early hearing

before the court that just heard the case. The petition was timely filed and if the confession is true, an injustice would obviously result if it were not granted.

The trial judge weighed the credibility of the witnesses and noted the internal conflicts in Lucas' confession as well as the inconsistency between his testimony at the hearing and his earlier statements to the police. Lucas' confession is obviously material to the guilt or innocence of Scott. It is the trial court's proper function to review newly discovered evidence, evaluate it and, where its exclusion would cause a grave miscarriage of justice, grant a new trial.

Scott argues on cross appeal that the State wrongly withheld Lucas' confession and, for that reason, we should grant sanctions against the State. Lucas' confession, even with its inconsistencies, was clearly exculpatory of Scott, and the arguments for withholding it are not impressive. Although we do not believe sanctions are in order, we would caution prosecutors to comply fully with the letter and spirit of Rule 17, Arkansas Rules of Criminal Procedure in the future.

Finally, we deny Scott's request for affirmance for the State's failure to abstract the record properly. *Brace* v. *Busboon*, 261 Ark. 556, 549 S.W.2d 802 (1977).

Affirmed.

Special Justice Kelvin Wyrick concurs.

HOLT, C.J., and PURTLE, J., not participating.

Clarence GAY *v.* STATE of Arkansas

CR 86-89 713 S.W.2d 232

Supreme Court of Arkansas
Opinion delivered June 9, 1986

Appellant, *pro se.*

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

PER CURIAM. On April 21, 1986 we granted appellant Clarence Gay permission to proceed with a belated appeal of his 1984 conviction for rape. We said that Joe Villines, the attorney who had represented Gay at trial, would continue to represent him on appeal. The record has been lodged with this Court and counsel's brief is scheduled to be filed June 28. Appellant now asks that Villines be relieved as counsel and he be permitted to proceed without the services of an attorney.

An appellant will be granted the right to proceed *pro se* if he agrees to abide by the rules of this Court. *Green* v. *State*, 277 Ark. 129, 639 S.W.2d 512 (1982); *see also Faretta* v. *California*, 422 U.S. 806 (1975). Appellant states that he will proceed with the appeal "nicely, as possible, and abide by all court rules," but he does not indicate whether he can submit a typewritten brief as

required by the rules. He also has not submitted an affidavit refusing services of an attorney on appeal in accordance with our Rule 8(d).

A criminal appellant is entitled to an attorney on appeal. If he elects to forgo the services of counsel, it is imperative that he do so intelligently and with full knowledge of his responsibilities. Since it is not clear from appellant's motion that he is making an intelligent waiver of his right to counsel, his motion will be denied until such time as he files a subsequent motion in which he states that he can abide by the rules of procedure, including the rule that all briefs be typewritten. He must further attach to the motion an affidavit refusing services of an attorney on appeal. When the brief is filed, he must submit an affidavit verifying that he prepared the brief without the paid assistance of any inmate. Ark. Sup. Ct. R. 8(d).

Motion denied.

PURTLE, J., would grant.

Elsie ALEXANDER et al. *v.* Jerry C. CHAPMAN and CRESTVIEW FAMILY CLINIC, P.A.

85-167 711 S.W.2d 765

Supreme Court of Arkansas
Opinion delivered June 16, 1986

Perroni & Rauls, P.A., by: *Samuel A. Perroni*; and *Wilson, Engstrom & Corum*, by: *William R. Wilson, Jr.*, for appellants.

Friday, Eldredge & Clark, by: *W.A. Eldredge, Jr.* and *Calvin J. Hall*, for appellees.

DARRELL HICKMAN, Justice. This is a medical malpractice case. John Alexander was 53 years old when he died on October 1,

1979, from a heart attack. Dr. Jerry Chapman and the clinic with which he was then associated, Crestview Family Clinic, treated Alexander several times for symptoms that could have been heart related. On July 14 and 24, 1979, he was hospitalized and treated by Chapman and his associates. He was seen thereafter on August 1, 16 and 19, and September 26. Dr. Chapman was telephoned September 28 because Alexander was weak and had chest pains. He died three days later. Alexander's widow and son sued, claiming that the appellees failed to diagnose and treat Alexander's illness and, thus, failed to prevent his death. The trial lasted seven days, and the jury returned a verdict for the appellees.

The question on appeal is whether the trial court abused its discretion in failing to deal with the trial tactics of the appellees' attorney. Among the allegations are that counsel repeatedly and continually led witnesses and violated a pretrial order that prohibited the mentioning of certain matters. We do not, as a matter of course, reverse on the basis of such allegations even if they are borne out by the record. See, e.g., *Missouri Pac. R. Co.* v. *Sullivan*, 197 Ark. 360, 122 S.W.2d 947 (1939).

[redacted] This case, however, presents the unique situation where counsel was repeatedly admonished and the court repeatedly sustained objections to the leading questions, was even presented with a motion to strike the testimony, yet counsel's conduct was not stopped. The trial court decided that striking the testimony was too severe a sanction, yet was unable to stop the leading. Counsel also violated pretrial orders. After the trial, a motion for a new trial was filed, citing violations of the pretrial order, comments by appellees' counsel, and counsel's conduct in examination of the witnesses. Now we must decide whether the trial court's decisions at the trial and in denying the new trial were an abuse of discretion. In doing so we must necessarily decide whether conduct of counsel, ordinarily a matter which lies within the court's sound discretion, can go so far that some sanction must be taken. There are limits to everything and when counsel cannot or will not abide by the rules of evidence and of the trial court, and the trial court cannot stop the violations, we have to. The contention on appeal is that although no one instance of counsel's conduct would be cause for reversal, all of the violations combined to deny the appellants a fair trial. We have to agree and the

only acceptable course is to reverse the trial court.

Before trial, appellants moved that the appellees be prohibited from mentioning certain matters during voir dire, arguments or any part of the trial. In a pretrial order the trial court granted the motion in the following instances relevant to this appeal: (1) there was to be no suggestion that a verdict for the appellants would be tantamount to a "conviction" of the appellees; (2) there was to be no suggestion of any "credibility enhancing" items such as religious activities; and (3) no suggestion that a verdict for the appellants would have a damaging effect on medical services.

The order was clearly violated in closing argument when appellees' counsel said, "you see, even $1.00 *convicts* my client of malpractice, doesn't it?" (Italics supplied.) Upon objection, the trial court asked counsel to rephrase the statement.

During opening and closing arguments, appellees' counsel stated that next to God, his family and his patients, the law suit was the most important thing in the doctor's life. No objection was made beyond the motion in limine and in the motion for a new trial. This was not a flagrant violation of the pretrial order.

In closing, appellees' counsel also said, "A judge once said, we've got to be careful in these cases not to make doctors guarantors of good results or a cure." Appellants' counsel objected that what another judge said is not the law. The trial court essentially overruled the objection and then appellees' counsel said, "And we must, therefore, be careful lest we find very few, if any, who would accept the responsibility of being a doctor, you see." The appellants contended in their motion for a new trial and argue on appeal that this violated the pretrial order prohibiting any suggestion that a verdict for the appellants would have a damaging effect on medical services. Again the statement is not a clear and undisputable violation of the pretrial order, but it does touch on a subject that was ruled prohibited. When these violations are considered along with the continued leading of witnesses during the trial, the errors become more significant.

Leading questions were continually used in the examination of appellees' experts. During direct examination of the appellees' expert witnesses, there were 28 objections to leading questions. Once the court admonished counsel without being prompted by

an objection. Fourteen objections were sustained. Three times there was no ruling. Twice the question was withdrawn by appellees' counsel. The appellants' objections were overruled nine times.

Before appellants' counsel asked for the sanction that appellees' counsel be prohibited from continuing to inquire after leading, the court admonished appellees' counsel five times, four times of which were of the court's own volition. For instance, once the court said, "[appellees' counsel], it is [leading], sir. I would appreciate it if you would ask questions rather than making statements and asking is that true." Another time the court said, "Yes, and I think that was pretty blatant leading that last time, [appellees' counsel]. Please, sir, let's please confine your questions to this gentleman to be questions." Finally appellants' counsel requested that if appellees' counsel continued to lead, that he be prohibited from inquiring further into the subject. The court responded to the request by admonishing appellees' counsel:

> The Court: Well, let's just take the last question, [appellees' counsel]. 'State whether or not millions have been spent in research into the causes of arteriosclerosis . . .' or whatever, however it ended. You know, obviously he's going to say. And in effect you're telling him what the fact is and you're telling the jury what the fact is and that has nothing to do with experts or anything else. That's just telling the witness, isn't this true, isn't this true, isn't this true. And that's what they're objecting to and that's what we're seeing a lot of. I suppose the proper way to ask that question is, what's being done in medical science to cure arteriosclerosis? And he would say, well, we're spending millions of dollars; rather than saying isn't millions of dollars being spent; isn't this a disease that's hard to cure; aren't people dying everyday from this disease, you know. Instead of saying, what's the effects of this disease; well, people die everyday. That's the reverse of it. That's what you're objecting to.

After an interjection by appellants' counsel, the court continued:

> Well, I know but I'm saying that's the last question that was asked and that's just clearly a leading question,

whether you say, state whether or not or isn't it true or whatever.

I don't know what the solution is because we're seeing a lot of leading questions and I certainly don't want to resort to that. Would it suffice if I just say, let's please, without having to go through this again, just please be circumspect in the questions you ask so that we're asking the party to state his testimony rather than yes or no, or yes, that's a fact, or no, that's not a fact, I agree with that or I don't agree. Which is really what you're asking yes, I agree with what you say, when you say state whether or not; yes, I agree with what you're saying, [counsel]. In which case as I said earlier, what we're doing is you're testifying or [appellees' counsel] testifying when he says it and all he's saying is, yeah, I agree with that fact you've just stated. And the jury says, well, [appellees' counsel] says that's true and the doctor says it's true, so —

* * * * * * * * *

The Court: I don't think [appellees' counsel] is intentionally leading these witnesses. He's a tried and true trial attorney and he's trying the case as he best knows how. I don't think he's intentionally saying, I'm going to get another one in here and do this. But the problem arises and the question is — it's an ongoing problem — how to deal with this question. And I'm just advising [appellees' counsel] I think we're getting a lot of leading questions and relying upon him to protect us from that in the future.

After that there were five more objections to leading questions until appellants' counsel asked that the responses be stricken. The trial court refused but admonished appellees' counsel to "please confine your questions to questions." There were seven objections to leading questions after that. At one time appellants' counsel renewed their motion and the following colloquy occurred:

[Appellants' counsel]: Secondly, I despair of what to do with respect to leading questions. If I continue to object, I'm going to not only alienate the jury, but it's my impression that the defense counsel is trying to beat the

Court down on leading questions. And not only do I run the risk of alienating the jury, but if the Judge overrules me when they're leading, then that makes my other objections look bad. *So I move to strike the testimony of all of the defense witnesses* on the grounds that their testimony has been warped completely out of kilter by suggestive, leading questions. (Italics supplied.)

The Court: *Well, of course I'm not going to do that.* I don't think it's that serious. I think there is a constant problem with leading questions, [appellees' counsel]. And I don't know what to do about it either. I certainly don't want to strike your witnesses, but there are a lot of comments — and I forget the one about the nurse, but, you know, I thought, gee whiz, what does that have to do with the case, which is harmless in itself, but I don't know. Tell me what I do, [appellees' counsel]. Tell me how to handle it. You tell me. (Italics supplied.)

[Appellees' counsel]: Your honor, you've shown that counsel has a continuing objection to this and —

The Court: I don't think you're intentionally saying, I'm going to lead this man and lead this man. It's just the patterns of the questions that keep coming up. I'm getting sensitive to it now because I expect [appellants' counsel] to jump up every time there's a leading question and say, oop, here we go again. And I'm getting sensitive to it and I'm getting overreactive to it in the sense I'm waiting for it each time because I'm waiting for [appellants' counsel] to jump up. And they're getting oversensitive to it because they're very sensitive about the leading situation.

[Appellants' counsel]: That's the very importance of it right there, Your Honor. I know the jury is getting irritated with me for making what is a proper objection.

The Court: I don't think they are frankly. Unfortunately my experience has been that the most obnoxious — of course you're certainly not this — but the most obnoxious lawyers I have, in the sense I just finally said, sit down, we'll note you object to everything, they win big verdicts. They've bothered the devil out of me. They don't bother the

> jury at all. So anyway the most extreme cases of objection I've seen have apparently not bothered the juries at all. And of course, you're not anywhere near anything like that. I'm just saying the worse case scenario I've seen has gotten some of the biggest verdicts, so I don't know that even has an effect on the juries, much against our common belief in the legal profession.
>
> But in any event all I can do is encourage [appellees' counsel] to be more circumspect in your questions in the sense they're not leading, and to ask the witness a proper question which elicits a statement from him rather than asking him to agree with your statement, and to avoid any gratuitous comments like we had of the nurse about whatever it was, which necessitated another bench conference.
>
> I don't think any great damage is being done to be honest with you, [appellants' counsel]. I don't think this is turning the case around and it's a situation in which the questions would not have been answered the same way if they'd been asked properly. It's not a situation where these witnesses are being led down the path. I know it's annoying to you and [appellants' counsel] and I know it's bothering the devil out of you and I'm getting to be bothered now because I'm sensitive to you all jumping up, and properly so, and I'm getting sensitive to the whole thing myself. I don't think it's determining the outcome of this case by any way, mean shape or form. It's just an annoying thing that's bothering you and it's beginning to bother me.
>
> So I'm not going to strike the testimony. I'm going to caution [appellees' counsel] once again to watch that and avoid any sidebar comments and to quit leading his witnesses. And we'll note your objection for the record.

The motion was renewed one other time, and the trial court instructed the witness not to answer the leading question. Appellants' counsel asked that a continued objection be noted, which it was.

[redacted] Improper leading includes improper suggestion and improper ratification. Wigmore, *Treatise on the Law of Evidence*

§ 769: *Callahan* v. *Farm Equipment, Inc.*, 225 Ark. 547, 283 S.W.2d 692 (1955). Suggestion occurs when a question indicates the answer desired and ratification occurs when a question is suggestive, contains factual detail which could and should originate with the witness and the witness adopts the detail and the form in which it is expressed. Denbeaux and Risinger, *Questioning Questions: Objections to Form in Interrogation of Witnesses*, 33 Ark. L. Rev. 439 (1979).

Following are examples where counsel improperly suggested the desired answers from his expert witnesses:

Q. All right. In your experience, does the computer overread or underread EKGs?

A. The computer tended to overread EKGs.

Q. And that's the way it should be, don't you agree?

A. I would prefer it that way.

Q. So that all doubt is resolved on behalf of the patient to try to give patient help if he needs it?

A. Every benefit of the doubt.

* * * * * *

Q. Now we know that there was no myocardial infarctions within one year prior to July of 1979 as a matter of truth and fact, don't we?

* * * * * *

Q. Then Doctor, it's unfortunate but true that in heart attack cases we really don't know about prior heart attacks and whether or not for sure the patient had one until, unfortunately, some day the patient dies and you can do an autopsy on him, isn't that true?

* * * * * *

Q. And the practice of medicine is based on what, Doctor?

A. The practice of medicine is based on, as nearly as possible, gathering objective data and then you have to interpret that data.

Q. And who has to interpret it?

A. The physician.

Q. And that's judgment, isn't it?

A. And that's judgment.

Q. Professional judgment.

A. That's professional judgment.

Q. Human judgment.

A. Human judgment.

* * * * *

[redacted] Some of the sanctions for leading questions recommended by the authors of the cited law review article are: striking the improper question and permitting a proper one, admonishment at the bench or before the jury, striking the improper question and refusing to allow counsel to reask, contempt, and mistrial. Denbeaux and Risinger, *supra*.

[redacted] Here counsel repeatedly ignored the trial court's warnings concerning leading questions. The court conceded it could not or would not take action beyond admonishment. Only once did it instruct the witness not to respond. If counsel will not comply with the trial court's requests, then some sanction, with teeth, must be used against him. We are certain the leading would have stopped had the trial court granted appellants' motion to preclude further inquiry. The appellants were entitled to have the leading stopped.

[redacted] Trial courts by necessity are granted great power and discretion to preserve the order of their courtrooms. They have at their command numerous sanctions to see that rules are followed. Because the sanctions exist they are usually not necessary, but sometimes they must be used. Some sanctions should have been used in this case. The appellants were entitled to have the case presented to the jury in the words of witnesses not counsel. In finding an abuse of discretion in not employing those sanctions, we emphasize that our decision is necessarily limited to the facts this record presents.

The appellees urge us to find no error because the appellants failed to move for a mistrial, to object during closing argument, or

to demonstrate prejudice. In this case, as counsel for the appellants pointed out, it would have been to the appellees' benefit to have a mistrial declared since it is they who are seeking to preserve the status quo. Repeated objections were made and timely motions made giving the trial judge an opportunity to stop the tactics. The trial judge essentially conceded he could not stop counsel. The impression left with the jury could not help but prejudice the appellants' case.

While the responsibility for the conduct of the trial falls on the trial court, experienced counsel should not go too far in testing the patience of the system. Besides continued leading and violating the pretrial order, appellees' counsel asked an expert whether he believed Dr. Chapman to be negligent. Counsel knew full well that the answer was an impermissible opinion on the ultimate issue and withdrew the question upon objection. There should be no attempt to elicit such evidence on retrial.

Appellants make other arguments about sidebar comments of appellees' counsel and statements made in argument that were allegedly unsupported by the evidence. The instances will not occur on retrial, and, even so, the trial court's ruling will not be disturbed on appeal. We have no way to determine simply from the record the effect of these comments or the spirit in which they were made and we must rely on the trial court's sound discretion.

Reversed and remanded.

HOLT, C.J., and PURTLE, J., not participating.

DEAN WITTER REYNOLDS INC. *v.* Betty Lou DEISLINGER

86-33 711 S.W.2d 771

Supreme Court of Arkansas
Opinion delivered June 16, 1986

Wright, Lindsey & Jennings, by: *Peter G. Krempe & Walter McSpadden*, for appellant.

Robert L. Brown, P.A., by: *Robert L. Brown*, for appellee.

JOHN I. PURTLE, Justice. This is an appeal from the action of the circuit court that set aside an arbitration award. In setting aside the award the court made three findings: (1) that the transcript of the arbitration hearing was incomplete, (2) that the

arbitrators rejected relevant evidence and (3) that the arbitration panel exhibited partiality in favor of the appellant. We do not agree with any of the reasons stated for setting aside the award; therefore, we reverse the order of the circuit court.

On November 18, 1981, the appellant and the appellee entered into an agreement whereby the appellee was to receive $18,000.00 over a period of three months. The payments were to be made in three equal payments of $6,000.00. The appellee agreed that she would remain in the appellant's employment for thirty-six (36) months. On January 27, 1982, the appellee submitted her resignation. Approximately one month later the appellant demanded repayment of $6,955.17, representing previously advanced payments. The appellee refused repayment and on August 31, 1982, the appellant filed a claim against Deislinger for $13,950.00. The appellee filed an answer denying the claim and counterclaimed for $25,000.00 damages for breach of contract.

Subsequently the parties voluntarily agreed to submit the dispute to arbitration. Three members were selected to hear the dispute; however, on the day scheduled for the hearing one member failed to appear. Upon agreement of the parties, the hearing proceeded with the two-member panel. The panel proceeded in accordance with the National Association of Securities Dealers, Inc. (NASD) Code of Arbitration Procedures. During the hearing the arbitrators refused to admit evidence concerning the appellant's payments to other employees. The arbitrators found this to be irrelevant. The reviewing court found that this evidence should have been admitted pursuant to Unif. R. Evid. 406.

The panel awarded appellant the sum of $7,813.70 and denied appellee's counterclaim. Upon the petition of the appellee, the Pulaski Circuit Court set aside the arbitration award. This appeal is from that order.

The Arkansas arbitration and award procedures are set forth in Ark. Stat. Ann. § 34-501 (Supp. 1985) et seq. Vacating an arbitration award is specifically controlled by Section 522. Arkansas Stat. Ann. § 34-522 (a)(2) states: "Upon application of a party, the Court shall vacate an award where . . . there was evident partiality by an arbitrator appointed as a neutral or

corruption in any of the arbitrators or misconduct prejudicing the rights of any party." This statute further provides: "But the fact that the relief was such that it could not or would not be granted by a Court of law or equity is not ground for vacating or refusing to confirm the award."

In the instant case the court found that the panel demonstrated on numerous occasions their bias in favor of the appellant. Subsection (2), quoted above, appears to be the only statutory ground used by the court in setting aside the award. We find that no partiality was demonstrated.

56 A.L.R. 3d 697 (1973), *Setting Aside Arbitration Award on the Ground of Interest or Bias of Arbitrators*, states that it is well established that the interest, partiality, or bias which will overturn an arbitration award must be certain and direct, and not remote, uncertain or speculative. This authority also states that the party attempting to set aside the award bears the burden of proof to establish partiality. Even though Unif. R. Evid. 406 may have permitted some of the excluded evidence to have been considered in a court of law or equity, the exclusion of this evidence in an arbitration proceeding is not a statutory ground for vacating the award. Section 34 of the NASD Code of Arbitration states: "The arbitrators shall determine materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence." The NASD Code also states that no record of arbitration proceedings shall be kept unless a party or an arbitrator requests that a record be made. The record of the arbitration hearing was complete except for a few gaps of short duration.

In Arkansas arbitration is strongly favored by public policy and is looked upon with approval by courts as a less expensive and expeditious means of settling litigation and relieving congestion of court dockets. *McEntire* v. *Monarch Feed Mills, Inc.*, 276 Ark. 1, 631 S.W.2d 307 (1982). We have recently addressed the weight to be given an arbitration award in *Wessell* v. *Crossett Public School Dist. #52*, 287 Ark. 415, 701 S.W.2d 99 (1985). There we stated: "The decision of the arbitration board on all questions of law and fact is conclusive. [Citations omitted.] The court shall confirm an award unless grounds are established to support vacating or modifying the award."

The parties to this action voluntarily entered into an arbitration agreement and further agreed that two arbitrators would decide the dispute. Having entered into this agreement, there is a moral and legal duty to abide by the award in the absence of valid reason not to do so. Simply being dissatisfied with the results is not a good reason for setting aside the award.

Neither the failure to keep a record nor the failure to follow the rules of evidence is enumerated in Ark. Stat. Ann. § 34-522 as being a ground for setting aside an arbitration award. Nor does the record or citation of authority support the allegation of partiality on the part of any member of the panel. The application of the arbitration statutes to the facts of this case is not challenged by either party.

The order of the court was in error and we reverse and remand with instructions to vacate the order setting aside the arbitration award.

Reversed and remanded.

Johnny BARGER *v.* Margaret Ann FARRELL

86-26 711 S.W.2d 773

Supreme Court of Arkansas
Opinion delivered June 16, 1986

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

Mitchell, Williams, Selig, Jackson & Tucker, by: *W. Kirby Lockhart*, and *Tracy A. Barger*, for appellee.

STEELE HAYS, Justice. This case concerns a property damage claim arising from an automobile accident between Johnny Barger, appellant, and Margaret Ann Farrell, appellee. Barger admitted fault and while Ms. Farrell's late model BMW was being repaired, he paid the estimated cost of repairs, $5,145.40, and a portion of the cost of a rental vehicle. Later Ms. Farrell filed suit for an additional $4,000 in property damage and for additional loss of use.

The case was tried to a jury and negligence was conceded, thus the only issue was the extent of the plaintiff's damage. Ms. Farrell testified she bought the BMW 318 in May, 1983 for $18,800. The car, she thought, had depreciated about $1,000 during the year she had driven it. She said while the car was being repaired additional damage was discovered, adding $322.87 to

the original estimate. Warden Motors had offered her $8,000 for the car in its wrecked condition. She declined that offer but after the car was repaired she traded it for another BMW, receiving an allowance of $13,390.20.

The only other witness, Mr. Bobby Ray Miller, was a salesman for Warden Motors when Ms. Farrell's car was repaired and traded. He had ten years experience in automobile appraisal. It was he who estimated the repairs to the wrecked vehicle and who sold the second BMW to Ms. Farrell. He appraised her car after being repaired for $13,500. He thought the car had a value of $17,450 before the accident, based on a comparable model Warden had for sale. He said a car that has been damaged does not have the same value as one that has not been wrecked.

When Barger offered no proof, Ms. Farrell moved for a directed verdict in the amount of $5,417.87.[1] The trial court directed a verdict and Barger has appealed. We reverse the judgment.

Appellant Barger relies largely on two rules of law: 1) in testing the propriety of a directed verdict the testimony of a party is not considered since such testimony is controverted as a matter of law (*Little* v. *George Feed and Supply Co.*, 233 Ark. 78, 342 S.W.2d 688 (1961), and 2) the opinion testimony of an expert is entitled only to such weight as a jury elects to give it, even when such testimony is wholly uncontradicted. *Curry* v. *State*, 271 Ark. 913, 611 S.W.2d 745 (1981); *American Bauxite Company* v. *Dunn*, 120 Ark. 1, 178 S.W. 934 (1915).

[1, 2] Appellee Farrell cites us to cases holding that when evidence is wholly undisputed the court should take the issue from the jury, that a directed verdict should be granted where there is no substantial evidence to the contrary. *Paul Hardeman, Inc.* v. *J.I. Hass Company*, 246 Ark. 559, 439 S.W.2d 281 (1969); *Brown* v. *Keaton*, 232 Ark. 12, 334 S.W.2d 676 (1960). While these cases have general application to this case, they do not settle the issue presented. The fact is a party who does not have the burden of proof is not required to produce substantial evidence to

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[1] Presumably this figure includes $1,089 for loss of use, not an issue in the case.

offset the opposing proof. *Shaeffer* v. *McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985). Only when the proof of one party is so clear, convincing and irrefutable that no other conclusion could be reached by reasonable men should the issue be taken from the jury and decided by the court. We examined this situation in some depth in *Spink* v. *Mourton*, 235 Ark. 919, 362 S.W.2d 665 (1962), and in *Morton* v. *American Medical International, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985).

Those cases involved issues of negligence. The plaintiffs had offered substantial evidence on the issue of liability and were appealing from a jury verdict for the defendants, who had offered little or no evidence in return. Spinks argued that the trial court erred in refusing a motion for judgment n.o.v., conceding that it was properly denied unless it can be said the trial court should have directed a verdict in favor of the plaintiff. Language quoted in that opinion is especially appropriate to this case:

> Thus, no matter how strong the evidence of a party, who has the burden of establishing negligence and proximate cause as facts, may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise.

The *Morton* case, *supra*, is similar. Mrs. Morton brought suit for injuries sustained in a fall in St. Mary's Hospital in Russellville. She and others testified the floor was very slick, which no witness for the defendant refuted. Mrs. Morton appealed a jury verdict for the defendant on the premise there was no substantial evidence to support the verdict. In affirming, we cited *United States Fire Insurance Co.* v. *Milney Hotels*, 253 F.2d 542 (8th Cir. 1958), quoted above, and *Clark* v. *Abe*, 328 Mo. 81, 40 S.W.2d 558 (1931):

> The burden was not on the defendant, but was on the plaintiff to make out the case stated in his petition. In a case where the allegations of the petition are denied by the answer, and the plaintiff offers oral evidence tending to support the allegations of the petition, the defendant is entitled to have the jury pass upon the credibility of such evidence *even though he should offer no evidence himself.*

> The court has no right to tell the jury that it must believe the witnesses. The jury, in the first instance, is the sole judge of the credibility of the witnesses and of the weight and value of their evidence, and may believe or disbelieve the testimony of any one or all of the witnesses, though such evidence be uncontradicted and unimpeached. (Our italics).

There are instances, to be sure, where a directed verdict for a plaintiff is proper. Two examples are *Plunkett* v. *Winchester*, 98 Ark. 160, 135 S.W. 860 (1911) and *Arkansas Real Estate Co., Inc.* v. *Fullterton*, 232 Ark. 713, 339 S.W.2d 947 (1960). But in those cases the defendants admitted facts in the pleadings and proof showing the plaintiffs to be entitled to the relief sought, and there was no question left for the jury to decide.

[redacted] In this case Barger made no admission except as to negligence and he was entitled to have the amount of the plaintiff's damage decided by the jury. The jury could have disbelieved the plaintiff's proof altogether, or it could have believed it in part and rejected it in part. It could have decided the BMW had depreciated more than the thousand dollars Ms. Farrell "thought" to have occurred during the year she drove it. Or it could have decided that after repairs the car was worth more than the $13,500 ascribed to it by the expert witness, Bobby Miller. His testimony concerning values before and after the collision was, after all, merely his opinion and was not binding on the jury. Those were matters which the defendant had a right to argue to the jury and it was error to deprive him of that opportunity.

Reversed and remanded.

Steven Robert ROGERS *v.* STATE of Arkansas

CR 85-199 711 S.W.2d 461

Supreme Court of Arkansas
Opinion delivered June 16, 1986

Wood Law Firm, by: *Steven R. Davis*, for appellant.

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

STEELE HAYS, Justice. Steven Robert Rogers was found guilty of two counts of aggravated robbery and one count of kidnapping. Pursuant to Ark. Stat. Ann. § 41-1001, the court instructed the jury that Rogers had been convicted of three prior felonies and the jury fixed the sentences at twenty years on each count, which the court ordered to be served consecutively. We affirm the judgment.

Appellant first contends the convictions are void because the Information failed to comply with Article 7, Section 49 of our Constitution, which provides that the "[i]ndictments shall conclude: 'Against the peace and dignity of the State of Arkansas'." This information does conclude with the appropriate language, but, as appellant points out, several of our cases have held that the language must follow each count, which was not done here. *Hall* v. *Lackmond*, 50 Ark. 113, 6 S.W. 510 (1887); *Williams* v. *State*, 47 Ark. 230, 1 S.W. 149 (1886); *State* v. *Hazle*, 20 Ark. 156, (1859). However, this objection was not presented to the trial court and cannot be raised for the first time on appeal. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

The two remaining arguments are: the trial court erred in permitting the introduction of a certified copy of a docket sheet to prove one of appellant's prior felony convictions and counsel's failure to object to the introduction of the docket sheet constitutes ineffective assistance of counsel.

These arguments, like the first, are also subject to summary denial. There was no objection to the introduction of the docket sheet and claims of ineffective assistance of counsel may not be raised initially by appeal. *Sumlin* v. *State*, 273 Ark. 185, 617 S.W.2d 372 (1981).

Affirmed.

Charles E. DOYLE *v.* CHILTON CORPORATION and CBM OF ARKANSAS, INC. d/b/a CREDIT BUREAU SERVICES and WORTHEN BANK AND TRUST CO., N.A.

85-228 711 S.W.2d 463

Supreme Court of Arkansas
Opinion delivered June 16, 1986
[Rehearing denied July 7, 1986.]

Nelwyn Davis Law Office, by: *Nelwyn Davis*, for appellant.

Friday, Eldredge & Clark, by: *Donald H. Bacon*, for appellee Chilton Corp. and CMB of Arkansas, Inc. d/b/a Credit Bureau Services.

Wright, Lindsey & Jennings, for appellee Worthen Bank & Trust Co., N.A.

DAVID NEWBERN, Justice. The appellant Charles E. Doyle brought an action against the appellees after he was denied credit he sought to finance a motor home. Appellee Chilton Corporation is the parent corporation of appellee CBM of Arkansas, Inc., d/b/a Credit Bureau Services. The appellant alleged that Credit Bureau Services, in compiling a credit report, violated the Fair Credit Reporting Act, codified at 15 U.S.C. §§ 1681-1681t. He alleged that Worthen Bank and Trust Co., N. A., had violated the reporting provisions of the same Act. Summary judgment was awarded to the appellees because the court found the Act was inapplicable as the credit was sought for commercial rather than personal purposes. The main question we must resolve is whether

the court was correct in its interpretation of the Act and was thus correct in concluding there was no remaining issue of material fact to be determined. Ark. R. Civ. P. 56(c). We hold the Act was not properly construed, and because there are remaining material issues of fact the judgment must be reversed and the case remanded.

In their summary judgment motion the appellees relied on the deposition of the appellant which revealed these facts: The appellant and his brother, Ronnie Doyle, wished to purchase a motor home which they would own jointly. They found one they wanted to purchase at a dealership. They arranged to purchase it and asked the dealer to arrange the financing. A credit application was filled out, and the dealer submitted it to Worthen. Worthen had a credit check performed by Credit Bureau Services. When Charles returned to the dealer he was informed the financing request had been rejected by the bank.

The dealer gave Charles no reason for the refusal of credit. A few days later, Charles called Worthen and was told the refusal "had to do with the . . . Credit Bureau saying something about a bad credit card." Charles then called Credit Bureau Services and was told the information would not be revealed on the telephone but that he would have to write to inquire. He wrote to Credit Bureau Services and received a credit sheet from which he concluded the poor credit record revealed was that of another Charles Doyle. The credit sheet referred to two accounts with J.C. Penney Co., differentiated by their computer identification numbers. One was the account of the appellant and his wife. The other account, in which there was a delinquency, was that of the other Charles Doyle. The appellant called the agency again to inform it of the mistake. He was told that Credit Bureau Services could not make the change and he would have to straighten it out with J.C. Penney Co. The information he received by telephone from the J.C. Penney Co. Dallas office was that J.C. Penney Co. was not at fault, and the credit agency would have to straighten it out.

Charles Doyle then hired an attorney to pursue the matter, and his credit file at Credit Bureau Services was eventually changed to remove the negative part but not until after interest rates had gone up dramatically and he had decided not to obtain

financing for the purchase.

1. The Statute

Section 1681e(b) contains the language upon which the appellant's claim is based. It provides:

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Thus it becomes crucial to know whether Credit Bureau Services, the consumer reporting agency, in this case prepared a "consumer report" as defined by the Act. Section 1681a is the definitions section. It provides, in relevant part:

> (d) The term "consumer report" means any . . . communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit . . . to be used primarily for personal, family, or household purposes. . . .

2. The Claim Against Credit Bureau Services

Credit Bureau Services argued below, and they argue here, that because Mr. Doyle stated in his deposition that he intended to use the motor home primarily in his business the loan in prospect was a commercial loan rather than a consumer loan and that, therefore, the Act is inapplicable and summary judgment was appropriate. Credit Bureau Services cites *Sizemore* v. *Bambi Leasing Corp.*, 360 F. Supp. 252 (N.D. Ga. 1973) in which it was held that an application for credit made by "G. Sizemore Company" was for commercial purposes and thus not within the coverage of the Act. In that case the credit of the company proved to be satisfactory, but a subsequent report on Mr. Sizemore's personal credit rating was not, and the credit was thus denied. Although it is troublesome that the credit was denied on the basis of Mr. Sizemore's personal credit rating, the holding of the case does not support Credit Bureau Services' argument here because the application of Mr. Doyle was not made in the name of his

company or any company for which he worked. Any credit agency or user was obviously on notice of the commercial nature of Mr. Sizemore's application.

Also cited is *Ley* v. *Boron Oil Company*, 419 F. Supp. 1240 (W.D. Pa. 1976). In that case the court held that a report by a credit agency of certain personal information about an attorney was not a "consumer report" because it was not collected, used or intended to be used for credit purposes. Rather, it was requested and collected to obtain information about an attorney who had threatened Boron with suit. No credit purpose whatever was involved. The case is thus easily distinguishable from this one.

In *D'Angelo* v. *Wilmington Medical Center*, 515 F. Supp. 1250 (D. Del. 1981), also cited by Credit Bureau Services, the plaintiff contended he intended to use the credit for which he applied for personal purposes and thus the court should not have rendered summary judgment against him on his claim under the act although on his credit application he had checked a box indicating the credit was for commercial purposes. The court said:

> The Act focuses on the user of consumer information (here Sunmark) and its purpose in obtaining and using that information. If it collects and uses the information for the purpose of deciding upon a proposed extension of primarily personal credit, the communication from the consumer reporting agency is a consumer report within the meaning of the Act and both the agency and user have responsibilities under the Act. 15 U.S.C. § 1681e(a). If the purpose of the user involves an application for commercial credit, on the other hand, those responsibilities do not arise. For this reason, among others, the intent of the user with respect to information sought from a consumer reporting agency must be certified to that agency. Because of this focus on the use to which the information is put by the user, I conclude that Congress must have intended that the private-commercial dichotomy be drawn on the basis of the credit application which the consumer report is used to evaluate. [515 F. Supp. at 1254-1255.]

In the case before us we have no idea what was on the credit application. The application is not in the record. How can we

know, and how could the trial court have known, what Worthen knew about the purpose for which it was to use the information? We are similarly in the dark about what Credit Bureau Services knew, when it collected the information, about the purpose for which it was to be used. All we know for purposes of deciding this case, is that Mr. Doyle's subjective intent, which the *D'Angelo* case says is irrelevant, was to use the motor home in his business but he applied in his own name and did not apply in the name of a business. If we focus on the purpose of Worthen, the user of the consumer information, as the statute requires, we are left with a material fact question.

The remark of the court in the *D'Angelo* case, quoted above, that the intent of the user must be certified to the collecting agency, states the requirement of § 1681e(a). When this matter is tried, presumably Worthen's certification to Credit Bureau Services as to whether the loan was to be for commercial or personal purposes will be in evidence and will be significant.

We are persuaded that the summary judgment motion of Credit Bureau Services should not have been granted. As the statute says, the purpose for which the report was collected and used or expected to be used is determinative of whether the Act applies. Those descriptions focus on the objective indicia of the purposes of the user and the collecting agency and not on the intent of the consumer. Even if the report is ultimately used for a purpose other than a personal, family or household credit application, it is a "consumer report" to which the Act applies if the information in the report was compiled and maintained for the purposes stated in § 1681b. *Boothe* v. *TRW Credit Data*, 523 F. Supp. 631 (1983). Whether the report in this case was compiled and maintained for those purposes is a remaining material issue of fact.

3. The Claim Against Worthen Bank and Trust Co.

The basis of the summary judgment in favor of Worthen was that the Act was inapplicable, therefore, the claim against Worthen for violation of § 1681n will depend upon the factual determination discussed above.

Worthen, in arguing the inapplicability of the Act, relies primarily on *Matthews* v. *Worthen Bank and Trust Co.*, 741 F.2d

217 (1984). There the plaintiff wanted to lease space in a "mini mall" for a liquor store. Worthen obtained a credit report on the plaintiff after the mall owners had discussed the prospective lease with a Worthen officer. The owners had a loan from Worthen which was being paid mainly from mall proceeds. In that case it is clear that Worthen, the user, knew of the commercial nature of the transaction, but beyond that, the opinion does not say that the information was to be used for credit purposes. The case becomes even less persuasive when it is realized that the credit report contained no derogatory information about the plaintiff. Speaking of the *Matthews* case, Worthen's brief says:

> The court found that the FCRA does not apply when a consumer's credit report is *released* for a business purpose. The purpose for which the information was originally *collected* was not even deemed worthy of discussion by the court. [Emphasis in the original.]

In the first place, we do not know if it was argued that the purpose of collection was significant. Secondly, the per curiam opinion said:

> We find that this particular transaction was exempt from the FCRA because the credit report was used solely for a commercial transaction. [741 F.2d at 219.]

The term "released" is not used in the opinion. The term "used," of course, appears in § 1681a(d) and, as noted above, becomes the focus of inquiry as to the applicability of the Act.

Worthen's second argument is that even if the Act applies, Worthen complied when it gave Mr. Doyle the information after his request. If, upon trial of this case, the court finds the Act was applicable, presumably there will be more substantial evidence as to whether Worthen's reply to Mr. Doyle's question constituted compliance with § 1681m.

4. Conclusion

[redacted] When the purpose of the Fair Credit Reporting Act is examined it becomes clear it could apply in this case. Section 1681(b) provides:

> (b) It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures

> for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

The information upon which the appellant was denied credit was obtained from a credit card account with the J.C. Penney Co. The appellant testified it was a charge account used primarily by his wife. It is obviously the sort of information collected and disseminated daily by credit reporting agencies with respect to consumer credit applications. It is the sort of information as to which § 1681e(b) requires "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

Reversed and remanded.

Willie Ray MACKEY *v.* STATE of Arkansas

CR 86-48 711 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered June 16, 1986

Hurst Law Office, by: *Q. Byrum Hurst, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted of first degree murder by a "death qualified" jury. We affirmed. *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983). He petitioned us for permission to seek post conviction relief in the

trial court pursuant to Ark. R. Crim. P. 37 on the ground that he had been denied due process because potential jurors who had expressed unwillingness to impose the death penalty had been excused and thus he was tried by a conviction prone jury rather than one composed of a true cross-section of persons in the community. We denied his petition for two reasons. First, it was an issue which could have been, but was not, raised at his trial in the Rule 37 petition, and, if proven, would not have voided the conviction. Second, we had repeatedly held that a so-called "death qualified" jury was not unconstitutional. *Mackey* v. *State*, 286 Ark. 188, 690 S.W.2d 353 (1985).

The appellant then sought to have his sentence set aside pursuant to Ark. Stat. Ann. § 43-2314 (Supp. 1985) on the basis that it had been imposed in an illegal manner, again claiming the sentence was invalid because it was imposed by a "death qualified" jury. The trial court denied the relief requested.

We affirm again. Even had this issue not been waived by failure to raise it at the trial level, we have consistently held that "death qualified" juries are not unconstitutional. *See, e.g., Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985); *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983). Our view of the matter has recently been upheld by the United States Supreme Court in *Lockhart* v. *McCree*, Case No. 84-1865, May 5, 1986.

Affirmed.

James A. RAGAN, RILEY'S INC., On Behalf of Themselves and All Other Similarly Situated Taxpayers *v.* Donald VENHAUS, et al.

85-109 711 S.W.2d 467

Supreme Court of Arkansas
Opinion delivered June 16, 1986

Mitchell, Williams, Selig, Jackson & Tucker, by: *Eugene G. Sayre* and *Joyce Kinkead*, for appellants.

Henry & Duckett, by: *Stephen L. Curry*, for appellees Donald Venhaus, County Judge; William R. Tedford, Treasurer of Pulaski County, Arkansas; and Pulaski County, Arkansas.

Arkansas Office of Revenue Legal Counsel, by: *Wayne Zakrzewski*, for appellee Charles D. Ragland, Commissioner of Revenues of the State of Arkansas.

Mark Stodola, Little Rock City Attorney, by: *Carolyn Witherspoon*, for appellees Jack Murphy, Treasurer of the City of Little Rock, Arkansas, and the City of Little Rock, Arkansas.

Steve Clark, Att'y Gen., by: *E. Jeffrey Story*, Asst. Att'y Gen., for appellee Jimmie Lou Fisher, Treasurer of the State of Arkansas.

Jim Hamilton, North Little Rock City Attorney, by: *Michael Emerson*, for appellees Mary Ruth Morgan, Treasurer of the City of North Little Rock, Arkansas, and the City of North Little Rock, Arkansas.

Bob Dawson, Sherwood City Attorney, for appellees Amy Saunders, Treasurer of the City of Sherwood, Arkansas, and the City of Sherwood, Arkansas.

Keith Vaughn, Jacksonville City Attorney, for appellees Lula M. Leonard and City of Jacksonville, Arkansas.

JOHN G. LILE, Special Justice. Appellants filed suit in Pulaski Chancery Court claiming that the 1% compensating use tax imposed and collected by appellees in Pulaski County since April 1, 1982, constitutes an illegal exaction. The chancellor held that appellees' imposition of the use tax was not an illegal exaction. We reverse and remand.

The facts were virtually all stipulated and are undisputed by the parties. The Pulaski County Quorum Court adopted Ordinance 81-OR-71 on December 8, 1981, calling for a special election in Pulaski County to be held February 2, 1982. The official ballot and voting instructions called for the voters to vote for or against the adoption of a 1% sales tax pursuant to the provisions of Act 991 of 1981, as amended by Act 26 of 1981,

First Extraordinary Session, but no mention was made of a 1% compensating use tax. The proposition received a favorable majority, and the results were certified to and published by the Pulaski County Judge on February 5, 1982.

However, on March 23, 1982, the Pulaski County Quorum Court adopted Ordinance 82-OR-12 which contained an article purporting to enact a 1% compensating use tax after April 1, 1982, and since that date both a 1% sales tax and a 1% use tax have been imposed and collected by the appellees.

This suit was filed October 5, 1982, and subsequently was certified as a class action.

The chancellor determined that the suit was an untimely election challenge filed more than thirty days after the certification of the election results. She further held that if the claim was not an election challenge, and was indeed an illegal exaction suit, then the mention of Act 26 of 1981 in the ballot title used in the special election was sufficient to notify the voters that not only a 1% sales tax but also a 1% use tax were to be voted on in the election.

There is a threshold issue which must be considered. Appellants filed a timely notice of appeal and properly ordered a transcript; however, appellants did not designate the entire record. Appellants did specifically list pleadings, motions, responses, all testimony, all stipulations, all exhibits and all orders filed in the trial court. The appellants did not file with their notice of appeal a statement of points on which they would rely on appeal.

The appellees filed a motion in the trial court to dismiss the appeal alleging that appellants had not complied with all of the provisions of Rule 3(g) of the Arkansas Rules of Appellate Procedure because they failed to file a statement of points on which they would rely on appeal. The chancellor granted appellees' motion to dismiss. Thereafter, appellants filed a second notice of appeal both from the original judgment and the order dismissing the appeal; they also simultaneously filed a statement of points to be relied on, setting forth the same issues which had been fully argued and briefed before the trial court. Once again the appellees moved to dismiss, and the chancellor ordered

dismissal, limiting appeal to whether the chancellor erred in dismissing the initial notice of appeal. Appellants moved this court for permission to file a full abstract and brief on all issues raised in the trial court, and such permission was granted.

It is obvious from the original designation of record on appeal that all substantive pleadings, motions and responses, all orders and the judgment of the court, all exhibits introduced into evidence, all stipulations of fact, and all of the testimony were designated. The only items not designated were discovery pleadings, discovery objections and briefs of the parties.

The purpose of Rule 3(g) is to prevent prejudice such as was found in *Jones* v. *Adcock*, 233 Ark. 247, 343 S.W.2d 779 (1961), which dealt with the statutory predecessor to Rule 3(g). In that case a full record had been designated originally, but was subsequently replaced by an abbreviated designation which was not served on the appellees. The points argued on appeal were affected by *un*designated portions of the record, and consequently the appellees were prejudiced by appellant's failure to comply with the rule; appellees were therefore deprived of the opportunity to bring up additional matters in the record.

In the case at hand, there is no prejudice to appellees.

Accordingly, we do not limit the appeal to the question of whether the chancellor erred in dismissing the original notice of appeal; rather, we will address all the issues raised by appellant.

The appellants do not contest the validity of the 1% sales tax. They do not challenge the election process or result as they relate to the sales tax. The appellants are not going behind the returns nor inquiring into the qualifications of the electors as in *Parsons* v. *Mason*, 223 Ark. 281, 265 S.W.2d 526 (1954) and *Vance* v. *Johnson*, 238 Ark. 1009, 386 S.W. 2d 240 (1965).

The appellants are questioning the power of the quorum court to adopt a 1% use tax in Article 2 of Ordinance 82-OR-12 passed on March 23, 1982. Until that Ordinance was passed there had been no mention of a use tax in any public expression by the court officials. Before a tax can be enacted, a referendum is required by article 16, section 11, of the Constitution of the State of Arkansas. This Ordinance is an attempt to enact a tax without a referendum.

The citizens are entitled to be informed by plain language about what they are voting, and this court has long insisted on that standard. For example, in *Arkansas - Missouri Power Corporation* v. *City of Rector*, 214 Ark. 649, 217 S.W.2d 335 (1949), the city council passed an ordinance calling for an election in which the citizens would decide whether or not the city should issue and sell bonds in the amount of $65,000, "to build and construct an electric light plant." What the ballot title did not tell the voters was that the cost of the plant would be more than twice that amount. The city defended on the basis that at mass meetings and discussions at council meetings it was explained that the plant could not be built for the amount stated in the ballot title. This court stated in *Arkansas - Missouri Power Corporation, supra*, at 654, that "The ballot title is the final word of information and warning to which the electors had the right to look as to just what authority they were asked to confer, . . ."

To suggest, as appellees do, that references to acts of the legislature in a ballot title were sufficient to inform voters they were not only authorizing a sales tax but also a use tax is like suggesting that mass meetings and city council discussions will sufficiently supply missing necessary information in a ballot title. The voters do not have ready access to the acts of the legislature, and we cannot presume they know what repealing effects a later act may have on a former act. Employing the phrase "sales tax" with no mention of "use tax" is at best misleading, even if a referenced act in the ballot title clearly and specifically requires a use tax to be imposed if a sales tax is imposed.

Reversed and remanded.

Special Justice DON H. SMITH concurs.

HAYS and PURTLE, JJ., not participating.

Danny STEWART *v.* STATE of Arkansas

CR 85-191 711 S.W.2d 787

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Brad J. Beavers and *W. Frank Morledge, P.A.*, for appellant.

Steve Clark, Att'y Gen., by: *Jerome T. Kearney*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, Danny Stewart, was charged with having murdered Edna Jolly on March 7, 1984. He was found guilty of capital murder and sentenced to life imprisonment without parole. His principal argument for reversal is that his confession to the police was the product of an illegal arrest and should have been suppressed. The State responds that the arrest was proper because the police acted in good faith within the Supreme Court's ruling in *United States* v. *Leon*, 104 S. Ct. 3405 (1984). We cannot uphold the conduct of the police or of the municipal judge with respect to the arrest warrant and must reverse the judgment of conviction.

Mrs. Jolly's murder in March was an unsolved crime for almost five months. On August 1 Linda Hancock reported to the Forrest City police that she was getting obscene phone calls. A tap placed on her telephone showed that another call received by Ms. Hancock later that day had been made from the house in which Danny was living with his parents. Ms. Hancock described the caller's voice as that of a young black male. Officer Bill Dooley

went about getting a warrant for Danny's arrest. The officer filled in a printed form of Affidavit For Arrest Warrant, in which Linda Hancock was to swear that Danny Stewart had made an obscene phone call to her. Officer Dooley took the affidavit to Ms. Hancock's home and obtained her signature. She did not swear to it. Instead, the officer took the signed form to the office of the municipal court clerk, where a deputy filled in and signed the jurat without having talked to Ms. Hancock.

Municipal Judge John D. Bridgforth had signed a pad of 50 or more blank arrest warrants and had authorized the clerk to issue warrants on her own after having read the supporting affidavit and made certain it had been signed. Judge Bridgforth testified that he never saw the affidavit in this instance and made no judicial determination of reasonable cause for the arrest of Danny Stewart. The clerk, however, filled in one of the presigned warrants, charging Danny Stewart with harassment by communication, and gave it to Officer Dooley. He turned it over to another officer, who arrested Stewart and brought him in for questioning. Stewart was given the usual Miranda warning. He was first questioned about the phone calls and then about the murder of Edna Jolly. Stewart signed a confession in which he told how he had gone to a house on Franklin Street and entered by breaking a large window, after having first broken a small window in the back door. He found "an old white lady" in the bedroom. When she began yelling he hit her more than once with the piece of wood he had used to break the windows. He carried her outside and left her in a ditch by a railroad track. The details he gave corresponded to what the police had found back in March. The confession was the cornerstone of the State's case.

We have already decided to accept and adhere to the *Leon* relaxation of the exclusionary rule. *Lincoln* v. *State*, 285 Ark. 107, 685 S.W.2d 166 (1985). In the case at bar, however, the key element of good faith is lacking. Officer Dooley knew that Linda Hancock had not made her accusation under oath, an essential element of an affidavit. He could not have acted in good faith in obtaining the arrest warrant on the strength of that spurious affidavit.

The conduct of Judge Bridgforth was inexcusable. The *Leon* opinion states that the good faith exception will not apply in cases

"where the issuing magistrate wholly abandoned his judicial role." *Leon*, p. 3422. In Arkansas the magistrate's judicial role is clearly stated in Criminal Procedure Rule 7.1(b):

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

Judge Bridgforth testified that he had authorized the court clerk to issue warrants of arrest for misdemeanors. This warrant was for a misdemeanor, the making of an obscene call. But Rule 7.2(a)(iii) requires that every arrest warrant "be signed by the issuing official with the title of his office." The warrant now in question recites that there are reasonable grounds for believing that Danny Stewart has committed the offense of harassment by communication. Any law enforcement officer is ordered by the warrant to arrest Stewart and bring him before the municipal court of Forrest City. Those statements appeared above Judge Bridgforth's signature. He signed the warrant; the clerk did not. Judge Bridgforth was the "issuing official," not the clerk. Had the officers known nothing about the warrant when they received it, perhaps they might have relied on it in good faith. But here Officer Dooley took the warrant to the clerk's office, saw the deputy complete the jurat, and certainly knew that Judge Bridgforth had taken no part in the procedure, which Dooley said took only 4 or 5 minutes in the clerk's office.

In view of the police officer's knowledge of the illegal procedure and of the issuing magistrate's abdication of his responsibility, the arrest cannot be upheld under the ruling in the *Leon* case. The arrest was followed immediately by Stewart's interrogation and confession. The trial court should have suppressed the confession under the poisonous tree principle.

The appellant's next four points all relate to the confession or to the arrest and need not be discussed, for they will not arise upon a retrial.

The fifth point relates to a fingerprint. In March the police picked up pieces of broken glass at the Jolly home and sent them to the State Crime Laboratory. A latent fingerprint was found on

one piece of glass. When Danny Stewart was arrested, his fingerprints were taken. An expert compared them with the latent print and testified that the latent print had been made by Stewart's righthand ring finger.

The appellant now renews the arguments made at trial, that the chain of custody for the broken glass was not complete and that there was no proper foundation for the expert comparison. We need not pass upon these objections, for the State's proof may be more detailed at a second trial. We do note that neither at the trial nor in appellant's brief has it been argued that the illegality of the arrest made the fingerprint comparison inadmissible. It is not our practice to express an opinion about points not presented.

A final argument is that certain photographs of Ms. Jolly's body should have been excluded as being inflammatory. The trial judge did not abuse his discretion in allowing the pictures to be introduced in evidence.

Reversed and remanded.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I agree with the majority opinion with the single exception of the failure to rule on the suppression of the fingerprints obtained as a result of the illegal arrest. In keeping with the time-honored doctrine of exclusion of fruit of the poisonous tree, I would at this time inform the trial court and the state that the illegally obtained fingerprints may not be used if a retrial is conducted in this case. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Shirley BROWN and Fred BROWN *v.* Joann S. NOBLES, et al.

86-40 711 S.W.2d 786

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Appellants, *pro se.*

Wright, Lindsey & Jennings, and *Laser, Sharp & Mayes*, by: *Sam Laser*, for appellees.

DARRELL HICKMAN, Justice. This appeal must be affirmed because the appellants have failed to abstract any testimony or evidence from the record. Rule 9, Rules of the Arkansas Supreme Court and Court of Appeals.

Affirmed.

Farris HOLLIMAN *v.* MFA MUTUAL INSURANCE COMPANY, et al.

85-308 711 S.W.2d 159

Supreme Court of Arkansas
Opinion delivered June 23, 1986

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

Matthews & Sanders, by: *Gail O. Matthews* and *Marci L. Talbot*, for appellees.

DARRELL HICKMAN, Justice. This suit involves the interpretation of a homeowner's insurance policy issued to Farris Holliman by MFA Mutual Insurance Company. Holliman sued MFA alleging coverage for an accident on his premises which occurred on August 17, 1979. Holliman's brother, Garry, was pouring gasoline in the carburetor of a 1968 Ford automobile as Farris turned on the ignition. The gasoline ignited, burning Garry. Garry sued Holliman alleging negligence. MFA had been notified of the claim against Holliman by Garry Holliman's lawyer. After an investigation, MFA declined coverage because maintenance of the vehicle was the cause of the accident. A default judgment of $25,000 was entered against Holliman on December 28, 1981. Holliman then filed this suit against MFA, using the same lawyer retained by his brother, claiming the homeowner's policy covered the accident because the vehicle was in dead storage, and, therefore, not excluded under the policy. The trial court denied a directed verdict motion by MFA and the jury returned a verdict for Holliman. The trial court granted MFA's motion for judgment notwithstanding the verdict, finding that it was a question of law whether the vehicle was in dead storage or whether it was merely broken down and awaiting repairs. The trial court held the car was not in dead storage; therefore, the accident was not covered by the policy. We affirm the trial court.

The facts in this case are essentially undisputed. Farris Holliman bought a used vehicle in March or April of 1979. He owned three vehicles and none were insured. Both he and his wife drove this particular vehicle several times on the highway to the gas station, but the vehicle was never registered or licensed. About a month before the accident, he parked the vehicle on his premises approximately 100 feet from his house because it would not start. A few days before the accident Holliman charged the battery, the tires were inflated, the radiator had water in it, and there was probably gas in the tank. The vehicle was essentially ready to drive, except it would not start. In attempting to get the car started, the fire occurred and Garry was burned.

Holliman's homeowner's policy provides:

> This policy does not apply:
>
> 1. Under Coverage E—Personal Liability and Coverage F—Medical Payments to others:
>
> a. To bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading:
>
> * * * *
>
> (2) Any motor vehicle owned or operated by, or rented or loaned to any insured; but this subdivision (2) does not apply to bodily injury or property damage occurring on the resident premises if the motor vehicle is not subject to motor vehicle registration because it is used exclusively on the residence premises or kept in dead storage on the residence premises.

Holliman argues that while a homeowner's policy excludes personal injuries resulting from the use and maintenance of an automobile subject to registration, this vehicle was not being maintained but was in dead storage, and, therefore, the exclusion does not apply.

Two other states, Alabama and Florida, under strikingly similar facts, have held as a matter of law that a vehicle

undergoing maintenance is not in "dead storage"; thus, personal injuries sustained while maintaining the vehicle are not covered by the homeowner's policy. In *Broadway* v. *Great American Ins. Co.*, 465 So. 2d 1124 (Ala. 1985), the court considered an almost identical homeowner's policy which read:

> 1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage: * * * *
>
> e. Arising out of the ownership, maintenance, use, loading or unloading of:
>
> (1) an aircraft:
>
> (2) a motor vehicle owned or operated by or rented or loaned to any insured . . .
>
> [A] motorized land vehicle designed for travel on public roads or subject to motor vehicle registration. A motorized land vehicle in dead storage on an insured location is not a motor vehicle.

The insured purchased a used vehicle for his son. The car broke down and was towed to the insured's residence where it was moved into a shed behind the house. It was determined the vehicle needed extensive repairs including a complete engine overhaul. The vehicle remained parked in the shed for approximately one month. The engine was removed to be rebuilt. Two months after the vehicle was parked in the shed, gasoline was poured into the carburetor to start it, a fire occurred and injured a bystander.

The Alabama court, relying on two Florida decisions, held that the vehicle was being maintained and therefore was not in dead storage. The court said:

> As this court perceives the terms 'dead storage' and 'maintenance of a motor vehicle,' they are mutually exclusive. In other words, a motor vehicle in dead storage is one which is not undergoing maintenance, while a vehicle which is undergoing maintenance cannot be in dead storage. Regardless of the status of the Duster during the time it remained in Ryals's garage untouched, it was undergoing maintenance at the time Broadway's injuries

> occurred; consequently, it was not in dead storage.

The court observed that "maintenance" has been held to be an unambiguous term and negligent use of a carburetor would come within the meaning of this term. The court upheld a grant of summary judgment in favor of the insurance company.

The cases cited by the Alabama court, *Lawson* v. *Allstate Ins. Co.*, 456 So.2d 1235 (Fla. App. 3 Dist. 1984), and *Volkswagen Ins. Co.* v. *Dung Ba Nguyen*, 405 So.2d 190 (Fla. App. 3 Dist. 1981), are generally in accord with this decision. In *Volkswagen* a man was injured pouring gasoline in a carburetor and coverage was sought under a homeowner's policy. The court found as a matter of law that the vehicle was being "maintained" when the accident occurred. The court said:

> This policy provides coverage for personal liability to third parties. The policy contains an exclusion which specifically precludes coverage for the maintenance, operation or use of a motor vehicle . . . The attempt to start the truck by pouring gas into the carburetor, which resulted in the ignition of the gas, involved the 'maintenance' of the vehicle within the terms of the exclusion.

We agree with the Alabama court that when a vehicle is being maintained, as it was in this case, it is not in dead storage. The facts in this case present no substantial evidence that this vehicle was in dead storage within the meaning of the policy. When the language of the policy is clear and unambiguous, the court should decide the construction as a matter of law. *National Life and Accident Ins. Co.* v. *Abbott*, 248 Ark. 1115, 455 S.W.2d 120 (1970). Since the policy provision that excluded coverage for injuries arising from maintenance was unambiguous, the trial court could find as a matter of law that the vehicle was not in dead storage and enter accordingly the judgment notwithstanding the verdict.

Holliman also filed a claim for the tort of bad faith alleging MFA failed to defend him in the suit filed by his brother. The trial court refused Holliman's submitted jury instructions concerning these allegations. A trial court can properly refuse to give a jury instruction unsupported by the evidence. *Whitt* v. *State*, 281 Ark. 466, 664 S.W.2d 876 (1984). There is no

evidence that MFA was guilty of any affirmative act of bad faith that would trigger this claim or support the proffered jury instructions. *Aetna Casualty and Surety Co.* v. *Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984).

Affirmed.

David HIGGINS and John JUSTIS, Jr. *v.* Winston HINES

86-71 711 S.W.2d 783

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Murphy & Carlisle, by: *Marshall N. Carlisle*, for appellants.

Gary L. Carson, P.A., by: *Gary L. Carson*, for appellee.

JOHN I. PURTLE, Justice. In May 1983, the appellants and appellee entered into an oral agreement for the purpose of establishing a nightclub, the Zanzibar, in Fayetteville, Arkansas. Pursuant to the agreement the parties formed a corporation named D.J.W., Inc. and each of the three parties were issued ten (10) shares of stock in the corporation. This agreement also provided that the appellee would be the manager of the bar and when the club opened its doors to the public in October 1983, the appellee was the manager.

In order to start the Zanzibar, the appellants contributed bar equipment and supplies from an existing bar which was closing and the appellee contributed $15,000.00 and executed a note for an additional $10,000.00. The note was to be paid to the corporation within three (3) years. On October 4, 1983, the appellee contributed an additional $2,500.00 to the corporation. The remaining $7,000.00 due on the note was paid on January 20, 1984. That same evening the appellants terminated the appellee as the manager of the club. At trial one of the appellants stated that the reason for termination was theft of corporate funds and the other alleged mismanagement. Since his termination the appellee has not been furnished any information about the operation of the corporation nor has he been allowed to participate in any functions of the club or the corporation.

On August 14, 1984, the appellee filed a complaint against the appellants alleging that they had perpetrated a fraud upon him by falsely representing that he would be the manager of the new club. He sought recovery of the $27,500.00 that he had invested in the corporation, compensatory damages, liquidation of the corporation, and punitive damages. Upon trial a jury awarded appellee Thirty Four Thousand dollars ($34,000.00).

On appeal appellants argue that the trial court erred in failing to direct a verdict for the defendants at the close of the plaintiff's case and in failing to grant the motion for a directed

verdict at the close of the trial.

The first point gives us no concern. By going forward with proof after the motion for a directed verdict was denied, any error in denying the motion was waived. *Kansas City Southern Industries, Inc.* v. *Stevenson*, 266 Ark. 544, 587 S.W.2d 12 (1979); *Granite Mountain Rest Home* v. *Schwarz*, 236 Ark. 46, 364 S.W.2d 306 (1963); *Grooms* v. *Neff Harness Co.*, 79 Ark. 401, 96 S.W. 135 (1906). Also, in *Sanson* v. *Pullum*, 273 Ark. 325, 619 S.W.2d 641 (1981), we held that adoption of ARCP, Rule 50(a) did not change the settled rule that by going forward with proof waives any error in the trial court's failure to direct a verdict at the close of the plaintiff's case.

The second point argued is that the court erred in failing to grant the motion for a directed verdict at the close of all the evidence. The standard of review on this issue is whether there was any substantial evidence which would support a verdict. In determining the propriety of a failure to direct a verdict for the defendant, we view the evidence in the light most favorable to the plaintiff. If there is any evidence legally sufficient to warrant a verdict, it is proper for the trial court to deny the motion for a directed verdict. *Downey* v. *Jones Mechanical Contractor*, 273 Ark. 207, 619 S.W.2d 614 (1981); *Barrentine* v. *The Henry Wrape Co.*, 120 Ark. 206, 179 S.W. 328 (1915).

There are five elements which constitute the tort of deceit according to Prosser, *Law of Torts*, p. 685 (4th Ed. 1971). They are as follows:

1. A false representation made by defendant. In the ordinary case this representation must be one of fact.

2. Knowledge or belief on the part of the defendant that the representation is false—or, what is regarded as equivalent, that he has not a sufficient basis of information to make it.

3. An intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation.

4. Justifiable reliances upon the representation on the part of the plaintiff in taking action or refraining from it.

5. Damages to plaintiff, resulting from reliance.

The appellee submitted the following evidence: (1) that he was promised he would be an equal partner in the corporation and manager of the club; (2) that he would have three (3) years in which to pay the $10,000.00 note; (3) that except for $2,500.00, he contributed all the cash that was put into the corporation; (4) that he was never treated as an equal partner in the corporation; (5) that he was "talked into" paying the $7,000.00 to the corporation on January 20, 1984; (6) that he was terminated later on the same date; (7) that he relied upon the false representations made by the appellants that he would remain manager; (8) that he suffered damages as a result of his detrimental reliance upon said representations and (9) that the appellee devoted several months work to the club without receiving any compensation for his time and investment.

We find that there was substantial evidence to support the jury's verdict and that the trial court did not err in denying the appellants' motion for a directed verdict at the conclusion of all the evidence.

Affirmed.

VALLEY NATIONAL BANK OF ARIZONA *v.* Warren STROUD and Carol STROUD, and Bobby EPPERSON, Commissioner

86-47 711 S.W.2d 785

Supreme Court of Arkansas
Opinion delivered June 23, 1986

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

Streett & Kennedy, by: *Alex G. Streett*, for appellee.

JOHN I. PURTLE, Justice. The chancellor entered a decree of divorce in which certain property of the parties was ordered sold at public auction. The court appointed the chancery clerk commissioner for the purpose of conducting the sale. The clerk was awarded a fee for his services in the amount of $600.00. The clerk accepted the husband's bid at the first sale; however, the husband was unable to consummate the sale and the property was auctioned off at a second sale for the sum of $52,000.

The Strouds owed money on a promissory note and mortgage on their home place. They defaulted and the mortgage holder intervened to foreclose the mortgage. The parties to the divorce owed the appellant on an open line of credit. The appellant was allowed to intervene in the divorce proceeding and obtained a summary judgment against the parties to the divorce in the amount of $29,809.03.

During the divorce proceeding the chancery clerk held funds belonging to the parties to the divorce in the amount of $29,567.19. Appellant garnished these funds, which were insufficient to pay appellant's judgment. The clerk's commission in the

amount of $600 was paid from the funds held in escrow. The appellants argue on appeal that the fee allowed for the services in connection with the sale were excessive.

[redacted] The only issue on appeal is whether the court erred in allowing the commissioner's fee in an amount in excess of the fee established in Ark. Stat. Ann. § 12-1712 (Repl. 1979). This statute establishes a fee schedule for commissioners at judicial sales. A sale for $35,000 or more calls for a commission of one-tenth of one per cent. Based on the sale of the real property in this case the commissioner would be entitled to a fee of $52.00.

[redacted] The other statute relevant to this dispute is Ark. Stat. Ann. § 22-449 (Supp. 1985). The pertinent part of the last cited statute reads as follows: "Any master or *commissioner* appointed shall receive for such services such compensation as may be fixed by the court, *unless the amount* of compensation *shall be now* or hereafter *fixed by law* [emphasis added]." In the present case we have a general and a special statute involved. In statutory construction where specific expressions conflict with general expressions, the rule is to give greater effect to the specific expression. *Thomas* v. *Easley*, 277 Ark. 222, 640 S.W.2d 797 (1982). It is not necessary to resort to this rule of construction in the present case because the general statute (§ 22-449) expressly exempts cases where the compensation may now or hereafter be fixed by law. The specific statute (§ 12-1712) was in effect at the time of the enactment of the general statute.

[redacted] We hold that the real property was sold only one time and that was for the amount of $52,000. The fee fixed by law for such sale is $52.00. A sale is not completed until it is confirmed by the court. The first sale was not confirmed.

Reversed and remanded with instructions to proceed in a manner not inconsistent with this opinion.

George J. CHRISTY and CHRISTY COMPANY OF ARKANSAS, INC. *v.* FIRST NATIONAL BANK OF COMMERCE, NEW ORLEANS, LOUISIANA

85-316 711 S.W.2d 779

Supreme Court of Arkansas,
Opinion delivered June 23, 1986
[Rehearing denied September 15, 1986.]

Friday, Eldredge & Clark, by: *William A. Waddell, Jr.*, for appellant.

Shaver, Shaver & Smith, by: *Tom B. Smith*, for appellee.

ROBERT H. DUDLEY, Justice. Appellee, First National Bank of Commerce of New Orleans, Louisiana, filed a petition to register a foreign judgment against appellants, Christy Company of Arkansas, Inc. and George J. Christy. The trial court entered

an order of registration. We affirm.

A family named Blondin owned a 33.35 acre tract of land in Ruston, Louisiana. Appellant Christy Company leased the tract from the Blondins in order to build a shopping center upon it. The appellee bank agreed to make the interim loan for the construction of the shopping center. As evidence of the indebtedness to be incurred, the Christy Company executed a $4,600,000.00 promissory note to the appellee bank. The note was secured by a collateral mortgage note, also for the principal sum of $4,600,000.00. The collateral mortgage note was secured by a mortgage, executed by the Christy Company and the Blondins, by which the Christy Company mortgaged its leasehold interest and the Blondins mortgaged their ownership interest. The Blondins signed neither the collateral mortgage note nor the negotiable promissory note. Under the applicable Louisiana law, their liability was limited to their land which was mortgaged. Appellant George Christy endorsed both the negotiable promissory note and the collateral mortgage note.

The Title Insurance Company of Minnesota insured the bank's mortgage interest up to the $4,600,000.00 face amount of the policy.

After the bank had advanced $989,559.49 of the construction money, the Christy Company defaulted. The bank then filed suit to foreclose on the Blondin's property. The Louisiana trial court held the mortgage was unenforceable. The bank next filed suit against the Christy Company, George Christy, and the Blondins. The claim against the Blondins was again rejected, but the bank was awarded a judgment against the Christy Company and George Christy in the amount of $989,559.49, plus interest, attorney's fees and costs.

The bank then filed a malpractice suit for $989,559.49 against its law firm. Named in that suit were the law firm's malpractice carriers, St. Paul Fire and Marine Insurance Company and the United States Fire Insurance Company.

The bank filed another suit for $989,559.49, this one against its title insurer, Title Insurance Company of Minnesota, alleging that the insurer was liable as a result of the failure of the mortgage.

The law firm and the three insurance carriers later settled the bank's suits against them for $250,000.00. Appellants, Christy Company and George Christy, contend that the settlement also dismissed them under Louisiana law, and therefore, the judgment, having been discharged, is not subject to registration in Arkansas. *See* Ark. Stat. Ann. § 29-815 (Repl. 1979).

Appellants base their discharge argument on the Louisiana Civil Code, prior to its amendment and reenactment, which provided:

> Art. 2203. *Remission as to one codebtor in solido*
>
> Art. 2203. The remission or conventional discharge in favor of one of the codebtors *in solido*, discharges all the others, unless the creditor has expressly reserved his right against the latter.
>
> In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission.

"Remission" is defined in Black's Law Dictionary (Rev. 4th ed.) as: "In civil law. A release of a debt. It is *conventional*, when it is expressly granted to the debtor by a creditor having a capacity to alienate. . . ."

La. Civ. Code Ann. art. 2091 explains an obligation *in solido*:

> Art. 2091. *Obligations in solido on the part of debtors*
>
> Art. 2091. There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor.

La. Civ. Code Ann. art. 2092 provides further explanation:

> Art. 2092. *Debtors in solido with different terms or conditions*
>
> Art. 2092. The obligation may be *in solido*, although one of the debtors be obliged differently from the other to the payment of one and the same thing; for instance, if the

> one be but conditionally bound, whilst the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other.

Finally, La. Civ. Code Ann. art. 2093 provides:

> Art. 2093. *Presumption against obligations in solido; exceptions*
>
> Art. 2093. An obligation *in solido* is not presumed; it must be expressly stipulated.
>
> This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law.

For appellants to prevail on their argument they must show that their obligation is *in solido* with the obligation of the law firm and the insurance companies. In other words, appellants must establish that they are all obliged to the payment of the same thing even though they may be obliged differently. As provided by La. Civ. Code Ann. art. 2093, there is a presumption against obligations *in solido*, and they must be expressly stipulated or arise by some provision of the law.

There was no express stipulation of an obligation *in solido* among these parties. Therefore, in order to find an obligation *in solido* in this case, it must arise by virtue of some provision of the law.

An example of the concept of solidary obligors, something more broad than joint and several liability, is found in *Hoefly* v. *Government Employees Insurance Co.*, 418 So.2d 575 (La. 1982), where the Supreme Court of Louisiana wrote:

> The tortfeasor and the uninsured motorist carrier are obliged to the same thing. A tortfeasor is obliged to repair the damage that he has wrongfully caused to the innocent automobile accident victim. La.C.C. art. 2315. Subject to conditions not granted the tortfeasor, the uninsured motorist carrier is independently obliged to repair the same damage. By effect of the uninsured motorist statute, La.R.S. 22:1406(D)(1)(a), and its insuring agreement, the plaintiffs' uninsured motorist carrier is required to pay, subject to statutory and policy conditions, amounts which

they are entitled under other provisions of law to recover as damages from owners or operators of uninsured or underinsured motor vehicles. By effect of law, and the terms of the insuring agreement, therefore, both the uninsured motorist carrier and the tortfeasor are obliged to the same thing. The Work of the Louisiana Appellate Courts, 1974-1975 Term—Obligations, 36 La.L.Rev. 375, 379-380 at n. 23; The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Insurance, 29 La.L.Rev. 253, 257 (1969); The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Insurance, 28 La.L.Rev. 372, 373-374 (1968).

Appellants contend that La. Civ. Code Ann. articles 2091 and 2092 provide ample authority for finding that the appellants and the insurance companies were debtors *in solido*. In other words, they contend that meeting the requirements of those two articles alone is sufficient to establish solidary obligations, and that article 2093 does not require them to show that the obligation arises by virtue of some provision of the law *apart from* articles 2091 and 2092. We need not reach that argument because here the appellants have not established that the parties are obligated to the payment of the same thing under articles 2091 and 2092. The appellants are liable for all money advanced to them, almost a million dollars, plus interest, attorney's fees and costs. Under Louisiana law it is an in personam obligation. St. Paul Fire and Marine Insurance Company, United States Fire Insurance Company, Title Insurance Company of Minnesota, and the Louisiana law firm are not liable for the full amount of money advanced to appellants; instead, they are liable only for the amount of damages incurred by the bank for the failure to perfect a mortgage upon the Blondins' property. Under Louisiana law it is an in rem obligation. The nature of the two obligations is different. They are not the same thing.

Appellants contend that the obligations arise from the same fact situation and that the bank sued the insurance companies and the law firm for the same amount of money; therefore, it is the same obligation. The argument is without merit. Simply because the bank sued these parties and prayed for the same amount of money is not enough to establish *in solido* obligations. We cannot say that the obligations of the parties to

the settlement are *in solido* with the obligations of the appellants. The release did not discharge appellants' debt to the bank. Therefore, the judgment is not satisfied and is subject to registration.

Appellants next argue that, after registration of the judgment, they are entitled to a credit for the amount of the settlement, less costs and expenses. The argument is meritorious because in response to an interrogatory in this suit, appellee stated that it "would stipulate that Defendants [appellants] are entitled to a credit of $250,000.00, less the cost and expenses incurred in obtaining same, upon the judgment sought to be registered. . . ." That response was admitted into evidence with no objection from appellee.

Affirmed as modified.

Jerry W. MARTIN and ARKANSAS TRANSPORT COMPANY *v.* George RIEGER

86-69 711 S.W.2d 776

Supreme Court of Arkansas
Opinion delivered June 23, 1986
[Rehearing denied July 21, 1986.*]

* Holt, C.J., not participating; Hickman, and Purtle, JJ., would grant.

Friday, Eldredge & Clark, by: *William M. Griffin, III*, for appellant.

Malcolm R. Smith, for appellee.

ROBERT H. DUDLEY, Justice. Appellee, George Rieger, in his individual capacity and as executor of the estate of Ruth Rieger, brought this car-truck action for wrongful death, mental anguish, loss of consortium, funeral expense, and property damage. The jury returned a verdict of $400,000.00 against the driver of the truck, appellant, Jerry W. Martin, and his employer, appellant, Arkansas Transport Company. The Court of Appeals certified the tort case to this Court. Ark. Sup. Ct. R. 29(1)(o). We affirm if the appellee elects to remit $8,000.00 within seventeen days, otherwise the cause will be remanded for a new trial.

At about 1:15 on the afternoon of July 9, 1984, witness Kathy Barnett stopped her car on Highway 165 about nine miles north of England. Her car was facing in a northerly direction and she was preparing to turn left into her driveway. A truck tractor, without a trailer, driven by appellant Jerry W. Martin and owned by appellant Arkansas Transport Company came up behind witness Barnett. Appellant Martin admitted he was driving the tractor between 55 and 58 miles per hour. He also admitted knowing that a tractor without a trailer is more difficult to stop than one with a trailer because the trailer keeps the back wheels of the tractor from bouncing off the road when the brakes are applied. He saw witness Barnett's car when he came around a curve but did not apply his brakes until after he had driven an additional 250 feet because he thought she would complete her turn to the left off the highway. When he realized she was not going to complete her turn, he applied the brakes. The rear wheels of his tractor bounced and skidded, and he saw he was going to hit witness Barnett. He decided to turn off the road. He turned left, rather than right, and crossed over the center line. At that

moment Ruth Rieger, the decedent, approached from the opposite direction. She saw the tractor coming toward her and applied her brakes. The tractor skidded a total of 345 feet, hit Mrs. Rieger, and killed her.

Appellants argue that the trial court erred when it failed to direct a verdict in their favor because there was no substantial evidence of negligence. The argument is without merit. The standard for the granting of a directed verdict for a defendant has been set out many times. As explained in *St. Louis S.W. Ry. Co.* v. *Farrell*, 242 Ark. 757, 416 S.W.2d 334 (1967):

> A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury.

Here, there was substantial evidence from which the jury could find that appellant Martin was negligent in driving too fast under the circumstances, or negligent in failing to apply his brakes immediately, or negligent in turning across the center line of the highway.

Appellants next argue that the trial court erred in refusing to direct a verdict on the claim for mental anguish where no more than normal grief was shown by the survivor.

The General Assembly has clearly stated that the public policy of this State is to allow recovery for wrongful death and for the mental anguish of survivors of the deceased. Ark. Stat. Ann. §§ 27-906 to -910 (Repl. 1979). The application of the mental anguish statutes to particular fact situations has given us difficulty through the years simply because mental anguish of all survivors is a natural incident of practically every wrongful death. We have construed the statutes to mean that the proximity of relationship between the deceased and the survivors is the most significant factor in determining whether recovery is allowable.

Distant relatives generally have no more than normal grief and will not be allowed to recover without establishing something more.

In *St. Louis S.W. Ry. Co.* v. *Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977), we stressed the relationship between the deceased and the survivors. We listed the following factors for evaluating the relationship:

(1) The duration and intimacy of the relationship and the ties of affection between decedent and survivor.

(2) Frequency of association and communication between an adult decedent and an adult survivor.

(3) The attitude of the decedent toward the survivor, and of the survivor toward the decedent.

(4) The duration and intensity of the sorrow and grief.

(5) Maturity or immaturity of survivor.

(6) The violence and suddenness of the death.

(7) Sleeplessness or troubled sleep over an extended period.

(8) Obvious extreme or unusual nervous reaction to the death.

(9) Crying spells over an extended period of time.

(10) Adverse effect on survivor's work or school.

(11) Change of personality of the survivor.

(12) Loss of weight by survivor and other physical symptoms.

(13) Age and life expectancy of the decedent.

Here, the survivor and the decedent had been married for forty-four years, were very close, and had strong ties of affection. For years they had worked closely together in their business. The decedent suffered a sudden and violent death. The survivor's grief was evident. The survivor suffered sleeplessness to the extent that his sleeping pill prescription was refilled 5 or 6 times. The foregoing constitute substantial evidence to support

the award. The trial court correctly refused to direct a verdict on the claim for survivor's mental anguish.

The appellants next contend that the trial court erred in refusing to order a remittitur of damages for mental anguish and loss of consortium.

Our basic law on remittitur is set out in *Morrison* v. *Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981):

> Ark. Stat. Ann. § 27-1903 (Repl. 1979) provides that in cases where damages are not susceptible of definite measurement a remittitur shall be ordered only where the judgment is rendered under the influence of passion and prejudice. This statute was not repealed by the Rules of Civil Procedure. See Per Curiam of statutes superseded, Compiler's Notes to Rule 1, Ark. Stat. Ann. Vol. 3A (Repl. 1979). However, this statute is not the basic authority for the reduction of a jury verdict. Remittitur is within the inherent power of a court. *Dorey* v. *McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969). Our well established rule is that the jury has much discretion in determining the amount of damages in personal injury cases and we will not disturb a jury's verdict unless that verdict is shown to have been influenced by prejudice or is so grossly excessive as to shock the conscience of the court. *Grandbush* v. *Grimmett*, 227 Ark. 197, 297 S.W.2d 647 (1957).

Here, there is no showing that the verdict was influenced by passion, and the verdict, while high, is not so grossly excessive as to shock our conscience.

The next argument is the one we find most difficult. Before trial the appellants propounded interrogatories to appellee in which they asked the identity and location of all witnesses to the accident. In addition, appellee was asked to supplement the response in the event additional witnesses were discovered. Appellee agreed to do so. After the original interrogatories had been answered, and about 30 days before trial, appellee discovered two additional witnesses. Appellee's attorney did not disclose the additional witnesses before the trial. Then, at trial, appellee attempted to introduce testimony from those two undisclosed witnesses. Upon objection, the trial court refused to allow

the testimony. Appellants argue that the trial court erred in failing to order a new trial because of the failure to disclose.

It is the duty of an attorney to be completely candid with members of the bar and with the court. The knowing concealment of eyewitnesses is unquestionably a violation of that duty. While the members of this Court are in complete agreement that the attorney's action was wrong, we do not feel that the trial judge abused his discretion in refusing to grant a new trial. After the verdict, the appellants filed a motion for new trial alleging, among other points, that the failure to disclose the witnesses was a ground for a new trial. The appellee responded with an affidavit from the witnesses which clearly shows that the witnesses would have testified in accordance with appellee's view of the accident. The trial court ruled:

> The undisclosed witnesses were withdrawn by the Plaintiff when his attorney was confronted with the interrogatory requesting their disclosure. This could, at times, be grounds for a continuance or a new trial. However, in this case, there is absolutely no showing of prejudice to the Defendant. Therefore, it would be silly to order a new trial when foreknowledge of the witnesses could not change the Defendant's case, and might even help the Plaintiff's case.

The appellants in their argument on this point have not demonstrated any prejudice, and we cannot find any. Accordingly, we hold that the trial court did not abuse its discretion in refusing to grant a new trial because of the failure to disclose witnesses.

Appellants' last argument is that the trial court should have directed a verdict on the claim for property damage because appellee did not establish the value of his car immediately before and immediately after the accident. They further argue that the trial court's failure to do so requires a reversal of the entire case because a general verdict is a complete entity which cannot be disturbed. The appellant is partially correct. The trial court erred in refusing to grant a directed verdict on the issue of property damages since the appellee only proved the value of the car before the accident but failed to prove the value after the damage occurred. *See* Ark. Stat. Ann. § 75-919.1 (Repl. 1979). Appellants contend this error requires reversal of the entire case

because single verdicts may not be divided. Appellants' argument states the general rule, but there is an exception when the error relates to a separable item of damages. In *Swenson* v. *Hampton*, 244 Ark. 104, 424 S.W.2d 165 (1968) we explained:

> When the only error relates to a separable item of damages a new trial can sometimes be avoided by the entry of a remittitur. *St. Louis, I.M. & S. Ry.* v. *Bird*, 106 Ark. 177, 153 S.W. 104 (1913). Such a remittitur is fixed by the highest estimate of the element of damage affected by the error. *Surridge* v. *Ellis*, 117 Ark. 223, 174 S.W. 537 (1915).

Here, the property damage is a separable item of damages. The most the property damage could have amounted to is $8,000.00. If the appellee agrees to remit $8,000.00 within seventeen days, the rest of the judgment will be affirmed. Otherwise, the cause must be remanded for a new trial.

Affirmed upon agreement of remittitur.

Walter B. MASON *v.* STATE of Arkansas

CR 85-64 712 S.W.2d 275

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Robert S. Blatt, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. This case requires us to decide whether appellant's conviction for first degree murder must be reversed because of ineffective assistance of counsel.

On the afternoon of February 7, 1983, appellant shot and severely wounded Thurman Morse. That evening appellant employed Ralph Lowe to represent him. On February 9 appellant was charged by information with battery in the first degree. On February 18 the victim died, and the information was amended to

charge appellant with murder in the first degree. In November 1983, appellant was found guilty, and his sentence was fixed at twenty years. Lowe did not timely perfect the appeal. The trial court subsequently relieved Lowe, sent a letter regarding Lowe's conduct to our Committee on Professional Conduct, and appointed another attorney to represent appellant in his appeal. On March 20, 1985, the Court of Appeals handed down an unpublished opinion affirming the judgment of conviction. Next appellant filed a petition in this Court asking permission to file for post-conviction relief because of ineffective assistance of counsel. We granted permission to file the petition in circuit court for an evidentiary hearing. On June 27, 1985, the trial court held an evidentiary hearing, and on July 29 entered its order denying relief. We reverse and remand for a new trial on the merits.

The analytical approach to be used in determining whether the Sixth Amendment guarantee has been met is set out in *Strickland* v. *Washington*, 466 U.S. 668 (1984). There, a convicted defendant claimed that his counsel's assistance was so defective that it required a reversal of the conviction. The United States Supreme Court held that in order to prevail on such a claim, the defendant was required to show (a) that counsel's performance was deficient and, (b) that the deficient performance prejudiced the defense to such an extent that it deprived the defendant of a fair trial.

[redacted] (a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

[redacted] (b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

In his brief appellant argues that his attorney was deficient in sixteen particulars. We agree that counsel's representation fell below an objective standard of reasonableness in seven of the sixteen areas, but that showing of seven unprofessional errors, standing alone, does not mandate reversal. In addition to a showing of deficient representation, appellant must prove that there is a reasonable probability that the result of the trial would have been different but for counsel's errors. Four of the errors produced no prejudice. Examples are, even though counsel did not timely file the appeal, there was no prejudice to appellant since a belated appeal was allowed and the Court of Appeals decided the issues on appeal; and, while defense counsel erroneously exercised peremptory challenges before the prosecutor passed upon the jurors, the appellant suffered no prejudice because his peremptory challenges were never exhausted.

However, three of the errors did result in prejudice to the appellant. At the post-conviction hearing, the appellant testified that his attorney did not notify him of the trial date and, as a result, he missed the first day of trial. Counsel testified that he waived the appellant's presence during the first day's voir dire as a matter of trial strategy. The trial court found that the attorney's version was factually correct. Because of the trial judge's superior position to view the witnesses, we cannot say that finding is clearly erroneous. However, even if the attorney's version is correct, error and prejudice are present.

[redacted] We have held that even though an accused has a right to be present when any substantive step is taken, that right may be waived by him or his attorney. However, we have strongly suggested that the accused should be present at all important phases of the trial. *Harmon* v. *State*, 277 Ark. 265, 269, 641 S.W.2d 21 (1982). Here, ten jurors were selected during the first day of the trial. It is hard for us to conceive of any valid trial strategy which would call for the absence of a defendant the first

day of jury selection, but require his presence during the second day. Certainly, no valid reason is apparent in this case. Counsel's explanation was that because of potential bias against appellant he felt it would be best to interview prospective jurors the first day in appellant's absence. No explanation is given for the opposite conclusion the second day.

The appellant testified that he never saw a jury list, and counsel did not testify that he gave appellant a jury list. Thus, appellant was not able to participate in any manner in the selection of jurors taken the first day.

Appellant testified that he lived in the local area and knew some of the jurors, while the attorney was from out of town and did not know any of the jurors. He testified that he was prejudiced by the taking of jurors Betty Brown and Bertha Bearden. He testified that juror Betty Brown had heard various rumors about his case and could have been prejudiced against him and, because he was not present, he could not tell his attorney about her possible prejudice. More importantly, he testified that juror Bertha Bearden had been the victim of a burglary, and in his opinion, was conviction prone. Under the circumstances, he could not communicate this information to counsel before she was selected as a juror. She was ultimately elected foreman of the jury. During voir dire counsel did not ask any questions of the juror about being the victim of a crime. He asked if she was a friend of the Sheriff, and she responded that she knew the Sheriff very well. No questions were asked about other police officers or if she had worked with them on the burglary.

A sample of the voir dire of juror Bearden causes some additional concern about whether counsel correctly understood the presumption of innocence and the burden of proof:

> Q. [By Mr. Lowe] Do you feel the simple fact that a person is charged with a crime means where there is smoke there's fire?
>
> A. You mean, do I think that he is automatically guilty?
>
> Q. Or, that there is something there?
>
> A. Well, I don't assume that Mr. Mason is guilty of anything until it is proved to me that he's guilty *or*

innocent.

Q. And, by *proof, clear and convincing* without any question. Is that correct?

(Emphasis added).

Additional error of counsel which showed a reasonably probable prejudice to the appellant is in the area of trial stipulations. On the first day of the trial, during appellant's absence, counsel stipulated to the cause of death and to allow the State Crime Laboratory report into evidence.

At the post-conviction hearing appellant testified that he had serious questions about the cause of death, mentioned these questions to counsel, but counsel ignored his inquiries and stipulated to the cause of death in his absence. The death did not occur for eleven days after the shooting and cross-examination of the medical examiner would have determined if there were any intervening events which caused or contributed to the victim's death. In addition, by stipulating to the laboratory report, counsel lost for appellant the right to cross-examination, which probably would have proved that the shotgun blast fired by appellant did not strike the victim directly, but ricocheted off of an automobile and struck the victim. Such proof would tend to show there was no intent to kill.

Counsel's examination of witnesses was confusing and ineffectual. While it is difficult to determine the amount of prejudice that resulted, we can say that it so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. We can best illustrate this point by quoting from the cross-examination of the State's trace metal expert:

CROSS EXAMINATION

BY MR. LOWE:

Q. Mr. Cox, I believe you first—one of the first answers you gave to Mr. Mainard's question was of the tests that I performed. I believe I caught that there was one that wasn't requested or something like that. Were all tests that you would normally perform on this—was everything presented to you that you would normally have to perform

and do testing on?

A. I'm sorry. I missed your question.

Q. Well, perhaps I missed your answer and that's probably why I'm confused. Did you have all of the material, I mean, do you have everything in front of you for the microscopes and I think some other machines, which I confess I don't remember the names, the isotopes, etcetera, did you have everything—was there—was everything furnished to you to run the test? Was there anything else that you could have or should have to run a test to check for gun powder residue or for a victim in a shooting?

A. As far as our laboratory is concerned or as far as the investigating agency?

Q. Either or both. Is there more that could have been done?

A. I'm still—I still don't understand your question?

Q. Well, perhaps—perhaps I don't—perhaps I don't understand your last answer when you're saying, you know, investigators or medical—uh—is there more that could have been done in any event, regardless of who, how, or what?

A. To determine—

Q. Yes.

A. —if gun powder residue was present on a particular object?

Q. Yes, sir.

A. No, sir. The particular test that we use for gun powder residue is the most modern detection technique used in the nation right now.

We have examined this case with a strong presumption that an attorney's conduct falls within the wide range of reasonably effective assistance because there are countless ways to provide effective assistance in any given case. As pointed out in *Strickland* v. *Washington*, *supra*, at 689:

Judicial scrutiny of counsel's performance must be

> highly differential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.
>
> . . .
>
> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Even though we have indulged a strong presumption in favor of counsel's conduct, we have concluded that counsel's assistance was not effective and the original trial cannot be relied on as having produced a just result. Accordingly, we reverse and remand for a new trial on the merits.

HICKMAN and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. I believe this case should be affirmed. The trial judge obviously gave serious attention to these allegations of ineffective assistance. His written findings and conclusions dealt with the issues point by point and carefully noted the evidence pro and con. He explained his reasons for each finding in detail. It was he who presided over the trial and who heard the testimony at the Rule 37 hearing. His ability to judge the proof is unquestionably superior to ours and his findings on

these disputed issues are not clearly erroneous. *Thomas* v. *State*, 277 Ark. 74, 639 S.W.2d 353 (1982).

The majority opinion has cited the case law on ineffective assistance, which may be summarized by saying that no higher burden exists under the law than setting aside a criminal conviction based on ineffective assistance of counsel, and rightly so. These are serious charges and should not rest on inconsequential grounds. The appellant has compiled a long list of particulars against defense counsel. But the fact is, with one possible exception, the allegations appear more serious on the surface than, on closer inspection, they prove to be. In short, the Rule 37 petition, as well as the proof, produce a great deal of smoke but very little fire. Had it not been for trial counsel's neglect of his duty to appeal so that the trial court had to remove him and appoint other counsel, I doubt the case would have given us much concern. But what happens *after* a trial is, after all, irrelevant to the issue of whether effective assistance has been rendered *during* the trial.

The majority opinion discusses only three of the allegations of ineffective assistance. From a dissenting point of view the others are notable for their lack of substance:

There is the charge that defense counsel was intoxicated and used drugs during the trial. These charges are admittedly groundless and the trial court so found. The sum and substance of the proof was that some of appellant's family members said they smelled alcohol on counsel's breath—once during a lunch break and once an hour *after* the trial had ended. The witnesses acknowledged the absence of any behavior consistent with intoxication and the trial judge commented that he detected nothing of the sort, even in close communication with counsel at bench conferences. The proof wholly failed to support the claim.

Appellant claims counsel advised him to give the police a statement before even talking with him. This charge was denied by the lawyer and the testimony of State Trooper Don Taylor refutes the contention. He said, "Well, I had been called down here to assist in the investigation and when I got to the jail they had—Mr. Mason had been arrested and he had requested an attorney before I interviewed him and sometime later his attorney showed up, and after he talked with his attorney I did take a

statement from him in his attorney's presence."

Much is made of a particularly minor incident. Shortly after a noon recess counsel asked permission to go to the restroom. The trial judge estimated the interruption at two or three minutes and saw it as entirely insignificant. He was right.

There is the incident of the spectator saying, "No, sir" while a witness was being asked if Thurman Morse, the victim, had ever been in prison. The comment was not factually inaccurate, nor was it contradictory to the response given by the witness. The trial judge immediately instructed the spectators against any recurrence and that was the end of it. To argue that it was ineffective assistance not to request a mistrial ignores the many times this court has said mistrials are an extreme and drastic remedy, to be granted only when prejudice is so manifest the trial cannot in justice continue. *Combs* v. *State*, 270 Ark. 496, 606 S.W.2d 61 (1980). In this instance a motion for mistrial would have been a waste of time and perhaps tactically counterproductive.

One allegation is particularly disturbing—the accusation that defense counsel tried to convey to the jury the impression that appellant, his client, was lying on the witness stand. It is a wholesale distortion of the incident and brings no credit to those who make it. It is one thing to charge counsel with ineptness, but quite another thing to accuse him of a perfidious act toward his own client. While appellant was being cross-examined evidently defense counsel was nodding in agreement, at least the prosecutor perceived it that way and said, "Is your attorney nodding agreement?" The record itself makes it clear that appellant's response was a denial of the implication that he was being coached, not an assertion that his lawyer was disagreeing with him:

> Q. . . .Do you reasonably—do you believe that the force that you used was that which is—was reasonably necessary under the circumstances to preserve your own life and the life of your loved ones?
>
> A. Yes, I most certainly did.
>
> Q. That is your testimony? Is your attorney nodding agreement?

A. No, he is not.

Q. Okay.

MR. LOWE (Defense counsel): Your Honor—well, I'll withdraw my objection. I'm not testifying here.

MR. SANFORD: Well, you have.

THE COURT: Go ahead.

There is the allegation that counsel did not know the correct standard of proof in criminal cases because on voir dire he asked several jurors if they would require clear and convincing proof of guilt. There is no need to quote excerpts from the record, but nothing suggests counsel did not know the law on this basic point, familiar even to laymen. He may have phrased his question simply to impress on the jury the high standard of proof the state must meet in criminal cases.

There is the charge that counsel met with appellant and defense witnesses for only an hour preparing for trial. This is a frequent complaint in Rule 37 cases because no matter how much time the lawyer spends, the client thinks it was not enough. But the fact is it affords very little likelihood of relief under Rule 37 as there is no way to gauge how much time must be spent on a given case. Here, we need look no further than the finding of the trial court that defense counsel met with appellant and the witnesses in excess of four hours and was adequately prepared.

There is the charge that defense counsel would not call character witnesses for the appellant. The trial court found this decision was not prejudicial and in view of the fact the appellant had a criminal record I cannot say that finding was clearly erroneous.

Appellant claims counsel did not tell him when the trial was to be held. But the proof was undisputed that appellant and defense witnesses gathered with defense counsel at appellant's home at what they repeatedly referred to as "The night before the trial." Evidently they were referring to the first day of the trial. Be that as it may, it is improbable the defendant and his witnesses would have gathered at defendant's home if they were not well aware of the trial and the Rule 37 petition itself alleges that counsel told appellant to come to court after the jury was selected.

There is the point that counsel filed a motion for discovery only the day before trial. But there was proof, to the trial court's satisfaction, that the prosecutor applied an open file policy to this case which defense counsel took advantage of and that defense counsel had completed discovery when the motion was filed.

There is the charge that counsel was inept because on four occasions he excused prospective jurors by peremptory challenge without waiting to see whether the prospect was acceptable to the state. Again, without some showing that such minor departures had an adverse effect on the outcome, they do not meet the stringent requirements of establishing ineffective assistance. The trial court rejected this point with the comment that it was evident the prospects would not have been challenged by the state.

There is the charge that counsel did not call individuals to testify to previous violent acts by the victim, particularly Elbert Frazier, who testified at the Rule 37 hearing that the victim was known to be belligerent and prone to get in fights. But counsel testified he had never heard the name Elbert Frazier mentioned and Frazier said appellant's family was not aware of his knowledge because he had never talked to them about it, nor did he know whether appellant's lawyer was aware he was a potential witness.

Three allegations: (1) That counsel stipulated to the introduction of several items of evidence without appellant's knowledge or consent, 2) that counsel did not know how to examine the appellant and tried to introduce his statement to the police instead of having appellant testify firsthand about the events, and 3) counsel did not know the state's purpose in introducing appellant's statement to the police, proving his ineffectiveness) were summarily rejected by the trial court because there was no proof whatever to sustain them.

The lack of merit of appellant's allegations is illustrated by the fact the majority opinion ignores all but three: the absence of the defendant at voir dire, the stipulation as to the cause of death and several questions posed on cross-examination of Steve Cox, the state's trace metal expert.

As to the cross-examination of Cox, the objection seems to be that the questions were poorly phrased. I agree, but I do not agree

that ineffective assistance is proved by a few clumsy questions. Of the brief excerpt quoted in the majority opinion, only two of the questions seem particularly awkward. Perhaps counsel should have thought through his questions more fully, but how can it possibly be said that this clearly affected the outcome of the trial? The trial court observed that Cox's testimony contained nothing beneficial to the state nor harmful to the defense and that should end the matter.

As to the defendant's absence at voir dire, I am as puzzled as the majority and the trial judge over this unorthodox tactic. But while I have never heard of its use in criminal cases, I cannot say it is so plainly without redemption that it provides, per se, the basis for ineffective assistance. Some lawyers advocate the avoidance of overexposing the client to the jury. They believe the jury becomes weary of looking at the individual on whom all the attention of a trial is centered, that his or her presence in the courtroom should be limited as much as possible. Whether that was the motivation here I don't know, but defense counsel testified that he discussed this tactic with appellant prior to trial. The trial court concluded there was no prejudice and I believe he was correct. The two women jurors cited by the majority testified they knew neither the defendant nor the victim and would try the issues fairly on the evidence. There is no showing to the contrary. More importantly, this issue concerns strategy and we have said again and again we will not substitute our own notions of strategy for those of the practitioner in Rule 37 cases. *Knappenberger* v. *State*, 283 Ark. 210, 672 S.W.2d 54 (1984); *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983). We should adhere to those precedents.

Finally, there is the matter of the stipulation to the cause of death. It is on this issue that I disagree most emphatically with the majority. In the first place there is not a shred of evidence from which to argue that death may have been attributable to some intervening cause. The medical report said simply that the cause of death was homicide, resulting from a .00 buckshot striking the victim in the left eye and entering his brain. Eleven days later he died. Appellant relies entirely on a "rumor" that Thurman Morse was brain-dead and "his family pulled the plug" when he developed pneumonia. But pneumonia frequently accompanies such injuries, and taking the rumor at face value it still does not

provide the slightest basis for an inference that death was attributable to anything other than a lethal head wound. It is pure speculation to suppose that by refusing to stipulate counsel could have uncovered evidence pointing to an intervening cause—a lead .00 buckshot in the brain is cause enough, whether death is instantaneous or prolonged. What bothers me most is for this court to hold, based entirely on speculation, that by stipulating to the cause of death defense counsel was guilty of ineffective assistance. The holding is bound to have a chilling effect on the defense bar, as the obvious message is 'don't stipulate to the cause of death' lest ineffective assistance claims may follow. Thus a sensible and favorable option to the defense is lost. Sensible because it saves time and resources, favorable because there are many times, when the cause of death is clear, that it is better for the defense for the jury not to have to hear the specific details of the victim's death. That there was no doubt about the cause of this victim's death is attested to by the appellant's own words. At trial the first question he was asked on cross-examination was:

> Q. Birch (appellant), there is no question you killed Thurman Morse by your own act with the use of this 12 gauge shotgun, is there?
>
> A. No, there isn't.

Nor is there any basis for the suggestion the buckshot may have ricocheted off another surface. The occupants of the car with Thurman Morse testified the appellant kicked open the door, drew the shotgun to his shoulder, aimed and fired directly at the car. Photographs of the vehicle corroborate this testimony. They show the blast was direct rather than glancing by reflecting a circular pattern of shot on the side of the car where some eight or nine buckshot pierced the metal door cleanly at ninety degree angles.

When any defense counsel's performance is examined under a magnifying glass from the advantage of hindsight it is easy to find fault. The representation in this case may not have been notably skillful, but who can say with certainty? The result favors the contrary. Having found the defendant guilty (a predictable outcome given the proof) the jury could have imposed a sentence of not less than ten nor more than forty years. It chose twenty, closer to the minimum than to the maximum. Even if the defense

was only marginal, it was still above the level contemplated by Rule 37. Our law inveighs against setting aside a conviction except where the representation falls below *any acceptable standard of performance*. That was not the case here.

The appellant took the life of another human being on less than mitigating circumstances. He was tried fairly and a jury of his peers exacted twenty years, which doubtless would prove to be considerably less. He was provided an appeal by a court appointed lawyer and he was given a thorough hearing under Rule 37. In none of these proceedings was his position sustained. Now a majority of this court, on questionable grounds, is holding the entire process must be repeated. I respectfully disagree.

HICKMAN, J., joins in this dissent.

ARKHOLA SAND & GRAVEL COMPANY, A Division of Apac-Arkansas *v.* Rick HUTCHINSON; Rusty GOODMAN; Martin E. LANCASTER; and Sandra LANCASTER

86-78 711 S.W.2d 474

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Daily, West, Core, Coffman & Canfield, for appellant.

Ball, Mourton & Adams, by: *Stephen E. Adams*, for appellees.

STEEL HAYS, Justice. Arkhola Sand & Gravel Company filed suit to impress a materialman's lien upon real property owned by defendants Martin and Sandra Lancaster for building supplies furnished to defendants Rick Hutchinson and Rusty Goodman, who constructed improvements on the Lancasters' property.

The Lancasters moved to dismiss the suit as to them because the legal description of their property was imprecise. Although Arkhola later amended to provide a sufficient description, that was after the time for perfecting liens under the statute had expired. The complaint was dismissed as to the Lancasters, though not as to Hutchinson and Goodman, and Arkhola has appealed.

The Lancasters have not challenged the appealability of the order of dismissal, but as that is a jurisdictional requirement we raise it ourselves even when the parties do not. *Arkansas Savings and Loan Association* v. *Corning Savings and Loan Association*, 252 Ark. 264, 478 S.W.2d 431 (1972), *McConnell* v. *Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970).

A number of recent cases have pointed out that when multiple claims or multiple parties are involved in a case the trial court may direct the entry of a final judgment as to one or more (but less than all) of the parties or claims *only* upon an express determination that there is no just reason for delay and upon the express direction for the entry of the judgment. ARCP Rule 54(b). *Sherman* v. *G & H Transportation, Inc.*, 287 Ark. 25, 695 S.W.2d 832 (1985); *3-W Lumber Co.* v. *Housing Authority for the City of Batesville*, 287 Ark. 70, 696 S.W.2d 725 (1985); *Tulio* v. *Arkansas Blue Cross and Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984); *Heffner* v. *Harrod*, 278 Ark. 188, 644 S.W.2d 579 (1983). The reason for the rule was fully explained in those opinions and need not be repeated here.

The requirements of Rule 54(b) were not observed in this

case and the order of dismissal as to the Lancasters is not an appealable order. Rule 2, Arkansas Rules of Appellate Procedure.

Accordingly, the appeal is dismissed.

Raymelle GREENING *v.* Hon. H. Allan DISHONGH, Judge of Little Rock Municipal Court

86-25 711 S.W.2d 475

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Howell, Price, Trice, Basham & Hope, P.A., by: *Robert J. Price*, for appellant.

Mark A. Stodola, City Att'y, by: *Victra L. Fewell*, Asst. City Att'y, for appellee.

STEELE HAYS, Justice. Raymelle Greening, appellant, is charged in the Little Rock Municipal Court with the criminal offenses of failure to produce a driver's license, disorderly conduct, resisting arrest, and two counts of battery in the third degree. Following the testimony of two officers of the Little Rock Police Department on direct examination, the defense requested

their prior written statements pursuant to Ark. Stat. Ann. § 43-2011.3 (Repl. 1977). The state maintained the statements should not be divulged because they were made in connection with investigations of the Internal Affairs Division. The court, after hearing protracted arguments, denied the request for these statements but granted a motion for a recess to allow Ms. Greening to obtain a ruling from the circuit court on a petition for a writ of mandamus. The circuit court held the provisions of § 43-2011.3 were discretionary and that appeal rather than mandamus was the proper remedy. Ms. Greening has appealed the denial of mandamus. We affirm the circuit court.

Appellant's argument is simply that § 43-2011.3 is mandatory and therefore, mandamus should be granted to direct the municipal judge to order the state to produce the statements. She does not address the propriety of this remedy, only the merits of her claim, contending that if she relies on appeal for recourse she may be convicted.

The state asserts that the initial question on appeal is whether mandamus is the proper remedy. The state is correct and we agree mandamus will not lie in this case.

There is no contention the trial court exceeded its jurisdiction, only that its ruling was erroneous. The writ will not be granted for such an action. Appellant's argument that appeal is inadequate in a criminal case because she may be convicted does not support the inadequacy of appeal. The remedy is by appeal. If a litigant who is dissatisfied during trial with an evidentiary ruling, however erroneous, could interrupt the trial for an extended period, in this case over a year, while he seeks relief by mandamus, the expeditious handling of cases would clearly become impossible. We said as much in *Burney* v. *Hargraves*, 264 Ark. 680, 573 S.W.2d 912 (1978).

> If the writ were used to stay the proceeding in the trial court whenever counsel thought a ruling to be erroneous, much of our time would be occupied in the piecemeal settlement of questions that should be presented by appeal, and the trial courts would be unduly hampered in the disposition of their cases.

In *State* v. *Glenn and Hamilton*, 267 Ark. 501, 592

S.W.2d 116 (1980), the circuit judge interrupted a bench trial to permit the state to take an interlocutory appeal to determine whether evidence offered by the state should have been suppressed. We said:

> A criminal trial cannot be suspended for weeks or months to allow an appeal from an interlocutory ruling upon the admissibility of evidence.

Appellant has presented no other argument to show the inadequacy of appeal, and presents nothing more than the possibility of error on the part of the trial court for which mandamus will not lie.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. It seems to me that the majority has confused A.R.Cr.P. Rule 17 with Ark. Stat. Ann. § 43-2011.3, the statute here under consideration. The majority opinion does not recite the pertinent provisions of the statute, which reads as follows:

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

The words "the Court shall" seem to be clear and unequivocal. It is not even implied that the Court has any discretion in the matter. There was no argument before the Court that the facts were an exception to the statute or that the statute was not applicable. The issue is squarely whether a trial court "*shall*" follow the plain wording of the statute.

I have no disagreement with the holding that mandamus cannot be substituted for appeal. Neither can it be used to review findings of fact, correct abuses of discretion, or correct erroneous conclusions of fact. We considered this same statute and facts

almost identical to those in the present case in *Blakemore* v. *State*, 268 Ark. 145, 594 S.W.2d 231 (1980). There the defendant requested the reports after the officer had testified, which was also done in the present case. The trial court held the request was not timely as the same information was available by discovery pursuant to Criminal Procedure Rule 17.1(b). In reversing the trial court in *Blakemore* we stated:

> It is provided by statute, however, that after a witness called by the State has testified on direct examination, the Court "shall," on motion of the defendant, order the State to produce any relevant statement of the witness in its possession. Arkansas Stat. Ann. § 43-2011.3(b) (Repl. 1977). Thus the requests for statements were timely.

Also, see *Nelson* v. *State*, 262 Ark. 391, 557 S.W.2d 191 (1977), where the identical rule and statute were considered. This court reversed in *Nelson* for the same reasons stated in *Blakemore*.

The purpose of mandamus is not to establish a right but to enforce a right already established. *Carter* v. *Marks*, 140 Ark. 331, 215 S.W. 732 (1919). This definition remains operative and is still followed by the courts. *Wells* v. *Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979). In reversing a circuit court's refusal to issue a writ of mandamus directing a city to hold a timely election we held that a public official has no discretion to do away with a right already established. *Lewis* v. *Conlee*, 258 Ark. 715, 529 S.W.2d 132 (1975).

What good is a statutory right if it may be ignored by a court. An appeal is time consuming and expensive. To force a person to resort to an appeal on refusal of the trial court to grant a vested statutory right, in most cases, has the effect of denying such (a statutory) right. In my opinion no court has the discretion to deny a statutory right unless it is either waived or is contrary to public policy or the Constitution.

I would issue a writ of mandamus.

Larry STOKES and Sylvia STOKES *v.* Shelton ROBERTS and Rita ROBERTS

85-295 711 S.W.2d 757

Supreme Court of Arkansas
Opinion delivered June 23, 1986

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellants.

Wynne, Wynne & Wynne, by: *Robin F. Wynne*, for appellees.

STEELE HAYS, Justice. Larry and Sylvia Stokes, appellants,

entered into an agreement to sell their western store to Shelton and Rita Roberts, appellees, for $45,000. The price covered the inventory, fixtures and equipment, and a registered quarter horse, worth about $2,000. The transaction was closed on June 14, 1982, with one contract for the sale of the store for $26,500 and three bills of sale: 1) $15,000 for fixtures and equipment; 2) $11,500 for the inventory; and 3) $18,500 for the horse. These allocations were made simply to accommodate the buyers and had no correlation to actual values.

The Robertses took possession of the store but repudiated the contract a few days later, stopping payment on their checks given in payment of the purchase price. The Stokeses sued for breach of contract and after a bench trial were awarded $5,628 in damages—the difference between the value of the inventory and fixtures, $39,371, and the contract price of $45,000. The two points for reversal are without merit.

The Stokeses first contend interest they incurred on a loan should have been awarded as incidental damages resulting from the breach. They had been operating the store for several years when Mr. Roberts met Mr. Stokes in April 1982. They discussed the possibility of Roberts buying the store and the sale was consummated in June, 1982. When the Stokeses received payment of the $45,000, they deposited the proceeds in their account and paid off some outstanding debts. These debts included a balance of $31,000 on an existing mortgage on their home. The Stokeses assert the mortgage was to obtain funds to finance their business operations. When payment was stopped on the checks, the Stokeses had to borrow to cover the checks they had written and they again mortgaged their home to secure the debt. They submit this second loan was needed to operate their business. It is unclear whether the claim rests on the first or second loan, but in either case, it is without merit.

[redacted] Appellants rely on recent cases holding that interest is recoverable on loans incurred by one party to perform a contract breached by the opposing party. In those cases interest was awarded from the time of the loan until the judgment was satisfied. This type of "incidental damages" is defined under UCC 2-710:

2-710. *Seller's Incidental Damages.*

> Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

This recent innovation in the application of 2-710 is finding acceptance. See, *Bulk Oil* v. *Sun Oil*, 697 F.2d 481 (2nd Cir. 1983); *Gray* v. *West*, 608 S.W.2d 771 (Tex. 1980); *Atlas Concrete Pipe* v. *Au*, 467 F. Supp. 830 (1979); *Intermeat* v. *American Poultry*, 575 F.2d 1017 (2nd Cir. 1978).

Bulk Oil v. *Sun Oil, supra* and *Gray* v. *West, supra*, present typical situations when this principle is applied. In both cases the plaintiffs, as sellers, borrowed money to purchase the subject matter of a contract, which the opposing party later breached. When the breach occurred the sellers were left with a debt they would not otherwise have owed but for the contract. Interest had to be paid on the loan until cover was effected. In *Gray*, the court found the actual interest expenses on the money borrowed by the seller to finance the subject matter of the contract, incurred as a result of a buyer's breach, were incidental damages under 2-710. Similarly, in *Bulk Oil* v. *Sun Oil*, the seller had borrowed $4,000,000 to finance a sale of oil to the buyer, who then defaulted, and the court held interest payments on the loan to be incidental to the breach.

We disagree that those cases govern this situation. The interest expense incurred in those cases was a result of performance made in *reliance* on the contracts. See, generally, Farnsworth, Contracts (1982) § 12.1, 12.8. It is the relationship between expenditure and the performance of the contract that provides a basis for holding that interest in those cases was incidental to the breach. See *Ernst Steel Corp.* v. *Horn Construction Div.*, 104 App. Div. 55, 481 N.Y.S.2d 833 (1984).

[redacted] Here, no expenditure was made by the Stokeses in reliance on the contract. Neither the earlier nor the more recent loan was made in such reliance. At the time of the original loan, the Stokeses did not even know the Robertses. There is no contention that the original loan to finance the store had any relationship to the contract, much less that they relied on it.

As to the second loan, the Stokeses chose to pay off the note on their home with the proceeds of the contract. When the Robertses reneged, they had to acquire another loan to operate their business. While the Stokeses characterize this loan as distinct from the first, it is, in effect, simply a renewal of the previous debt, which had no real relationship to the contract.

The second loan was necessary, not to cover expenses incurred by performance in reliance on the contract, but because of the Stokeses' decision to use the sale proceeds to pay off a pre-existing debt. Had they used the proceeds on some unrelated venture and because of the breach had to cover the expense with a loan, it is clear that such an expense would not be recoverable. The debt was only coincidentally incurred to finance the business, a debt incurred at an earlier time with no relationship to the contract. In the cases cited, except for the performance in reliance on the contract, no loan would have been necessary. *Atlas, supra.* Had the Stokes never entered into this contract, they would be obligated on a loan nonetheless. In reality, the Stokeses are disappointed in their expectation of the use of the proceeds to pay off a pre-existing debt. However, the law does not go that far in fulfilling the expectation interest of a party. See generally, Farnsworth § 12.1, 12.8; Restatement of Contracts 2d (1981) § 344, 351.

The Stokeses' second point concerns the construction the trial court gave to the contracts for the sale of the store for $26,500 and the sale of the horse for $18,500. Appellants argued to the trial court that the instruments should be read separately—the contract for the store for $26,000 would hold no loss, as its value was $39,471 and the contract for the horse at $18,500 would be a loss of $16,500, as the horse was valued at $2,000. The trial court, however, construed the contracts together to find the true intention of the parties and found the sale of the horse was not a separate transaction but part of the sale of the business for $45,000. The Stokeses argued on appeal that the contracts are clear and unambiguous and should be read separately as written.

[redacted] The argument ignores other rules of construction. When two instruments are executed contemporaneously, by the same parties in the course of the same transaction, they should be considered as one contract for purposes of interpretation, in the

absence of a contrary intention. *Henslee* v. *Boyd*, 235 Ark. 369, 360 S.W.2d 505 (1962); *Gowen* v. *Sullins*, 212 Ark. 824, 208 S.W.2d 450 (1948); *Rawleigh* v. *Wilkes*, 197 Ark. 6, 121 S.W.2d 886 (1938); *Belding* v. *Vaughan*, 108 Ark. 69, 157 S.W. 400 (1913). To arrive at the intention of the parties to a contract, courts may acquaint themselves with the persons and circumstances and place themselves in the same situation as the parties who made the contract. *Schnitt* v. *McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968). We may also consider the construction the parties themselves place on the contract. *Hastings Industrial Co.* v. *Copeland*, 114 Ark. 415, 169 S.W. 1185 (1914).

Appellants concede there is no serious claim the parties intended the instruments to be taken literally, but argue the trial court should have construed the contracts separately nonetheless because of the lack of ambiguity. Admittedly their aim was to get $45,000 for the inventory, which they valued at $39,000. The transaction was partitioned at the request of Mr. Roberts and Mr. Stokes testified that he did not care how it was done as long as he got $45,000. Stokes testified the horse and the inventory were a "couple deal" and he would have sold the store for $45,000 without the horse and he would not have sold the store alone for $26,500 without the arrangement for the horse. It is clear the contracts were intended as one and neither party would have agreed to one without the other. See *Dynamics Corp. of America* v. *International Harvester Co.*, 429 F. Supp. 341 (S.D.N.Y. 1977). See also *Belding, supra*; *Hastings Industrial, supra.*

Affirmed.

David SULLIVAN *v.* STATE of Arkansas

CR 86-3 711 S.W.2d 469

Supreme Court of Arkansas
Opinion delivered June 23, 1986
[Rehearing denied July 21, 1986.*]

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* Holt, C.J., not participating.

Chandler & Thomason, by: *J. G. Molleston*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted of raping his thirteen-year-old stepdaughter. He was sentenced as an habitual criminal to sixty years imprisonment. He raises these points: (1) the court abused its discretion in refusing his application to subpoena out of state witnesses; (2) evidence of past sexual contacts between the appellant and the victim should have been excluded; (3) the court should have instructed on carnal abuse in the first degree as a lesser included offense; and (4) the evidence was insufficient. We find no merit in any of these arguments, and thus we affirm.

The appellant's stepdaughter came to live with him in Missouri when she was eleven pursuant to an agreement between him and her mother. Her mother lived in Minnesota. The victim described the appellant as her stepfather. They moved from Missouri to a rent house at Emerson, Arkansas, where they lived with two other children and three other adult family members.

The victim testified that her stepfather began touching her in the "wrong places" when she was eleven and that the appellant began engaging in sexual intercourse with her when she was twelve. The record shows she was pregnant at thirteen, and apparently this brought her to the attention of Columbia County authorities. She testified she had had visits with social workers in Missouri and in Arkansas, and with a doctor, but that she had not told on the appellant because she feared him and did not want him to get into trouble.

The victim was asked to recall the 24th of March and if that was the last time she had intercourse with the appellant. She said

it was a Saturday or a Sunday, she could not remember which. She said the appellant came into the bathroom where she was naked, except for a towel wrapped around her, preparing to take a bath. She said the appellant shoved her to the floor, took down his pants and underwear, and placed his penis in her vagina.

1. Witness Subpoenas

The appellant's counsel petitioned the court for subpoenas to obtain the presence of the three adults who had been living with the appellant and the victim. The appellant's counsel filed with the petition his affidavit stating that the witnesses were at a certain address in Hannibal, Missouri, some 600 miles away, and that they had been in the house where the rape was alleged to have occurred at the time it was alleged to have occurred. The state did not dispute these facts, but argued the appellant had not demonstrated the witnesses had material testimony to offer.

In argument on the motion it became clear that counsel for the appellant had not spoken with the three witnesses as to whom the subpoenas were sought. The court offered to give the appellant a continuance so he could complete his investigation. The appellant's counsel apparently was unable to speak to the witnesses, as nothing further appears on the record. The court ultimately denied the motion.

The appellant had no absolute right to the subpoenas or to have the witnesses appear at government expense. Whether to honor such a request is within the discretion of the trial court. *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Wright* v. *State*, 267 Ark. 264, 590 S.W.2d 15 (1979); *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983). Given counsel's inability to produce any evidence as to what these witnesses might or might not be able to say, we find no abuse of discretion.

2. Past Sexual Conduct

By a motion *in limine*, the appellant sought to prevent any testimony as to sexual contact between his stepdaughter and himself other than the offense charged. The motion was denied. The victim testified as to her prior sexual relationship with the appellant. She said he had hit her in connection with prior sexual episodes and she testified that he "hits pretty hard."

In *Price* v. *State*, 267 Ark. 1172, 599 S.W.2d 394 (Ark. App. 1980), our court of appeals analyzed Uniform Rule of Evidence 404(b) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The court said:

> In our view, the rule should be interpreted to exclude evidence of other offenses when its only purpose is to show the accused's character or some general propensity he might have to commit the particular sort of crime in question. It should not be interpreted to exclude evidence of other offenses when that evidence is probative of the accused's participation in the particular crime charged. If it is probative of his participation the only remaining question should be whether it is so prejudicial that it should be excluded because the prejudice brought about by exposition of other offenses is not sufficiently balanced by the probative value of the evidence on the facts sought to be proved. See, Rule 403. [267 Ark. at 1176, 599 S.W.2d at 396.]

We affirmed the court of appeals decision in *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980). We said:

> Although petitioner contends that Rule 404(b) prohibits the introduction of testimony of other criminal activity, the rule clearly permits such evidence if it has relevancy independent of mere showing that the defendant is a bad character. In other words: 'If other conduct on the part of the accused is independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal — then evidence of that conduct may be admissible, with a proper cautionary instruction by the court. (Citation omitted.)' [268 Ark. at 538, 597 S.W.2d at 599.]

We most recently dealt with the question in *Johnson* v. *State*, 288 Ark. 101, 702 S.W.2d 2 (1986), where we again held that evidence of prior incestuous acts with the same person was admissible.

We interpret Rule 404(b) as meaning that if the evidence of prior bad acts is relevant to show the offense of which the appellant was accused occurred, and is thus not being introduced to show only bad character, we will not exclude it. While we may not be able to tie the evidence specifically to proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absense of mistake or accident," if it has an independent relevancy we will regard it as being, in the words of the rule, "such as" one of those permissible objects of proof.

In this case the evidence that this forcible sexual intrusion by the appellant had been going on for some time was probative of both the victim's fear of the appellant and the fact that a rape could have occurred in the bathroom of a house which might have been full of people, after the accused merely shoved the victim to the floor.

The trial court properly admonished the jury that the evidence was not being introduced to show the appellant's bad character or that he may have been acting in conformity with that bad character. We find no error.

3. Lesser Included Offense

The appellant proffered an instruction on carnal abuse in the first degree as a lesser offense included in rape. The court declined to give the instruction.

The rape allegedly occurred March 24, 1985. Prior to March 7, 1985, Ark. Stat. Ann. § 41-1803 (Repl. 1977) provided:

> Rape. — (1) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
>
> (a) . . . .
>
> (b) . . . .
>
> (c) who is less than eleven years old.

On March 7, 1985, Act 281 of 1985, codified as Ark. Stat. Ann. §

41-1803 (Supp. 1985), became effective. The comparable section defined rape as follows:

> (1) Rape. A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
>
> (a) . . . .
>
> (b) . . . .
>
> (c) who is less than fourteen years of age. It is an affirmative defense to prosecution under this Section that the actor was not more than two years older than the victim.

This is the offense with which the appellant was charged.

[redacted] The statute defining carnal abuse in the first degree, Ark. Stat. Ann. § 41-1804(1) (Repl. 1977), was not amended in 1985. It provides:

> A person commits carnal abuse in the first degree if being eighteen years old or older, he engages in sexual intercourse or deviate sexual activity with another person not his spouse who is less than fourteen years old.

[redacted] One definition of rape and the definition of carnal abuse in the first degree have thus become identical except that carnal abuse in the first degree requires proof that the accused be at least eighteen years old. Thus it is clear that carnal abuse in the first degree may not be regarded as a lesser included offense to rape as defined by § 41-1803(1)(c).

[redacted] In *Gaskin* v. *State*, 244 Ark. 541, 426 S.W.2d 407 (1968), we held that to constitute an included offense, all the elements of the lesser offense must be contained in the greater offense which contains certain elements not in the lesser offense. Carnal abuse now contains an element not included in rape, i.e., that the accused be over eighteen. A seventeen-year-old who engages in intercourse with a thirteen-year-old could be convicted of rape [and not have the benefit of the affirmative defense provided in § 41-1803(1)(c)] but could not be convicted of carnal abuse in the first degree. Rape is a class Y felony. § 41-1803(2). Carnal abuse in the first degree is a class B felony. § 41-1804(2) (Supp. 1985). The sentencing range for class B is less punitive

than for class Y. *See* Ark. Stat. Ann. § 41-901(1)(a) and (c) (Supp. 1985).

We need go no further into the anomaly the new legislation has produced with respect to these offenses. It is enough to say there was no error resulting from refusing in this case to instruct on carnal abuse in the first degree because it is not a lesser included offense in the rape with which the appellant was charged.

4. Sufficiency of the Evidence

The appellant's main contention in this point for reversal is that the state presented no clear evidence that the offense occurred on March 24, 1985. As noted above, the statute pursuant to which the appellant was charged went into effect March 7, 1985.

The victim testified that she and the appellant and the others moved to Arkansas in March, 1985, that the appellant engaged in intercourse with her three or four times after the move, and that they had been in Arkansas two or three weeks when the police came out to their house. When he began to inquire at trial during the victim's testimony about the rape charged, the prosecutor asked and she answered as follows:

> Q: I call your attention to around the 24th of March, around in that area, which was the last — was this the last time it happened? Do you remember the last time that he engaged in intercourse with you?
>
> A: It was around Saturday or Sunday one, I can't remember.
>
> Q: Tell the jury if you will very loudly . . . very clearly, what happened on that day.

The victim then recited the details of her final sexual encounter with the appellant.

We must view the evidence most favorably to the appellee. *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985); *McCree* v. *State*, 266 Ark. 465, 585 S.W.2d 938 (1979). While it is true that the victim did not give a clear reference to a date after March 7, 1985, we hold her testimony was sufficient to

show the rape occurred on or about March 24, 1985, as charged, and in any event was sufficient to sustain the conclusion the rape occurred after March 7, 1985.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Anomaly or not, carnal abuse in the first degree is established by proof of the same or less than all the elements required to establish the commission of rape as defined in Ark. Stat. Ann. § 41-1803 (1)(c) (Supp. 1985). In order to provide a quick comparison the statutes involved are set out below.

Ark. Stat. Ann. § 41-105 (Repl. 1977):

> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> > (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged; . . . .

Ark. Stat. Ann. § 41-1803 (Supp. 1985):

> (1) Rape. A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person: . . .
>
> > (c) who is less than fourteen years of age. It is an affirmative defense to prosecution under this Section that the actor was not more than two years older than the victim.

Ark. Stat. Ann. § 41-1804 (Repl. 1977):

> A person commits carnal abuse in the first degree if being eighteen years old or older, he engages in sexual intercourse or deviate sexual activity with another person not his spouse who is less than fourteen years old.

It can be clearly seen from the above statutes that carnal abuse in the first degree and rape as charged herein may be committed upon the exact same facts. The evidence clearly shows

the appellant to be over the age of 18 and the victim to be under the age of 14. Since the facts of this case clearly establish either and/or both offenses, the appellant was entitled to have the jury instructed on both. We have many times held that an offense is included in another if it is established by proof of the same or less than all the elements required to establish the commission of the other offense. *Akins* v. *State*, 278 Ark. 180, 644 S.W.2d 273 (1983); *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982); *Swaite* v. *State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

I would reverse and remand because the court refused to give the instruction on carnal abuse in the first degree.

Johnny GORMAN et ux *v.* Russell RATLIFF

85-322 712 S.W.2d 888

Supreme Court of Arkansas
Opinion delivered June 30, 1986

James B. DePriest, Central Arkansas Legal Services, for appellants.

Bridges, Young, Matthews, Holmes & Drake, by: *Michael J. Dennis*, for appellee.

JACK HOLT, JR., Chief Justice. This landlord/tenant case requires interpretation of the Forcible Entry and Detainer statutes, Ark. Stat. Ann. §§ 34-1501—34-1512 (Supp. 1985). Because we are being asked to interpret an act of the General Assembly, our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c).

The appellants, Johnny and Mary Gorman, were tenants of the appellee, Russell Ratliff. The appellants admit that they became delinquent in their rent payments and that the appellee

asked them to vacate the premises. Before they did so, Ratliff entered the rental house while the appellants were not at home and removed all of their personal property. Ratliff then stored the property, which included a refrigerator, stove, beds, childrens' toys, a bassinet, personal papers, and other items. The appellants filed suit against Ratliff claiming his actions constitute a wrongful and constructive eviction, and a wrongful conversion of property.

Ratliff filed an answer and counterclaim in which he claimed that appellants had violated the terms of the lease agreement between the parties. Ratliff relied on provisions in the lease permitting him upon nonpayment of rent to enter the property and store all personal property left at the leased premises. The lease also provided that if the charges are still unpaid after 30 days, the stored property can be sold to satisfy the rent arrearage.

In an amended complaint, appellants alleged that Ratliff's actions constitute a forcible entry and detainer. To the extent that appellee's actions were in accordance with the terms of the lease, appellants claim the lease is illegal, unconscionable and against public policy.

The parties stipulated that the lease was entered into on November 30, 1984, that Ratliff and not appellants has had possession of the premises since April 23, 1985, and that Ratliff has had possession of appellants' personal property since then, and that no judicial order has been entered granting possession of the personal property to Ratliff.

The trial court ruled, after a preliminary hearing on appellants' motion for relief pendente lite that, pursuant to the lease contract, Ratliff had a right to peaceable repossession of the premises and a lien on the personal property found therein. After a trial, the court denied appellants' claim and awarded Ratliff $528 on his counterclaim, that amount representing unpaid rent and moving, storing, and cleaning expenses. The court further found that the lease conforms to all applicable Arkansas law. We disagree and reverse the trial court's order.

The lease provided in pertinent part:

> 10. Any violation of any provision of this lease by any of the lessees, or any person on the premises with the lessee's

consent, or any failure to pay rent upon the date due, shall result, at the option of the lessor, in the immediate termination of this lease without notice of any kind, and lessor may thereupon enter said premises and take and retain possession thereof and exclude lessees therefrom.

12. If lessees leave said premises unoccupied at any time while rent is due and unpaid, lessor may, if desired, take immediate possession thereof and exclude lessee therefrom, removing and storing at the expense of said lessees all property from contained therein.

14. The lessor shall have the lien granted by law all baggage and other property of lessees for their rent, accomodation and services, and the lessees hereby grant to lessor a lien upon all personal property brought into said premises, regardless of any provisions of law or whether or not the apartment is furnished, and lessor may enforce said lien as provided by law or by entering said premises and either taking possession thereof and the belongings contained therein for safekeeping, or by removing said property therefrom and storing the same at the expense of the lessees. Said lien may be enforced whenever rent is due and unpaid and regardless of whether or not a three (3) day notice to pay rent or quit shall have been served, and enforcement of the lien shall not operate to waive any other rights of the lessor in unlawful detainer or otherwise. If rent is still due and unpaid thirty (30) days after the enforcement of said lien, then the lessor may sell any or all personal property taken possession of as herein provided, and may apply any monies received against the unpaid rent, ...

In Act 615 of 1981 the legislature revised the statutes describing the cause of action for forcible entry and detainer and unlawful detainer and prescribing the procedure for carrying out the rights and remedies of the affected parties. The legislature did so because it found the former statutes were in need of clarification and revision and it was in the best interest of the people that "an additional procedure be specifically prescribed for the enforcement of the rights of parties. . ." Ark. Stat. Ann. § 34-1501 (Supp. 1985). That additional procedure afforded persons

affected by the legislation an opportunity to be heard on legitimate objections to writs of possession, *Id.* At the outset, therefore, the legislature evinced a desire to extend additional protection to parties in possession of property before that property could be taken from them, as well as to provide for procedures to expedite the removal of parties who are unlawfully in possession of property.

Section 34-1503 defines those acts that will constitute a forcible entry and detainer as follows:

> If any person shall enter into or upon any lands, tenements or other possessions and detain or hold the same without right or claim to title, or who shall enter by breaking open the doors and windows or other parts of the house, whether any person be in or not, or by threatening to kill, maim or beat the party in possession or by such words and acts as have a natural tendency to excite fear or apprehension of danger or by putting out of doors or by carrying away the goods of the party in possession, or by entering peaceably and then turning out by force or frightening by threats or other circumstances of terror the party to yield possession, in such cases every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this Act.

Included in this list is the action taken by the landlord in this case: "carrying away the goods of the party in possession". Appellee asks us to read this statute as prohibiting only people "without right or claim to title" from carrying away the goods of the party in possession. We do not find his position persuasive however. In this statute, the legislature has embodied guidelines of prohibited conduct, any one of which constitutes a forcible entry and detainer within the meaning of the Act, thus giving protection to appellants.

In addition to delineating prohibited conduct, the legislature provided a remedy for landlords with holdover tenants and others guilty of forcible entry and detainer and unlawful detainer. Once a party is unlawfully in possession of property, the person with a cause of action under this Act may file a complaint and an affidavit in circuit court and the complaint will then be served on the defendant with a notice of intention to issue a writ of

possession. § 34-1507. If the defendant does not respond within five days the writ of possession is issued. If the party responds and objects, a hearing will be held. At the hearing, if the court decides the plaintiff is likely to succeed and the plaintiff provides adequate security, the court then orders the clerk to issue the writ. *Id.* For the defendant to retain possession of the property, he must provide adequate security. *Id.*

Although a landlord's use of self-help to evict a holdover tenant is not specifically addressed by the act, § 34-1502 does provide:

> No person shall enter into or upon any lands, tenements, other possessions, and detain or hold the same, but where an entry is given by law, and then only in a peaceable manner.

[redacted] No entry by a landlord onto property occupied by another is given by Act 615, except by first resorting to legal process. Accordingly, self-help action is prohibited.

[redacted] This finding is in keeping with the long standing policy behind the forcible entry and detainer statutes, which were first enacted to prevent landlords from retaking their land by force. *Vinson* v. *Flynn*, 64 Ark. 453 (1897). The statutes were designed to restore possession to the tenant until the right to possession could be adjudicated and to compel people "to the more pacific course of suits in court, where the weak and strong stand upon equal terms." *Id., quoting Littell* v. *Grady*, 38 Ark. 584; *see also* 35 Am Jur 2d *Forcible Entry & Detainer* § 5 p. 894 (1967). This concept has evolved until now the modern doctrine requires a landlord, otherwise entitled to possession, upon the refusal of the tenant to surrender the leased premises, to "resort to the remedy given by law to secure it". 50 Am Jr 2d *Landlord & Tenant* § 1220 p. 104 (1970); Annotation, 6 A.L.R.3d 177 § 5 (1966).

Other courts addressing this same question have held that, although the real owner of the property may be ultimately entitled to possession of the property, the entry and detainer action is designed to compel the party out of actual possession to respect the present possession of the other party and resort to legal channels to obtain possession. *See e.g., Floro* v. *Parker*, 205 So.2d 363 (Fla. 1968); *Jordan* v. *Talbot*, 55 Cal. 2d 597, 12 Cal. Rptr.

488, 361 P.2d 20 (1961); *Bass* v. *Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974); and *Edwards* v. *C.N. Investment Co.*, 27 Ohio Misc. 57, 272 N.E.2d 652 (1971).

The Arkansas Legislature through Act 615 has expressed its intention to prohibit landlords from entering premises without statutory authority. Recognizing that landlords, too, have rights with respect to their property, and the problems they face, particularly with holdover tenants, the legislature in the same Act establishes procedures to enable them to expeditiously evict tenants.

Although the terms of the lease agreement clearly permitted Ratliff's actions, the appellants did not waive their rights under the forcible entry and detainer statutes by executing the lease agreement. Section 34-1503 prohibits several kinds of conduct and the appellee is asking us to find that the tenant waived one of them. The provisions of § 34-1503 cannot be isolated so as to permit waiver of a portion of the statute. Nor can the entire statute be waived, since to do so would conceivably permit a person to threaten "to kill, maim or beat the party in possession," actions which are absolutely prohibited.

For these reasons those provisions of the lease authorizing the landlord's self-help remedy are invalid and the trial court's granting of relief to appellee is reversed.

Appellants include a prayer for actual and punitive damages in this appeal. Section 34-1509 provides that, if the judgment is for the tenant, the court should give judgment for costs and "any damages that may be assessed in favor of the defendant." The only evidence of damages which can be found in the record is the appellants' claim that the property taken from them was worth $1,000. Much of that property has now been returned pursuant to appellants' claim of exemption. There was no evidence presented as to punitive damages.

Accordingly, we remand this matter to the trial court to determine what, if any, damages have been suffered by appellants.

Reversed and remanded.

HICKMAN and NEWBERN, JJ., concur.

DAVID NEWBERN, Justice, concurring. The result reached by the majority is correct. However, I believe the majority opinion does not correctly address the central issue in the case. That issue is whether a lessee, by a provision in a lease contract, may confer upon the lessor the "right" to enter which, according to Ark. Stat. Ann. § 34-1503 (Supp. 1985), exempts the landlord from liability for forcible entry.

The majority opinion adequately describes the policies behind the forcible entry and unlawful detainer statutes. However, in applying those policies to invalidating the provisions of the lease which are contrary to them the only discussion is about whether one part of the statute may be "waived" and not the others. If that were the issue, I believe a strong argument could be made that, by contract, the parties might create a landlord's "right" to enter but might not be able to create a right to commit the criminal acts stated disjunctively in § 34-1503.

We should say simply that the General Assembly has stated a strong public policy against forcible entry by a landlord, and a contract by which the parties seek to avoid that policy is invalid. In *Ladd* v. *Ladd*, 265 Ark. 725, 580 S.W.2d 696 (1979) we held an agreement invalid for violation of public policy. *See also Hultsman* v. *Carroll*, 177 Ark. 432, 6 S.W.2d 551 (1928); *Swann* v. *Swann*, 21 F. 299 (E.D. Ark. 1884); *Woodson* v. *Kilcrease*, 7 Ark. App. 252, 648 S.W.2d 72 (1983). The Arkansas General Assembly has made our public policy clear in the area of landlord-tenant relations. We need not go beyond that policy to find the contract invalid and unenforceable.

HICKMAN, J., joins.

Maria H. WILES *v.* John H. WILES

86-75 711 S.W.2d 789

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Redden & Hirby, by: *Michael Redden*, for appellant.

Baim, Gunti, Mouser, Bryant & DeSimone, by: *Judith A. DeSimone*, for appellee.

JACK HOLT, JR., Chief Justice. The sole issue to be decided in this appeal is whether to apply our decisions in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984) and *Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986) retroactively to a divorce decree which became final prior to the decisions in those two cases. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) to interpret Act 705 of 1979.

The parties, John and Maria Wiles, divorced on November 16, 1982, after approximately 20 years of marriage. Mr. Wiles was in the military during the marriage. The decree provided:

> [T]he Court hereby specifically authorizes the Defendant to have all of the benefits for herself and her children under the new Former Spouses Protection Act of the United States Congress except that she is not entitled to any

> portion of any provision regarding present, past or future retirement benefits of the Plaintiff.

Arkansas law at the time provided that military retirement pensions were not "marital property" under Ark. Stat. Ann. § 34-1214 (Repl. 1962). *Paulsen* v. *Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980). Mrs. Wiles did not appeal from the decree.

On January 30, 1984, this court handed down *Day* v. *Day, supra*, in which we held that an employer-sponsored retirement plan was marital property subject to allocation. In so holding, we stated:

> After the adoption of Act 705 of 1979 we failed to give full effect to the new law and instead adhered to the position we had taken under a quite different statute. In *Paulsen* v. *Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980), we decided that a military pension, currently being paid but not transferable, was not marital property. . . .
>
> We now realize that we have inadvertently failed to recognize the new concept of "marital property," created by Act 705 of 1979, as amended. That statute defines marital property as *all* property acquired by either spouse subsequent to the marriage, with exceptions not important here. Section 34-1214 (Supp. 1983). That law directs that *all* marital property be distributed equally unless the court finds that division inequitable.

In *Young* v. *Young, supra*, we held that military retirement benefits also constitute marital property and that our prior holding in *Paulsen* was effectively overruled by *Day* and its progeny.

On September 9, 1982, the Uniformed Services Former Spouses' Protection Act, 10 USCA § 1408, was enacted into law and became effective February 1, 1983. The Act permitted states, whose laws so provide, to divide military retired pay as marital property. *See Durham* v. *Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986).

On April 30, 1985, the appellant, Mrs. Wiles, filed a complaint in chancery court seeking modification of the divorce decree. The portion of that complaint at issue here asked the

chancery court to apply the *Day* decision retroactively and allow her a portion of Mr. Wiles' military retirement pension. The chancellor determined that *Day* should not be applied retroactively and dismissed that portion of the complaint. In so holding, the chancellor acknowledged that if Mr. and Mrs. Wiles had been divorced at any time following *Day*, Mrs. Wiles would have been entitled to make a claim for a portion of the pension. In refusing to allow her to do so now, the chancellor noted that the prior rule of law was relied upon when the decree was entered and that probably hundreds of divorces were granted between the dates of the passage of the Uniformed Services Former Spouses' Protection Act and the *Day* decision, and a retroactive application may very well burden the administration of justice.

We find the principle of reliance to be persuasive and affirm the chancellor's holding on that basis.

Although we have long held that a decision of this court, when overruled, stands as though it had never been, *Taliaferro* v. *Barnett*, 47 Ark. 359 (1886), we have also acknowledged the need, when overruling prior case law, to recognize the validity of actions taken in faith upon old decisions while stating the rules to be followed in the future. *See Crisco* v. *Murdock Acceptance Corp.*, 222 Ark. 127, 258 S.W.2d 551 (1953). This court has also observed that no matter how a new rule of law is applied, the benefit of the new decision is denied to some injured persons when there is any change in the law. *Parish* v. *Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968).

Here, our previous holdings, even though ultimately determined to be erroneous, were justifiably relied upon by the parties and by the trial court when the original decree was entered. Since that time, the parties have restructured their lives, no doubt based in part on the terms of the decree. For this court to reopen the proceedings and cause a new division of property to be made, nearly four years later, would work a great hardship on the parties and would defeat the purposes underlying the doctrine of res judicata. *See* Annotation, 10 ALR 3d 1371, 1403 § 8 [d] (1966).

Accordingly, the chancellor's decree is affirmed.

Decima ZINI et al. *v.* Freddie PERCIFUL, Administrator, et al.

86-76 711 S.W.2d 477

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Green Law Offices, by: *Anthony J. Sherman*, for appellants.

Wallace & Hammer, by: *James B. Wallace*, for appellees.

GEORGE ROSE SMITH, Justice. Angelo Zini died in October, 1983. By petition an attempt was made to probate any one of three separate writings as Mr. Zini's will. The validity of all the proffered instruments was challenged. The court appointed a master to take testimony. This appeal is from a judgment adopting the master's finding that none of the three writings was a valid will. One was found to be largely typewritten but not witnessed. The other two, though handwritten, were found to contain numerous strike-throughs, to be almost illegible, to fail to reflect an intent to make a will, and to lack the necessary words of dispositive character.

The appellants, beneficiaries of the purported will that was dated May 17, 1978, argue that because there is a strong presumption against intestacy, the trial court should have found the language of the instrument sufficient to constitute a valid holographic will. Two phrases, apparently quoted from the writing in question, are relied on to support the argument.

It is impossible for us to consider the appellants' contentions, because counsel have not provided us either with an exact quotation of the instrument in question or with an abstract of it. We have no idea how it reads. We are referred by the appellants to Exhibit 2 in the transcript, but for a hundred years we have pointed out, repeatedly, that there being only one transcript it is impractical for all members of the court to examine it, and we will not do so. An early case, among scores of such cases, is *Shorter University* v. *Franklin*, 75 Ark. 571, 88 S.W. 974. There we noted, in 1905, that the rule (now Rule 9) had been promulgated twenty years earlier.

In a reply brief counsel for the appellants put forth this explanation for the omission in their original brief:

> Appellants were unable to abstract the decedent's wills in words. Rule 9(d) provides that when a map, or other similar exhibit can not be abstracted in words, appellant shall reproduce such exhibit and attach it to the copies of the abstract. Appellants attempted to file their brief attaching a copy of the subject wills to their brief, but the Supreme Court Clerk refused to accept it because of the proposed exhibit. Since this Court reviews this appeal de novo, appellants referred to the records so the Court could see the subject wills. Appellants submit that they have complied with Rule 9 of the Rules of the Supreme Court and that this case should not be summarily affirmed because of any deficiency.

[redacted] The explanation misconceives the purpose of Rule 9, for in effect counsel are insisting that all seven judges examine the transcript. The wills were all written instruments and could have been abstracted in words, which is probably why the clerk rejected the proffered brief. Better still, the wills could have been copied verbatim in the abstract of the record, that being almost invariably the preferred practice when a will, deed, contract, or other writing is to be interpreted. If counsel wanted the members of the court to see the wills in their original form, the wills should have been included in the abstract and also attached to the brief in the form of photocopies. Finally, even though we review probate court appeals de novo, the review is upon the record as abstracted, not upon the original record. *Smock* v. *Corpier*, 226 Ark. 701, 292

S.W.2d 260 (1956).

Affirmed.

FIRST COMMERCIAL BANK, Trustee *v.* Duane T. MEYER, Beneficiary

86-12 711 S.W.2d 791

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Friday, Eldredge & Clark, by: *A. Wyckliff Nisbet* and *William A. Waddell, Jr.*, for appellant.

Moses, McCellan & McDermott, by: *Harry McDermott, III*, for appellee.

DARRELL HICKMAN, Justice. D. T. Construction Company established a profit sharing plan for its employees. The plan was qualified under the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. 1001 et seq. Duane T. Meyer, president of the company, was named the plan administrator and First Commercial Bank was named the trustee of the plan. The

plan administrator was authorized to interpret the plan, determining to whom and how the benefits were paid. The trustee was only authorized to follow the written directions of the plan administrator regarding any disbursements from the funds of the plan. The plan provides that only vested employees are entitled to distribution from the trust. It takes 10 years of employment to become 100% vested under the plan. After three years of employment, the employee becomes 30% vested with vesting increasing 10 percent each succeeding year.

In September 1984, Meyer delivered seven notices of termination and employee participation in the plan to the trustee, who at that time was Frank Scherr. Scherr had recently been hired by the bank as trustee. The notices were to identify the status of the employee-participants and note their vested interest in the plan. The notices concerning five employees stated they were zero percent vested, meaning they were not entitled to share in the plan. The other two notices were left blank as to their contributory share. All seven notices of termination stated the reason for termination as dissolution of the corporation. Scherr testified he informed Meyer that in his opinion the employees were automatically 100% vested upon dissolution of the corporation. Scherr said Meyer nodded his head in agreement. Meyer testified that he did not recall nodding. Later, Scherr sent Meyer an allocation report for the fiscal year, showing that four of these seven employees were zero percent vested. But Scherr later concluded these four employees were 100% vested because their termination was due to the corporation being dissolved. He said he tried to call Meyer several times but was unable to reach him. Scherr then mailed withholding election forms to these employees, a requirement by the IRS, prior to distribution of the funds. When the forms were returned, Scherr paid these four individuals a total of $4,758.24 on October 16, 1984.

In November, 1984, one and a half months after Scherr paid these employees, Meyer learned of the disbursement. He and his accountant met with Scherr and explained that these four employees were not laid off because the corporation was dissolving, but that they had voluntarily quit at various times during the last fiscal year. Meyer further explained he did not intend for them to receive any funds because none of them were vested in terms of years of service; that was the reason zero was written on

the form. Scherr wrote the four individuals and requested that the money be returned explaining that the instructions given to the trustee by the plan administrator were misinterpreted, and they were not entitled to the payments since they had quit. None of the employees returned the money and Meyer sued the bank for reimbursement. The trial court held for Meyer finding that the trustee had acted unreasonably under the circumstances.

On appeal the bank asks us to hold as a matter of law that the payments made to the four employees were proper because their interest in the plan had vested upon dissolution of the corporation under ERISA. On the facts before us, we cannot say the chancellor was clearly wrong because evidently Scherr did misinterpret his instructions. That was the judgment of the chancellor. The termination notices stated none of these individuals had any interest in the plan. While the reason given was dissolution, the trustee on his own decided all four employees were vested and should receive their share of the fund. There is no evidence the four employees were terminated because the corporation was to be dissolved. Meyer testified these four employees had quit prior to the adoption of the resolution of dissolution. This testimony was undisputed.

The question before us then is whether the trustee reasonably relied on Meyer's acts, causing the claim to be barred by equitable estoppel. Scherr testified Meyer nodded upon the dissolution of the corporation. Meyer testified that he did not recall nodding his head. The trial court has the responsibility of resolving conflicts in testimony. *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985). The chancellor resolved this question of fact in Meyer's favor, and we cannot say the chancellor was clearly wrong.

There is no doubt that both Meyer and Scherr made mistakes which caused the confusion in this case. Meyer was mistaken by stating the reason for termination was dissolution of the corporation when the employees had quit. Scherr erred in disbursing the funds when the notices indicated no funds should be disbursed. Scherr acted without written authority regardless of Meyer's mistake. Scherr wrote a letter requesting the money be returned, stating that the instructions had been misinterpreted. Under these circumstances, the findings of the trial court cannot

be set aside.

In the bank's reply brief, it raises for the first time the argument that one of these employees was vested because he had not incurred a break in service before he was terminated. This argument is based on a provision in ERISA. Such an argument cannot be made for the first time on appeal. *Ivey* v. *Bray*, 278 Ark. 475, 647 S.W.2d 430 (1983).

The appellee's attorney was awarded an attorney's fee pursuant to 29 U.S.C. § 1132 (g) (1). An additional fee of $1,000 is awarded for the appeal.

Affirmed.

Bessie W. COFFELT *v.* ARKANSAS STATE HIGHWAY COMMISSION

86-34 712 S.W.2d 283

Supreme Court of Arkansas
Opinion delivered June 30, 1986
[Rehearing denied September 15, 1986.*]

Kenneth C. Coffelt, and *Michael K. Wilson*, for appellant.

* George Rose Smith and Hickman, JJ., not participating.

Thomas B. Keys, *Philip N. Gowen* and *Charles Johnson*, for appellee.

ROBERT H. DUDLEY, Justice. This is the second appeal of this condemnation case. *See Coffelt* v. *Arkansas State Highway Commission*, 285 Ark. 314, 686 S.W.2d 786 (1985). We affirm the trial court because the appellant has flagrantly violated Rules 9(c) and (d) of the Rules of the Supreme Court and the Court of Appeals.

In the section of her brief entitled "Abstract of Record" the appellant has not used the first person and has reprinted a major part of the trial transcript. A reprint of a major part of the transcript is not an abstract. We have consistently held that this type of flagrant violation of Rule 9(d) calls for summary affirmation. *Gray* v. *Ouachita Creek Watershed District*, 239 Ark. 141, 387 S.W.2d 605 (1965); *Smith* v. *Pond*, 259 Ark. 564, 534 S.W.2d 769 (1976); *Harris* v. *Arkansas Real Estate Commission*, 274 Ark. 537, 627 S.W.2d 1 (1982); *Board of Education of Franklin County* v. *Ozark School District No. 14*, 280 Ark. 15, 655 S.W.2d 368 (1983).

In addition, appellant sets out only one point of appeal which is as follows: "The trial court erred in denying appellant's motion to set aside the verdict and judgment and to grant new trial and in rejecting each of her reasons and allegations set forth therein." Then, in the argument section of her brief, appellant addresses thirty-one points of alleged error by the trial court. This is a clear violation of Rule 9(c) which requires an appellant to concisely list and separately number the points relied on for reversal.

We affirm the trial court pursuant to Rule 9(e)(2).

GEORGE ROSE SMITH and HICKMAN, JJ., not participating.

PURTLE, J., dissents.

HAYS, J., concurs.

STEELE HAYS, Justice, concurring. I agree with the majority that the testimony has been abstracted in question and answer form and in that respect it violates Rule 9 of our rules. *Harris* v. *Arkansas Real Estate Commission*, 274 Ark. 537, 627 S.W.2d 1 (1982). Admittedly, we have affirmed other cases on the basis of

Rule 9 where the appellant failed to provide an abridgement and simply reproduced the record in near verbatim form. *Oaklawn Jockey Club* v. *Jameson*, 280 Ark. 150, 655 S.W.2d 417 (1983); *Gray* v. *Ouachita Creek Watershed District*, 239 Ark. 142, 387 S.W.2d 605 (1965). But in those cases the breach was far greater. In the *Harris* case the abstract covers two volumes, with 154 pages devoted to testimony which obviously is reproduced word for word in question and answer form. In *Oaklawn* v. *Jameson* the abstract was 261 pages, 80% of which was not relevant to the two questions presented by the appeal. In *Board of Education of Franklin Co.* v. *Ozark School District*, 280 Ark. 15, 655 S.W.2d 368 (1983), the appellants reproduced virtually the entire records of two appeals. The abstract contained "verbatim reprints of almost every document in both records, including summonses, statutes, pleadings, tax records and minutes from school board meetings."

On the other hand, we have often looked beyond technical violations of Rule 9 and decided the issues on their merit. See *Myers* v. *Muuss*, 281 Ark. 188 (p. 190), 622 S.W.2d 805 (1984); *Ford* v. *State*, 276 Ark. 98 (p. 112), 633 S.W.2d 3 (1982); *Lincoln* v. *State*, 262 Ark. 511, 558 S.W.2d 146 (1977), and *Randle* v. *State*, 257 Ark. 232, 516 S.W.2d 6 (1974).

Abstracting under Rule 9 is not black and white. There is a sizeable area of subjective judgment involved in deciding on just the right amount. And there are, I submit, no clear boundaries between violations that are flagrant and those that are marginal. For that reason alone when the issue is one of too much rather than too little we should, I believe, err on the side of tolerance rather than intolerance. It is one thing for the abstract to omit crucial segments of the record so that an understanding of the points argued on appeal is impossible. (For example see *Lawson* v. *Lewis*, 276 Ark. 7, 631 S.W.2d 611 (1982); *Wade* v. *Franklin-Stricklin Land Surveyors, Inc.*, 264 Ark. 841, 575 S.W.2d 672 (1979); *Bank of Ozark* v. *Isaacs*, 263 Ark. 113, 563 S.W.2d 707 (1978); *Merritt* v. *Merritt*, 263 Ark. 432, 565 S.W.2d 603 (1978).) But it is a different matter when the abstract contains more than is necessary (though not so much as to be wholly unmanageable) because the simple expediency of skipping over non-essential portions is available to the reader.

Here, the only infraction I can detect in the abstracting (I disagree the abstract is in the third person) is that the testimony is reproduced in question and answer form. But there is relatively little of it. There were only two witnesses—one to a side—and the entire abstract of the testimony covers only 45 pages, about ten of which are attributable to objections and dialogue between the trial judge and the lawyers. That does not strike me as being so *flagrant* as to require affirmance under Rule 9.

I would consider the appeal on the merits and on that basis I would affirm the judgment.

JOHN I. PURTLE, Justice, dissenting. Article 2, Section 22 of the Constitution states:

> 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.

Therefore, neither Rule 9 (d) nor the Highway Department are before and higher than our Constitution.

I would reverse and remand.

EVELYN HILLS PHARMACY, INC., and Phillip J. COLWELL *v.* FIRST NATIONAL BANK OF FAYETTEVILLE

86-23 712 S.W.2d 291

Supreme Court of Arkansas
Opinion delivered June 30, 1986

F.H. Martin, for appellant.

Mark Lindsey, P.A., for appellee.

ROBERT H. DUDLEY, Justice. This appeal is from a decision of the trial court holding appellant Evelyn Hills Pharmacy, Inc. liable on a promissory note and appellant Phillip J. Colwell liable as a loan guarantor of the note. We affirm the decision.

Evelyn Hills Pharmacy, Inc. is a corporation in which Richard A. Brown owned one-half of the stock and appellant Colwell owned the other half. In 1974 both Brown and Colwell executed loan guaranty agreements to appellee First National Bank of Fayetteville in which they guaranteed the notes of the corporation up to a limit of $20,000.00. In 1980 the note at issue was executed in favor of the First National Bank.

The form note was executed on August 12, 1980, in the amount of $28,000.00. It provides: "The undersigned borrower . . . promises to pay . . ." The words "Evelyn Hills Pharmacy" are typed in the upper left corner. The handwritten signature "Richard A. Brown" followed by the printed word "borrower" appears on the lower right section of the note.

$8,433.72 of the loan, for which the note is evidence, was used to retire an earlier note of the pharmacy, and the remaining $20,000.00 was deposited in the pharmacy's bank account. The pharmacy's board of directors did not authorize either the debt or

the note. Brown, who signed the note, actively managed the pharmacy and had previously borrowed money on the corporation's account. Brown did not discuss the note with appellant Colwell until about a month after it had been executed. Colwell did not take any action to repudiate the note or his guaranty agreement.

In January 1985 the note was in default, and the bank filed suit for judgment against the appellant pharmacy and appellant Colwell. The bank did not sue Richard A. Brown.

[redacted] The case was tried to the court, which held that Richard A. Brown was an authorized agent of the pharmacy and had the authority to execute the note. The appellant argues that such a factual ruling is clearly erroneous. We agree, but the result reached by the trial court was the right one, and we will sustain a judgment which is right even if the trial court announced the wrong reason. *Armstrong* v. *Harrell*, 279 Ark. 24, 648 S.W.2d 450 (1983). While Brown was not authorized to execute the note, all of the stockholders, officers, and directors of the pharmacy knew of the execution of the note about a month after the fact and took no action to either limit Brown's authority or to return the proceeds of the note. Such action constitutes a ratification and is binding upon the corporation. Our statement in *Cleburne County Bank* v. *Butler Gin Co.*, 184 Ark. 503, 42 S.W.2d 769 (1931) is precisely in point:

> It is well settled, as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper unless such authority is expressly conferred by the charter or by the board of directors. *City Elec. St. Ry. Co.* v. *First Nat. Bank*, 62 Ark. 33, 34 S.W. 89, 31 L.R.A. 535, 54 Am. St. Rep. 282, and authorities there cited. See also *Anderson-Tully Co.* v. *Gillett Lbr. Co.*, 155 Ark. 224, 244 S.W. 26. This rule, however, is subject to important qualifications, one of which is that where the act is performed by the officers through whom the corporation usually functions and results in benefit to the corporation, it will be bound where the transaction was had under circumstances by which knowledge might be imputed to it. Where the unauthorized act of officers is clearly beneficial to the

> corporation, slight circumstances will be sufficient to impute knowledge and will effect a ratification of that act. *City Elec. St. Ry. Co.* v. *First Nat. Bank, supra*; *Anderson-Tully Co.* v. *Gillett Lbr. Co., supra*; *Love* v. *Metro. Church Assn.*, 181 Ill. App. 102; *Washington Savings Bank* v. *B. & D. Bank*, 107 Mo. 133, 17 S.W. 644, 28 Am. St. Rep. 405; *Knowles* v. *N.T.T. Co.*, (Tex.) 121 S.W. 232. Especially is this true where the other party to the transaction has acted in good faith, and a repudiation of the transaction will result in harm and disadvantage to him.

Appellant's second assignment of error has consumed a good deal of our time in conference. Before discussing the point, it is necessary for us to summarize the applicable code provisions. Ark. Stat. Ann. § 85-3-401 (Add. 1961) provides that no person shall be liable on an instrument unless his signature appears on the instrument. That section further provides that a signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature. The comments to § 85-3-401 indicate that a signature may be handwritten, typed, printed, or made in any other manner. The comments also indicate that the signature could validly appear in the body of the instrument, as in the case of "I, John Doe, promise to pay . . ." without any other signature.

Ark. Stat. Ann. § 85-3-403 provides that a signature may be made by an agent or other representative. Comment 2 to this section contains language pertinent to this case. The comment indicates that even though an agent is authorized to sign, *"the principal is not liable* on the instrument, under the provisions (Section 3-401) relating to signatures, unless *the instrument names him [the principal] and clearly shows that the signature is made on his [the principal's] behalf."* The appellant tacitly admits that the typing of "Evelyn Hills Pharmacy" rather than "Evelyn Hills Pharmacy, Inc.," was sufficient to name the principal. However, the appellant in this point of appeal strongly argues that the signature "Richard A. Brown" followed by the printed word "borrower" does not clearly show that the signature was on behalf of the purported principal, and therefore, the principal is not liable according to Comment 2. The appellant is factually correct but we choose not to reach the result suggested

by the comment.

Here, Richard A. Brown, the purported agent was not sued. The sole issue is whether the principal, Evelyn Hills Pharmacy, Inc. is liable on the note. The problem with the code comment is discussed in J. White & R. Summers, *Uniform Commercial Code*, 49-92 (2d ed. 1980):

> In at least one type of case (discussed more fully in Section 13-5), the Code is unclear on the principal's liability. Assume the agent reveals *either his agency status or the name of the principal but not both* and later successfully frees himself from personal liability in a suit by an immediate party by proving that he acted in an agency capacity. When the agent is free of liability in such case, is the principal nonetheless liable although his name does not appear on the instrument and the instrument does not reveal the agency status of the one who signed as his agent? Section 3-401(1) would seem to indicate that the principal is not liable since his signature does not appear on the instrument. Comment 2 to 3-403 reinforces that conclusion and seems to apply even when the agent names the principal: "Even though he [the agent] is authorized the principal is not liable on the instrument, under the provisions (Section 3-401) relating to signatures, unless the instrument names him [the principal] and clearly shows that the signature is made on his [the principal's] behalf." The rule is clear, yet there is something fundamentally unfair about letting the agent weasel out of the apparent agreement on the note without at least holding the principal liable; in such case the payee is left with a wholly worthless instrument. Yet in the face of 3-401 and Comment 2 to 3-403 we see no way to avoid that conclusion.

We choose not to reach such a fundamentally unfair result.

In an action between the immediate parties to the instrument, Ark. Stat. Ann. § 85-3-403(2)(b) allows an agent who has signed a negotiable instrument to introduce parole evidence to establish that personal liability on his part was not intended. *See* R. Hillman, J. McDonnell & S. Nickles, *Common Law and Equity Under the Uniform Commercial Code* § 1.04[4]

(1985). If parole evidence may be used to limit liability of an agent, then every reason exists to allow its use to show that the immediate parties intended for the named principal to be liable. The parole evidence in this case convinces us that all parties to the transaction intended that the pharmacy be liable as principal because part of the proceeds were used to retire an earlier corporate note and the remaining $20,000.00 was deposited in the pharmacy's account. The parole evidence is also binding against the guarantor, Colwell, since he acquiesced in the entire transaction. Accordingly, we hold the pharmacy liable as principal.

Appellant's final argument is that appellant Colwell agreed to guarantee the pharmacy's notes "up to the sum of $20,000.00," but the note at issue was in the original amount of $28,433.72, and therefore the terms of the obligation were changed and appellant is not liable. The short answer to the argument is that the terms of the obligation were not changed. Neither the note nor the guaranty was modified or altered in any manner, and appellant's liability is for a lesser amount than the guaranteed amount.

Affirmed.

NEWBERN, J., not participating.

FIRST NATIONAL BANK OF WYNNE *v.* Edna O. LEONARD *v.* Joann HESS

86-109 711 S.W.2d 798

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Shaver, Shaver & Smith, by: *Tom B. Smith*, for appellant.

Joseph O. Boeckmann, for cross-appellee.

B. Michael Easley, for appellee.

ROBERT H. DUDLEY, Justice. Edna Leonard, the plaintiff below and the appellee in this Court, purchased a clothing store in Wynne from Joann Hess, the defendant and counter-claimant below and cross-appellee here. At the time of purchase, counter-claimant Hess owed money to the First National Bank of Wynne, the defendant below and the appellant here. As consideration for the purchase, plaintiff agreed to make a $5,000.00 down-payment to counter-claimant Hess and assume the approximate $15,000.00 debt which was owed to the bank. Plaintiff, in running the store, was plagued by a lack of operating capital. In March 1983 she borrowed $2,000.00 for operating capital from the bank. To secure the debt, she signed a new note and security agreement and financing statement. The note was in the amount of $17,802.94, which represented the amount of debt assumed plus the loan for operating capital. Counter-claimant Hess guaranteed the note. The security agreement pledged all of the inventory and equipment of the store. Even after this loan plaintiff was short on operating capital and on March 30, 1983, the bank loaned her an additional $2,000.00. She executed a promissory note, and she gave a financing statement and security agreement pledging her automobile. Her financial problems continued, and on June 1, 1983, the defendant bank peacefully repossessed the contents of the store. The bank took an inventory and, although it did not have a security interest in the accounts receivable, attempted to collect the accounts receivable. Thirty days later the bank instructed counter-claimant Hess to liquidate the business. The bank mailed to plaintiff a notice of intent to sell the inventory, but the notice was never received by plaintiff because it was addressed to her at the store after the business had been closed and the locks changed. Hess sold the inventory and fixtures, and all of the funds received were applied to plaintiff's debt. There remained an outstanding balance of $7,602.94 plus interest which the endorser, cross-claimant Hess, paid.

On September 2, 1983, the plaintiff signed an agreement which allowed her to refinance her car for the consideration of executing a release. In addition, she signed an agreement styled

"Release of All Claims" by which she released any and all claims arising from the closing of her business.

Plaintiff later filed suit against the bank and cross-claimant Hess for wrongfully closing her business and doing so in a commercially unreasonable manner. She alleged the release was invalid because she was not competent at the time she executed it. Hess counter-claimed against plaintiff for the money she had paid as the promissory note guarantor. The jury returned a verdict on plaintiff's claim against the bank in the amount of $15,000.00 and a verdict on counter-claimant's claim against the plaintiff in the amount of $8,000.00. We affirm both verdicts.

The appellant bank filed a pre-trial motion, in the nature of a motion for summary judgment, to dismiss the complaint because the plaintiff had executed a release. Without objection, the trial court heard testimony on the motion and ruled that the issue of competency to sign the release was a matter for the jury. On appeal, the appellant bank contends that the trial court erred in not granting its motion to dismiss. The argument is without merit.

A release may be voided if the person's physical or mental condition, at the time of signing, was such that he was incapable of appreciating the character of the instrument and the consequences of executing it. *Lynch* v. *Missouri Pacific Railroad Co.*, 285 Ark. 49, 684 S.W.2d 817 (1985). Viewing the evidence most favorably to appellee, as we must do, it is clear that there was a genuine issue concerning a material fact and that the trial court was correct in denying the motion to dismiss. At the hearing on the motion, the plaintiff testified that at the time she signed the release she was under a doctor's care for anxiety, stress, and psychological problems and was taking medication consisting of Ativan and depressants which "slows everything down." She testified that she was under stress, was physically impaired, and thought she was signing papers about her car.

At trial, the appellant bank moved for a directed verdict at the close of all of the evidence on the ground that the plaintiff had not proved that "she should be relieved of the release by clear and convincing evidence that she did not have the mental capacity. . . ." The trial court denied the motion for a directed verdict, and the appellant now argues the ruling was in error. The trial court was right. Before discussing the point of appeal, we

note that the correct burden of proof was by a preponderance of the evidence. The clear and convincing burden is a standard applied at times in chancery cases, but not in law cases under our state standard.

To determine whether the trial court was right in refusing to grant a directed verdict for a defendant, the appellate court takes the view of the evidence most favorable to the plaintiff to see if there was any substantial evidence upon which the jury could have based its finding, and if there was substantial evidence affirms the denial of the motion. *Wenger* v. *Kiech*, 273 Ark. 369, 616 S.W.2d 714 (1981). Here, when viewed in the light most favorable to appellee, there was substantial evidence upon which the jury could find that appellee was not competent to execute the release. She testified that she did not know that she had signed a release. More importantly, she testified that on the day she signed the release she had taken two Ativan pills which "made me drowsy, wiped me out and blurred my vision." Her doctor testified that amount of Ativan could cause her to be dazed. Another witness testified that she drove appellee to the office of the bank's attorney where the release was signed, because appellee was so dazed she was unable to drive her own car, and while at the attorney's office plaintiff was crying and shaking.

The appellant also argues that the trial court erred in denying the motion for a directed verdict because the plaintiff ratified the action of the bank and because the plaintiff did not suffer any recoverable loss. However, these arguments were not made to the trial court, and we do not consider arguments raised for the first time on appeal.

Defendant and counter-claimant Joann Hess obtained a verdict against the plaintiff for the $8,000.00 which is the amount she had to pay to the bank on her guaranty of plaintiff's note. Plaintiff cross-appeals from the verdict claiming that the trial court erred by failing to grant a directed verdict or a judgment notwithstanding the verdict because counter-claimant Hess and the bank failed to comply with the Uniform Commercial Code's notice requirements for a secured party. The trial court was right. The bank was the secured party, not counter-claimant Hess. Hess was the guarantor of the note. The bank, not Hess, had the duty to give notice. Even if the notice was deficient,

it did not constitute a defense against Hess.

Affirmed on direct appeal and affirmed on cross-appeal.

Anthony W. BARTELS and Drew LUTTRELL *v.* Delia WAIRE

86-41 712 S.W.2d 285

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Howard & Howard, by: *William B. Howard*, for appellant.

William Gary Holt, and *James Gerard Schulze*, for appellee.

STEELE HAYS, Justice. Delia Waire retained attorneys Drew Luttrell and Anthony Bartels to represent her in connection with a workers' compensation claim. A hearing was conducted before an administrative law judge who announced at the end of the hearing that he was not in a position to make any kind of determination without additional medical reports. The record was left open for Mr. Bartels to submit additional proof.

A year later, on August 25, 1980, the administrative law judge wrote to Mr. Luttrell and to Mr. Bartels reminding them the hearing had been left open for additional medical reports. The letter stated that since no additional reports had been submitted, in view of the length of time which had elapsed, the administrative law judge would assume the record was complete if he had not heard from claimant's attorneys within ten days. This letter evidently received no response and in November the administrative law judge issued his opinion denying the claim.

Mrs. Waire brought suit against the attorneys for malpractice. The case was tried and the defendants moved for a directed verdict, which was denied. The jury returned one verdict against Anthony Bartels for $15,000 and one verdict against Drew Luttrell for $15,000. The circuit judge ruled the defendants' liability was joint and several and entered one judgment against both defendants in the amount of $15,000.

Luttrell and Bartels have appealed on the grounds their directed verdict should have been granted because the plaintiff's case was based entirely on speculation and conjecture. Delia Waire has cross-appealed from the entry of a judgment for $15,000. She contends the judgment should have been for $30,000. We affirm on direct appeal and on cross-appeal.

When a defendant has appealed the denial of a motion for a directed verdict the standard on review is: after giving the plaintiff's evidence, and all reasonable inferences to be drawn from such evidence, its highest probative value, a motion for a directed verdict against the plaintiff should be granted only if the evidence is so insubstantial that if a verdict were returned for the plaintiff the trial court would be required to set it aside. *Farm Bureau Mutual Insurance Co.* v. *Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982); *Miller* v. *Tipton*, 272 Ark. 1, 611 S.W.2d 764 (1981). Or as is sometimes said, "A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men and women could possibly find the issues for the plaintiff." *O'Brian* v. *Primm*, 243 Ark. 186, 419 S.W.2d 323 (1967); *St. Louis Southwestern Railway Co.* v. *Farrell, Adm'x*, 242 Ark. 757, 416 S.W.2d 234 (1967).

Substantial evidence has been defined in numerous cases:

> Substantial evidence has been defined as 'evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture.' Ford on Evidence, Vol. 4, § 549, page 2760. Substantial evidence has also been defined as 'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely created a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences.' Wigmore on Evidence, Vol. IX, 3rd ed. § 2494, footnote at page 300. See also *Tigue* v. *Caddo Minerals Co.*, 253 Ark. 1140, 491 S.W.2d 574 (1973); *Goaz* v. *Central Ark. Dev. Council*, 254 Ark. 694, 496 S.W.2d 388 (1973).

When viewed according to the foregoing authority the proof in this case plainly justified the denial of the defendants' motion for a directed verdict.

The allegations of malpractice against Drew Luttrell and Anthony Bartels included the following: failing to secure a hearing on the plaintiff's entitlement to additional temporary

total and permanent partial disability benefits, failing to secure medical reports in connection with the proceedings before the administrative law judge; failing to make timely claim for rehabilitation benefits for the claimant; failing to file timely notice of appeal from the decision of the administrative law judge, and failing to adequately and properly prepare and present evidence of the claim for additional benefits under the Workers' Compensation Act.

The plaintiff's proof consisted of her own testimony as well as that of Dr. Donald Richard Butts, a neuropsychiatrist, who had served as medical director and consultant to the Ozark Regional Mental Health Center, where Mrs. Waire was treated. Attorney Frederick Spencer also testified for the plaintiff. Dr. Butts testified Mrs. Waire was a client of the Mental Health Center from September 1975, through March 5, 1984. He said Mrs. Waire was suffering from reactive depression associated with her back injury; that she had a great deal of difficulty in locomotion, sitting or rising from chairs, riding in cars, climbing stairs, and lifting, which were attributable to complaints in the lumbosacral area. He described emotional and psychological problems due to constant pain, low energy, loss of sleep and appetite which he associated with the type of injury Mrs. Waire had sustained. He was of the opinion that Mrs. Waire's condition in 1979 was not materially different than at the time of his testimony (June 8, 1984). He estimated her permanent partial disability at 80%, 50% emotional and 30% anatomical.

Mr. Spencer testified about his legal training and experience. Mrs. Waire had consulted him in April 1981 and in that capacity he investigated the status of her claim before the Workers' Compensation Commission. He said Mrs. Waire understood from Mr. Luttrell that she had six months in which to appeal from the decision of the administrative law judge but in his opinion the claim was barred both for failure to appeal to the full commission within thirty days and because of the lapse of more than two years from the original injury. He said the only thing he could do was to attempt to reopen the case on the basis of Section 26 of the Compensation Act, that is a worsening of a claimant's condition within six months of an award or order. The administrative law judge held this section did not apply, there having been no award of additional benefits to Mrs. Waire resulting from the

hearing on August 22, 1979. That position was upheld on appeal to the full commission and to the Court of Appeals. At that point Mr. Spencer referred Mrs. Waire to other counsel.

Mr. Spencer reviewed the handling of Mrs. Waire's claim by the defendants, expressing his opinion that two medical reports in the files of the Disability Determination Unit of the Social Security Administration regarding Mrs. Waire could have been obtained by the defendants which he believed would have been helpful to her claim, as they described the functional limitation of her injury. He said he had never known of a permanent, partial disability rating as high as 80%, given by Dr. Butts. Mr. Spencer expressed the belief that the defendants had failed to exercise reasonable diligence in representing Mrs. Waire and that if the evidence which was available had been presented to the Commission Mrs. Waire would have been entitled to a recovery of $140,000.

We find nothing speculative about the proof presented by Mrs. Waire to support her allegations of malpractice. The testimony of Mr. Spencer was clear and unequivocal and entirely sufficient to sustain the verdict on the issue of liability. Appellants insist that Mrs. Waire did not give Mr. Bartels the name of Dr. Butts, which can be conceded. It is undisputed that she gave him the name of the Ozark Mental Health Center where Dr. Butts was affiliated. But whether Mr. Bartels and Mr. Luttrell exerted their best efforts to obtain the medical proof that was plainly available was for the jury to decide and the trial court was entirely correct in submitting the issues to the jury.

For her cross-appeal Mrs. Waire submits that the trial court erred by interpreting the verdicts returned by the jury as a verdict of $15,000 when the jury obviously intended to award $30,000. But it is clear from the record that no objection was made to the judgment as entered and this argument cannot now be asserted.

Affirmed.

Robert HANSON *v.* GARLAND COUNTY ELECTION COMMISSION, Dan McCRAW, Ed FRENCH and Natalie J. KILMER

86-134 712 S.W.2d 288

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*; and *R. David Lewis*, for appellee.

Wood, Smith, Schnipper & Clay, by: *Ray S. Smith, Jr.* and *James W. Chesnutt*, for appellee.

STEELE HAYS, Justice. On April 8, 1986 the people of Hot Springs voted in a special election to change their government to the city manager form pursuant to Act 99 of 1921. The vote was 4,018 for to 2,663 against. The Garland County Election Commission certified the election results to the mayor on April 23 and he issued a proclamation calling for a special election on June 17 to elect four city directors.

On May 22, within the time allowed under Ark. Stat. Ann. § 19-111 (Repl. 1980) to contest an election (thirty days), appellant Robert Hanson brought this suit for declaratory judgment and injunctive relief in the Circuit Court of Garland County. The respondents are members of the election commission. The complaint alleged the proposed change in city government was an initiated procedure and therefore subject to the provisions of Amendment VII of the Arkansas Constitution. The complaint further stated because the amendment requires initiated proposals to be submitted to the electorate at general, rather than special elections, the April 8 election was in violation of Amendment VII and should be held void.

As an advanced case, trial was set for June 6 and on that date, 44 days after certification of the election, Hanson filed an amendment to his complaint alleging the issue had been submitted to the voters under an improper ballot title. The respondents immediately objected to this attempt to amend the complaint after the time allowed by § 19-111. The circuit court held that while the ballot title was not properly presented to the electorate, that issue was not raised within the time allowed under § 19-111. The court also held the only timely issue presented was whether a petition for a city manager form of government was an initiated proposal and subject to Amendment VII. Relying on *Dingle* v. *City of Eureka Springs*, 242 Ark. 382, 413 S.W.2d 641 (1967) and *Knowlton* v. *Walton*, 189 Ark. 901, 75 S.W.2d 811 (1934), the trial judge held in favor of the respondents and dismissed the complaint.

Appellant's brief before this court asserts only one issue is presented for decision—whether or not the trial court was correct in holding the amendment to the complaint was filed out of time. That holding was correct.

Ark. Stat. Ann. § 19-111 provides in part:

> The election thereupon shall be conducted, the votes canvassed, and the results declared in the same manner as is provided by law with respect to other city elections. The county board of election commissioners shall certify the results of any such election to the mayor, and the result so certified shall be conclusive and not subject to attack unless suit is brought to contest such certification within thirty

(30) days after such certification in the Circuit Court of the county in which such municipality is situated.

In *Jones* v. *Ethridge*, 242 Ark. 907, 416 S.W.2d 306 (1967) and *Cain* v. *McGregor*, 182 Ark. 633, 32 S.W.2d 319 (1930) we held that new grounds of contesting an election may not be raised by amendment after the statutory period has expired.

Appellant urges that this case is distinguishable in that in those cases no cause of action was stated in the original complaint contesting an election, and we held in that situation the complaint may not be amended out of time. Appellant argues the cases do not hold that a legitimate cause of action may not be later amended to raise a legitimate legal issue. We disagree. The obvious purpose behind the requirement in our election statutes for a timely challenge to election results is so the elective process will not be unduly delayed, hence the issues must be promptly raised and promptly decided. We have said the right to contest a primary election is a statutory proceeding, the purpose of which is to furnish a summary remedy and to secure a speedy trial. And the contestant is limited to the grounds set out in his original complaint, and those grounds cannot be enlarged by subsequent amendment not made within the time required by the statute for contesting. *Gower* v. *Johnson*, 173 Ark. 120, 292 S.W. 382 (1927); *Bland* v. *Benton*, 171 Ark. 805, 286 S.W. 976 (1926). If one could defeat the time limitation simply by filing a timely cause of action and then amending it at his leisure the purpose of the statute would be plainly defeated.

Appellant argues that ARCP Rule 15(c) provides that an amendment arising out of the conduct, transaction or occurrence set forth in the original pleading relates back to the date of such pleading. But we believe election contests are subject to ARCP Rule 81, which excepts from the applicability of the rules "those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply." See *Travelodge International Inc.* v. *Handleman National Book Company*, 288 Ark. 368, 705 S.W.2d 440 (1986).

Affirmed.

PURTLE, J., and NEWBERN, J., dissenting.

JOHN I. PURTLE, Justice, dissenting. On April 8, 1986, the people of the City of Hot Springs, Arkansas, lost their representative form of government. The shame of it is the manner in which the people lost or surrendered their rights. Sometime prior to the election date a few people got together and decided how to change the form of government with the approval of the voters. Thus, they devised a proposal which appeared on the voting machines as follows:

FOR the proposition

[ ]

AGAINST the proposition

[ ]

The paper ballots read as follows:

FOR the proposition to organize this City under Act 99 of the General Assembly of 1921, as amended. [ ]

AGAINST the proposition to organize this City under Act 99 of the General Assembly of 1921, as amended. [ ]

Following the above cited options, there appeared in very small print a "PROCLAMATION OF SPECIAL ELECTION." It would take a fairly intelligent person several minutes to read the extremely complicated fine print contained in the proclamation. Probably not a single person read the proclamation at the time of voting. It is impossible to know what "proposition" a voter was voting FOR or AGAINST, at least on the voting machines. On the paper ballot, it is likewise impossible for a voter to understand what he was voting FOR or AGAINST unless the voter already knew what it meant to organize the City under Act 99 of the General Assembly of 1921, as amended.

Whether this was a clever maneuver on the part of the sponsors of the City Manager form of government or simply an oversight, is immaterial because the result is the same; no ordinary voter could possibly have understood what was presented unless they had gained knowledge from another source. The trial court was absolutely correct in finding that the ballot proposition was improperly presented inasmuch as it was not in

substantial compliance with Ark. Stat. Ann. § 19-111 (Repl. 1980). However, I think the trial court erred in ruling that the amendment to the complaint was not filed within 30 days of the certification of the election and therefore could not be properly considered.

The majority opinion fails to recognize the purpose of ARCP Rule 15, which in part states:

> (a) Amendments. With the exception of pleading the defenses mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.
>
> . . . .
>
> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. . . .

The obvious purpose in adopting Rule 15 was to allow amendments to pleadings without special permission of the court in nearly all instances. The court's discretion is very limited and the pleader is given a rather loose rein.

The majority fails to give effect to the express provisions of Rule 15(a) and Rule 15(c) by stating that Rule 81 is an exception to Rule 15. Rule 81(a) states:

> These rules shall apply to all civil proceedings cognizable in the circuit, chancery, and probate courts of this State except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so

> specified shall apply.

This court has dealt with the relation back of amendments under Rule 15 in the case of *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). In *Bonar* we stated:

> Rule 15 not only makes liberal provision for amendments to pleadings, it also states that any claim asserted in the amended pleading, which arises "out of the conduct, transaction or occurrence set forth in the original pleading, . . . relates back to the date of the original pleading." Rule 15(c).
>
> Since the amendment relates back, there can be no statute of limitations objection to the amendment without proof of undue delay or prejudice. *See, Brill, supra; Ozark Kenworth, Inc.* v. *Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984). No such proof was offered here.

In the case before us there was no request for a continuance nor a showing of undue delay or prejudice. There can be absolutely no question in the mind of any reasonable person that every allegation contained in the complaint and the amendment arose out of the same conduct, the April 8, 1986, voting incident. I don't think this court has the right to pick and choose which Rule it wishes to apply in cases being considered by it. It is my opinion that the appellants had the right to amend the complaint in order to have the real issue adjudicated.

Any change in any form of government is a serious matter and should be undertaken only after careful consideration. If the people of Hot Springs want to change their form of government and knowingly vote to do so, then I have no objection to their doing so. However, under the guise of being "FOR" or "AGAINST" most people prefer to be "FOR." The very least that can be expected is that they know what they are voting "FOR."

I would have prohibited the election.

I am authorized to state that Justice Newbern joins in this dissent.

W. J. BUDD, et al. *v.* Joe DAVIS, et al.

86-42 711 S.W.2d 478

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Chambers & Chambers, by: *Rodney T. Chambers*, for appellants.

Keith, Clegg & Eckert, by: *Elliott L. Clegg*, for appellees Joe Davis and Betty Davis.

Michael E. Surguine, for appellees Barry L. Dennis and Donna Dennis.

James E. Baine, for appellee Deltic Farm & Timber Co., Inc.

DAVID NEWBERN, Justice. The appellants brought this action against the appellees for wrongfully cutting timber from land owned by the appellants. Appellee Joe Davis claims to be a cotenant with the appellants with respect to the land in question. Appellee Barry Dennis claims to be a cotenant by virtue of a timber deed from Davis. Appellee Deltic Farm and Timber Co., Inc., claims to be a cotenant by virtue of a timber deed from Dennis. The appellants sought treble damages, pursuant to Ark. Stat. Ann. § 50-105 (Repl. 1971). The appellees denied liability for treble damages on the ground that, as cotenants with the appellants, they could not be regarded as trespassers upon the appellants' land.

The trial court entered an order holding that the appellees

could not be trespassers on the interest of their cotenants and thus that § 50-105 does not apply. The appellants have taken this interlocutory appeal. They contend, in their jurisdictional statement, that we should decide the issue despite the fact that the case has yet to be tried. We decline to do so.

The appellants state that the court's ruling is upon a "separable" branch of the litigation and thus an appeal is permissible under Ark. R. App. P. 2(a)(2). That rule does not permit appeal except of "[a]n order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action." Here we have no such situation. Nor has there been a final determination of a claim or certification under Ark. R. Civ. P. 54(b).

As there has been no final or otherwise appealable order entered, we lack jurisdiction to hear the appeal. *3-W Lumber Company* v. *Housing Authority for the City of Batesville*, 287 Ark. 70, 696 S.W.2d 725 (1985); *Arkansas Savings and Loan Association* v. *Corning Savings and Loan Association*, 252 Ark. 264, 478 S.W.2d 431 (1972).

Appeal dismissed.

James E. FENNELL, et ux *v.* Billy J. ROSS

85-178 711 S.W.2d 793

Supreme Court of Arkansas
Opinion delivered June 30, 1986
[Rehearing denied September 15, 1986.]

Hartenstein, Lassiter & Oberlag, by: *Ray Hartenstein*, for appellants.

Ralph M. Cloer, Jr., for appellees.

DAVID NEWBERN, Justice. This is an appeal from a judgment awarding the appellees, the Rosses, who were the sellers, damages for breach of a real estate sale contract against the appellants, the Fennells, who were the buyers. The Fennells answered, contending they had properly rescinded the contract, and they filed a separate counterclaim seeking restitution in the sum of the earnest money they had paid. The basis of the rescission asserted by the Fennells was that the Rosses had misrepresented the property, through their listing broker, in the multiple listing service (MLS) publication by advertising that the property had "Commercial Potential! Any type business!" In fact, the property was zoned residential and was in the one hundred year flood plain. The court held that the fact that the land was in the flood plain was material, presumably because it, in large measure, negated the commercial potential of the property. However, because that fact was known to the agent who showed and sold the property to the Fennells, and because the court deemed her to be the agent of the Fennells, rather than the sellers, the Rosses, he held the Rosses were entitled to damages for the Fennells' failure to perform. In other words, the court found the Fennells' attempted rescission of the contract was not effective because their agent's knowledge, imputed to them, negated their claim of reliance on the misrepresentation that the property had commercial potential. We disagree with the trial court's holding that the selling agent was the agent of the buyers, and thus we reverse and remand.

Dr. Fennell and his wife were looking for property where they could reside and he could have room to conduct his veterinary medicine practice. Mrs. Whiteman, a real estate agent working for Rainey Realty Co., had been working with the Fennells for months, trying to find such a place. In the MLS publication she noticed a listing for a dwelling on Stagecoach Road in Little Rock described, in part, as follows: "Commercial Potential! Any Type business!" The property had been listed by Century 21 Reddick Company. Mrs. Whiteman showed the

property to the Fennells and assured them they would have no trouble getting the zoning changed from residential to a satisfactory commercial classification to accommodate Dr. Fennell's clinic. After the Fennells and the Rosses executed an offer and acceptance, the Fennells were told by a city planning office employee that the property was in the "100 year flood plain" and that because of that fact, rezoning would be very difficult to obtain. The testimony of Richard Wood, a supervisor in the City of Little Rock planning office confirmed that conclusion. Upon learning of this obstacle caused by the property's location in the flood plain, the Fennells refused to go through with the contract.

In a letter to counsel after post trial briefs and preceding the entry of judgment, the judge said:

> The Court has now received and is appreciative of your excellent briefs; however, those authorities found in those briefs failed to answer with finality the question of whose agent Mrs. Whiteman was. The mention of that failure should not be received as a criticism of either brief. To the contrary, the Court is of the conviction that our Appellate Courts have not been called upon to decide that issue; therefore, to assign you the task of finding such authority was requesting the impossible.
>
> The Court would find that the testimony by and about Mr. Wood and his attitude toward securing a suitable rezoning of the property which was the subject of the sale to be of no significance. Which is to say, a purchaser of property would have no right to rely upon a statement by a real estate agent concerning whether or not the property would find a favorable or unfavorable zoning classification by the city on application to that city seeking rezoning. Further, the mere fact that the city would resist a zoning change does not mean that a zoning change would not follow the applicant's efforts upon a showing of justification.
>
> The Court, however, is of the conviction that the fact that city property is classified as being in a flood plain and by that very fact there are imposed restrictions upon the use and development of that property is a fact material to the value of that property. By restrictions here the Court intends to describe restrictions imposed by governmental

authorities, for a view of the terrain itself should alert any purchaser of property that the property lies in an area which is apt to be affected by heavy rains. Thus restriction to development and use of the property arising from that fact is not an item that is required to be disclosed. Which is to say, a purchaser should be aware or alerted to the point of inquiry.

It would seem to the Court that here the critical facts are:

1. The purchasers of the property were aware or should have been aware that this property was subject to flooding; however, at the time of purchase they were not aware that the land's use and development was affected by governmental restrictions by reason of the lands having been formally declared to be in the flood plain.

2. The fact that the lands are situated in a formally described flood plain is a fact material to the bargain and a fact that should be disclosed to an innocent party.

3. Mrs. Whiteman is a person who either had knowledge of the "flood plain problem" or is deemed to have such knowledge.

4. Mrs. Whiteman is the agent of the purchasers in the situation found in this record. She had been working with these purchasers for some period of time in an effort to find the type of property they were seeking.

5. The sellers here are entitled to their bargain.

The ensuing judgment contained the five numbered conclusions from the court's letter.

We have no quarrel with any of the court's factual determinations, but they were not the crux of the decision. The court obviously, and we think correctly, regarded the question of whether Mrs. Whiteman was the agent of the sellers or of the buyers as one of law. That is the question his decision turned upon, and it is thus the one we must address. Here we are dealing with a garden variety MLS property sale transaction conducted by two real estate brokers through their agents. Obviously, the broker and agent who listed the property with MLS was the representative of the sellers, but what of the others, the selling

broker and its agent who brought the buyers' attention to the property? A good statement of the problem is as follows:

> In many real estate transactions, there are two brokers involved. One of the brokers is the "listing broker" and the other broker is the "selling broker." When this is the case, the agency relationship is usually established between the seller and the listing agent through the listing contract, an agreement that acts as an employment contract for the listing agent. An agency relationship between the seller and the selling broker is often created by express language in the listing agreement. The clause that creates this agency relationship expressly authorizes or requires the listing agent to utilize the services of other brokers as subagents. Therefore, any broker who is not the listing broker but is attempting to effect a sale of the property in cooperation with the listing agent is considered a subagent. Consequently, when the listing contract contains such a provision, the selling broker has the duties of agency imposed upon him as a subagent of the listing broker. In essence, the selling broker, as subagent, is the agent of the seller. This subagency relationship with the seller, which generally precludes an agency relationship with the buyer, seems to be ignored by, if not unknown to, many selling agents. In addition, most buyers are probably unaware of its existence much less its legal ramifications. In practice, if the selling broker ever meets the seller, it is usually either when showing the property to a prospective purchaser or upon presentation of a purchase offer to the seller. However, the selling broker's relationship with the buyer is quite different. Often, the broker has been in the company of the purchaser for many hours and has conducted some fairly confidential interviews with the prospective purchaser. Given such extensive contact with the buyer, and such minimal contact with the seller, the buyer is justified in believing that the agent will do his best to obtain the property for the buyer at the lowest possible price and on the most advantageous terms. Of course, for the agent to attempt to do so is a violation of the agent's duty to the seller. However, it would be unrealistic to expect the buyer to feel that a broker who has worked with him extensively is

> attempting to obtain the highest possible price for the seller, which, in actuality, is the agent's duty. [Footnotes omitted]

Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 Ariz. L. Rev. 767, at 771-773 (1978).

We have not previously decided this issue, and there is a dearth of authority from other jurisdictions. A California court has held the selling agent in these circumstances is the agent of the sellers. *Kruse* v. *Miller*, 143 Cal. App. 2d 656, 300 P.2d 855 (1956.) Most scholarly articles, in addition to the one quoted above, reach that conclusion also. *See, e.g.*, D. Burke, *Law of Real Estate Brokers*, § 1.5, pp. 9-10 (1982); J. Sinclair, *The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 Ill. B.J. 263, 265 (1981). One reported trial court decision reached the opposite result. *Wise* v. *Dawson*, 353 A.2d 207 (Del. Super. 1975). Recognizing the magnitude of the problem in terms of the frequency with which it arises, one author has suggested the problem could be solved by giving the selling broker a dual fiduciary responsibility. *Comment*, 18 Wayne L. Rev. 1342 (1972). That suggestion was soundly criticized as one which might create more problems than it would solve. 20 Ariz. L. Rev. 767, *supra*, p. 773, n. 33.

The law of agency contemplates that an agent may serve only one principal with respect to any one transaction. *See* Rest. Agency (Second) §§ 387, 391, 394 (1957). We agree with the authorities and authors cited above who have reached the conclusion that in an MLS transaction like this one the selling agent is a subagent of the sellers.

Reversed and remanded for a new trial.

Special Justice ELLEN BRANTLEY, concurs.

HAYS, J., dissents.

PURTLE, J., not participating.

ELLEN B. BRANTLEY, Special Justice, concurring. While I, too, would reverse the trial court's decision and remand for trial on the Fennells' claim for restitution, I would do so on different grounds. I do not believe it necessary to decide whether Mrs.

Whiteman was the Fennells' agent. The majority may well be correct in its conclusion that, under the circumstances of this case, Mrs. Whiteman is properly considered a sub-agent of the Rosses. However, agency issues in the Multiple Listing Service conflict can arise in many different ways, and the resolution of those issues raises many complex problems. See, e.g., Burke, *Law of Real Estate Brokers*, § 1.5, pp. 9-10 (1982); Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 Wayne L. Rev. 1350 (1972). Since I would reverse the case even if I accepted the trial court's finding on agency, I do not believe the case should turn on that issue.

The case involves a material misrepresentation of fact in the sale of property. The misrepresentation about whether the property was located in the flood plain concededly began with the Rosses. The failure of Mrs. Whiteman (and Mrs. Reddick) to independently discover that the property was so located, even if they could have done so by the exercise of reasonable care, should not allow the Rosses to profit by their own misrepresentation. A contract may be rescinded if there was a mutual mistake of material fact. *Foster* v. *Dierks Lmbr. & Coal Co.*, 175 Ark. 73, 298 S.W. 495 (1927). *Hubbard* v. *Elam*, 238 Ark. 976, 385 S.W.2d 925 (1965). Precisely such a mutual mistake occurred here, and the trial court erred in refusing rescission.

STEELE HAYS, Justice, dissenting. Whether the Multiple Listing Service has altered the traditional concepts of agency in real estate transactions, I have not attempted to fathom. The trial court did not rely on it, though the majority sees it as the basis for the conclusion that Mrs. Whiteman was the seller's agent as a matter of law, a view I believe is incorrect.

Nor do I think the claim of the sellers that the property had "Commercial Potential—Any Type Business" to have been a material misrepresentation in this case, even taking into account the floodplain issue. It is undisputed the buyers were told the property had flooded, that water had entered the house and damaged the carpets. There was no proof the claim of "commercial potential" was intended by the sellers, nor taken by the buyers, to mean anything other than what the phrase implies—*potentially* usable as commercial property. There was no guarantee of commercial zoning, just as there was no proof that

rezoning was an impossibility. Richard Wood of the planning department testified rezoning would have been difficult but not impossible. The buyers could have conditioned their offer on rezoning but they chose not to. As they did not even attempt to obtain a zoning change, for all intents and purposes the zoning issue is moot. The evident fact is these buyers simply changed their mind soon after signing the offer and acceptance agreement. The agreement was signed on October 7, 1983 and on October 12 the buyers gave notice they were not going through with the purchase. There was substantial evidence that Mrs. Fennell did not like the property and did not want to buy it.

Regardless of how any other issues in this case are decided, the issue that concerns me is the majority's treatment of the agency problem. Few areas of the law of agency present problems as complex as in real estate transactions. Whether an individual is the agent of the buyer or of the seller is rarely static, it may depend on the particular function being performed. The "agent" may be an agent of the principal in one capacity though not in another. *Walker* v. *Huckabee*, 10 Ark. App. 165, 661 S.W.2d 460 (1983). In some respects real estate agents owe a duty to both buyers and sellers and do not fit neatly into a category readily applicable to all situations. *Little* v. *Rohner*, 707 P.2d 1015 (Col. App. 1985). And in a dual capacity, each principal is protected from a disloyal agent by general principles of agency and partnership. See 4 ALR 3d 224, Dual agent—Notice to principal.

I believe it is a mistake for this court to hold as a matter of law that Mrs. Whiteman was the agent of the sellers and it is clear the trial court did not treat it as a question of law. The existence of an agency relationship is a question of fact, as countless cases here and elsewhere have held. *Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980); *Bell Transportation Co.* v. *Morehead*, 246 Ark. 170, 437 S.W.2d 234 (1969); *Campbell* v. *Bastian*, 236 Ark. 205, 365 S.W.2d 249 (1963); *Curtis Circulation Co.* v. *Henderson*, 232 Ark. 1029, 342 S.W.2d 89 (1961); *Green* v. *Jones-Murphy Properties, Inc.* 232 Ark. 320, 335 S.W.2d 822 (1960); *Langston* v. *Harper*, 216 Ark. 778, 227 S.W.2d 973 (1950); *Ford & Son Sanitary Co.* v. *Ransom*, 213 Ark. 390, 210 S.W.2d 508 (1948); *Walthour* v. *Pratt*, 173 Ark. 617, 292 S.W. 1017 (1927); *Bell* v. *State*, 93 Ark. 600, 125 S.W. 1020 (1910).

It has been said the ultimate question in agency is determining the intention of the parties. *Green* v. *Jones-Murphy Properties, Inc., supra*, AmJur2d, Vol. 3, p. 525, § 21. That being so, how can it be said Mrs. Whiteman was the agent of the sellers as a matter of law? For more than a year she had been employed by the buyers to search for the type of property they wanted. She considered herself the buyers' agent and Mr. Fennell testified unequivocally that he regarded Mrs. Whiteman as their agent. Mrs. Whiteman signed the offer and acceptance agreement on a line designating her as the buyers' agent. Finally, the trial court, sitting as fact finder, found her to be the buyers' agent. How she was to be paid is not revealed in the record, but even if she were to be paid from the proceeds of a purchase, that is simply one element to be considered in determining her status; it is not *controlling. Terry Dairy Co.* v. *Parker*, 144 Ark. 401, 223 S.W. 6 (1920); Corpus Juris Secundum, Vol. 2A, p. 608, § 40.

There may be something to be gained by declaring that agents involved in Multiple Listing Service contracts are the agents of the sellers as a matter of law, but I suspect there will be cases where we will not be entirely comfortable with so categorical a rule. For example, see *Little* v. *Rohner, supra*, where the equities and sound logic dictated the listing broker was the agent of the buyer for a particular part of the transaction. Had it previously been settled as a matter of law that the listing broker was the seller's agent, the court would have been precluded from reaching a just result.

The trial court's findings in this case have not been shown to be clearly erroneous and should be affirmed.

James CLARK *v.* STATE of Arkansas

711 S.W.2d 162

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Hanks, Gunn & Borgognoni, by: *Mary Ann Gunn*, for appellant.

No response by appellee.

PER CURIAM. The judgment of conviction was entered on November 7, 1985. Notice of appeal was filed December 3, 1985. The record was thus due in the clerk's office within ninety days of the filing of the notice of appeal. The record was tendered on June 2, 1986, some three months late.

The appellant's counsel, Mary Ann Gunn, contends the circuit judge entered an order extending the time for filing the record, and she presents his affidavit to that effect. She also presents her own affidavit showing she gave the extension order to her law clerk to file at the clerk's office. She presents her law clerk's affidavit to the effect that he gave the order to a deputy clerk for filing. She does not present the order or a file-marked copy of it.

In similar circumstances we have held we will not permit a record to be filed unless the attorney assumes full responsibility for presenting it late. *Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 804 (1986). A statement that it was someone else's fault or no one's fault will not suffice. *Moore* v. *State*, 268 Ark. 191, 600 S.W.2d 1 (1980).

If the appellant's attorney files a motion and affidavit in this case accepting full responsibility for not perfecting the appeal, then the motion will be granted. That negligence will be duly noted and a copy of the opinion granting the motion will be forwarded to the Committee on Professional Conduct.

Troy Michael McKINNEY *v.* STATE of Arkansas

711 S.W.2d 162

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Michael R. Salamo, for appellant.

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

PER CURIAM. The appellant was convicted on March 7, 1985 and filed a notice of appeal on April 8, 1985. The record was thus due in the clerk's office within 90 days of the filing of the notice of appeal.

On March 7, 1986 the appellant's attorney, Michael R. Salamo, filed a motion for a rule on clerk to lodge the transcript claiming that the attorney-client relationship necessary for effective assistance had dissolved which affected a timely filing of this transcript. On March 24, 1986, this court remanded the case to the trial court for a determination of the attorney-client relationship existing between the parties. On May 3, 1986 the trial court held a hearing and found that the attorney-client relationship existed at the time the transcript should have been filed and still exists. The attorney filed a second motion for rule on clerk on behalf of the appellant on June 16, 1986, which stated the same grounds.

In similar circumstances we have held we will not permit a record to be filed unless the attorney assumes full responsibility for presenting it late. *Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 804 (1986). A statement that it was someone else's fault or no one's fault will not suffice. *Moore* v. *State*, 268 Ark. 191, 600 S.W.2d 1 (1980).

If the appellant's attorney files a motion and affidavit in this case accepting full responsibility for not perfecting the appeal, then the motion will be granted. That negligence will be duly noted and a copy of the opinion granting the motion will be forwarded to the Committee on Professional Conduct.

Sterling Jackson WILLIAMS, Jr. *v.* STATE of Arkansas

CR 86-84 711 S.W.2d 479

Supreme Court of Arkansas
Opinion delivered June 30, 1986

Appellant, pro se.

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

PER CURIAM. Petitioner Sterling Williams pleaded guilty in 1981 to theft in case CR 81-82A and two counts of burglary. He was sentenced to serve terms of imprisonment for each of the burglary counts. A sentence of ten years for theft was suspended. He was released from prison in 1982. Petitioner was again arrested and charged with burglary and confined to the city jail. He escaped and was subsequently charged with escape in the first degree. As a result of the escape charge, the State filed a petition to revoke the ten-year suspended sentence. Petitioner pleaded guilty to escape and to the allegations contained in the petition to revoke. He was sentenced on February 1, 1983 to terms of ten years for escape and the ten-year suspended sentence was revoked.

In July, 1985, petitioner filed an error coram nobis petition in the trial court seeking to vacate the guilty pleas entered on the escape charge and the revocation. Because the petition raised issues cognizable under our postconviction rule, Rule 37, the court treated the petition as a Rule 37 petition and denied relief. This was not improper since a court may treat a petition for postconviction relief as a Rule 37 petition if it raises grounds covered by the rule regardless of the label placed on the petition. *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984). Petitioner does not seek a belated appeal.

Instead of filing a notice of appeal as he could have done because the petition was treated as a Rule 37 pleading, petitioner chose to file in this Court a petition for writ of certiorari, which is the means to challenge the denial of a petition for writ of error coram nobis. He also requests appointment of counsel. We find that the petitioner raised no ground on which the lower court could have granted a writ of error coram nobis and deny the petition for writ of certiorari and motion for counsel.

Petitioner contended in his petition for writ of error coram nobis that the trial court had not complied with Criminal Procedure Rule 24 when it accepted the pleas of guilty, that he was placed in double jeopardy when the suspended sentence was revoked and that he was denied credit against his sentence for the time he had spent in jail. These grounds are within the purview of Criminal Procedure Rule 37.

Error coram nobis proceedings are not interchangeable with proceedings under Rule 37. *See McDonald* v. *State*, 285 Ark. 482, 688 S.W.2d 302 (1985). Error coram nobis is an extraordinary remedy. The writ serves to fill a gap in the legal system and will provide relief after a plea of guilty only where a remedy was unavailable because a fact exists which was not known when the plea of guilty was entered. The writ is granted only when the error of fact might have resulted in a different verdict. *See Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984). Petitioner has not demonstrated that the grounds he raised in his error coram nobis petition could not have been presented to the trial court when the plea was entered or raised in a petition under Rule 37. *See Williams* v. *Langston*, 285 Ark. 444, 688 S.W.2d 285 (1985).

Petition and motion denied.

Steven Douglas HILL *v.* STATE of Arkansas

CR 85-212 713 S.W.2d 233

Supreme Court of Arkansas
Opinion delivered July 7, 1986
[Rehearing denied September 15, 1986.]

William R. Simpson, Jr., Public Defender, and *Thomas J. O'Hern*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant was charged

with nine felonies stemming from events that occurred on October 15, 1984, when the appellant and another inmate, Michael Cox, escaped from the Wrightsville Unit of the Arkansas Department of Correction. Separate trials were held for the two defendants. On the day of his trial appellant pleaded guilty to all charges except for the capital murder of Arkansas State Trooper Robert Klein and the attempted murder of Lt. Conrad Pattillo, a fellow officer. A jury trial was held on the remaining counts and a guilty verdict was returned. In a separate sentencing procedure, the jury sentenced appellant to death by lethal injection for the capital murder and to 50 years imprisonment for criminal attempt to commit capital murder. It is from that verdict and sentence that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(b). As required by our rule 11(f) we have reviewed all abstracted rulings adverse to appellant as well as the points raised on appeal. We find no error.

The appellant raises eight arguments for reversal which will be discussed separately.

I. *VOLUNTARINESS OF HIS CONFESSION*

Appellant's first allegation of error is that the trial court should not have admitted into evidence a statement given by him after his arrest as the appellant did not voluntarily or knowingly waive his constitutional rights. In support of this contention, appellant claims that he was threatened by police officers and that, during the videotaping of his confession, some of the officers were armed and one of the officers was "playing" with his gun in an effort to intimidate the appellant. The officers denied these accusations.

On appeal this court examines a trial court's ruling that a statement was voluntarily given to see if the state proved by a preponderance of the evidence that the statement was voluntary. We make an independent determination of this issue considering the totality of the circumstances and affirm the trial court unless we can say the lower court was clearly wrong. *Williamson* v. *State*, 277 Ark. 52, 639 S.W.2d 55 (1982); *Hunes* v. *State*, 274 Ark. 268, 623 S.W.2d 835 (1981). When the situation presents a swearing match between the officials and the appellant, as here, the conflict is for the trial court to resolve. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

The testimony at the *Denno* hearing revealed that appellant escaped from prison shortly before 3 p.m. on October 15. He and Cox arrived at a home in Woodson, Arkansas, occupied by Billie Jo, Merle and Buck Rice. The two inmates robbed the Rices at gunpoint, threatened and intimidated them, tied them up, and left the house at about 10:30 p.m. From there they went to a second house, owned by the Cooks where the fatal shooting occurred at about midnight. After a standoff with the police, Hill surrendered at approximately 4:30 a.m. and was advised of his Miranda rights by Lt. David Rosegrant. Around 5 a.m. Cox surrendered. The inmates were transported to state police headquarters in Little Rock and arrived at 5:45 a.m. Cox was interrogated first and then Hill. The appellant's videotaped confession was taken at 6:50 a.m. after he was advised of his Miranda rights by Investigator Bill Gage. The statement lasted about 30 minutes. The videotape was then transcribed and read back to Hill who signed it.

During the *Denno* hearing, Hill acknowledged that he was read his rights and understood them, but he did not choose to exercise those rights at that time. He stated that he knew what rights were available to him.

[redacted] Based on the foregoing, the state met its burden of proving a voluntary waiver.

[redacted] Appellant also contends that when the statement was taken the officers only advised him that he was a suspect in an escape and not in a capital murder. Accordingly, appellant maintains he could not intelligently waive his rights since he did not know the nature of the charges and the consequences of a waiver of rights. Contrary to the appellant's claim, the transcript reveals that he was advised he was a suspect in a capital murder on at least two different occasions. Sgt. Larry Gleghorn testified the appellant was advised he was a suspect in a murder and kidnapping and aggravated robbery before the videotaping began. Officer Rosegrant testified that when he advised appellant of his rights he also informed him of the charges. Appellant's argument is without merit and the confession was properly admitted.

II. *PROSECUTORIAL MISCONDUCT*

Appellant claims that the prosecutor's closing argument in the penalty phase of the trial was improper and prejudiced his right to a fair trial. He maintains the trial court erred in refusing to grant a mistrial or a new trial after the prosecutor argued outside the record and presented evidence not in the record.

During his closing argument, in the penalty phase of the trial, the prosecutor argued as an aggravating circumstance the that the capital murder was committed to avoid arrest. As evidence of that, he told the jury that the appellant was at the Cooks' house "loaded for bear." To illustrate his point, he picked up one of the recovered shotguns and loaded it, to show that it held only five shells, which was the number found in the gun when Hill was arrested. The inference to be drawn was that Hill, after firing two shots — one at Officer Klein and one at Officer Pattillo — reloaded the gun and was ready to shoot again.

The appellant states that, although the murder weapon, a 20-gauge shotgun, contained five shells when it was found, there was no proof that the gun held *only* five shells. In addition, when the prosecutor conducted the demonstration, he mistakenly used the wrong gun, a 16-gauge shotgun also found at the scene. Although the appellant's counsel lodged a general objection to the demonstration, there was no specific objection during the closing argument to the use of the wrong gun.

Demonstrations such as the one performed by the prosecutor are permissible. We have allowed prosecutors to use items such as clothing, rope or documents by way of illustration in their closing arguments for many years. *See Derrick* v. *State*, 92 Ark. 237, 122 S.W. 506 (1909); *Tiner* v. *State*, 109 Ark. 138, 158 S.W. 1087 (1913). Some leeway is given in closing remarks and counsel are free to argue every plausible inference which can be drawn from the testimony. *Abraham* v. *State*, 274 Ark. 506, 625 S.W.2d 518 (1981). Nevertheless, "[c]losing arguments must be confined to questions in issue, the evidence introduced and all reasonable inferences and deductions which can be drawn therefrom." *Williams* v. *State*, 259 Ark. 667, 535 S.W.2d 842 (1976). The trial court has a wide latitude of discretion in controlling the arguments of counsel and its rulings in that regard are not overturned in the absence of clear abuse. *McCroskey* v. *State*,

271 Ark. 207, 608 S.W.2d 7 (1980).

Other states have found permissible closing argument where a prosecutor used "similar" material to a rope used to bind a victim to show that the victim might have bound himself, *Collins* v. *State*, 561 P.2d 1373 (Okla. Cr. 1977); where a live model and an unloaded pistol were used to demonstrate that shots could not have been fired in the manner claimed by the defendant, *Herron* v. *Commonwealth*, 23 K.L.R. 782, 64 S.W. 432 (1901); where a piece of crayon was used to show how the defective muzzle on a revolver could have deformed a bullet fired from the pistol, *Russell* v. *State*, 66 Neb. 497, 92 N.W. 751 (1902); where an attorney borrowed a gun from an officer in the courtroom to demonstrate the deceased could not have inflicted a fatal wound upon herself, *Peoples* v. *Commonwealth*, 147 Va. 692, 137 S.E. 603 (1927); and where a toy gun was used to prove the fatal wound could not have been inflicted as claimed, *Barber* v. *Commonwealth*, 206 Va. 241, 142 S.E.2d 484 (1965). In the *Barber* case the Virginia court found it was within the sound discretion of the trial court to determine whether the use of the toy pistol should be permitted even though the toy was not shown to be the same size or type as the murder weapon.

Likewise, here the trial judge did not abuse his discretion when he permitted the prosecutor's demonstration with the shotgun. As to the use of the wrong gun for the demonstration, without an objection at the trial, this could not have been a ground for a mistrial. Nor is it newly discovered evidence since it could have been discovered when it occurred during the trial and there is no indication that the evidence is "important" as required by Ark. Stat. Ann. § 43-2203(6) (Repl. 1977).

Even if this court were to consider the use of the wrong gun to be error, it would be rendered harmless by the jury's specific findings of aggravating circumstances. By the demonstration, the prosecutor was attempting to establish the proposition that the appellant knowingly created a great risk of death to a person other than the victim, premised on the fact that the appellant reloaded after shooting the police officer. The jury, however, given the opportunity, failed in its formal findings to recognize that aggravating circumstance existed. *See Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3 (1982). This argument is

accordingly without merit.

III. *PREVIOUS FELONY AS AGGRAVATING CIRCUMSTANCE*

Prior to the beginning of the trial, appellant pled guilty to three counts of aggravated robbery and one count of kidnapping, and to burglary, theft and escape. These offenses stemmed from appellant's escape from jail and the incident at the Rice home in Woodson and occurred on the same day as the murder and attempted murder of which appellant was convicted. In the penalty phase of the trial, the state used these convictions pursuant to Ark. Stat. Ann. § 41-1303(3) (Repl. 1977) which provides as an aggravating circumstance:

> The person previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

Appellant maintains that the statute does not contemplate the use of felonies that are part of the same criminal episode as the capital murder. We disagree.

In passing § 41-1303(3) the General Assembly intended to narrow the class of persons exposed to the death penalty to those with a predisposition for violent acts. The state, during the guilt and innocence phase, can always prove other acts done at the same time as the principal crime to show the aggravated nature of the crime charged. *McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233. Furthermore, Ark. Stat. Ann. § 41-1303(8) (Supp. 1985) allows the state, during the penalty phase, to show the murder was done in a particularly heinous manner. The reason, then, for section (3) is to allow the state to show that the defendant has a character for violent crimes or a history of such crimes.

Section (3) was amended in 1977 to permit the state to prove that the defendant has previously *committed* violent felonies. Prior to the amendment, the state could only offer proof of previous *convictions* for violent felonies. The question we must answer is what the legislature meant by "previously committed."

Since there are other avenues by which the state can

prove crimes immediately connected with the principal crime, the only logical conclusion is that section (3) applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. In this case the crimes used to prove an aggravated circumstance involved other victims, in another place and previously in time. Therefore, they were properly used as an aggravating circumstance.

IV. *YOUTH AS MITIGATING EVIDENCE*

The appellant turned 18 about two months before the crimes were committed. This evidence was presented to the jury and was submitted on the form as a mitigating circumstance. The jury found that "[t]here was no evidence of any mitigating circumstance." Because the jury did not check the part of the form providing that "there was evidence of mitigating circumstances but the jury agreed they did not exist at the time of the murder," appellant argues the jury improperly failed to consider the evidence of appellant's youth.

In *Giles* v. *State*, 261 Ark. 413, 549 S.W.2d 479 (1977) this court found error in the sentencing procedure in the jury's failure to find any mitigating circumstances where there was evidence throughout the record that appellant was an imbecile who suffered from organic brain syndrome. In that same case, however, the jury found that the youth of the appellant, who was apparently 19 or 20 when the crime was committed, was not a mitigating factor. This court affirmed the jury's finding, stating, "[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances." *Giles, supra; see also Neal* v. *State*, 261 Ark. 336, 548 S.W.2d 135 (1977).

We do not interpret the jury's action to mean that they did not consider the evidence of mitigation that was offered. Rather we find the jury determined that the appellant's youth was not a mitigating factor, as they were entitled to do, and so indicated that no mitigating circumstances were found. No error was committed.

V. *MANDATORY DEATH SENTENCE*

The appellant filed a pretrial motion challenging the constitutionality of the death penalty sentencing statute as a mandatory death statute. The sentencing statute, Ark. Stat. Ann. § 41-1302 (Repl. 1977) states:

> (1) The jury shall impose a sentence of death if it unanimously returns written findings that:
>
> (a) aggravating circumstances exist beyond a reasonable doubt; and
>
> (b) aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and
>
> (c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

Appellant argues that the statute does not permit an individual determination to be made by the jury as to whether this particular defendant should be sentenced to death.

A jury cannot impose a sentence of death until it specifically finds that all three parts of the statute apply. We have held in several cases that, regardless of a jury's findings with respect to aggravation versus mitigation, "it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death." *Clines, Holmes, Richley & Orndorff* v. *State*, 280 Ark. 77, 656 S.W.2d 684 (1983). The jury has additional leeway because it can find that mitigating circumstances outweigh aggravating circumstances. We have found that this fact prevents the imposition of the death sentence from being mandatory. *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977). We further stated in *Collins* that "[t]he statute provides adequate guidelines, so limiting and directing the exercise of the jury's discretion that an arbitrary, capricious, wanton or freakish exercise of that discretion is improbable."

A further safeguard is provided in that the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Ruiz & Denton* v. *State*, 275 Ark. 410, 630 S.W.2d 44 (1982); *Collins, supra.*

The sentencing statute does not require a mandatory death sentence, but rather establishes criteria which must be strictly met before a death sentence shall be imposed. It is not unconstitutional.

VI. *CONSTITUTIONAL QUESTIONS*

Under this argument, the appellant raises several challenges to the constitutionality of the death penalty and alleges that his constitutional rights were violated.

He first argues that error was committed because the jury was death qualified. This court has repeatedly held that this practice is constitutional, *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983); *Novak* v. *State*, 287 Ark. 271, 698 S.W.2d 499 (1985), and the United States Supreme Court has now also taken that position. *Lockhart, Dir., Ark. Dept. of Correction* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986).

Appellant next claims the sentence of death is cruel and unusual punishment, but acknowledges that this argument has been rejected by the U.S. Supreme Court in *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and by this court in *Fairchild* v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984). We decline his invitation to overrule our cases.

The next allegation of error by appellant is that the death penalty statute unconstitutionally infringes upon an accused's right to plead not guilty and to have a jury trial. This contention is based on the fact that the only way the death penalty can be imposed is if the defendant chooses a jury trial since a judge cannot sentence a defendant to death. Ark. Stat. Ann. § 41-1302(3) (Repl. 1977). We have rejected this argument several times. *E.g., Ruiz & Denton* v. *State*, 275 Ark. 410, 630 S.W.2d 44 (1982); *Hill* v. *State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

VII. *MOTION FOR NEW TRIAL*

After the transcript was filed but before briefs were due, appellant submitted a petition for writ of error coram nobis which was denied by this court. The petition was based on an unsolicited affidavit from appellant's codefendant, Michael Cox, in which Cox purportedly states that he, not appellant, fired the shot that killed Officer Klein. Appellant asked this court in his petition to

order the trial court to conduct a hearing to determine whether a new trial is needed. We are now asked to reconsider our ruling denying the petition.

Although we are being asked to decide this petition on its merits, the petition is not a part of the transcript and neither is Cox's affidavit. It is the responsibility of the parties to provide this court with a record.

Based on what is contained in the briefs, however, we find appellant's argument is without merit. A writ of error coram nobis is an excessively rare remedy meant to provide relief where none is available on appeal because the facts are not in the record. *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984). That is the situation here. If relief was to have been granted, it would have been when the writ was filed and not now on appeal. We have already denied the writ.

VIII. *SUFFICIENCY OF THE EVIDENCE*

For his final contention, the appellant challenges the sufficiency of the evidence. In doing so he admits that there was sufficient proof that either he or Michael Cox killed Officer Klein. He maintains, however, that without his statement, the admissibility of which he has challenged, there is insufficient evidence to establish which of the two committed the murder. We have already discussed the appellant's confession and found that it was admissible. The appellant's confession is a part of the evidence which is sufficient to support the conviction.

Affirmed.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. The appellant was charged with nine felonies committed during a period of a few hours. At the beginning of his trial, he pled guilty to all of the felonies except the charges of capital murder and attempted capital murder, for which he was sentenced to death and 50 years, respectively. I disagree with the majority on two points. I believe the state erroneously argued evidence which was outside the record and introduced evidence of aggravating circumstances which should have been excluded.

First, the state's attorney used a shotgun for demonstration

purposes during the closing argument. He used the wrong gun in attempting to show how the appellant had fired twice and then reloaded for the purpose of being ready to shoot someone else. Aside from it being the wrong gun, the evidence did not tend to show the appellant had in fact reloaded the weapon. The worst thing about the incident was that the prosecuting attorney had trouble loading the gun and it jammed. No doubt this apparent reckless use of a loaded shotgun in the presence of the jury had a tendency to arouse fear and bias in the jury and inflame the passions of the jury. Suppose the gun had fired; would it have been all right if the court directed the jury to remove it from their minds? I don't think so. I would condemn such activity before someone gets seriously injured or killed. I believe the defense attorney properly objected to this performance at the time it was taking place. I think the court should have stopped the demonstration and admonished the jury to disregard the performance of the prosecutor. There had been no proof presented to show that appellant had in fact reloaded the shotgun. Therefore, this part of the argument was outside the record.

Secondly, I disagree with the majority in approving the procedure utilized by the court in the penalty phase of this trial. As evidence of aggravating circumstances, the jury was allowed to consider evidence that the appellant had previously committed other felonies which grew out of the conduct of the appellant during the period of his escape and the murder for which he was convicted in the trial under consideration. This trial commenced on March 4, 1985. On the same day appellant offered to plead guilty to several charges growing out of the same episode. The trial court entered an order which was dated March 7, 1985, in which the court attempted to nunc pro tunc the judgment to March 4, 1985. The jury verdict reflects appellant was found guilty of attempted capital murder and capital murder. At page 32 of the appellant's abstract, it is noted that the jury found three aggravating circumstances and sentenced appellant to death by lethal injection. The amended felony information, pursuant to Ark. Stat. Ann. § 41-1001 (Repl. 1977), charging the appellant as an habitual offender, commences on page 33. Following the amended information, the judgment is found at page 34, sentencing appellant on the crimes which had already been presented to the jury as aggravating circumstances. There does not appear to

have been any separate proof that appellant had committed any prior felonies. These judgments should not have been presented to the jury because they had not yet been entered.

If this procedure is approved, then there is no reason why the court should not have stopped the proceeding after the jury announced its first verdict, on either the attempted capital murder or the capital murder, and informed the jury that now that he had been found guilty of one felony they could consider it in determining the other verdict.

We have not previously had any trouble with the wording of Ark. Stat. Ann. § 41-1303(3), as amended in 1977. In *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982), we considered the identical provision wherein the appellant argued the jury improperly considered felony convictions that had simultaneously been entered. In rejecting Hill's argument that the jury may have considered these felonies arising out of the same episode for enhancement purposes or as aggravating circumstances, we stated:

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

The wording of the statute seems clearly to apply only to felonies committed at a prior time. The defendant in *Hill* committed the same-episode felonies at different times and places — the robberies at one place and the murder and attempted murder at a later time and several miles away — the same as in the instant case. The verdict forms submitted to the jury in *Hill* referred to convictions for *previous* felonies. Under Ark. Stat. Ann. § 41-1303(3), the same-episode crimes should not have been considered by the jury during the penalty phase for purposes of enhancement and aggravation.

The majority opinion on this point appears to be based upon the Commentary, which is not a part of the statute or our

interpretation of it. The Commentary states that the prosecutor may now establish an aggravating circumstance through *proof* that the defendant *previously committed* another specified type of offense.

I concur in the result because I do not think either error was prejudicial in this case. The defense did not discover that the prosecutor had used the wrong shotgun until after the trial, but this does not amount to newly discovered evidence, nor can I say with any degree of certainty that the erroneous conduct by the State in the closing argument had any effect on the verdict.

The reason the second error (sentencing phase) was not prejudicial is that two other aggravating circumstances were found by the jury, and the defense specifically waived any objection to the offering of the same-episode felonies in the penalty phase of the trial.

Gary HOGAN *v.* STATE of Arkansas

CR 86-27 712 S.W.2d 295

Supreme Court of Arkansas
Opinion delivered July 7, 1986

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

Steve Clark, Att'y Gen., by; *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. On August 21, 1984, the appellant, Gary Hogan, was found guilty by the Little Rock Municipal Court of driving while intoxicated. He was sentenced on September 24, 1984. An appeal was taken to the Pulaski County Circuit Court for a trial de novo where he was also found guilty. On appeal to this court, appellant argues that the municipal court exceeded its jurisdictional authority by waiting more than thirty days before sentencing. We find no merit in appellant's argument and affirm. Jurisdiction is pursuant to Sup. Ct. R. 29(1)(c).

Appellant contends that Ark. R. Cr. P. Rule 36.4 and Ark. Stat. Ann. § 75-2506 (Supp. 1985) were violated by the municipal court. Rule 36.4 states that after the verdict, "sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, ..." Section 75-2506 provides that a presentence report shall be provided within thirty days of a DWI conviction, but does not limit the time a court has in which to sentence a defendant.

In addition to the fact that we have held this thirty day provision of Rule 36.4 is not mandatory, *Hoke* v. *State*, 270 Ark. 134, 603 S.W.2d 412 (1980), appellant cannot rely on an error in the municipal court after he has received an entirely new trial in the circuit court, "as if no judgment had been rendered" in the municipal court. Ark. Stat. Ann. § 44-509 (Repl. 1977); *Killion* v. *State*, 260 Ark. 560, 542 S.W.2d 744 (1976). Appellant received a fair trial in the circuit court, unaffected by the proceedings in the municipal court, and therefore there is no basis for reversing the judgment. *Killion*, supra.

Affirmed.

Earnest HUFF *v.* STATE of Arkansas

CR 86-40 711 S.W.2d 801

Supreme Court of Arkansas
Opinion delivered July 7, 1986

[redacted]

Lloyd R. Haynes, for appellant.

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

JACK HOLT, JR., Chief Justice. Appellant's petition for Rule 37 postconviction relief was denied by the Pulaski Circuit Court after an evidentiary hearing. This appeal is from that denial and, accordingly, our jurisdiction is pursuant to Sup. Ct. R. 29(1)(e). We affirm.

The appellant was arrested in September, 1983 for burglary and theft of property. After his arrest, a ring was recovered from appellant which was identified as coming from a robbery committed August 10, 1983, in Sherwood, Arkansas. Appellant later gave a statement to a Little Rock police officer admitting the robbery. On December 12, 1983, appellant pled guilty to aggravated robbery and burglary and was sentenced to 10 years imprisonment for the burglary and 30 years for the aggravated robbery, with directions that the sentences be served concurrently. Appellant's petition for postconviction relief was filed *pro se*. He is represented by counsel for this appeal, however.

The appellant alleged ineffective assistance of counsel as the basis for postconviction relief. The appellant and his attorney provided the only testimony at the Rule 37 hearing. In denying the relief, the trial court found he failed to present sufficient evidence to prove his allegations.

Counsel is presumed competent. *Travis* v. *State*, 283 Ark. 478, 678 S.W.2d 341 (1984). The burden of overcoming that presumption rests on the petitioner. *Maddox* v. *State*, 283 Ark. 321, 675 S.W.2d 832 (1984). When a guilty plea is challenged, as here, the sole issue is whether the plea was intelligently and voluntarily entered with the advice of competent counsel. *Williams* v. *State*, 273 Ark. 371, 620 S.W.2d 277 (1981). The appellant has the heavy burden of establishing that

counsel's advice was not competent. *United States* v. *Cronic*, 466 U.S. 648 (1984); *Crockett* v. *State*, 282 Ark. 582, 669 S.W.2d 896 (1984). Ineffective assistance of counsel with regard to a guilty plea can be shown only by pointing to specific errors by counsel. *Crockett, supra.* Alleged errors are to be evaluated under the standard enunciated in *Strickland* v. *Washington*, 466 U.S. 668 (1984), which requires a petitioner to demonstrate both that counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the sixth amendment and that the deficient performance resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial whose outcome cannot be relied upon as just. Both showings are necessary before it can be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985). A defendant whose conviction is based on a plea of guilty ordinarily will have difficulty in proving prejudice since his plea rests on the admission in court that he did the act with which he is charged. *Crockett, supra.*

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).

Appellant claims he was assaulted by police officers and forced to appear in a lineup without an attorney, although he requested one. He also maintains that he confessed because the police officer threatened to file additional charges against him if he refused, and that the police officer told him what to say in his confession. Appellant further argues that his attorney told him he would try to have that confession suppressed and then failed to do so. These claims of constitutional deprivation, because they occurred prior to the entry of his guilty plea, are not pertinent since the focus of inquiry in a collateral attack on a guilty plea is on the question of voluntariness of the plea as it relates to the advice rendered by counsel. *Thomas* v. *State*, 277 Ark. 74, 639 S.W.2d 353 (1982), *quoting, Irons* v. *State*, 267 Ark. 469, 591 S.W.2d 650 (1980). Any other defenses, except jurisdictional defects, are considered waived by the appellant. *Id.*

Appellant also alleges that he was erroneously advised by his

attorney that, if he pled guilty and received the 30 year sentence, he would be eligible for parole in four or five years. That promise of parole led him to plead guilty, according to the appellant, who also states that he was not guilty of the aggravated robbery charge. His attorney denies advising the appellant when he could be paroled prior to appellant's guilty plea.

Before entering his plea, the appellant filled out a plea statement which stated that he was charged with a felony and no prior convictions. Appellant testified he thought that meant he would be sentenced as a first time offender, leading to the early parole. Both plea statements he signed also stated the minimum and maximum sentences he could receive, and included statements that his plea was not induced by force, promises or threats, and that he was satisfied with his attorney. Counsel is not required to advise his client about parole because that matter is not a direct consequence of his guilty plea, *Bell* v. *North Carolina*, 576 F. 2d 564 (4th Cir. 1978) *cert. denied*, 439 U.S. 956 (1978), and the voluntariness of a guilty plea is not undermined by a lack of explanation as to the mechanics of the parole system. *Hunter* v. *Fogg*, 616 F.2d 55 (2d Cir. 1980).

The United States Supreme Court has also held that erroneous advice by counsel as to eligibility for parole under the sentence agreed to in a plea bargain is not sufficient to satisfy *Strickland's* requirement of prejudice where petitioner does not claim he would have pleaded not guilty and gone to trial had he been correctly informed. *Hill* v. *Lockhart*, ___ U.S. ___, 106 S.Ct. 366 (1985). We need not decide whether *Strickland's* prejudice requirement is met where the appellant *does* claim he would have gone to trial had he been correctly informed, because here, the question is essentially one of credibility.

The appellant introduced into evidence a letter from his attorney dated December 16, 1983, in which the attorney stated:

> In accordance with our agreement last week when you entered your guilty plea and received a sentence of 30 years, I am writing this letter to advise you that I will represent you in any matter before the Arkansas Parole Board and will, after the appropriate amount of time (approximately 4 or 5 years) apply for early relief by way of parole and/or clemency on your behalf.

During the evidentiary hearing, the following occurred in reference to this letter:

Q. Okay. Now, did that tie in with your understanding with . . . [your attorney] when you signed the plea statement as to the effect of the no prior convictions plea?

Appellant: This is what really, just really made, I felt that this is what really clinched everything when I signed the plea statement with no prior, I said, I can go on and plead to this and I can go down and therefore, I can go up in four or five years and if I did get a year and I can do another year now and then go up and maybe go up and make a go of it with his help. Because I know of another inmate that had got out like this. So, this is really the reason that I signed this statement. And the letter here, you know, I felt was the clincher and really, you know, if it was not true I felt it was misleading on his part. Because really, you know, I felt that I would have went to court or took a chance on going through other avenues besides pleading guilty, you know, instead of pleading guilty with the Court.

Appellant's attorney, on the other hand, testified as follows:

Q: Okay. And did you advise him as to his parole eligibility?

Attorney: I think this was, this was right after the Legislature had changed the parole eligibility. Penitentiaries were crowded. My discussion with Mr. Huff about parole was that after a period of time I would apply for clemency and/or take advantage of any laws that were on the books at that time for early parole. I think I advised him by letter that we would do this. This was after the plea was over. Not before. I think I advised him there that I would apply for clemency and/or parole and if since —

. . . .

Q: And had you — Did you advise him that parole eligibility was up to the Department of Corrections?

Attorney: I advised Mr. Huff, as I advise everyone who goes to the Penitentiary. That it's their penitentiary, they run it to suit themselves. . . . I never advise anybody or take it into consideration parole eligibility because it is something you have no control over. They change the laws and you go on. . . .

Q: And that's what you told Mr. Huff?

Attorney: I'm sure of it.

Here, the trial court was basically presented with a swearing match: appellant claimed his attorney erroneously advised him that he would be paroled within 4 or 5 years and, based on that, he entered his guilty plea. The attorney claimed that the parole discussion took place after appellant entered his plea and that he never advised anyone to take parole eligibility into consideration when deciding whether to accept a negotiated sentence because the parole laws can change. The trial court evidently believed the attorney. Conflicts in testimony are for the trial judge to resolve, and he is not required to believe any witness's testimony, especially the testimony of the accused since he has the most interest in the outcome of the proceedings, *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985). We cannot say his findings are against a preponderance of the evidence.

Affirmed.

LOUISIANA AND NORTH WEST RAILROAD COMPANY and Joe R. YOUNGBLOOD *v.* James H. WILLIS, Administrator of the Estate of Jo Ann Willis WILLIAMS

86-79 711 S.W.2d 805

Supreme Court of Arkansas
Opinion delivered July 7, 1986
[Rehearing denied September 15, 1986.]

Chandler & Thomason, by: *Larry W. Chandler*, for appellants.

Mike Kinard, and *Acchione & King*, by: *Harold King*, for appellee.

JACK HOLT, JR., Chief Justice. Jo Ann Willis Williams was killed when she drove into the side of appellant Louisiana and North West Railroad Company's locomotive. The locomotive had stopped at the crossing of Highway 19 and appellant's track near Magnolia so that the front end blocked only her lane of traffic. The appellee, James H. Willis, administrator of the estate of Mrs. Williams, was awarded $5,000 in compensatory damages and $65,000 in punitive damages in an action against appellant for the wrongful death of Mrs. Williams. Appellant argues on appeal that both of these verdicts were clearly against the preponderance of the evidence and that the question of punitive damages should not have been submitted to the jury. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(o).

A jury verdict will be affirmed on appeal if, when viewing the evidence in the light most favorable to the appellee, there is substantial evidence to support the verdict. *E.I. DuPont de Nemours & Co.* v. *Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983). There was substantial evidence from which a jury could conclude that L&NW Railroad Company, through its employees, negligently caused the death of Mrs. Williams, but the evidence does not support a finding of wanton and conscious disregard for the rights and safety of others. Accordingly, we affirm as to actual damages and reverse and dismiss the judgment

for punitive damages.

The testimony at trial established the following set of events which preceded the collision between Mrs. William's car and the appellant's locomotive. At approximately 9 p.m. on December 30, 1980, the appellant's train was in the process of making a switching operation at the intersection of Highway 19 and the appellant's track. The intersection was a grade crossing, meaning the crossing and the highway were on the same level. The three locomotives pulling the train were disengaged from the other cars, and the engineer pulled the locomotives completely across to the other side of the highway. He then backed the locomotives into position to be coupled with the other cars, clearing only one lane of the highway. The engineer testified that when the brakeman on the crew instructed him to stop, he set the brakes and looked up the road, at which time he realized he was still sitting partially across the highway. He said there was nothing he could do to change that until the cars were coupled. The engineer said the brakeman had initially flagged him across the highway but had gone to the back of the engine to the switch stand after the locomotive had stopped.

There were no signal lights or arms at the crossing, and after the locomotive had stopped in the intersection, there were no crew members flagging traffic, and no burning flares left on the road. Two signs were standing at the side of the highway giving notice of the crossing. The highway had no light poles or other illumination. There were lights on the locomotive which remained in the crossing, and windows through which the cab lights could be seen, but because of the angle in which the tracks crossed the highway, the locomotive's headlight faced slightly away from traffic traveling in the lane it blocked. The engineer said the bell was ringing during the entire operation.

The engineer estimated the locomotive had been stopped thirty to sixty seconds when he saw Mrs. Williams's car approaching at a "high rate of speed." He reached for the whistle cord, but the impact occurred before he could pull it. The speed limit was 35 miles per hour, and Mrs. Williams had a straight stretch of about a mile before the crossing.

The collision was also witnessed by a driver coming from the opposite direction on Highway 19. He said he rounded a curve

before the crossing and saw a set of car headlights, which disappeared almost instantly. He did not see the locomotive or its lights until the collision. He ran up to the scene, where he saw no flares burning and heard no bells.

The investigating police officer testified that it was dark at the scene and that the signs on the side of the road were faded and difficult to see. He also said it had been raining prior to his arrival at the scene.

The appellant's vice-president and the crew members all testified that no rules and regulations were broken in their switching operation that night. They stated that there is no requirement of flagging traffic or setting flares or other warnings after the crossing is occupied by a train. We have also held that it is generally not required to have signals after the train has entered the crossing as the train itself stands as a warning to drivers. *St. Louis S.W. Ry. Co.* v. *Robinson*, 228 Ark. 418, 308 S.W.2d 282 (1957); *Lloyd* v. *St. Louis S.W. Ry. Co.*, 207 Ark. 154, 179 S.W.2d 651 (1944). An exception is when the crossing is shown to be abnormally dangerous and the railroad may then have a duty to provide active warning devices. *Chicago, Rock Island & Pacific R.R. Co.* v. *Gray*, 248 Ark. 640, 453 S.W.2d 54 (1970). There was insufficient proof in this case, however, to show that the crossing was abnormally dangerous, and no jury instruction was requested on the extra precautions necessary at those crossings.

The evidence was sufficient to raise a jury question on the issue of appellant's negligence. There is no steadfast rule that there can be no liability on the part of the railroad company when a car is driven into the side of the train. The correct approach to analyzing cases of this nature is explained in *Hawkins* v. *Mo. Pac. R.R. Co.*, 217 Ark. 42, 228 S.W.2d 642 (1950):

> This Court has several times held that injured plaintiffs could not recover against railroad companies when automobiles were driven into the side of trains standing still on a highway crossing. [citations omitted] From these cases it is conceivable that one might leap to the conclusion that this Court has laid down a rule of law that a plaintiff can never recover when his automobile is driven onto a highway-railroad crossing into the side of a train. A reading of the cases cited makes it very clear that we have

not laid down any such broad and all-embracing rule. We have not chosen to disregard the governing abstract principles of negligence and contributory negligence to the extent of saying that there never will be a crossing collision of that sort in which the railroad company or its employees are guilty of negligence, nor have we said that injured plaintiffs figuring in such collisions will always and invariably, in every case that arises, be guilty of negligence equal to or greater than that of the defendant railroad. On the contrary, in *Fleming, Admrx.* v. *Mo. & Ark. Ry. Co.*, 198 Ark. 290, 294, 128 S.W.2d 986, 988, one of the cases cited *supra*, we said:

> "It is the settled rule that whether failure of a railroad company to station a flagman at a crossing, constitutes an omission of such care as an ordinarily prudent person would use under the same or similar circumstances, is a question of fact where there are obstructions which materially hinder the view of approaching trains, provided the crossing is used frequently by the public, and numerous trains are run. Inasmuch as permanent surroundings may create a hazardous condition, the rule of care goes further and requires precautions where special dangers arise at a particular time. It is said that the obligation exists, at an abnormally dangerous crossing, to provide watchmen, gongs, lights, or similar warning devices not only for the purpose of giving notice of approaching trains, but such care is to be equally observed where the circumstances make their use by the railroad reasonably necessary to give warning of cars already on a crossing, whether standing or passing, as where a crossing is more than ordinarily dangerous because of obstructions to the view interfering with the visibility of the responsible train operatives, or those approaching the track."

In *Hawkins*, the crossing was two or three feet above the rest of the highway so that approaching cars could see through to the other side of the crossing, and the doors on the boxcar were open. Traffic lights on the other side of the track were visible and as the plaintiffs approached the crossing at 2 a.m., undimmed lights shone directly in the driver's line of vision, creating the appearance that the road was clear. We held that these facts presented a

question for the jury as to whether the railroad company was negligent in not providing some form of warning to approaching traffic.

As in *Hawkins*, there was evidence here that the appellant created, "unintentionally but perhaps carelessly, something like a trap for unwary night drivers." The locomotive was blocking only a portion of the highway, with its headlights angling away from the appellee's direction of travel. A driver from the other direction stated he also did not see the train until Mrs. Williams's car appeared underneath it. Considering the darkness of the crossing, the weather, and the absence of watchmen or other appropriate warning signals during the time the locomotive partially occupied the crossing, the jury was justified in finding that the appellant was negligent.

Appellant relies heavily on *Missouri Pac. R.R. Co.* v. *Purdy*, 263 Ark. 654, 567 S.W.2d 92 (1978), where we held the trial court should have directed a verdict in favor of the defendant railroad company where the plaintiff "simply drove into the side of the train." In that case, however, the plaintiff admitted he had been drinking, a state trooper measured skid marks of 93 feet, there was testimony the plaintiff was driving in excess of 50 miles per hour in a 35 mile per hour speed zone, the accident occurred at 5:45 p.m. and, most importantly, the train presented a solid profile completely across the highway. The facts in *Purdy* clearly distinguish it from the present case.

Although the evidence justified a finding of negligence, the issue of punitive damages should never have been submitted to the jury. Punitive damages "are not a favorite of the law." *Diamond Shamrock Corp.* v. *Phillips*, 256 Ark. 886, 511 S.W.2d 160 (1974). "Negligence alone, however gross, is not sufficient to sustain such an award. *St. Louis, I.M. & S.Ry.* v. *Dysart*, 89 Ark. 261, 116 S.W. 224 (1909). Gross negligence, without willfulness, wantonness, or conscious indifference, does not justify infliction of punitive damages. *St. Louis S.W. Ry.* v. *Evans*, 104 Ark. 89, 148 S.W. 264 (1912)." *Phillips, supra.*

"Before punitive damages may be allowed it must be shown that in the absence of proof of malice or willfulness there was a wanton and conscious disregard for the rights and safety of others on the part of the tortfeasor." *Dalrymple* v. *Fields*, 276

Ark. 185, 633 S.W.2d 362 (1982).

The following quote from *Dysart supra*, illustrates the insufficiency of appellee's proof on this issue:

> The negligence consisted in failing to observe the rules laid down for the operation of trains at crossings. If these rules had been observed on the part of defendant's servants, no injury would have occurred; and the defendant is liable because of the negligence of its servants in the non-observance of those rules. But this was gross negligence, and nothing more. There is nothing to show that the trainmen were aware of the perilous situation, or that there was any wilfullness on their part or conscious indifference to the consequences of their negligent act.

The appellant's crew members did nothing that could be termed wanton and willful, or a conscious disregard of the rights and safety of others, and there were no safety regulations or requirements violated.

[redacted] Appellee asserts that certain correspondence between the appellant's vice-president and a highway department official, in which the highway department initiated plans for placing signals at the crossing nine months before the accident occurred, shows a conscious disregard for safety by appellant. The plans had temporarily stalled because federal funding for the project had not yet been authorized. There was no other showing that this crossing was known to be or even was abnormally dangerous, so that warning devices would be required. The fact that appellant elected to wait for the funding rather than finance the signals cannot be said to be willful and wanton negligence. Railroads are obviously not required to have active warning devices at every crossing.

For these reasons, the case is reversed in part with instructions to enter judgment only for compensatory damages.

Affirmed in part and reversed in part.

Joe W. CLINE, Jr., d/b/a CLINECO ERECTORS, INC. *v.* B.G. CONEY COMPANY and NORTH ARKANSAS WHOLESALE, INC.

86-130 711 S.W.2d 815

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Gibson & Ellis, by: *Sam Ed Gibson*, for appellant.

William R. Butler, for appellee.

GEORGE ROSE SMITH, Justice. This is an action brought by the appellant, Clineco Erectors, to enforce a mechanic's lien upon property owned by an appellee, Arkansas Wholesale. On motion for summary judgment the trial court dismissed the action on three grounds, one being that a necessary party, Lashlee Steel Company, had not been joined as a defendant within the time allowed by statute. The case was transferred to us by the Court of Appeals as involving an interpretation of a procedural rule. We need not reach this point, because the case was correctly dismissed for want of a necessary party.

Arkansas Wholesale employed B.G. Coney Company as the general contractor for the construction of a building in White county. Coney subcontracted part of the work to Lashlee Steel, which in turn employed the plaintiff, Clineco, to erect the building. Clineco alleges that there is a balance of $4,253 due for overtime wages paid on the job, which was completed on October 15, 1984.

The statute, as interpreted by court decisions, requires the lien claimant either to file its account with the circuit clerk or to

bring suit within 120 days after the completion of the work. Ark. Stat. Ann. § 51-613 (Repl. 1971). On February 6, 1985, the 114th day, Clineco filed this action against the landowner and the general contractor. On February 15, the 123rd day, Clineco joined Lashlee Steel as a defendant, though no service of process was ever had on Lashlee. Clineco admits that its contract of employment was only with Lashlee, not with Coney.

[redacted] The case is controlled by our reasoning in *Simpson* v. *J.W. Black Lbr. Co.*, 114 Ark. 464, 172 S.W. 883 (1914), which we have reaffirmed in later cases. *Burks* v. *Sims*, 230 Ark. 170, 321 S.W.2d 767 (1959); *B.S.C., Inc.* v. *McKinney*, 263 Ark. 110, 562 S.W.2d 600 (1978). In the *Black* case the materialman, which had sold lumber to the contractor, brought suit only against the owners, who had no contract with the materialman. In holding that the contractor was a necessary party and that it was essential that he be joined as a defendant within the 90 days then allowed, we said:

> The contractor was a necessary party and should have been made codefendant with the owners, who knew nothing about what amount of materials had been furnished, nor how much of the materials furnished had gone into the construction of the improvement. He was a necessary party, both for his own and the owner's protection. The owners had the right to look to him for the payment of any judgment that might be recovered against their property for materials furnished, having contracted with him to supply such materials and paid him the contract price for the improvement, and can not be compelled to resort to another action against the contractor for the recovery of such sum of money in which the contractor would be at liberty to claim that he did not owe the materialman the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor to defend all such actions and be bound by the judgment rendered.

The same principle applies here. Neither the owner nor the general contractor had a contract with Clineco. The contractor had paid Lashlee Steel. It was essential that Lashlee Steel be joined, within 120 days, to settle all the issues in one lawsuit.

Affirmed.

Bettye KREMER and William KREMER *v.* BLISSARD MANAGEMENT & REALTY, INC., et al.

86-85 711 S.W.2d 813

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Davidson Law Firm, Ltd. by: *Charles Phillip Boyd, Jr.*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Beverly A. Rowlett*, for appellee.

GEORGE ROSE SMITH, Justice. This is a suit for personal injuries suffered by Bettye Kremer when she stumbled at night outside the condominium she and her husband were renting from its owner, Joan Palmer, who in turn had employed the appellee, Blissard Management & Realty, to manage the condominium. Mrs. Kremer attributed her fall to Blissard's failure to replace a burned-out light bulb which Mrs. Kremer had reported. Although the suit was based on negligence, it seems to have been

submitted to the jury as one for breach of an oral contract. The verdict was for Blissard. The appeal comes to this court as a second appeal, under Rule 29(1)(j). *Blissard Management & Realty* v. *Kremer*, 284 Ark. 136, 680 S.W.2d 694 (1984).

Counsel for the appellants, without objection, designated only a small part of the record for the presentation of the two arguments for reversal. First, during the testimony of Dwight Blissard, Jr., he identified two written contracts: the management agreement between Mrs. Palmer and Blissard and the lease signed by Blissard and the Kremers. Both documents were admitted into evidence. The court, however, refused to allow counsel to stop at that point and have the witness read paragraphs of the contracts to the jury. The court explained that the documents were in evidence and could be used in the closing argument. Counsel then asked the witness Blissard if under the management agreement he had to maintain the leased premises. The court interposed, stating its position:

> Just a minute, Mr. Boyd. I still haven't made my point clear to you. And that is, Mr. Blissard, he may have gone to law school; I don't know. But it is presumed that he didn't. And you see, the question of law in a court proceeding is for the Court. The question of fact is for the jury.

There was no error and certainly no hint of prejudice. The trial court stated the law correctly.

Second, at the end of the trial counsel for the plaintiffs asked the court to give a number of instructions that would have left the determination of questions of law to the jury. For example, the amended complaint had alleged that Mrs. Kremer was a third party beneficiary of the management agreement, so that Blissard's duty to maintain the common areas was in part for her benefit. One proffered instruction would have defined a third party beneficiary and closed by telling the jury that "whether or not Bettye Kremer was a member of the class of individuals intended to be a beneficiary of that contract, is for you to determine." Other instructions would have told the jury to interpret the contracts according to their plain meaning, to construe ambiguities against the defendants, who prepared the contracts, and so on.

The requested instructions were properly refused. The construction and the legal effect of contracts are to be determined by the court as a question of law, except in instances in which the meaning of language depends on disputed extrinsic evidence. *Security Ins. Co.* v. *Owen*, 252 Ark. 720, 480 S.W.2d 558 (1972). That principle was recognized and applied by the court below. In admitting the lease into evidence the court remarked that during a recess "we'll see what we need to do in the way of an interpretation of its legal significance to the jury." By proceeding in that way the court might, if the occasion arose, first have construed the management agreement to require Blissard to maintain the common areas and then have instructed the jury that it was Blissard's duty to use ordinary care to maintain the common areas in a reasonably safe condition. Jurors are not trained in the law. They cannot be expected to examine a contract, decide what duties it imposes, pass upon the facts, and return their verdict accordingly. The plaintiffs' requested instructions would have resulted in that impermissible procedure.

Affirmed.

Marynell Milburn SUTTON, and Herbert COLLINS and John Rogers COLLINS, Trustees *v.* Margaret F. MILBURN, Executrix of the Estate of J.B. Milburn, Jr.

85-317 711 S.W.2d 808

Supreme Court of Arkansas
Opinion delivered July 7, 1986
[Rehearing denied September 15, 1986.]

Wright, Lindsey & Jennings, and *Bailey, Trimble & Sellars*, for appellant.

Perroni & Rauls, P.A., by: *Stanley D. Rauls*, for appellee.

GEORGE ROSE SMITH, Justice. This is a petition for the construction of a will. The testator, John Collins, was engaged for many years with his brother Herbert in managing property and estates. John died in Little Rock on January 4, 1965, a few days before his 64th birthday. He was survived by his wife Blanche, 58, his mother, Norrie Collins, 87, his brother Herbert, 55, and three sisters, Mona Collins Milburn, 62, Avanelle Collins Rogers, 60, and Anne Beth Collins Nanson, 53. The bulk of the estate was left in trust to two trustees, the testator's brother Herbert and their nephew, John Collins Rogers. As a result of their management, the conversion of real estate into more productive investments, and an increase in the value of a block of corporate stock, the worth of the trust property had increased substantially when the trustees filed the present petition in 1985.

The Collins trust was to last at least 20 years, with the income being distributed to the testator's mother, his widow, and his heirs at law. On the 20th anniversary of the testator's death the trustees filed this petition to have the estate reopened for the determination of heirship. The question presented by the petition is: Should the testator's "heirs at law," who are to receive the trust property at the expiration of the trust, be determined as of the date of the testator's death in 1965 or as of the date of the death of the surviving life beneficiary, Blanche (who died on June 8, 1985, while the petition was pending in the probate court)?

The probate judge chose a third date, that of the death of the testator's mother on June 12, 1967. That choice was based on a legal theory that avoids incongruities when one of two or more life beneficiaries is also the testator's sole heir, as John Collins's mother would have been under Act 52 of 1933, § 1, which was in force at his death. For the theory adopted by the trial judge, see Restatement of Property, § 308, Comment *k* (1940); *Delaware Trust Co.* v. *Delaware Trust Co.*, 33 Del. Ch. 135, 91 A.2d 44, 38

ALR 2d 318 (1952). We need not weigh the trial court's theory, because the view that the heirship is to be determined as of the date of the testator's death treats the main issue more directly and reaches the same result on the facts of this case.

Before turning to the provisions of the Collins will, we note that the distribution of only one eighth of the trust property is affected by this dispute about heirship. The testator's brother and two of his sisters were still living at Blanche's death; each receives one fourth under any view. The third sister, however, died on May 5, 1967, survived by two children, J.B. Milburn, Jr. and the appellant Marynell Milburn Sutton. If the heirs are determined as of the testator's death in 1965, then upon the death of the testator's sole heir, his mother, the one-eighth interest now in question would have passed by her will to J.B. Milburn, Jr., whose mother had predeceased her own mother, Norrie. That vested one eighth would then have passed by J.B. Jr.'s will to his widow, the appellee Margaret F. Milburn. On the other hand, if the heirs are determined as of Blanche's death in 1985, J.B. Milburn, Jr. had died three months before Blanche's death, without descendants; so Mona Milburn's entire one-fourth share would have vested in her daughter, the appellant Marynell Milburn Sutton.

John Collins's will was executed on January 27, 1964, about a year before he died from a heart attack on January 4, 1965, and seven weeks after he married his second wife, Blanche. The will consists of ten numbered paragraphs, after an introductory sentence. All the paragraphs are short except the seventh, in which the trust is created. We quote that paragraph and summarize the others.

> First: [The usual direction that debts be paid.]
>
> Second: [A devise of a home to the testator's wife, Blanche, plus a legacy of $5,000, with minor details.]
>
> Third: [A gift of $10,000 to a church.]
>
> Fourth: [A legacy of $2,500 each to the testator's brother and three sisters, who are named.]
>
> Fifth: [A legacy of $1,000 each to the testator's seven nephews and nieces, if living, otherwise to their "heirs at law."]

Sixth: [Legacies to three domestic employees.]

Seventh: The remainder of the rest and residue of my Estate I give, devise and bequeath to Herbert Collins and John Collins Rogers in trust with all the right, title and power in handling same that I now possess for the uses and purposes set out hereinbelow.

Out of the net income my Executors and/or Trustees shall pay to my wife, Blanche H. Collins, the sum of $700.00 cash per month beginning immediately after my death and for the duration of her lifetime, and additional amounts out of the income of my Estate which my Trustees may deem necessary or in the case of illness or any unforeseen contingency if, in their opinion the $700.00 monthly payment does not appear to be adequate. In the event the current year's income is not sufficient for the monthly payment and additional amounts which my Trustees are authorized to pay to my wife, then my Trustees shall pay same from prior years accumulated, undistributed income, if any, otherwise, out of the corpus of my Estate for whatever amount may be required in excess of income. If my wife remarries, the monthly payments and additional amounts shall be terminated at that time.

Out of the net income my Executors and/or Trustees are to pay to my Mother, Mrs. Norrie M. Collins, the sum of $200.00 cash per month beginning immediately after my death and for the duration of her lifetime, as well as any additional amounts which my Trustees deem are necessary or in case of illness or any unforseen contingency. In the event there is not sufficient income from the current year or prior years accumulated, undistributed income, such additional amounts as may be needed shall be paid from the corpus of my Estate.

Whatever net income is remaining at the end of each calendar year, after the payment of amounts which are to be paid from income, shall be invested and after the accumulated, undistributed net income amounts to a total of $20,000.00, all the net income not needed for my wife Blanche H. Collins, and my Mother, Mrs. Norrie M.

Collins, under the foregoing provisions shall be distributed share and share alike to my heirs at law, with the further provision that if part of said $20,000.00 is used for the purposes set forth, a like amount shall be retained out of the succeeding year's net income so that the accumulated, undistributed net income of $20,000.00 shall be maintained before resuming payments of net income to my heirs at law.

After the death of my wife or her remarriage, my Trustees are authorized to use out of the corpus of my Estate $5,000.00 for each of the children of my nieces and nephews now living or that may be born hereafter, for education purposes after finishing High School, to be paid out as in the discretion of my Trustees is advisable.

After a ten year period following my death has expired, or the death or remarriage of my wife, whichever is later, my Trustees shall determine how much of the corpus of my Estate, including prior years accumulated, undistributed net income on hand, if any, will be needed for payment of bequests which I provide be paid from income and the amounts needed for educational purposes for the children of my nieces and nephews, and out of the corpus in excess of the amounts reserved, my Trustees are authorized to distribute one-half of the remaining corpus of my Estate, share and share alike per stirpes to my heirs at law. The Trustees shall take sufficient time for making said distribution as would be for the best interest of the Estate, as it might be necessary to sell some things that cannot be distributed in kind in order to make the distribution. Partial distributions can be made.

After a twenty year period following my death has expired, or the death or remarriage of my wife, whichever is later, this Trust shall ipso facto cease and whatever remains shall go share and share alike per stirpes to my heirs at law, my Trustees to have whatever time is deemed for the best interest of my Estate to dispose of those assets necessary to make an equal distribution. Before making the distribution after twenty years has expired following my death or the death or remarriage of my wife, whichever

is later, my Trustees shall retain sufficient liquid assets or income producing real estate to provide for educational purposes for the children of my nieces and nephews and/or any amounts which are to be paid under the provisions of this will or any codicil to same.

Eighth: [Directions for the liquidation of Collins & Company, the partnership with Herbert Collins.]

Ninth: [All beneficiaries to receive their bequests without deduction for estate taxes.]

Tenth: [Appointment of Herbert Collins and John Collins as executors and trustees, with the survivor to serve alone upon the death of either.]

The rival lawyers support their arguments by stressing distinctly different aspects of the problem. Counsel for the appellee, arguing for the determination of heirship as of the date of John Collins's death, relies upon two familiar rules: One, the law favors the early vesting of estates when a choice is to be made, and two, the word "heirs" is a legal term that refers both by the common law and by statute to those who are entitled by law to inherit property from a person who dies intestate. The substance of that definition of "heir" is contained in our statute of descent and distribution, Ark. Stat. Ann. § 61-131 (Repl. 1971), and in our Probate Code. Section 62-2003(j). We have often determined heirship as of the date of a pertinent death, but we have not allowed that principle to override the clear intention of a testator. The appellee cites *Bowman* v. *Phillips*, 260 Ark. 496, 542 S.W.2d 740 (1976), as being closely on point. That opinion, however, construed a deed, not a will. Wills were involved in *Wallace* v. *Wallace*, 179 Ark. 30, 13 S.W.2d 810 (1929), and *Griffin* v. *Moon*, 238 Ark. 692, 384 S.W.2d 243 (1964). In *Wallace* the will seemed to create a trust for the management of farmland for 25 years, but the court held that the will did not create a trust nor even a remainder. Consequently title vested at the death of the testator, whose devisees could immediately convey a clear title. In *Griffin* the testator left his farm to his wife, "with the remainder thereof on her decease or marriage, to my said children and their children, respectively, share and share alike." The testator's children had no children at his death. The court stressed the rule of early vesting in holding that title vested in the testator's

children at his death. As usual, however, the court qualified the principle favoring early vesting by adding "in the absence of a contrary intention of the testator appearing from the will."

Historically, the emphasis on early vesting and on a fixed construction of the word "heirs" arose as part of the developing law of real property in feudal times and thereafter. Those common law rules governing the creation and conveyance of estates in real property are surely the most technical that have managed to survive to the present. For instance, a deed to a grantee and his heirs conveys nothing to the heirs; the grantee takes the fee. Again, a deed to a grantee for life with remainder to his heirs conveys the fee simple to the grantee, by the application of the Rule in Shelley's Case. In fact, that rule is so inflexible that, in commenting on a Pennsylvania case, we noted that the devisee took the fee simple under the Rule in Shelley's Case even though the testator had said in his will that "in no event whatever shall the fee simple vest" in that devisee. But it did, the Rule being applied despite the testator's contrary intention. *Bishop* v. *Williams*, 221 Ark. 617, 255 S.W.2d 171 (1953).

We are not questioning the wisdom of the strict principles applied in the law of real property. It is essential that the law governing the ownership of land be absolutely certain, regardless of logic. When a person buys a home, the law must be able to assure him that his title will be upheld by the courts, if challenged. The surest way yet found to reach that goal is to use language that through centuries has attained a rigid meaning. Early vesting also has a practical advantage, in the avoidance of contingent remainders that would make it impossible for any person or combination of persons to convey good title until the contingency occurred.

Counsel for the appellants, in presenting their side of the case, urge the court to give effect to John Collins's intent, as reflected by the language of his will, rather than to the rigid rules of the common law. They have the stronger position. In some instances, of course, the common law rules give effect to the testator's intent; there is no problem. In the case at bar, for example, by the fifth paragraph of the will the testator left a legacy of $1,000 to each of his seven nephews and nieces "if living, otherwise to their heirs at law," the legacies to be payable out of the corpus of the estate "as soon after my death as my Executors

deem it convenient to do so." There can be no reasonable doubt about the heirship defined by that language.

[redacted] When, however, the common law rules of construction, as distinguished from the rules of law, would bring about a result manifestly contrary to the testator's intention, it is the intention that must prevail. We doubt if our first statement of this principle, made in 1840, was too broad: "The object of the courts of all countries, in the construction of wills, is to arrive at the true and real intention of the testator. To this end all the rules upon the subject necessarily tend, and upon it they are all made to turn." *Moody* v. *Walker*, 3 Ark. 147, 185 (1840). A companion rule, though not so broad in its application, was quoted from a New York case: "[I]f there is a gift of the principal, unconnected with the time of payment, then the legacy vests; if there is no gift except at the time of payment, then it does not vest until the time arrives; and if it never arrives, the legacy is lapsed." P. 186. The *Moody* opinion is still the law.

The Collins will provides, in the final paragraph under Seventh: "After a twenty year period following my death has expired, or the death or remarriage of my wife, whichever is later, this Trust shall ipso facto cease to exist and whatever remains shall go share and share alike to my heirs at law," with the trustees having ample time to make an equal distribution. Later in the paragraph the testator directs that the trustees retain sufficient assets to provide for the specified educational purposes of his grandnephews and grandnieces.

Herbert Collins was the only witness below. John Collins was not a lawyer, but he had been the trust officer of a bank that closed, which led to his being named as trustee or executor for estates, guardianships, and trusteeships. After John's second marriage, in November, 1963, he started discussing with Herbert what he planned to do about his estate. The will was dictated by John, in Herbert's presence, during several sessions in the month of January. It was evidently prepared with great care and certainly expressed the testator's desires with remarkable clarity.

The testator's primary concerns were for his mother, whom he had supported since he was 22, when his father died, and for his wife. The corpus of the trust was made available for their support. Apart from gifts to the church and to domestic employees, all the

rest of the principal and income of the estate goes to or for the benefit of the testator's immediate family or their descendants. For at least 20 years the trust property is to be preserved for the benefit of the family. Perhaps long after the expiration of the 20 years part of the estate may still be kept in trust for the education of younger members of the family.

A determination of heirship as of the date of the testator's death would have no advantage, as far as the accomplishment of his intentions is concerned. With respect to real property, for which the rule of early vesting was created, there are often advantages in making the owner's interest in the property readily transferable. No such advantage is discernible here. To the contrary, John Collins would no doubt have been strongly opposed to any thought that a beneficiary's interest in the principal or income of the trust could be sold to outsiders, with obvious possibilities of resulting dissension. Similarly, there is no inference to be drawn from the testamentary plan that the testator meant for the ownership of any part of his estate to stray outside the family if one or more of the beneficiaries were to die without descendants before the expiration of the 20 years. Yet that is what could and did happen if the heirship is determined as of the testator's death rather than at a time when a determination becomes necessary. After studying the case we are firmly convinced that John Collins's fundamental purposes in creating the trust can best be carried out by fixing the determination of heirship as of the date of the death of Blanche Collins.

Reversed and remanded for the entry of a decree conforming to this opinion.

PURTLE, J., not participating.

Dawn Hall BAKER *v.* STATE of Arkansas

CR 85-227 711 S.W.2d 816

Supreme Court of Arkansas
Opinion delivered July 7, 1986

William R. Simpson, Jr., Public Defender, and *Howard W. Koopman*, *Arthur L. Allen*, and *Deborah Sallings*, Deputy Public Defenders, by: *Jerry Sallings*, Deputy Public Defender, for appellant.

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

DARRELL HICKMAN, Justice. Dawn Hall Baker was convicted by a jury of three counts of capital felony murder and sentenced to three terms of life without parole. We affirm the convictions.

Baker met Charles Franklin Stoner, a taxi driver, on October 29, 1984. On November 26, they robbed Capitol Cab Company, Stoner's former employer. During the robbery, Stoner stabbed and killed the dispatcher, Roma Silvey. On November 29 Stoner and Baker went to Mark Graves' apartment in Maumelle. Stoner knew Graves from driving him in his taxi. Graves was paralyzed and confined to a wheelchair. Stoner stabbed Graves three times, killing him, and the couple took his wallet and a box of foreign coins. On December 2, the couple went to Ken and Laurie Goodwin's house. The Goodwins had also ridden with Stoner. They were both blind and Mrs. Goodwin is hard of hearing. Stoner stabbed Mr. Goodwin six times, killing him. Stoner and Baker took Goodwin's wallet and Mrs. Goodwin's purse. The couple was arrested December 10 in Lenoir, Tennessee, after using Ken Goodwin's credit card.

Baker's first argument is that the statements she made after her arrest should have been suppressed because they were obtained while she was under the influence of narcotics and after she was interrogated for over 24 hours without proper food, medical attention or sleep. After the arrest, Baker was placed in a patrol car, orally advised of her rights and questioned. She executed a written rights form at the scene at 9:51 p.m. and again at about 10:50 p.m. when she dictated a statement. She was taken to a cell between 1:30 and 2:00 a.m. Arkansas officers arrived the next day and she was again questioned at about 12:15 p.m. The interview was taped and lasted until 1:00 p.m. Baker was then driven to Little Rock. She arrived at 10:00 or 11:00 p.m. and was again advised of her rights at 11:55 p.m. A taped interview between her and a deputy prosecuting attorney began at 12:21 a.m. and ended at 12:55 a.m. A transcript of that interview was the only statement admitted into evidence. Baker was admitted to the hospital December 23 for symptoms of drug withdrawal.

Baker moved to have her statements suppressed. After a hearing the trial court denied the motion. At the hearing Baker maintained that she injected herself with Dilaudid about an hour before her arrest. She said that she hid ten more Dilaudid tablets in her boots and took them over the course of the next few days. She said that she began suffering withdrawal symptoms at about 1:00 or 2:00 a.m. on December 11, while being questioned by the Tennessee authorities. She said that she was interrogated all

night and was not taken to her cell until morning when breakfast was brought to her. At that time she was so sick from withdrawal, she was unable to eat. Baker contended that she did not sleep that night nor on the way to Little Rock the next day.

Her testimony was directly contradicted by the officers involved. The arresting officer, who first questioned Baker, said that she was very willing to make a statement and did not seem to be under the influence of drugs or alcohol. The officer who took her statement at headquarters in Tennessee said that her mental and physical condition was good and that she did not appear to be under the influence of drugs or alcohol. The Tennessee authorities testified that she was taken to a cell at 1:30 or 2:00 a.m., given some food at that time, and that prisoners are ordinarily awakened at 7:30 and given breakfast at 8:00.

The Arkansas officers who questioned Baker the next day testified that Baker was cooperative and did not appear to be under the influence of drugs or suffering from withdrawal. She was taken to Little Rock and the officer who transported her said that they ate and that she slept for a couple of hours on the way. After Baker's arrival at 10:00 or 11:00 p.m., she was interviewed at 12:21 a.m. The prosecutor who interviewed her testified at the hearing that she was quite lucid and did not seem to be under the influence of drugs or alcohol. She agreed to make the statement and was talkative.

When an in-custody statement is challenged, the state has the burden of proving by a preponderance of evidence that the statement was voluntarily given. On appeal we make an independent determination of this issue and affirm the trial court's ruling unless it is clearly wrong. *Scroggins* v. *State*, 276 Ark. 177, 633 S.W.2d 33 (1982). We do not find such error. Each of the officers testified that they saw no evidence that Baker was under the influence of drugs. She appeared to understand her rights and was cooperative in giving the statements. None of the interviews were particularly long. It was for the trial court to weigh the evidence and resolve the credibility of the witnesses. *Hunes* v. *State*, 274 Ark. 268, 623 S.W.2d 835 (1981). The trial court believed that Baker's faculties were not impaired and that a bed was provided for her in Tennessee while she was in custody. It rejected her testimony that she was not permitted to sleep, and we

cannot say that finding was clearly against the preponderance of the evidence. We affirm the finding that Baker's statements were voluntarily given.

Baker's next two arguments have been settled. The overlap between our first degree murder and capital murder statutes has been upheld. *Penn* v. *State*, 284 Ark. 234, 681 S.W.2d 307 (1984). Death qualified juries are constitutional. *Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986).

Pursuant to Rule 11(f) of the Rules of the Supreme Court and Court of Appeals, the state has raised what it perceives may be a prejudicial error. Baker argued in the penalty phase of her trial that pecuniary gain should not be submitted as an aggravating circumstance which would justify the death penalty, since that duplicates an element of the crime of robbery/murder. The argument is based on *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 546 (1986), where the Eighth Circuit found that the state violates the eighth and fourteenth amendments of the United States Constitution by using an aggravating circumstance as an element of the underlying crime.

Since Baker received a sentence of life without parole, instead of the death penalty, she could not have been prejudiced by the submission of the aggravating circumstance. *See Williams* v. *State*, 260 Ark. 457, 541 S.W.2d 300 (1976); *Sumlin* v. *State*, 266 Ark. 709, 597 S.W.2d 571 (1979).

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 points argued or in the other objections abstracted for review.

Affirmed.

SKAGGS COMPANIES, INC. *v.* Loraine WHITE

86-28 711 S.W.2d 819

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Wright, Lindsey & Jennings, by: *Edwin L. Lowther*, for appellant.

Gary Eubanks & Associates, by: *William Gary Holt* and *James Gerard Schulze*, for appellee.

JOHN I. PURTLE, Justice. The appellee obtained a jury verdict for damages in the amount of $48,500.00 in a slip and fall case. This appeal is from the refusal of the trial judge to grant a directed verdict in favor of appellant at the close of the appellee's case and at the close of all the evidence. We agree with the appellant that the motion should have been granted.

Both sides agree on the law which controls this case. To establish liability on the part of the owner or operator of a store, the plaintiff must prove the presence of the substance on the floor resulted from the negligence of the owner, or that the owner knew, or reasonably should have known, of the presence of the substance on the floor and that he failed to use ordinary care to remove or

control it.

The appellee stepped into a clear gel-like substance which was only a few inches in circumference. The substance was located in a well-traveled aisle of the Skaggs Alpha Beta store located at 8415 West Markham Street in Little Rock, Arkansas. There was no color or odor to the substance which caused the appellee to slip and fall. There was no evidence offered, from any source, to indicate the length of time the substance had been on the floor or how it got there. No one saw it before the appellee fell. Skaggs offered testimony that an employee had walked down the aisle five minutes before the occurrence and did not observe the foreign matter. There was no evidence that the substance on the floor was part or parcel of anything sold by the appellant. In fact there is a complete absence of anything identifying the substance or indicating the length of time it had been on the floor. There is no presumption of negligence from the mere fact that a customer slips and falls while in the store. *Moore* v. *Willis*, 244 Ark. 614, 426 S.W.2d 372 (1968). The evidence in the present case is almost identical to that presented in *Jackson & Kroger Co.* v. *Hemphill*, 245 Ark. 699, 434 S.W.2d 818 (1968). In *Hemphill* we reversed the ruling of the trial court and held that the trial court erred in refusing to grant the directed verdict motion of Kroger at the close of all the evidence. See also, *Safeway Stores, Inc.* v. *Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986).

The fact that the appellee suffered severe injuries and sustained much expense is not evidence of negligence. Under the facts of this case, we have no choice but to reverse and dismiss.

Reversed and dismissed.

SCHUECK STEEL, INC. *v.* McCARTHY BROTHERS COMPANY

86-96 711 S.W.2d 820

Supreme Court of Arkansas
Opinion delivered July 7, 1986
[Supplemental Opinion on Rehearing October 20, 1986.*]
[Rehearing denied November 24, 1986.*]

Owens, McHaney & Calhoun, by: *John C. Calhoun, Jr.*, for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant Schueck Steel, Inc. filed suit to foreclose a lien against appellee McCarthy Brothers Company. The trial court granted a default judgment against appellee. Later, the trial court set aside the default judgment. Appellant appeals, contending that the trial court erred in setting aside the default judgment. We dismiss the appeal because the setting aside of a default judgment is not a final judgment by the trial court. Ark. R. App. P. 2.

We have frequently held that we will not decide the merits of an appeal when the order appealed is not a final one. *Fratesi* v. *Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984); *Corning Bank* v. *Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984); *Heffner* v. *Harrod*, 278 Ark. 188, 644 S.W.2d 579

* Holt, C.J., not participating.

(1983); *McIlroy Bank & Trust* v. *Zuber*, 275 Ark. 345, 629 S.W.2d 304 (1982); *Roberts Enterprises, Inc.* v. *Arkansas Highway Commission*, 277 Ark. 25, 638 S.W.2d 675 (1982). In all of these cases we have stated that in order for a judgment to be appealable, it must dismiss the parties or conclude their rights to the subject matter in controversy. Here, the parties are still before the trial court, and the rights in the subject matter remain to be decided.

The appellee does not raise the issue of appealability, but the issue is a jurisdictional one which we raise on our own in order to avoid piecemeal litigation. *Hyatt* v. *City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982).

Appeal dismissed.

Supplemental Opinion on Rehearing
October 20, 1986

717 S.W.2d 816

Owens, McHaney & Calhoun, by: *John C. Calhoun, Jr.*, for appellant.

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

ROBERT H. DUDLEY, Justice. In the original opinion, we dismissed this appeal on the basis that the order setting aside a default judgment was not a final order. In the petition for rehearing, the petitioner argues that we erroneously applied the "final order" rule because the default judgment in the case was set aside over ninety days after the judgment was entered. The petitioner's argument is valid. In *Maxwell* v. *Maxwell*, 240 Ark. 29, 397 S.W.2d 788 (1966) we said: "The order setting aside the default judgment at a term subsequent to the one in which the judgment was rendered is a final order and appealable." A.R.C.P. Rule 60(b) has substituted a fixed period of ninety days for the term of court. Since this order setting aside the judgment was entered more than ninety days after the judgment was entered, it is a final and appealable order. Therefore, we grant the petition for rehearing and reinstate the appeal. In this supplemental opinion we affirm the case on its merits.

The material facts of the case are that Missouri Pacific Railroad Company contracted with appellee, McCarthy Brothers Company, for the construction of a locomotive repair facility in North Little Rock. Appellee McCarthy in turn subcontracted part of the project to appellant, Schueck Steel, Inc. At the conclusion of appellant Schueck's work on the project, appellee McCarthy refused to pay Schueck the contract balance of $91,406.68. Schueck filed a materialman's lien against the Missouri Pacific property. On February 5, 1985, Schueck sued McCarthy for the debt and joined Missouri Pacific to foreclose the lien. Federal Insurance Company was joined as McCarthy's surety. Missouri Pacific filed a timely general denial on February 25, 1985. McCarthy did not file an answer. On March 14, 1985, Schueck non-suited both Missouri Pacific and Federal Insurance Company. This action left only McCarthy as a defendant, and McCarthy had not answered. On March 18, 1985, Schueck filed a motion for a default judgment against McCarthy. The trial court granted the default judgment. Following writs of garnishment against Missouri Pacific and a bank, McCarthy, on March 28, moved to set aside the default judgment. On April 22 the trial court, by letter opinion, ruled that the default judgment should be set aside. The trial court gave two reasons for its ruling: (1) the answer filed by Missouri Pacific inured to the benefit of McCarthy pursuant to the common defense doctrine as set out in

Firestone Tire & Rubber Co. v. *Little*, 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980), and (2) the answer by the common defendant was not erased by the later dismissal of Missouri Pacific.

Appellant, in its original brief in this court, does not question the first part of the ruling which concerns the applicability of the common defense doctrine to this case. Instead, appellant questions only the second part of the ruling. The following two statements contained in the argument of appellant's opening brief state the argument very clearly:

> This case presents a narrow issue of procedure: Is a defaulting party insulated from judgment by reason of an answer once filed by a co-defendant even though the answering defendant is no longer in the case at the time a default judgment is requested and entered?
>
> The sole and limited issue for decision is whether MoPac's answer continued to inure to the benefit of McCarthy after MoPac was dismissed from the suit.

The appellee responded to the argument in its brief by citing a case, *Rogers* v. *Watkins*, 258 Ark. 394, 525 S.W.2d 665 (1975), which is squarely in point. In that case, the plaintiff filed suit against a seventeen year old girl, her mother, and her father. The mother and daughter answered in due time, while the father did not. The plaintiff dismissed the mother and the daughter, and then took a default judgment against the father. We reversed and expressly held that the answer inured to the benefit of the father, even after the daughter and her mother were dismissed from the suit. On the basis of the *Rogers* precedent, the trial court ruled correctly in the case at bar.

In its reply brief the appellant first contends that *Rogers* was not correctly decided because the common defense doctrine should not have been applied. (For a discussion of the subject, see Note, *Firestone Tire & Rubber Co.* v. *Little: Overextension of the Common Defense Doctrine*, 35 Ark. L. Rev. 328 (1981)). Next, appellant argues that the common defense doctrine should not be applicable in the case at bar since Missouri Pacific was only secondarily liable and the defenses were not truly common. In so contending, the appellant has shifted arguments and, for the first

time in the reply brief, is actually contending that the trial court erred by applying the common defense doctrine.

As set out earlier, the trial court made a ruling on two separate points. One of those points was that the common defense doctrine provided an answer for the common defendant, appellee McCarthy. Appellant did not question that ruling in its opening brief, instead, it raises the argument for the first time in the reply brief.

We do not consider arguments raised for the first time in a reply brief. *Myers* v. *Muuss*, 281 Ark. 188, 662 S.W.2d 805 (1984). The reason is that the appellee is not given a chance to rebut the argument. *Yellow Cab Co.* v. *Sanders*, 250 Ark. 418, 465 S.W.2d 324 (1971). Accordingly, we do not consider appellant's argument that the trial court erred by applying the common defense doctrine.

Affirmed on its merits.

HOLT, C.J., not participating.

Billy Earl MITCHELL *v.* STATE of Arkansas

CR 83-108 711 S.W.2d 821

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Achor & Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

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

STEELE HAYS, Justice. On May 25, 1983 Billy Earl Mitchell was convicted of four counts of aggravated robbery. As an habitual offender he was sentenced to four consecutive life sentences. He did not testify in his own behalf and at sentencing he offered no reason why sentence should not be imposed. The

judgment on those convictions was unanimously affirmed by this court on December 19, 1983. *Mitchell* v. *State*, 281 Ark. 112, 661 S.W.2d 390.

Mitchell now requests an evidentiary hearing on a Rule 37 petition. He contends he was in Seattle, Washington on June 1, 1982, when the robberies occurred. That defense was presented at trial and was rejected by the jury. It affords no basis for post-conviction relief. *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983). The petition is entirely unsubstantiated and consists of nothing more than the bare assertion that Mitchell told his appointed counsel there were persons who could corroborate his alibi defense that were not called as witnesses. The petition lists five individuals (Linda Smith, Barbara Beaver, Peggy Slaughter, Willie Denton and James Poke, Jr.) whose names were allegedly given to defense counsel as being able to verify Mitchell's presence in Seattle when the crime was committed.

We have said numerous times that allegations without substantiation do not justify a hearing. *Gilbert* v. *State*, 282 Ark. 504, 669 S.W.2d 455 (1984). And that bare allegations, without factual support do not justify an evidentiary hearing. *Blakely* v. *State*, 283 Ark. 138, 671 S.W.2d 183 (1984); *Jones* v. *State*, 283 Ark. 363, 676 S.W.2d 738 (1984).

The petition does not give the addresses of these individuals, nor tell us how they knew Mitchell, nor even that they would testify Mitchell was in Seattle on June 1, 1982 as alleged. For that matter, the petition does not even purport to claim that defense counsel did not contact these people. He claims simply that he gave his lawyer their names. We spoke to that argument in *Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984):

> It is well settled that the decision to call certain witnesses and reject other potential witnesses is largely a matter of trial strategy. Counsel must use his own best judgment to determine which witnesses will be beneficial to his client. See *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983). It is possible that another attorney might have attempted, and perhaps succeeded, in having the testimony of the witnesses admitted into evidence, but petitioner has not established that counsel's decision prejudiced him or amounted to more than a tactical decision.

In order for Billy Mitchell to prevail in his allegation of ineffective assistance of counsel, he must overcome a strong presumption that his counsel was competent. He must be prepared to prove that his representation was so "patently lacking in competency or adequacy that it was the court's duty to correct it." *Davis* v. *State*, 267 Ark. 507, 592 S.W.2d 118 (1980). Moreover, he must prove by *clear and convincing evidence* that he was so prejudiced that he did not receive a fair trial. *Jeffers* v. *State*, 280 Ark. 458, 658 S.W.2d 869 (1983). And that the result of the trial would probably have been different had it not been for defense counsel's incompetence. *Lascano* v. *State*, 282 Ark. 501, 669 S.W.2d 453 (1984). *Strickland* v. *Washington*, 466 U.S. 668 (1984). Mitchell has failed to do that.

The petition further charges that the testimony of petitioner's parole officer, Randy Noah, who testified that Mitchell did not show up for an appointment on June 2, 1982 (the day after the robbery) had no probative value since Mitchell's defense was that he was in Washington state. Though Noah's status as a parole officer was not exposed, a reference to his "official duties" told the jury indirectly that Mitchell was a convicted felon. Thus, he argues, there was prejudice to the defense purely for the sake of prejudice since the testimony had no redeeming probative value to the prosecution. This argument would be better left unsaid for two reasons—it was raised in the appeal and therefore it is not subject to post-conviction relief, *Hayes* v. *State, supra*; more importantly, defense counsel made a timely motion for a mistrial, which hardly supports the allegation of ineffective assistance. Aside from that, Noah's testimony had a distinct probative value to the prosecution: his testimony was that Mitchell was in his office in Little Rock on May 25, 1982, and told him he was driving a 1968 Ford XL-500 two-door automobile, the car used in the robbery. Mitchell was scheduled to return on June 2 but failed to appear.

One other allegation of the petition warrants response: the petition implies that Mitchell's guilt is doubtful, i.e. "It is important to realize that in this case the identification of Petitioner was quite weak." To the contrary, the proof that Mitchell was one of the robbers was clear and convincing, and based on both direct and circumstantial evidence. Four masked men robbed the Godfather's Pizza restaurant in North Little

Rock at about 10:30 p.m. One of them was wearing a yellow shirt, gray pants, orange socks and silver, Corfam tuxedo slippers. Four or five victims had their money and billfolds taken from them. As the robbers were leaving in a 1968 Ford XL-500 two-door automobile they ignored a police signal to stop and drove off at high speed. The Ford evaded the police long enough for three of the men to escape on foot, before running into a ditch. Officer Polk saw the driver, whom he positively identified as Billy Mitchell, run from the car wearing a yellow shirt, gray pants, orange socks and silver shoes. The masks, money and billfolds, all identified by the victims as the articles taken from them, were recovered.

The car was identified as belonging to Joe Mitchell, Billy's father. Mitchell was contacted that night at his home and told the officers the car was in Billy's custody, that Billy lived with his mother at 4719 Patterson Street in North Little Rock. At trial Mitchell testified the car had been stolen, but on cross-examination he admitted the theft was not reported to the police until the following day.

The defense called four witnesses: Ms. Diane Paige, Billy's sister, testified that on May 26, 1982 she and Billy's mother, Bertha Thomas, put Billy on a bus at Conway, Arkansas, bound for Washington, that he called her long distance after he arrived three or four days later. Asked if he told her where he was calling from, she said, "He was in Washington. I don't know if it was Seattle or D.C." Mrs. Paige admitted that when the police came to her home on June 1 or 2 asking her brother's whereabouts she did not tell them he was in Washington.

Mrs. Bertha Thomas testified that Billy was living with her during the latter part of May, 1982. She said she went with her daughter to put Billy on a bus on May 26, 1982. When asked where the station was located she said, "At Lonoke. I mean. Just a minute, was it Lonoke or Carlisle?" Later, she was unable to recall where it was. She said when the police came looking for Billy she didn't tell them where he was because she didn't know where he was going when he left on the bus. Nor did she tell them he had left the state on May 26.

Another witness for the defense, Glenn Mosley, an inmate at the Department of Correction, testified that he had known Billy Mitchell for six or seven years. He said that on June 2 or 3 he had

received a letter from Billy addressed to him at the Pulaski County Jail. The letter was postmarked Seattle, Washington. On cross-examination he admitted he did not know exactly when he got the letter.

Another inmate, James Norwood, testified that he had participated in the June 1 robberies. He said Billy Mitchell was not one of the robbers, though he admitted Billy's car was used. He said he and Sidney Johnson robbed the restaurant while the other two, whom he could not identify, remained in the car. On cross-examination he admitted that he had given the police a sworn, detailed statement shortly after the robberies in which he named Billy Mitchell as one of the robbers. He said his earlier statement was false.

The petition in this case provides no substance to necessitate a hearing. It consists of bare allegations and conclusory assertions. The trial record demonstrates that defense counsel, who was court appointed at little or no compensation, did the best he could with what he had to work with. Certainly the petition provides no basis whatever for ruling otherwise. Nothing in the record suggests his representation was "a farce and a mockery" (*Davis* v. *State*, 267 Ark. 507, 592 S.W.2d 118 (1980)) and, accordingly the petition is denied.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I think petitioner is entitled to an evidentiary hearing on his request for Rule 37 relief. All parties agree that *Strickland* v. *Washington*, 466 U.S. 668 (1984), is controlling. The real issue is whether sufficient grounds are alleged which, if proven, constitute ineffective assistance of counsel.

As an alibi defense, the defendant alleges that he was in the State of Washington on the date the crime was committed. He also alleges that he gave his appointed defense counsel the names and addresses of several people in Washington who could verify his presence in that state on the date in question. No fair-minded person could doubt that if witnesses testified that petitioner was over 2000 miles away at the time of the crime, that this proof would be much stronger than if witnesses simply testified that he was not in Little Rock at the time of the crime. With the latter

testimony, all the witnesses were saying was that he was not in their presence when the crime was committed. In the present case it is important to note that the other persons convicted of this crime testified that petitioner was not with them when they committed the aggravated robbery of Godfather's Pizza.

The appointed defense attorney apparently made no attempt to obtain an out of state subpoena for the Washington witnesses. Since he had the names and addresses of several of these witnesses, it was reasonable to expect him to try to get at least one witness present for the trial. Failure to do so, under the circumstances of this case, amounts to ineffective assistance as defined in *Strickland*. There is no way of determining whether the allegations are true unless the trial court gives the petitioner a chance to prove his allegations and has the opportunity to examine the allegations.

I would grant the petition.

Sylvester WILLIAMS *v.* STATE of Arkansas

CR 86-26 711 S.W.2d 825

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Edward T. Barry, for appellant.

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

STEELE HAYS, Justice. Sylvester Williams was charged with possession of marijuana with intent to deliver, a felony. Williams was acquitted of that charge but the jury convicted him of the lesser offense of possession, a misdemeanor, and sentenced him to six months in jail and imposed a fine of $500. Williams argues several points on appeal but we address only one, the sufficiency of the evidence, because on that basis the case must be reversed and

dismissed. Our jurisdiction attaches under Rule 29(1)(a and c), interpretation and construction of Article 2, Sections 8 and 10, of the Arkansas Constitution and Ark. Stat. Ann. § 28-531 et seq. (Repl. 1979).

Deputy Sheriff Steve Spades and Walnut Ridge police officer Kenny Jones testified for the state. The substance of their testimony was they stopped Sylvester Williams and Charles Sweat on the night of February 15, 1984 for driving at a speed of 44 in a 35 mile an hour zone. Williams was driving and Sweat was seated in the right front seat. The car emitted a visible cloud of blue smoke which the officers attributed to marijuana. Sweat had a significant amount of marijuana scattered over his clothing and a brown paper sack on the floorboard in front of him contained 3.6 ounces of marijuana. Several roaches, one still "simmering," were found in the ash tray. No traces of marijuana were found on Sylvester Williams.

When a defense motion for a directed verdict was overruled Sylvester Williams testified that Charles Sweat had paid him $10 to drive him to Pocahontas in a vehicle borrowed from Williams's ex-wife. Williams took Sweat to the Sonic drive-in where Sweat got into a truck with two other men. Williams said in about fifteen minutes Sweat came back and they left. Williams saw nothing change hands between Sweat and the other men and he did not see a paper sack in Sweat's possession when he returned.

When they were nearing Walnut Ridge Sweat lit a marijuana cigarette. Williams said he told Sweat not to smoke that in his car and soon after that the police stopped them. Williams denied knowing anything about Sweat's reasons for going to Pocahontas or knowing anything about the sack of marijuana. He claims he first observed the sack when officers removed it from the passenger's side of the car. One officer's testimony placed it in the center of the floorboard, the other on the passenger's side between Sweat's feet.

On appeal from a judgment of conviction in a criminal case we affirm if there was any substantial evidence to support the verdict. *Pickens* v. *State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982). Substantial evidence is defined as evidence which is of sufficient force that it will compel a conclusion one way or the other. It must be more than mere suspicion or conjecture. *Jones* v.

State, 269 Ark. 119, 598 S.W.2d 748 (1980).

We have held that when the premises where contraband is found are not *exclusively* subject to the control and dominion of the accused, some additional factor must be present linking him to the contraband. *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976). The difficulty of proving possession where the defendant's control of the premises is not exclusive was described by the authors of 56 ALR3d 948, at page 953:

> As might be expected, no sharp line can be drawn to distinguish between the congeries of facts which will, and those which will not, constitute sufficient evidence of the defendant's knowledge of the presence of illicit drugs in a place to which he had access, but not exclusive access, and over which he had some control, but not exclusive control. Consequently, in the majority of cases where the defendant's conviction has been sustained, the courts have had to rely on certain evidential factors which, when added to nonexclusive possession by the defendant, supported a finding of the defendant's knowledge of the presence of and control of the drugs.

In *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982) and *Ravellette* v. *State*, 264 Ark. 344, 571 S.W.2d 433 (1978) we considered the quantum of proof necessary to sustain a conviction for possession of a controlled substance where the defendant did not have exclusive control of the premises on which the contraband was discovered. We held there must be some element of proof in addition to the joint control to link the defendant to the illegal matter. Quoting from the *Ravellette* opinion:

> When only circumstantial evidence is presented, as here, there must be some factor in addition to the joint control of the premises to link the accused with the controlled substance. *Cary* v. *State*, 259 Ark. 510, 534 S.W.2d 230 (1976). See also *Evans* v. *United States*, 257 F.2d 121 (C.A. 9 Cal. 1958). In other words it cannot be inferred that one in nonexclusive possession of premises knew of the presence of drugs and had joint control of them unless there were other factors from which the jury can reasonably infer the accused had joint possession and control.

In *Wilkes* v. *State*, 572 S.W.2d 538 (Tex. Cr. App. 1978) the rule was summarized:

> It has been consistently held in this State that possession means more than just being where the action is: the State must prove two elements: (1) that the accused exercised care, control, and managment over the contraband, and (2) that the accused knew the matter possessed was contraband. * * * Therefore, there must be additional independent facts and circumstances which affirmatively link the accused to the contraband in such a manner that it can be concluded he had knowledge of the contraband as well as control over it. . . ." See also *Rice* v. *State*, 548 S.W.2d 725 (Tex. Cr.App. 1977).

In a similar case, *State* v. *Bowyer*, 693 S.W.2d 845 (Mo.App. 1985), a Missouri Court of Appeals reversed and dismissed a conviction for possession of about three ounces of marijuana. The defendant, driving the car of his estranged wife, who was riding as a passenger, was stopped for speeding. The officer noticed a feathered clip dangling from the rear view mirror which he recognized as an instrument for smoking marijuana. The clip contained a dried roach. The officer opened the console between the two seats and removed a Tupperware container with a partially smoked marijuana cigarette. The driver was charged with possession and convicted in spite of the estranged wife's testimony that the defendant had not been in her car for six months, that the items belonged to her brother. In reversing, the court said:

> The mere presence of the accused on the shared premises where the drugs are found, however, does not suffice to convict for possession. Nor does proximity to the contraband, alone, even as to a substance in plain sight, tend to prove ownership or possession as among several persons who share the premises.

The court noted that where the conviction rests not on exclusive possession, but on shared possession of premises, an inference of possession of contraband found in an automobile does not arise from the fact of joint possession alone, but *only* from evidence of additional circumstances which inculpate the

accused. *Bowyer* at p. 849.

Here there was no evidence connecting the appellant to the marijuana other than the fact he was the driver of a borrowed car in which the marijuana was found. But even giving that fact and the proof in its entirety its highest probative value, *Pope* v. *State*, 262 Ark. 476, 557 S.W.2d 887 (1977), it fails to compel a conclusion that Williams was in constructive possession of the marijuana. There is no proof Williams had knowledge of its presence in the car prior to the point at which Sweat lit a marijuana cigarette shortly before being stopped.

The state urges there was marijuana in William's seat. But whether the car was equipped with bucket seats or a single seat is not revealed and the abstract tells us only that there was marijuana in "the seat." Even if that were intended to mean Williams's seat, it would not be so material to the issue of possession as to require a different result, in view of the testimony that traces of marijuana were "strung all over" the floorboard and Charles Sweat. This bit of evidence was too ambiguous to be of much value. Even if it could be said Williams had knowledge of the presence of marijuana, which arguably might be inferred from the circumstances, the proof would still be left wanting with respect to some additional element from which to conclude that Williams had control of the illegal substance. *Ravellette* v. *State, supra*. Nor do we attach any great significance to the presence of an undetermined number of roaches in the ash tray. Assuming they were marijuana (they were not produced at trial and were not tested) they could have belonged to Williams's ex-wife, or even to someone else. The one which was smoldering may have been the one partially smoked by Sweat, which was not otherwise accounted for in the abstracted testimony.

Obviously Williams may have known about the sack of marijuana, he may even have participated in its purchase, but that is conjecture rather than fact, and our criminal law does not permit a conviction supported by conjecture alone. *Redmon* v. *State*, 282 Ark. 353, 668 S.W.2d 541 (1984).

Reversed and dismissed.

Dewey L. EARLE, Individually, Winnie POWELL, Individually and as Next Friend of Dewey L. EARLE
v. Pam BENNETT

86-101 711 S.W.2d 829

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Art Dodrill, for appellant.

Dodds, Kidd, Ryan & Moore, by: *Judson C. Kidd*, for appellee.

DAVID NEWBERN, Justice. The appellants appeal from an order granting a guardianship of the person and estate of Dewey L. Earle and appointing the appellee as guardian. The appellants contend (1) that no notice of the guardianship petition was given to Dewey L. Earle, (2) that the appellee presented no bond, and (3) that the appellee presented no proof of incompetency of Dewey L. Earle. The appellee contends that the order was for a temporary guardianship pursuant to Ark. Stat. Ann. § 57-840 (Supp. 1985) which requires no prior notice to the prospective ward. We hold the guardianship granted was invalid.

The appellants' abstract shows that a "Petition for Appointment of Guardian of the Person and Estate of Dewey L. Earle" was filed February 26, 1986, by the appellee, and that the petition

was granted by a court order of March 3, 1986. The appellants' abstract makes no mention whatever of a temporary guardianship petition or order. The appellee does not supplement or challenge the appellants' abstract in this respect. The record bears out the appellants' claim that the order of March 3, 1986, granted a guardianship which was not temporary. It complied with none of the requirements of § 57-840 for a temporary guardianship.

Ark. Stat. Ann. § 57-825 (Supp. 1985) permits appointment of a guardian of the person and estate of an incapacitated person. Ark. Stat. Ann. § 57-831 (Supp. 1985), in part, provides:

> Except as provided in subsection (a) of this Section, before the court shall appoint a guardian, other than a temporary guardian, notice of the hearing of the application for the appointment of such guardian shall be served upon the following:
>
> > (1) The alleged incapacitated person if over fourteen (14) years of age, and the alleged incapacitated person shall be notified of his rights under Section 16 [§ 57-835]. This notice shall be served with the notice of hearing. . .

As the exceptions in subsection (a) do not apply, and this was not a temporary guardianship, it is clear that notice to Dewey L. Earle was required to have been given prior to the appointment of the appellee as her guardian.

The appellants filed their notice of appeal in the trial court and filed the record with the clerk of this court on May 2, 1986. The appellee has abstracted an order of the probate court of June 10, 1986, which characterizes the March 3, 1986, order as one for a temporary guardianship and purports to make it final. The order of June 10, 1986, is not in the record before us. If indeed such an order was entered, the court lacked jurisdiction to enter it because the record had been docketed in this court. *See State* v. *Adkisson*, 251 Ark. 119, 471 S.W.2d 332 (1971); *Estes* v. *Masner*, 244 Ark. 797, 427 S.W.2d 161 (1968); *Andrews* v. *Lauener*, 229 Ark. 894, 318 S.W.2d 805 (1958).

Reversed and dismissed.

HICKMAN, J., dissents and would affirm under Rule 9 of Rules of the Arkansas Supreme Court and Court of Appeals.

Ronald SATTERLEE *v.* STATE of Arkansas

CR 86-35 711 S.W.2d 827

Supreme Court of Arkansas
Opinion delivered July 7, 1986
[Rehearing denied September 15, 1986.]

Appellant, pro se.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted in a municipal court of driving a motor vehicle on a public highway without a driver's license. Ark. Stat. Ann. § 75-307 (Repl. 1979). He appealed the conviction, and it was affirmed by

the circuit court. In the appeal to this court, the appellant, appearing pro se, has stated thirty points for reversal. Some of the points are incomprehensible to us. Others are lacking in authority or convincing argument, and we will not consider them. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977). From the appellant's argument, we have distilled two points with which we can deal. He argues (1) the statute is an unconstitutional intrusion upon his personal rights and (2) he was not properly proceeded against as there was no indictment or jury trial. We find merit in neither contention, and thus we affirm.

1. Constitutionality of the Statute

The state has the "police power" to promulgate regulations calculated to promote safety in the use of highways. *Hess* v. *Pawloski*, 274 U.S. 352 (1927). Driving a motor vehicle on a public highway is a privilege, and not an unrestrained, natural right, and the state may require a license of those who exercise the privilege. *Miami* v. *Aronowitz*, 114 So. 2d 784 (Fla. 1959); *Taylor* v. *State*, 209 S.W.2d 191 (Tex. 1948); *Cincinnati* v. *Wright*, 67 N.E.2d 358 (Ohio 1945).

2. Propriety of Proceedings

The record shows that the appellant was to have a trial by jury but refused to accept a jury which would be limited to determining the facts as opposed to the law and the facts. He thus waived his right to be tried by a jury.

No grand jury action, indictment, or information was necessary. Driving without a license, as charged in this case, is a misdemeanor. Ark. Stat. Ann. § 75-346 (Repl. 1979). A misdemeanor may be charged by a citation as occurred here. *Lowell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Affirmed.

HICKMAN, J., would affirm under Rule 9 of Rules of the Arkansas Supreme Court and Court of Appeals.

Donnie Ray PETERSON *v.* STATE of Arkansas

711 S.W.2d 830

Supreme Court of Arkansas
Opinion delivered July 7, 1986

Appellant, pro se.

No response by appellee.

PER CURIAM. On January 29, 1986, petitioner Donnie Ray Peterson pleaded guilty to burglary and theft of property and was sentenced to consecutive terms of imprisonment of forty and thirty years. The sentences were ordered served consecutive to sentences imposed for three prior convictions. On February 20, 1986, he filed a motion to "correct illegal sentence" pursuant to Act 431 of 1983 and Criminal Procedure Rule 26. The motion was denied on the same day. Petitioner does not contend that the

circuit court failed to inform him promptly that relief had been denied, and it is apparent that he was aware of the denial of his motion within the time for filing a notice of appeal since he mailed to this Court on March 7, 1986, a *pro se* appellant's brief seeking review of the lower court's action. The brief was returned to him because a notice of appeal had not been filed and there was no record lodged with this Court. He was also informed by our criminal coordinator at that time that notices of appeal must be filed within thirty days of the date the order was entered. Although he still had until March 22 to file a timely notice of appeal, he did not do so. Petitioner now seeks a belated appeal of the circuit court order.

Petitioner's sole reason for not filing a notice of appeal was his lack of knowledge of appellate procedure. He contends that he was relying on another prison inmate to pursue the appeal and that the inmate abandoned him after the inmate was placed in punitive isolation. He argues that since his only source of legal assistance was unavailable, he should be allowed to proceed with a belated appeal.

We will grant a belated appeal of an order denying a petition for postconviction relief if good cause is shown for the petitioner's failure to file a timely notice of appeal. *See Scott* v. *State*, 281 Ark. 436, 664 S.W.2d 475 (1984). All litigants, including those who proceed *pro se*, must bear responsibility for conforming to the rules or demonstrating good cause for not doing so. We have consistently held that ignorance of the rules of appellate procedure is not in itself good cause to grant a belated appeal. *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984); *Thompson* v. *State*, 280 Ark. 163, 655 S.W.2d 424 (1983); *Grain* v. *State*, 280 Ark. 161, 655 S.W.2d 425 (1983).

The fact that an appellant is in prison and trusted another prisoner to advise him does not excuse the failure to conform to the rules. An appellant may not by-pass the requirement of filing a timely notice of appeal by simply asserting that he relied on a misinformed or irresponsible fellow prisoner. There is no guarantee of effective legal assistance from a person who is not a licensed attorney.

Motion denied.

Willie Earl CAMPBELL *v.* STATE of Arkansas

CR 85-172 712 S.W.2d 302

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Cross, Kearney & McKissie, by: *Gene E. McKissie*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, Willie Earl Campbell, was charged with four felonies and with being an habitual offender with four prior convictions. The jury found Campbell guilty of all the charges and imposed sentences as follows: For burglary, 27 years; use or possession of a prohibited weapon, 10 years; being a felon in possession of a firearm, 10 years; and terroristic threatening, 15 years. The trial judge directed that the sentences run consecutively. Campbell's appeal comes to this court under Rule 29(1)(b).

The appellant's attorney filed a no-merit brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967). The Attorney General agreed that there is no merit in the appeal. Our Criminal Justice Coordinator, however, noted apparent merit and made an appropriate recommendation. We agree with her conclusion that the State failed to prove the charge of burglary.

In April, 1984, Lula Johnston, age 91, was standing on the porch of her home in Pine Bluff when a man suddenly appeared beside her. He put his hand over her mouth and said he would kill her if she screamed. He threw her to the floor and began feeling across her breast, apparently in search of her purse. Ms. Johnston began screaming and kept it up as the intruder dragged her

toward the door. She fought back until her screams brought several neighbors to the scene. At that point the intruder released her, ran through the house, and broke a rear window to make his escape. At least four of the neighbors who saw him flee recognized him as Willie Earl Campbell, whom they knew. When the police arrested Campbell at his home he was hiding in a closet. Also in the closet was a sawed-off shotgun which Campbell admitted to be his.

Burglary is defined as entering another person's occupiable structure with the purpose of committing therein any offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977). The State did not prove an unlawful entry upon Ms. Johnston's front porch, for the statute permits an entry upon premises that are open to the public. Section 41-2001(3). We need not consider the possibility that Campbell entered the house for the purpose of committing an offense in the course of his efforts to escape apprehension; there was no such proof.

The judgment is modified to delete the conviction and sentence for burglary. As so modified it is

Affirmed.

HOLT, C.J., not participating.

PUROLATOR COURIER CORPORATION
v. ARKANSAS AIR COURIER

86-5 712 S.W.2d 892

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Friday, Eldredge & Clark, by: *Michael G. Thompson*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee.

GEORGE ROSE SMITH, Justice. The appellee, Arkansas Air Courier, applied to the Arkansas Transportation Commission for authority to transport by motor vehicle, between points in the State of Arkansas, various papers exchanged among banks, such as cash letters, data processing work, commercial paper, documents, and business records. The application was opposed only by the appellant, Purolator Courier Corporation. After a hearing the Commission granted the application. This appeal from the circuit court's affirmance of the Commission's order comes to this court under Rule 29(1)(d).

Our review in a case of this kind is de novo, much like that in a chancery appeal. Ark. Stat. Ann. § 73-1760(f) (Repl. 1979), which incorporates § 73-134. The latter section provides

that the Supreme Court shall review all the evidence and make such findings as are proper and equitable. Nevertheless, we must keep in mind that the Commission saw and heard the witnesses, whereas we review the record only. Consequently we uphold the Commission's order unless it is against the weight of the evidence. *Wisinger* v. *Stewart*, 215 Ark. 827, 223 S.W.2d 604 (1949). In the present case we find the Commission's order to be supported by the preponderance of the evidence.

The applicant, AAC, has been transporting bank paper since it obtained a federal interstate permit in 1976. At that time all its operations were by air, but the 1981 air controllers' strike reduced the availability of weather information to such an extent that AAC had to convert its business from air transportation to motor vehicle transportation. At first it conducted an intrastate business in Arkansas without a permit, because it was not sure that it needed a permit and was erroneously told by an employee of the Commission that no permit was required. In 1984 the present application for statewide authority was filed. AAC is a comparatively small individual proprietorship employing ten drivers and one aviation pilot. When the application was filed, AAC was serving about 80 banks in the state.

The protestant, Purolator, is a comparatively large company with interstate authority to serve virtually every point in the United States. It carries not only banking paper but also general commodities, by air as well as on the surface.

AAC's application was supported by the Arkansas branch of the Federal Reserve Bank and by the three large Little Rock banks, all of which serve as clearing houses for smaller banks throughout the state. Their witnesses discussed in great detail the importance that banks attach to the rapid transfer of commercial paper to and from the clearing houses, so that the banks can debit and credit the checks quickly and the customers have the use of their money as soon as possible. The time required for transfers is referred to as the float or turn-around. Two witnesses testified that AAC had reduced the turn-around from two days to one. The Commission commented in its opinion on the testimony of a DeWitt banker who said that Purolator's inability to deliver the bank's paper until 9:25 to 10:00 a.m. had resulted in five or six employees sitting idle from 8:30 until the paper was delivered.

When the bank changed to AAC, the paper was delivered by 8:15 and the employees were able to get to work at once. There was testimony that AAC adjusts its schedules to meet the banks' needs. Purolator, by contrast, has commodities to be delivered in addition to bank paper, so that, as Purolator's manager conceded, "we have limits to our flexibility."

The specific arguments presented by Purolator do not call for extended discussion. It is said that AAC produced an insufficient number of witnesses to establish a need for AAC to be granted state-wide authority. According to the testimony as we understand it, the majority of interbank transactions in Arkansas are cleared through the three large Little Rock banks and the Federal Reserve. Representatives of all four testified in favor of the application. In addition, bankers from DeWitt, El Dorado, Salem, and Springdale testified favorably from the point of view of the smaller banks. In all, AAC presented eight public witnesses in support of its position. No public witness came forward to testify for Purolator. Since there was no testimony to indicate that something less than state-wide authority would be preferable, we hardly see that the Commission was presented with any middle ground between granting and denying the requested authority. The Commission specifically found: "There is obviously a tremendous demand for the specialized type of work and service applicant provides." Moreover, the existence of a genuine need for AAC's service is indicated by AAC's having built up a clientele of some 80 banks. Several witnesses said they paid more for AAC's service than they had for Purolator's, but it was worth the difference.

Purolator concludes by arguing that AAC is not morally fit to receive the requested authority, because it operated illegally, without a permit, for several years and because it received three citations for violations of Arkansas law. The Commission summarily dismissed the illegality of AAC's prior conduct by admitting for the record that a Commission employee had misled AAC. There is very little proof about the nature of the citations, but at the very most they were merely allegations, not proof. The charges had not yet been heard when the Commission decided the case. Upon the record we cannot hold that AAC is not morally fit to exercise the authority it seeks.

Affirmed.

HOLT, C.J., not participating.

Larone LOWE, et ux *v.* Linda MORRISON, et al.

86-92 711 S.W.2d 833

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Honey & Rodgers, P.A., by: *Danny P. Rodgers*, for appellant.

Sanford L. Beshear, Jr., for appellee.

DARRELL HICKMAN, Justice. The question in this case is whether a third party, who has a money judgment against the husband, can force partition and sale of land held by the husband and wife by the entirety. The answer is no. The trial court dismissed the partition action filed by Larone and Floy Lowe against Jones and Helen Morrison. We affirm the decree.

The Lowes and the Morrisons are neighbors. The families got involved in a dispute and Larone Lowe was severely injured by Jones Morrison and his two sons, Nick and Rodney. Larone and Floy Lowe sued and got judgment against Jones, Nick and Rodney Morrison jointly and severally. The case was appealed twice. *Morrison* v. *Lowe*, 267 Ark. 361, 590 S.W.2d 299 (1979);

Morrison v. *Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981). Ultimately we affirmed a large judgment.

Before the second appeal, the Lowes filed suit against the Morrisons alleging that Jones Morrison fradulently conveyed his property in order to avoid having to pay the judgment. The deeds in question were executed on August 21 and 26, 1975, from Jones and Helen Morrison, husband and wife, to Helen and Nick Morrison and Willie Johnson, conveying just under 400 acres of real property. Another chailenged deed was executed on July 21, 1978, in which Helen Morrison conveyed a 3.5 acre tract from the above property to Rodney and Linda Morrison, husband and wife. The chancellor found that the conveyances were made in an effort to avoid the judgment against the Morrisons and that the conveyances from Jones and Helen Morrison were void as to the interest Jones conveyed and that the deed from Helen Morrison to Rodney Morrison was void as to the interest Helen purportedly acquired from Jones by virtue of the first two deeds.

On April 23, 1984, by way of a sheriff's deed on execution, the Lowes bought several parcels of land owned by the Morrisons. They bought one parcel of 16 acres, another of 65.5, another of 36.8, another of 69 acres, and one of 3.5 acres from Rodney Morrison. Their bid of $150,000 was to be credited against the judgment.

In 1984 the Lowes filed two actions to force the sale of the land; one action concerned the 3.5 acre tract and the other concerned the remaining land. The cases were consolidated for trial. It was stipulated that all of the property was held by Jones and Helen Morrison as tenants by the entirety before the earlier conveyances. The trial judge correctly held that since he had found the deeds void and the title was again in Helen and Jones Morrison by the entirety, partition would not lie.

Partition is a statutory right. Ark. Stat. Ann. § 34-1802 (Supp. 1985) provides:

> Any persons having any interest in and desiring a division of land held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned courtesy [curtesy], or in coparceny, absolutely or subject to the life estate of another, or otherwise, or under an estate by the

> entirety where said owners shall have been divorced either prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occupied by either of said divorced persons, shall file in the circuit or chancery court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear.

Noticeably absent is the right to partition an estate by the entirety where the tenants are still married. An estate by the entirety is peculiar to marriage and entails the right of survivorship. The right of survivorship to the whole can only be dissolved in a divorce proceeding, by death, or by the voluntary action of both parties.

In various cases we have touched on the question raised by this suit. First the right of survivorship cannot be defeated by an outsider such as a judgment creditor. *Ellis* v. *Ashby*, 227 Ark. 479, 299 S.W.2d 206 (1957). A third person can obtain a judgment against a husband or wife and that judgment will be a lien against the debtor's interest in the land. *Franks* v. *Wood*, 217 Ark. 10, 228 S.W.2d 480 (1950). That claim cannot, however, defeat the interest of the other spouse. *Moore* v. *Denson*, 167 Ark. 134, 268 S.W. 609 (1924). Only on the death of the other spouse can that claim be perfected. *Ellis* v. *Ashby, supra.*

In *Davies* v. *Johnson*, 124 Ark. 390, 187 S.W. 323 (1916), we held that partition would not lie against an estate by the entirety.

Affirmed.

HOLT, C.J., not participating.

Robert Lee MARSHALL *v.* STATE of Arkansas

CR 86-9 712 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered July 14, 1986
[Rehearing denied September 15, 1986.]

William C. McArthur, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Robert Lee Marshall, who uses the alias Sido, was convicted of one count of delivery of a controlled substance, one count of attempt to deliver a controlled substance, and possession of marijuana. He was sentenced to 30 years and 10 years imprisonment and a $1,000 fine, respectively. On appeal he raises four arguments. Three are virtually unsupported by the abstract of the record and require affirmance. The fourth argument questions the sufficiency of the evidence. We find the argument meritless and affirm.

The first argument is that the court had no jurisdiction because the prosecution was barred for violation of the Interstate Agreement on Detainers, codified at Ark. Stat. Ann. §§ 43-3201 et seq. (Repl. 1977). The abstracted record is void of any substantial detail which could be the basis of a rational decision. Therefore we do not reach this issue. Rule 9, Rules of the Supreme Court and Court of Appeals; *City of Star City* v. *Shepherd*, 287 Ark. 188, 697 S.W.2d 113 (1985).

The second argument concerns two taped telephone conversations between Marshall and Otis Moseby, an informant for the sheriff's department. The tapes were played for the jury and Marshall objected on two grounds. The first objection was that the state failed to furnish copies of the tapes prior to trial; the state had provided only transcripts of the tapes. Marshall filed a motion for discovery but the contents of that motion were not abstracted. We therefore do not know whether Marshall requested copies of the tapes. We have no basis to find the trial judge abused his discretion in overruling the objection. Marshall has failed to carry his burden of presenting an abstract from which

the court can determine the error of which he complains. *City of Star City* v. *Shepherd, supra.*

The second objection to the tapes was that there was an insufficient basis for authentication and identification of Marshall as being the other party to the telephone conversation. The trial judge was satisfied that Moseby could identify the other speaker as Marshall. Rule 901, Uniform Rules of Evidence, allows telephone conversations to be introduced as evidence if they are authenticated. In this case it was within the trial court's discretion to allow the evidence. *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978).

Marshall raises the argument that the taped telephone conversations violated Ark. Stat. Ann. §§ 41-4501 et seq. (Supp. 1985), the Interception of Communication Act. This argument was not made to the trial court, and we do not consider arguments raised for the first time on appeal. *Novak* v. *State*, 287 Ark. 271, 698 S.W.2d 499 (1985).

The third argument is that Marshall was limited in his cross-examination of Ken Dillon, a deputy sheriff, concerning previous convictions and pending charges against Moseby. On the record before us, there is no basis to find the trial court in error. *City of Star City* v. *Shepherd, supra.*

Marshall's fourth argument raises the issue of the sufficiency of the evidence to support two of the convictions. A review of the evidence in a light most favorable to the state is required. Moseby testified that he obtained 12 sets of "Ts and Blues" tablets from Marshall on November 8, 1984. Each set contained two tablets: one was an antihistamine and the other tablet contained pentazocine. While no money was exchanged, Moseby testified that he and Marshall agreed over the telephone that Moseby was to pay Marshall after the "sets" were sold. Later on November 20, Moseby met Marshall at a grocery store to pay for the 12 sets and to buy 20 more. Moseby, who was wired with a transmitter, gave Marshall the money for the 12 sets. Marshall then gave Moseby the 20 additional sets. At that time someone came into the grocery store and informed Marshall that Moseby worked for the sheriff's department. Marshall told Moseby to show him he was not wearing a body mike and to return the "Ts and Blues." The officers, who were outside the store in a van

monitoring the transaction, realized Moseby was in trouble. Marshall ran to a restroom in the rear of the store and was seen by two officers following him flushing a white paper towel or napkin down the commode. Marshall dropped a firearm in the bathtub and was found in possession of 2.3 grams of marijuana.

The jury convicted Marshall of one count of delivery of a controlled substance on November 8 and one count of attempt to deliver a controlled substance on November 20.

Marshall argues there was no exchange of money or anything of value to support the November 8 conviction. We have held the exchange of drugs for money or anything of value is not essential to the commission of the offense. *Anderson* v. *State*, 275 Ark. 298, 630 S.W.2d 23 (1982). Ark. Stat. Ann. § 82-2601(f) (Supp. 1985) only requires the attempted transfer of drugs in exchange for an agreed price. There is sufficient evidence to support the conviction for delivery.

Marshall argues there is insufficient evidence to support the conviction for the attempt to deliver a controlled substance on November 20, because there is no competent evidence of a controlled substance involved in the transaction. We have held it is not essential to proof of such a charge that the substance be produced in court if one sufficiently experienced with the substance could testify that it was indeed that substance. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979). Moseby had received 12 sets of "Ts and Blues" on the 8th. Moseby testified the sets he received on the 20th looked like the ones he received on the 8th. Moseby further testified he had seen "Ts and Blues" before. That is sufficient evidence of a controlled substance to support the conviction.

Affirmed.

HOLT, C.J., not participating.

Edward Junior CRAFT *v.* STATE of Arkansas

CR 86-10 712 S.W.2d 303

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Tripper Cronkhite, for appellant.

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

JOHN I. PURTLE, Justice. The appellant was charged with capital felony murder in violation of Ark. Stat. Ann. § 41-1501 (Repl. 1977). On September 5, 1980, he entered a negotiated plea of guilty in return for a sentence of life without parole. He filed a Rule 37 petition on August 16, 1983. The petition, among other things, stated: "The defendant acknowledges that he is allowed by law to file such an application for relief only once in this court and that such legal action must be filed within three (3) years of his conviction by this court." The appellant simply argued that he was not guilty, i.e. that the evidence was not sufficient. The trial court entered a written order denying the petition without a hearing on August 25, 1983.

Subsequently the appellant continued to file various motions, petitions and letters. Among the filings was a motion, dated November 1, 1985, to withdraw a plea of guilty. The trial court entered an order on December 19, 1985, denying any post conviction relief. Notice of appeal by the appellant was filed on January 2, 1986. Present counsel was appointed on March 3, 1986.

[1] It is obvious from the record that appellant is not entitled to post conviction relief since he did not allege grounds which would void his conviction. See Rule 37.2(c); *Travis* v. *State*, 286 Ark. 26, 688 S.W.2d 935 (1985). Although not before the Court in this appeal, the record shows that appellant's first Rule 37 petition was denied by the trial court by a written order complying with Rule 37.3(a).

The appellant was entitled to but one petition pursuant to Rule 37. All grounds for relief not included in the first petition are deemed waived, unless the allegations would render the judgment of conviction absolutely void. Rule 37.2(b); *Scott* v. *State*, 267 Ark. 536, 592 S.W.2d 122 (1980). A petition claiming such relief must be filed within three years. Rule 37.2(c); *Travis*, supra.

We have examined the complete record and do not find any proceeding or action which was prejudicial to the appellant.

Affirmed.

HOLT, C.J., not participating.

Andy McKAY and Myrna McKAY *v.* ST. PAUL INSURANCE CO.

86-93 711 S.W.2d 834

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Rubens & Rubens, by: *David C. Peeples*, for appellant.

Rieves & Mayton, by: *Ted Mackall, Jr.*, for appellee.

JOHN I. PURTLE, Justice. This suit arose out of an injury which occurred on October 16, 1981, when the appellant Andy McKay slipped and fell in a substance in the hallway of Crittenden Memorial Hospital. Based upon the answer, discovery depositions and an affidavit, the trial court granted appellee's motion for a summary judgment. We think the trial court erred in granting the summary judgment.

Appellant Andy McKay was a security employee for the Crittenden Memorial Hospital. St. Paul Insurance Company is the liability carrier for the hospital. On the date of the occurrence other employees of the hospital were stripping and waxing the floor near where the appellant fell. After taking appellant McKay's deposition, the appellee moved for a summary judgment. The appellants took the discovery depositions of the employees who were working on the floor on the date of the occurrence and the affidavit of Johnny Brown. The affidavit stated that Brown owned and operated a janitorial service in West Memphis, Arkansas and had been so engaged in excess of 15 years. He stated that floor cleaners or maintenance personnel should not leave wax or water on the floor because it is a danger to people walking in such areas. He stated that it was negligence to leave puddles of liquids on the floors. The discovery deposition of Richard Gist was taken on October 17, 1985. He stated he was one of the employees who had been working on the floor near where the fall had occurred. It was he who mopped up the liquid after McKay had fallen. He stated they had been working inside a roped-off area but were in the process of removing the equipment

and returning it to the storage area. In describing the substance Mr. Gist stated:

> [I]t could have been anything, you know. It could have been something that we was using that might have dripped from the Roto as we was putting it up, but I couldn't swear to that. I just know it was a spot. It was skidded, a foot mark had been through it, so I couldn't really say what it was.

Mr. Gist went on to state that the substance on the floor could have been put there by the cleaning crew.

Mr. McKay stated that the spot where he fell was about 5 feet from the roped-off area. He stated that the buckets which the floor waxers had been using were sitting close to the pharmacy, beyond the spot where he fell. In other words, according to the appellant he fell at a place somewhere between the roped-off area and the place where the mops and buckets, which had been used to clean the floor, were resting.

In order to grant a summary judgment the court must have found that reasonable minds could not have reached different conclusions based upon the pleadings, depositions, and affidavits in the file at the time the motion is acted upon. *Leigh Winham Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). In considering a summary judgment the court must find from the pleadings, depositions, answers to interrogatories, admissions, and affidavits filed that there is no genuine issue of a material fact and as a matter of law the moving party is entitled to judgment. *Hurst* v. *Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983). In testing the proof in a proceeding pursuant to a motion for summary judgment, the court must not only consider the written material but all reasonable inferences deducible therefrom viewed in a light most favorable to the party against whom the motion is directed. *Clemens* v. *First Natl. Bank* v. *Berryville*, 286 Ark. 290, 692 S.W.2d 222 (1985).

The pleadings, depositions, and affidavits filed in this case, considered in the light most favorable to the appellant, together with all reasonable inferences and deductions therefrom, leave genuine issues of fact to be determined. Therefore, the trial court erred in granting the motion for summary judgment.

 [redacted]

Reversed and remanded.

[redacted]

WALLACE BAKER CHEVROLET CO., INC. *v.* Danny NELSON, d/b/a NELSON AUTO SALES

86-125 712 S.W.2d 896

Supreme Court of Arkansas
Opinion delivered July 14, 1986

[redacted]

Odell Pollard, P.A., by: *Margaret Bunn*, for appellant.

No brief filed.

JOHN I. PURTLE, Justice. Danny Nelson, d/b/a Nelson Auto Sales (appellee), sold Wallace Baker Chevrolet Company, Inc. (appellant), through the Beebe Auto Exchange, Inc., a 1983 Chevrolet Caprice automobile. Appellant resold the vehicle to a customer who returned it alleging multiple defects. Appellant then filed suit in the circuit court seeking rescission, revocation of acceptance and alleging breach of warranties pursuant to the Uniform Commercial Code. Also, a count for fraud and deceit

was contained in the complaint.

The case was tried on December 17, 1984, before a judge who resigned from the bench on December 31, 1984. No findings of fact and conclusions of law or judgment had been filed on the effective date of the judge's resignation. A judgment and findings of fact and conclusions of law, dated December 27, 1984, and signed by the resigning judge was entered of record on February 12, 1985. At the conclusion of the trial the judge stated:

> I can tell you what I'm going to do now, but as for making a finding of facts in regard to specific pleadings, I am going to not do that right now. . . . Well, I'm going to make my findings of fact in regard to what is before me. Whatever has been presented in regard to this. . . . Well, you know, I'm going to make my findings of fact on what has been presented to me here at this time. That's what I'm going to do. Is there anything else to come before the court?

From the statement of the judge it is very clear he intended at a later time to announce or make written findings of fact and conclusions of law. The appellant filed a motion to set aside the judgment and a motion for a new trial. On February 12, 1985, the new judge denied appellant's motions.

Appellant argues three points for reversal: (1) the trial court erred in finding that plaintiff did not establish his cause of action under the Uniform Code; (2) the trial court erred when it failed to find the defendant falsely represented the car, and failed to apply the Arkansas law of fraud and deceit to the facts and evidence; and (3) the trial court erred when it denied appellant's motion for a new trial and permitted entry of the judgment by the former judge. We agree with the appellant as to the third point and therefore do not discuss points one and two.

We think this case is controlled by ARCP Rule 63, which reads as follows:

> If for any reason, including resignation or removal from office, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are announced or filed, then any other judge regularly sitting in or assigned to the court in

> which the action was tried may perform those duties; but, if such judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may, in his discretion, grant a new trial.

Paraphrasing the Rule and applying it to the present facts, the Rule requires that a judge who hears a case and then resigns, without entering a judgment or announcing or filing findings of fact and conclusions of law, has no authority to enter a judgment or issue findings of fact and conclusions of law at a later date. With this interpretation of the Rule in mind, we must examine the facts of this case and any applicable law to determine whether the trial court erred in denying appellant's motions on February 12, 1985.

We do not find any decision by the Arkansas Court of Appeals or this Court which interprets this Rule. Our own Rule 63 is almost identical to Federal Rules of Civil Procedure, Rule 63. Therefore, we feel that an examination of federal cases is useful. *In Re Schoenfield*, 608 F.2d 930 (2d Cir. 1979), stated:

> The Sixth Circuit has recently taken the position that the clear implication of Rule 63 is that a new trial is always required when prior to filing findings and conclusions a judge is disabled from proceeding further with a bench trial. *Arrow-Hart, Inc.* v. *Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977).
>
> . . .
>
> Although this Court has never had occasion to rule on this precise issue, the Second Circuit cases concerning the substitution of judges appear to turn on the assumption that when during the course of a bench trial the original judge becomes unable to proceed, a new trial is required unless the original judge has previously filed findings of fact and conclusions of law. . . .

The opinion in *Arrow-Hart*, supra, construing Rule 63, stated:

> However, in the absence of unanimous agreement of the parties, and where, as here, there is no oral or written expression of the deceased judge reasonably satisfying the requirements of Rule 52 concerning findings of fact and

conclusions of law, we hold that a new trial is required. . . .

We agree with the reasoning in the above cited cases and find it persuasive.

It is clear that the trial judge's intentions were to make findings of fact and conclusions of law in order to protect the parties and to complete the record. Although he did in fact do so before his resignation became effective, he failed to file or announce them until after his resignation. Therefore, the present judge should have granted appellant's motions because the former judge had no authority to act after December 31, 1984.

Reversed and remanded for a new trial.

HOLT, C.J., not participating.

CITY OF MARIANNA, Martin CHAFFIN, Don CAHOON, Ed BROWN, Robert "Bub" DAVIS, Donnie EDWARDS, and Wilson KELL *v.* THE ARKANSAS MUNICIPAL LEAGUE, Administrator, MUNICIPAL LEAGUE DEFENSE PROGRAM

86-131 712 S.W.2d 305

Supreme Court of Arkansas
Opinion delivered July 14, 1986
[Supplemental Opinion on Denial of Rehearing
September 29, 1986.]

Daggett, Van Dover, Donovan & Cahoon, by: *Robert J. Donovan*, for appellant.

Winston Bryant and *William G. Fleming*, for appellee.

ROBERT H. DUDLEY, Justice. The appellants, the City of Marianna, its mayor and aldermen, filed this suit against the Home Indemnity Company and appellee Arkansas Municipal League, administrator for the Municipal League Defense Program. The suit seeks an order requiring the Home Indemnity Company and appellee Municipal League Defense Program: (1) to pay all costs incurred in defending a voting rights action that was filed against appellants by third parties in a United States district court; (2) to pay for any liability which might be assessed in that suit; and (3) to enter a declaratory judgment determining which of the defendants' coverage is primary and which is secondary. After various pleadings were filed, each of the parties filed a motion for summary judgment. The trial court granted summary judgment dismissing appellee Municipal League Defense Program from this suit. In addition, the trial court granted that part of appellants' motion asking that Home Indemnity Company be ordered to pay the costs of defending the United States district court action. No action has been taken yet by the trial court on that part of this lawsuit which seeks a declaratory judgment that Home Indemnity Company is liable for damages. In summation, there are still issues pending in the trial court between appellants and the Home Indemnity Company. Appellants seek to appeal only that part of the action involving appellee Municipal League Defense Program.

■ We dismiss the appeal because the order appealed from is not a final order, a jurisdictional requirement which we are obliged to raise even when the parties do not. *3-W Lumber Co.* v. *Housing Authority for the City of Batesville*, 287 Ark. 70, 696 S.W.2d 725 (1985).

ARCP Rule 54(b) provides that when multiple parties are involved, or where more than one claim is presented, the trial court may direct the entry of a *final* judgment as to one or more but fewer than all of the parties and claims *only* upon an express determination that there is no just reason for delay and upon the express direction for the entry of the judgment.

Here, the order appealed from dismissed neither all of the parties, nor all of the claims. Rule 54(b) specifically applies. Inasmuch as the order did not comply with the rule, no final judgment has been entered and no appeal may be taken at this stage of the proceeding.

Appeal dismissed.

HOLT, C.J., not participating.

Supplemental Opinion on Rehearing
September 29, 1986

718 S.W.2d 946

ROBERT H. DUDLEY, Justice. We deny petitioners' request for rehearing because petitioners did not comply with ARCP Rule 54(b). However, we modify the mandate dismissing the appeal to a dismissal without prejudice to the right of petitioner to apply to the trial court for a determination and direction under ARCP Rule 54(b). We express no opinion as to whether the determination and direction should be made as this is a matter

within the discretion of the trial court. If the determination and direction are made, a new appeal may come before us on the present briefs and record supplemented to show the subsequent proceedings.

Terry Wayne PORTER *v.* STATE of Arkansas

CR 85-226 712 S.W.2d 304

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Grant & Berry, by: *Sandra T. Berry*, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant Terry Wayne Porter pleaded guilty to capital murder in January 1984. The following May he filed a petition seeking to vacate the plea pursuant to A.R.Cr.P. Rule 26.1. The petition was denied without written findings of fact. In 1985, petitioner filed a Rule 37 petition raising allegations similar to those raised in the earlier Rule 26.1 petition. The petition was denied with the docket notation "previous Rule 37's have been denied and the subsequent motion is likewise denied, because defendant is entitled to only one Rule 37 and has had more than that." Appellant brings this appeal. His sole argument is that the trial court erred in refusing to hold an evidentiary hearing on the petition. We affirm the trial court.

The trial court had already considered and denied one petition for post-conviction relief filed by the petitioner before he filed the petition in question. Although he labeled the first petition a petition pursuant to Rule 26.1, the trial court was free

to consider it as a petition under Rule 37 since it raised grounds within the purview of Rule 37. *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984). A petitioner is not entitled to file a second petition containing Rule 37 grounds unless his original petition was specifically denied without prejudice to filing a subsequent petition. A.R.Cr.P. Rule 37.2(b); *Williams* v. *State*, 273 Ark. 315, 619 S.W.2d 628 (1981). The rule governing second petitions applies to all petitioners, including those convicted of capital murder. *Ruiz* v. *State*, 280 Ark. 190, 655 S.W.2d 441 (1983).

Affirmed.

Ann M. LUECKE, Executrix of the Estate of Nell S. SIMPSON, Deceased *v.* MERCANTILE BANK OF JONESBORO, ARKANSAS, Executor of the Estate of S.L. SIMPSON, Deceased, Marion S. CURTNER and Mary Louise BEENE

86-54 712 S.W.2d 306

Supreme Court of Arkansas
Opinion delivered July 14, 1986
[Rehearing denied September 15, 1986.]

Clayton L. Phillips, Jr., and *Robert S. Laney*, for appellant.

Shaver, Shaver & Smith, by: *J.L. Shaver*, and *Walker, Snellgrove, Laser & Langley*, by: *G.D. Walker*, for appellee.

STEELE HAYS, Justice. This is the second appeal arising from a spousal murder-suicide. See *Luecke* v. *Mercantile Bank of Jonesboro*, 286 Ark. 304, 691 S.W.2d 843 (1985). Mrs. Nell Simpson died at the hands of her husband, S.L. Simpson, on October 7, 1978. Mr. Simpson's death occurred some hours later. The parties are identical in both appeals: Appellant Ann Luecke is a daughter of Mrs. Simpson by an earlier marriage and the executrix of Mrs. Simpson's will; appellees are the daughters of Mr. Simpson, and Mercantile Bank is the executor of his will. Our jurisdiction occurs by reason of the second appeal, Rule 29(1)(i)(j).

After successfully pursuing a wrongful death action in federal court, Mrs. Luecke filed suit in the Craighead Chancery Court to impose a constructive trust upon certain assets of Mr. Simpson's estate and to establish an interest in real and personal property held jointly or as tenants by the entirety. The chancellor divided the assets, some to Mrs. Simpson's estate, some to Mr.

Simpson's. The jointly held properties, rather than in strict adherence to the rule of survivorship, were divided equally between the two estates as if the decedents had been tenants in common. That decision was affirmed in the first appeal.

After *Luecke* v. *Mercantile Bank* had become final, Mrs. Luecke filed a Creditors Bill in chancery to apply the rationale of divorce to the property interests altered by the two deaths. The suit was predicated on the theory that if the Simpsons had survived the October 7, 1978 incident, Mrs. Simpson would have had grounds for divorce, giving her the status of a creditor according to her entitlements based on the divorce laws in effect at the time. Mrs. Luecke asked that the resulting indebtedness of the S.L. Simpson estate to the Nell Simpson estate be liquidated, that the claim be given a higher priority than the claims of Mr. Simpson's heirs, and that the attorneys for "the wife" be awarded attorneys' fees as in divorce cases.

Mr. Simpson's executor filed a motion under ARCP Rule 12(b)(6) to dismiss the suit for failure to state facts upon which relief can be granted and the motion was sustained. On appeal we affirm the order of dismissal.

[redacted] This is a novel but unmistakable attempt by the appellant to relitigate the issues adjudicated in the earlier phases of the case and affirmed in the first appeal. Appellant has seized upon dictum in our opinion which compared the chancellor's dissolution of the joint tenancies to the manner of handling such properties in divorce. There was no intent on our part to imply that the chancellor's attempt to reach an equitable solution to an extraordinary situation, i.e. the murder and suicide of a husband and wife, should bind us to apply the statutory incidents of divorce in any literal sense. What we said was:

> As to the property held by Mr. and Mrs. Simpson as tenants by the entirety, we think the better rule is that applied by the trial court which holds that the murder/suicide severed the marital relationship and the parties became tenants in common, entitling each to recover ½ of the property. In adopting this viewpoint, we apparently align ourselves with the majority of courts who have ruled on this subject. The effect of the severance of the marital relationship is much like that caused by divorce. Likewise,

> our holding is consistent with our statutory law on divorce which provides for a similar equal division of the property, Ark. Stat. Ann. § 34-1215 (Supp. 1983). (Citations omitted).

The observation was made simply to point out that the chancellor's treatment of the problem was comparable to divorce, for whatever logic might be found in the analogy. It was entirely dictum and should be seen as nothing more than that. Even if it could be said the argument had merit, which we do not suggest, it may not be introduced as an afterthought to a trial and an appeal of the identical issues, although presented on other theories. *Hastings* v. *Rose Courts, Inc.*, 237 Ark. 426, 373 S.W.2d 583 (1963).

Mrs. Luecke also contends she has been denied procedural due process by the dismissal of her suit. The answer, of course, is that she has had a full opportunity to present her claims against the estate of S.L. Simpson and she may not be heard twice on issues which have been fairly tried and decided. *Davis* v. *Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972). *Smith* v. *Smith*, 241 Ark. 465, 409 S.W.2d 317 (1966).

Affirmed.

HOLT, C.J., not participating.

Lauren David NORSWORTHY *v.* Suzanne NORSWORTHY

86-97 713 S.W.2d 451

Supreme Court of Arkansas
Opinion delivered July 14, 1986

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

Saxton & Ayres, by: *Clint Saxton*, for appellee.

STEELE HAYS, Justice. This appeal involves the Uniform Child Custody Jurisdiction Act (Ark. Stat. Ann. § 34-2701, et seq. Supp. 1985) and the Parental Kidnapping Prevention Act of 1980 (Pub. L. 96-611, 28 USC § 1738A). Appellee Suzanne Norsworthy and Appellant Lauren Norsworthy married in Harris County, Texas in August of 1977. A year later a daughter, Darlah, was born. In 1984 Suzanne filed suit for divorce in Harris County. On April 10, 1984 a temporary order giving Suzanne custody was entered by agreement. On June 1, 1985 Suzanne moved with Darlah to Crittenden County, Arkansas, where Suzanne's father lived.

On September 19, 1985 Lauren Norsworthy called Suzanne to say he was coming to Arkansas and would like to visit Darlah. The next day he filed suit for divorce and custody in Henderson County, Texas and on September 21, as planned, he obtained custody of Darlah ostensibly for a brief visit. Instead of returning Darlah to her mother he took her to Texas, placing her in the custody of his brother, Gaylon Norsworthy. On September 24 Suzanne was served with process in Arkansas in the Henderson County suit. Suzanne promptly filed suit for divorce and custody in Crittenden County.

In response to the Arkansas proceedings, Lauren challenged jurisdiction in a motion to dismiss, citing Ark. Stat. Ann. § 34-2706(a), which provides that a court shall not exercise its jurisdiction if there is a pending proceeding in another state. In the alternative the Arkansas court was asked to stay its proceedings until the Texas court determined if it had jurisdiction.

The Arkansas court entered an order finding that Suzanne had temporary custody of Darlah pursuant to the order of the District Court of Harris County, Texas. The order recited that Lauren had obtained custody of Darlah by subterfuge, and that Arkansas had jurisdiction pursuant to Ark. Stat. Ann. § 34-2703(a)(2). The order denied the motion to dismiss, directed the immediate return of Darlah to Arkansas, and set a hearing for October 16. On October 16 Suzanne petitioned for a contempt

citation against Lauren for failure to return Darlah and the chancellor ordered him to appear on October 30 to show cause why he should not be held in contempt.

On October 21 Suzanne amended her complaint to ask for alimony, child support and attorneys' fees. Lauren sought a writ of prohibition from this court to prevent the chancellor from asserting jurisdiction in the Crittenden County proceedings. That petition was denied and on November 6 Lauren Norsworthy was held in contempt for his failure to return Darlah to Suzanne. A punishment of ninety days in jail was imposed.

The chancellor entered a decree of divorce finding that pursuant to Ark. Stat. Ann. § 34-2703(a)(2), Arkansas has jurisdiction to determine the custody of Darlah and is the most convenient forum under § 34-2707. Suzanne was awarded custody, child support and attorneys' fees.

[redacted] Lauren Norsworthy has appealed on two points of error: Arkansas was without jurisdiction to adjudicate the custody of Darlah pursuant to Ark. Stat. Ann. § 34-2706(a) and the chancellor erred in refusing to stay the proceedings in order to communicate directly with the District Court of Henderson County, Texas, as provided in Ark. Stat. Ann. § 34-2706(c). Neither brief cites the Parental Kidnapping Prevention Act, which must be read in conjunction with the Uniform Child Custody Jurisdiction Act, as where the two acts conflict, the preemptive Parental Kidnapping Prevention Act controls. *Leslie L.F.* v. *Constance F.*, 110 Misc. 2d 86, 441 N.Y.S.2d 911 (Fam.Ct. 1981).

[redacted] Appellant cites § 34-2706(a):

> A court of this State shall not exercise its jurisdiction under this Act [§§ 34-2701—34-2725] if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

He contends that because a suit for Darlah's custody was pending in the District Court of Henderson County filed on September 20, 1985, the Chancery Court of Crittenden County must dismiss the

custody suit filed there by Suzanne a week later. We readily reject that contention for several reasons: first, it is not at all evident from this record that the District Court of Henderson County was exercising jurisdiction "substantially in conformity with" the Uniform Child Custody Jurisdiction Act (§ 34-2706(a)). There had been, it is true, a suit pending in *Harris County* which clearly constituted an exercise of jurisdiction in conformity with the act, though what the present status of that proceeding is, is not entirely clear. The briefs indicate that the case was dismissed in 1984 for failure to prosecute. Be that as it may, we have no basis for knowing what jurisdictional claims, if any, Henderson County may have had on September 20, 1985, when Mr. Norsworthy filed his suit there, or, indeed, whether under the venue laws of Texas, Henderson County was the proper place to decide the custody of Darlah Norsworthy. So far as we can determine from the record Darlah had never been to Henderson County.[1] Certainly we are told nothing about the connection Henderson County may, or may not, have had with this family for purposes of qualifying as an appropriate forum to decide Darlah's custody under the act. Ark. Stat. Ann. § 34-2701(a)(3).

Secondly, while not controlling, the manner by which Henderson County is assertedly empowered with jurisdiction under the act to decide Darlah's custody to the exclusion of Arkansas is of some significance. One of the primary objectives of the Uniform Child Custody Jurisdiction Act is to "deter abductions and other unilateral removals of children undertaken to obtain custody awards" (See Ark. Stat. Ann. § 34-2701(a)(5)). That objective would be thwarted in blatant fashion if Mr. Norsworthy could achieve the summary dismissal of Mrs. Norsworthy's suit in Arkansas by the methods he employed in attempting to invest jurisdiction in the Henderson County District Court, methods which the act was plainly designed to discourage. See *Davis* v. *Davis*, 285 Ark. 403, 687 S.W.2d 843 (1985). The act expressly directs that it be construed to promote the general purposes enumerated in § 34-2701 and on that basis alone we would be loath to reverse on this argument. Whether Mrs. Norsworthy is subject to the same criticism for the unilat-

[1] We note independently of the record that Harris County includes the city of Houston while Henderson County is adjacent to the City of Dallas.

eral removal of Darlah from Texas to Arkansas without approval from the Harris County District Court, we could not say on the state of this record. We note only that Mr. Norsworthy seems to have voiced no complaint at the time.[2]

While we reject appellant's first point, we must agree with his alternative argument, that the Arkansas chancellor erred in declining to implement those provisions of the act intended to promote cooperation between the courts of two or more states concerned with the custody of a particular child. While all of the nine objections listed in § 34-2701 deal with these common objectives, sub-paragraphs (1), (2), (7) and (8) are specific:

> (a) The general purposes of this Act . . . are to:
>
> (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
>
> (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
>
> (7) facilitate the enforcement of custody decrees of other states;
>
> (8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other states concerned with the same child.

In reaching this view, we are influenced by the fact that when the Crittenden County suit was filed Texas was still the home state of Darlah as defined by the Uniform Child Custody Jurisdiction Act (Ark. Stat. Ann. § 27-2702(5)) and by the Parental Kidnapping Protection Act, six consecutive months not having expired preceding the time involved. Under the federal act

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[2] The record reflects that six weeks after Suzanne and Darlah left Texas, Lauren wrote Suzanne: "Although the miles may separate us, I have built a bridge of lovely memories. I would like to express my deepest appreciation and thanks for your years of patience, cheer, devotion, companionship, mother of *our precious daughter*, and most of all your friendship." (Emphasis in the original).

jurisdiction is given the home state to the exclusion of other jurisdictional considerations. 28 USC 1738A(4).

[redacted] We are not overlooking the finding in the decree that Arkansas has jurisdiction to determine custody under Ark. Stat. Ann. § 34-2703(a)(2) because it is in the best interest of the child that a court of this state assume jurisdiction since the child and her parents, or the child and at least one contestant, have "a significant connection" with this state, and there is "available in this state substantial evidence concerning the child's present and future care, protection, training, and personal relationships." But that provision, while broad, must be judiciously applied, and it should not be regarded as giving a court only recently involved an excuse to act precipitously, in an ex parte proceeding, by disregarding the remainder of the act, so plainly aimed at promoting cooperation between courts. Particularly is that true where, as here, Texas clearly remained the home state. In a similar circumstance the court in *Bowden* v. *Bowden*, 182 N.J. Sup. 307, 440 A.2d 1160 (1982), observed:

> [§ 34-2706(a)] was designed to avoid jurisdictional "shouting matches," and has been used successfully to accomplish that end. See *William* v. *Michele*, 99 Misc.2d 346, 416 N.Y.S.2d 477, 483 (Fam.Ct. 1979). The section is mandatory, i.e., the statute directs that, once informed, the court "shall stay the proceeding and communicate with the court in which the other proceeding is pending." This the trial judge did not do. Cooperatively, the courts should attempt to reach agreement as to the more appropriate forum, with the ultimate aim of providing protection and control, in both states, to assure compliance with custody and visitation orders entered in one of them. Following a final judgment or decree containing specific terms for custody and visitation or joint custody as appropriate, the goal of the nonforum jurisdiction should be imposition of reciprocal rather than conflicting provisions.

Some guidance is to be found in *Bonis* v. *Bonis*, 420 So.2d 104 (C.A. Fla. 1982) where Florida and Colorado had competing interests in a child custody dispute. The Florida appeals court reversed the trial court for assuming jurisdiction on the basis of a "significant connection" to the child even though the father was

found to have "snatched" the child from Florida, where a custody suit was pending, and to have returned to Colorado where a previous suit had been filed, though no service of process had. The Florida court said:

> Four stated purposes of the UCCJA are to (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody; (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in the state which can best decide the case in the interest of the child; (3) avoid relitigation of custody decisions of the other states; (4) make the law uniform with respect to child custody jurisdiction among states which have adopted the act. *Those purposes are not served when a court, with knowledge that the subject matter of child custody is pending in another state, totally ignores the foreign proceeding and exercises jurisdiction over a child, who has been in the state for less than a month, for the purpose of making a permanent custody award.* (Our italics).

Mrs. Norsworthy relies on *Pomraning* v. *Pomraning*, 13 Ark. App. 258, 682 S.W.2d 775 (1985), where the Arkansas chancellor's finding of jurisdiction was upheld despite the fact that the appellee wife and children had resided in Arkansas for less than the required time under the "home state" provision. The Court of Appeals noted that Arkansas had been the home of the wife until 1979 when she married the appellant in Louisiana, that when the parties separated she immediately returned to Arkansas with the children where she sought a divorce and custody after two months of renewed residency. The cases are distinguishable—there was nothing pending in Louisiana when the Arkansas suit was tried and, hence, no request was made for Arkansas to communicate with a Louisiana court before determining which forum was appropriate. Nor do we find any reference in *Pomraning* to the Parental Kidnapping Protection Act, and presumably neither party cited it. As we have noted, under the Parental Kidnapping Protection Act, the home state has exclusive jurisdiction over the other considerations noted in *Pomraning*. See Child Custody and Visitation Law and Practice, McCahey, Kaufman, Krant and Zett, Vol. 1 (1986) § 4.06 [1][2][3].

We think, therefore, it was incumbent on the Arkansas court before proceeding to a final decree, to enter into direct communication with one or both District Courts in Texas to determine, in accordance with the act, which was the better forum to decide custody.

Appellant's argument that he had made only a special appearance to object to jurisdiction is rejected. He sought affirmative relief in the Crittenden Chancery Court in the form of a stay of the proceedings so that courts of Texas and Arkansas can have direct communication in accordance with the Uniform Child Custody Jurisdiction Act. He cannot argue that by so doing he remained beyond the jurisdictional powers of the Crittenden Chancery Court. "This court has adopted the rule that any action on the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance." *Payne* v. *Stockton*, 147 Ark. 598, 229 S.W. 44 (1921).

Accordingly, we modify the provision of the decree pertaining to permanent custody and remand the case for further proceedings in accordance with the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.

Modified and remanded.

BLACK AND BLACK OIL COMPANY *v.* SMITH DRILLING COMPANY, INC.

86-63 712 S.W.2d 901

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Steve R. Crane, for appellant.

Bramblett & Pratt, by: *Eugene D. Bramblett*, for appellee.

DAVID NEWBERN, Justice. The appellant, Black and Black Oil Company, (Black and Black), entered a contract with the appellee, Guy R. Smith Drilling Company, Inc., (Smith), by which Black and Black hired Smith to drill a well. After the drilling had begun, the drilling ceased because circulation of the drilling mud, which is necessary to the drilling operation, was lost. Another company, Dia-Log, was called to the scene to restore the lost circulation. Dia-Log sued Black and Black as well as Smith to collect the amount it had billed for the service it rendered. Black and Black claimed Smith was responsible to pay Dia-Log, and Smith claimed it was Black and Black's responsibility. The trial court found the contract between Black and Black and Smith to have been ambiguous with respect to responsibility for Dia-Log's bill and thus permitted parol evidence to ascertain the parties' intent. Sitting without a jury, the court found the contract required that the operator, Black and Black, assume responsibility for Dia-Log's bill. Black and Black contends the trial court erroneously reformed or modified the contract and that it was error to interpret the contract as requiring Black and Black to pay Dia-Log. We affirm.

The contract consisted of a bid letter which looked like this:

GUY R. SMITH DRILLING CO., INC.
P. O. Box 396
STEPHENS, ARKANSAS 71764

April 12, 1984

Black & Black Operators
Magnolia, Arkansas 71753

Gentlemen:

Enclosed please find our turnkey bid on your 4900 foot Smackover well in Section 14, Township 14 South, Range 19 West of Ouachita County, Arkansas:

*Furnish road, location and pits.
*Furnish water.
*Drill 7 ⅞" hole to approximately 4900 feet.
*Furnish, set and cement 300 feet of 8 ⅝" surface casing.
*Furnish all mud and chemicals.
*Furnish Geolograph and catch samples as required.
*Furnish and run Gearhart DIL Log.
*Furnish 24 hours rig time to run production casing or plug and abandon.

Turnkey for the above $60,000.00

Rig time for any other services or the encounter of loss circulation will be at the rate of $175.00 per hour.

Optional - Furnish Minimum Density CDL-CNL-GR Log $3,858.00
Optional - Furnish 12 Side Wall Cores $2,040.00
Optional - Cut One 50 Foot Diamond Core $6,500.00
Optional - Attempt One Single Packer Drill Stem Test $6,500.00

Sincerely,

Guy R. Smith Drilling Company, Inc.

RGS:dt

Approved and Accepted on this
_____ day of _____ 1984
By: _____

The appellant concedes it was proper for the trial court to take parol evidence with respect to the parties' intent as expressed in the contract in view of the contract's ambiguity. We agree. In a similar case, *Murdock* v. *Reynolds*, 180 Ark. 729, 22 S.W.2d 1007 (1929), we reversed the refusal of the trial court to allow parol evidence.

The ambiguity here is created by the use of the term "turnkey" to apply to everything "above," which includes drilling to 4900 feet, and then using the term "rig time" to refer to the manner in which the operator, Black and Black, would be billed in the event of loss of circulation. The question becomes whether "turnkey" meant the driller, Smith, would supply whatever was necessary to reach 4900 feet and if so whether the reference to "rig time" for "any other services" created an exception to the "turnkey" portion of the agreement.

[redacted] The appellant's argument is that the trial court accepted the parol evidence for the purpose of modifying the contract or adding terms to it rather than interpreting it. While the trial court misspoke at one point, saying he would permit parol evidence to "modify" the contract, his letter order on which the judgment was based makes it clear he was following our decision in *Murdock* v. *Reynolds, supra*, and allowing "parol testimony to explain the customary, local meaning of the word [rig time]." The court's letter order further recited that "[e]ach expert testified unequivocally, that upon consideration of the contract, and the term 'rig time,' that the operator was responsible for third party services."

[redacted] We agree with the appellee's argument that in accepting parol evidence to determine the meaning of the contract the trial court was making a determination of fact. *C & A Construction Co.* v. *Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974); *Fort Smith Appliance & Service Co.* v. *Smith*, 218 Ark. 411, 236 S.W.2d 583 (1951); *Don Gilstrap Builders, Inc.* v. *Jackson*, 269 Ark. 876, 601 S.W.2d 270 (Ark. App. 1980). We will not reverse a factual determination made by the court sitting without a jury unless we can say it was clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a); *McDermott* v. *Strauss*, 283 Ark. 444, 678 S.W.2d 334 (1984); *Wasp Oil, Inc.* v. *Arkansas Oil and Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983). While the appellant presented an expert who contradicted, to an extent, the ones presented by the appellee, we cannot say the court's determination was clearly erroneous.

Affirmed.

HOLT, C.J., not participating.

Michael SELBY *v.* Robert N. BURGESS

85-261 712 S.W.2d 898

Supreme Court of Arkansas
Opinion delivered July 14, 1986

Perroni & Rauls, P.A., by: *Samuel A. Perroni*, for appellant.

Gary Eubanks & Associates, by: *Gary L. Eubanks*, for appellee.

DAVID NEWBERN, Justice. This is a slander case in which the trial court correctly found that a client, the appellee Robert Burgess, was not liable for statements made by his attorney in the course of investigating the client's claim. We must, however, reverse the summary judgment in favor of Burgess because there were allegations that Burgess personally slandered the appellant, Dr. Selby, and the summary judgment motion and its supporting documents did not show the lack of a remaining genuine issue of material fact as to those allegations.

Dr. Michael Selby, is an obstetrician-gynecologist. Melinda Burgess was a patient of Dr. Selby while she was married to appellee, Robert Burgess. Burgess retained attorney Gary Eubanks to represent him in bringing an alienation of affections claim against Dr. Selby, claiming that Dr. Selby had caused Melinda Burgess, who apparently later married Dr. Selby, to abandon Robert Burgess. The complaint alleged that Dr. Selby had induced Melinda Burgess to undergo an abortion and had thereafter impregnated her himself.

Dr. Selby counterclaimed contending that Burgess, "personally and through his duly authorized agent, Gary Eubanks," slandered him by stating to third persons that Dr. Selby had

performed an unnecessary abortion on Melinda Burgess.

The alienation of affections claim resulted in a judgment in favor of Dr. Selby. Burgess moved for a summary judgment on the slander claim, arguing that any statements Eubanks might have made to third persons in the course of investigating the alienation of affections claim were true as well as privileged. The argument submitted with the motion, however, did not address the part of the counterclaim stating that Burgess had "personally" slandered Dr. Selby.

In support of the motion for summary judgment, Burgess's brief in the trial court referred to these documents:

> (1) Depositions of Joyce Henderson and Margaret Coley in which they testified that they were medical records custodians and that, in attempting to obtain records of Dr. Selby's treatment of Melinda Burgess, Eubanks had referred to an "abortion."
>
> (2) The deposition of Dr. Selby confirming that he had performed a "D & C" on Melinda Burgess before which she had been pregnant and after which she had not.
>
> (3) The deposition of Melinda Burgess Selby confirming that her pregnancy had been terminated but declining to characterize the procedure by which it was done as an "abortion."

In response to the motion, Dr. Selby submitted:

> (1) The deposition of Sam Winstead who testified that he thought Burgess had told him that Dr. Selby had performed an abortion on Melinda Burgess.
>
> (2) The affidavit of Melinda Burgess Selby stating that Burgess told her he intended to ruin Dr. Selby's medical practice.
>
> (3) The depositions of Margaret Coley and Joyce Henderson.

The question to be answered in determining whether a summary judgment was correctly granted is whether the trial court was correct in concluding there remained no genuine issue

of material fact and the moving party was entitled to judgment as a matter of law based on the pleadings, discovery documents, admissions and affidavits, if any, showing what the proof will be. Ark. R. Civ. P. 56(c).

1. The Attorney's Privilege

The Restatement of Torts (Second) § 586 provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The appellee cites many cases from many jurisdictions holding consistently with § 586. In response, Dr. Selby cites only our cases holding that we are circumspect as to summary judgments because they are drastic.

[redacted] We adopted the principle of § 586 in *Pogue* v. *Cooper*, 284 Ark. 202, 680 S.W.2d 698 (1984). There we held that absolute privilege attached to allegations made by an attorney in a pleading filed with the court, as long as the statements alleged to be defamatory were relevant and pertinent to the issues in the case. We relied heavily on our earlier decision of *Mauney* v. *Millar*, 142 Ark. 500, 219 S.W. 1032 (1920), in which we recognized the absolute privilege of an attorney to make statements in pleadings regardless of their truth or the existence of actual malice on the part of the attorney so long as the statements were relevant and pertinent to the pleadings.

We have no difficulty extending the privilege to statements by an attorney made, as § 586 says, "preliminary to a proposed judicial proceeding." The section obviously covers communications made during investigation of a claim. Comment *e.* to § 586 is as follows:

> As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the pro-

> ceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

Other jurisdictions have held the privilege extends to such communications. *See, e.g., Sriberg* v. *Raymond*, 345 N.E.2d 882 (Mass. 1976); *Theiss* v. *Scherer*, 396 F.2d 646 (6th Cir. 1968) (applying Ohio law); *Johnston* v. *Cartwright*, 355 F.2d 32 (8th Cir. 1966) (applying Iowa law). *See also Friedman* v. *Alexander*, 433 N.Y.S. 2d 627 (App. Div. 1980).

Although the privilege is absolute where it applies, we consider it to be a privilege narrowed closely by the "relevancy" and "pertinency" requirements, and we note that while the privilege will prohibit an attorney from being subject to litigation it will not make him immune from professional discipline, *see Theiss* v. *Scherer, supra*, when it is appropriate. We make no suggestion that any professional discipline is called for in this case.

It was correct for the court to find no liability with respect to the allegations of statements made by Gary Eubanks, as the discovery documents showed his publication of the allegedly slanderous statement occurred preliminary to or in the course of litigation, and that the statements he allegedly made were relevant and pertinent to that litigation.

2. The Remainder of the Claim

In moving for summary judgment, in arguing the motion to the trial court. and in arguing the propriety of the summary judgment in his brief before us, Burgess gave no reason to ignore the allegation that he personally slandered Dr. Selby.

The appellant, Dr. Selby, argues that in finding a summary judgment proper with respect to the claim against Eubanks, the court overlooked the fact that Burgess was alleged to have "personally" slandered him. None of the proof to which the summary judgment motion referred dealt with the claim against Burgess. The testimony of Sam Winstead which was submitted in response to the motion tended to support the claim. Thus, we find the summary judgment to have been entered erroneously.

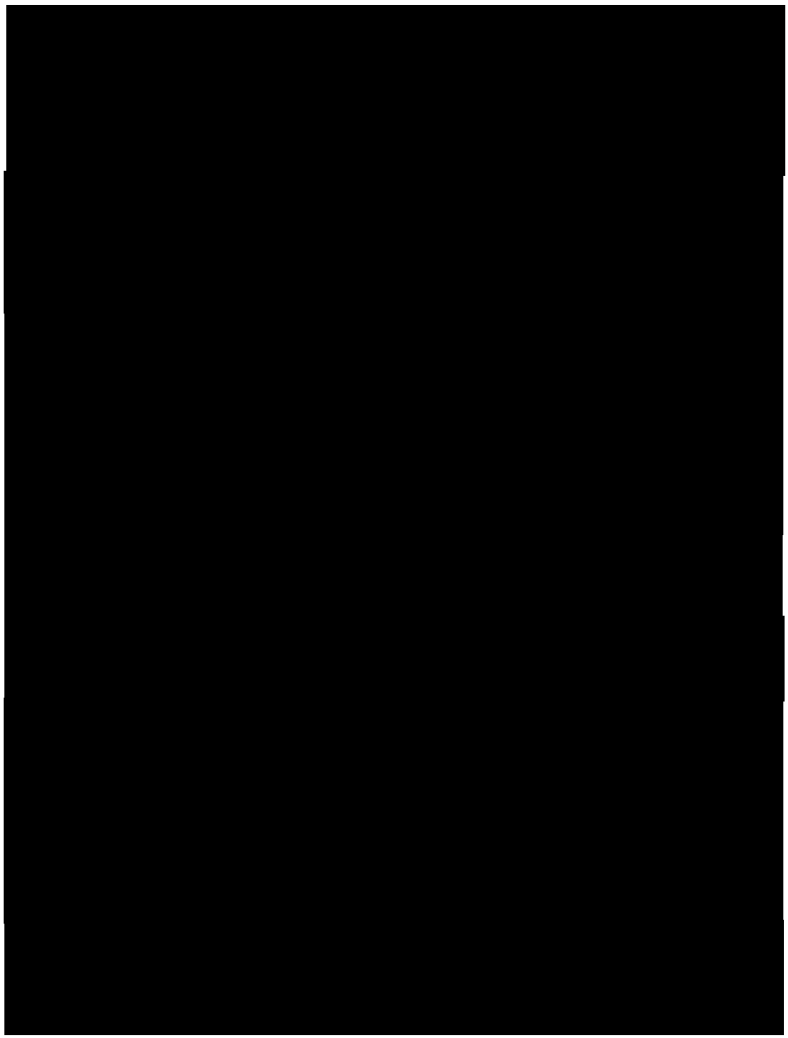
Reversed and remanded.

HOLT, C.J., not participating.

LEOLA SCHOOL DISTRICT *v.* Lucille McMAHAN

86-14 712 S.W.2d 903

Supreme Court of Arkansas
Opinion delivered July 21, 1986
[Rehearing denied September 15, 1986.]



G. Ross Smith & Associates, P.A., by: *W. Paul Blume*, for appellant.

Cearley, Mitchell & Roachell, by: *Marcia Barnes*, for appellee.

JACK HOLT, JR., Chief Justice. The appellee, Lucille McMahan, was a nonprobationary teacher who had been employed by appellant, Leola School District, for eleven years. During the 1981-82 school year, Mrs. McMahan was the subject of complaints from some parents concerning her alleged mistreatment of children in her classes. After proper notification and a hearing, the school board voted three-to-two not to renew Mrs. McMahan's contract. Mrs. McMahan appealed to the Grant County Circuit Court where the trial court reversed the decision of the Leola School Board, finding that the board failed to substantially comply with the Arkansas Teacher Fair Dismissal Act by voting to nonrenew Mrs. McMahan for arbitrary, capricious and discriminatory reasons. The school board brings this appeal from that order. We affirm the trial court. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) as we are being asked to interpret the Teacher Fair Dismissal Act of 1979,[1] Ark. Stat. Ann. §§ 80-1264—80-1264.10 (Repl. 1980).

The determination not to renew a teacher's contract

[1] This act was repealed, effective July 4, 1983, by the Teacher Fair Dismissal Act of 1983, Ark. Stat. Ann. §§ 80-1266—80-1266.09, 80-1266.11 (Supp. 1985). However, the 1979 Act controlled at the time the board made its decision.

is a matter within the discretion of the school board, and the reviewing court cannot substitute its opinion for that of the board in the absence of an abuse of discretion by the board. *Safferstone* v. *Tucker*, 235 Ark. 70, 357 S.W.2d 3 (1962); *Chapman* v. *Hamburg Public Schools*, 274 Ark. 391, 625 S.W.2d 477 (1981). In our judicial review of the trial court's decision, we affirm unless the court's findings were clearly erroneous. Ark. R. Civ. P. Rule 52; *Moffitt* v. *Batesville School Dist.*, 278 Ark. 77, 643 S.W.2d 557 (1982); *Chapman, supra.* It is not our function to substitute our judgment for the circuit court's or the school board's. *Moffitt, supra; Green Forest Public Schools* v. *Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985).

Arkansas Stat. Ann. § 80-1264.9 (Repl. 1980) provided:

> (b) Any certified teacher who has been employed continuously by the school district [for] three (3) or more years may be terminated or the board may refuse to renew the contract of such teacher for any cause which is not arbitrary, capricious, or discriminatory, or for violating the reasonable rules and regulations promulgated by the school board.

The question before the trial court was whether the Leola School Board refused to renew the appellee's contract for reasons permitted by the Teacher Fair Dismissal Act. *Moffitt, supra.* A school board's action in this regard is arbitrary and capricious only if the board's decision is not supportable on any rational basis. *Lee* v. *Big Flat Public Schools*, 280 Ark. 377, 658 S.W.2d 389 (1983); *Lamar School Dist. No. 39* v. *Kinder*, 278 Ark. 1, 642 S.W.2d 885 (1982).

The facts leading up to the board's nonrenewal of Mrs. McMahan's contract were as follows. The superintendent of the school district received some complaints from parents about Mrs. McMahan on December 13, 1981. Mrs. McMahan was not informed of these complaints at that time. On December 16, an evaluation was made of Mrs. McMahan and all of the other teachers. Mrs. McMahan was rated "satisfactory" on fifteen items, "needs improvement" on four items and "unsatisfactory" on one item. Mrs. McMahan was rated unsatisfactory in the area of rapport with parents and students. A conference was held January 4, 1982, at which time Mrs. McMahan was told by the

superintendent of three complaints against her. The complaints were excessive harassment of students, remarks to students and parents asking if there were problems at home, and remarks to parents that if a student colors in black, the student has a problem. The superintendent recommended that Mrs. McMahan use tactics besides badgering students and that she refrain completely from the other activities. Mrs. McMahan submitted a report asking for further information about what she did that was considered harassment, denying that she asked her students about problems at home, and offering to quit making any comments to parents about the significance of coloring in black.

A second conference was held January 18 and the same three complaints were discussed. The superintendent wrote in his report of the conference that no positive plan for resolution of the problem had been submitted by the teacher since the first conference. Mrs. McMahan replied in writing, stating that she disagreed with the report but was willing to work with the superintendent and the board to solve the problem. She noted that she asked at both conferences for a written statement of what kind of harassment was stated in the complaints, but she has not received an explanation. Mrs. McMahan then responded to the complaints, stating that she has been as gentle as possible since the first conference so as not to harass her students, she does not question her students or talk to their parents about their home life, and she has not mentioned coloring in black again.

A third conference was held January 21 with Mrs. McMahan, the superintendent, and Mrs. Beverly Williams, the main complaining parent. There is no written record of what took place at this conference.

On February 3 the superintendent verbally informed Mrs. McMahan that there was no need for further conferences and he was leaning heavily towards recommending renewal of her contract. On February 18 the superintendent wrote a note to Mrs. McMahan, which was delivered February 22, telling her no further conferences were needed and a recommendation of renewal would be presented to the school board at the April board meeting.

On March 22, Mrs. Williams complained about an incident when she came to the school to have a conference with Mrs.

McMahan over a discipline sheet. Another teacher, Mrs. Dennis, was included in the conference as a witness at the request of Mrs. McMahan. Mrs. Dennis actively participated in the conference and, as a result, Mrs. Dennis's actions were the focus of Mrs. Williams's complaint. The superintendent had a conference March 25 with Mrs. Dennis, Mrs. McMahan, and Mrs. Williams. The superintendent stated Mrs. McMahan interfered with the conference and was insubordinate and so he asked her and Mrs. Williams to step out into the hall so he could talk to Mrs. Dennis alone. After they left the room, Mrs. Williams called him and he went outside to find Mrs. McMahan lying on the floor, yelling and in apparent pain. Mrs. McMahan later explained that she fainted and that the stress had given her back spasms.

Despite the March incidents, at the April 8 school board meeting the superintendent recommended Mrs. McMahan's renewal. The board did not take any action on her contract and instead asked the superintendent for more information on the March 25 conference before a decision would be made. Thereafter, the superintendent stated that he studied his information "based upon what I had recognized at the Board meeting", then withdrew his recommendation. Mrs. McMahan was properly advised that he now planned to recommend nonrenewal of her contract because of "a recurrence of the type of problem for which you have been repeatedly counseled this year, as well as in previous years." Mrs. McMahan requested a hearing before the school board on the superintendent's change of recommendation and such a hearing was held on May 18. After hearing testimony from the superintendent, Mrs. Williams, Mrs. McMahan, and witnesses for Mrs. McMahan, the school board held an executive session and voted three to two to accept the superintendent's recommendation of nonrenewal.

In finding that the school board abused its discretion, the trial court in an amended order made several findings of fact, including the following: that at the April 8 board meeting, a letter of complaint against Mrs. McMahan was read and Mrs. McMahan was not allowed to respond, even though in January she made a written request to be allowed to respond to complaints; that at its May meeting, the board denied Mrs. McMahan and her supporters the right to address the board, yet allowed complaining parties to address the board; that documents and

testimony were introduced at the May 18 hearing of which Mrs. McMahan had no prior notice although she had requested this information pursuant to the Teacher Fair Dismissal Act; and that "[t]he basis of the Board's vote to nonrenew Plaintiff in 1982 was an incident that occurred in 1976 for which Plaintiff had been cleared. Two of the Board members who voted to nonrenew Plaintiff were the only two complaining parents in 1976."

The trial court held that these actions all violate the Teacher Fair Dismissal Act in that they constitute arbitrary, capricious and discriminatory reasons to nonrenew Mrs. McMahan's teaching contract.

The appellant first objects to the weight placed by the trial court on the fact that the superintendent originally recommended renewal and then, when asked by the board to provide more information, recommended nonrenewal. The appellant claims that the recommendation of the superintendent was not binding on the board and this reliance is accordingly misplaced.

Although it is true that the board was not bound to follow the superintendent's recommendation, that recommendation was used by the board as the format for the nonrenewal hearing. One of the board members stated at the outset that the procedure for the hearing would be that the superintendent would first state his recommendation and fully explain his reasons, then any other persons would testify "offering evidence in support of his recommendation." Mrs. McMahan would then be permitted to respond with her own statement and with the testimony of others. Then, "[a]fter the conclusion of all the witness' statements, the Board will consider the evidence presented and act on the recommendation." It is clear from the record that the recommendation was relied upon by the board members as they considered Mrs. McMahan's contract.

The appellant also objects to the findings by the trial court that Mrs. McMahan was not allowed to address the board and respond to complaints at one of the board meetings and that documents and testimony were introduced at the hearing of which Mrs. McMahan had no prior notice. Appellant maintains these findings were both factually incorrect and that neither the opportunity to so address the board nor notice of documents and testimony is required by the Teacher Fair Dismissal Act.

We cannot say the trial court was clearly erroneous in finding that Mrs. McMahan was not allowed to address the board at its May meeting, although she was allowed to testify at the May hearing. It is more difficult to ascertain whether certain documents and testimony were introduced at the hearing of which Mrs. McMahan had no prior notice. Regardless, we do not reverse a trial court if its judgment is correct for any reason, *Miller* v. *Dyer*, 243 Ark. 981, 423 S.W.2d 275 (1968). The Teacher Fair Dismissal Act does require a school administrator to bring to a teacher's attention in writing any problems that may lead to the teacher's dismissal, Ark. Stat. Ann. § 80-1264.6 (Repl. 1980), and to maintain a personnel file which is available for the teacher's inspection. § 80-1264.7. The latter statute includes a requirement that the teacher be allowed to submit for inclusion in the file any written information in response to any of the matter contained in the file. Clearly then it was intended by the Legislature that the teacher be apprised of any problems and permitted to respond. The lack of both prompt notice to Mrs. McMahan and the opportunity to respond immediately to allegations against her, prevented Mrs. McMahan from taking further action to satisfy the complaints against her. To thwart Mrs. McMahan's efforts to respond and remedy the complaints, and then base her dismissal on these same complaints, supports the trial court's finding that the board relied upon arbitrary and capricious reasons for nonrenewal.

Similarly, there was conflicting testimony as to whether the 1976 complaints formed the basis of the board's decision and whether Mrs. McMahan was "cleared" of those complaints. Since there was testimony that supports the trial judge's findings on this issue, we cannot say he was clearly wrong.

The record reveals that the same three complaints were used against Mrs. McMahan at each of her conferences and, ultimately, were used to nonrenew her contract. Yet, Mrs. McMahan apparently corrected the documented deficiencies insofar as she was able to with the explanation of those deficiencies that was afforded her.

The school board's nonrenewal of Mrs. McMahan's contract, based on the foregoing, constituted an abuse of discretion. In so holding, the trial judge did not impermissibly substitute his

judgment for that of the board, but rather acted within the scope of judicial review of school board actions. We affirm his order.

As a second issue, the appellant objects to the trial court's decision to reinstate Mrs. McMahan and to award her backpay for the years between her nonrenewal and her reinstatement. Appellant maintains that the Teacher Fair Dismissal Act does not mandate reinstatement as a remedy and that the award of backpay for a period exceeding one year violates this court's holding in *Marion County Rural School Dist. No. 1* v. *Rastle*, 265 Ark. 33, 576 S.W.2d 502 (1979) and Ark. Stat. Ann. § 80-1264.2 (Repl. 1980).

We answered appellant's argument as to backpay in the recent case of *Western Grove School Dist.* v. *Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986), where we held that by statute, a teacher's contract with the school district continues unless nonrenewed for cause. We stated:

> Once [the teacher] . . . was removed from her job by the school district without cause, her contract was in abeyance during the pendency of the lawsuit. Since the lawsuit resulted in her reinstatement, [the teacher] . . . is entitled to be compensated for the period she was unemployed due to the actions of the school district.

The award of backpay was thus correct.

As to the reinstatement of Mrs. McMahan, the appellant maintains that a court should not grant reinstatement unless the return of the given teacher to a school's environment will not cause unnecessary disruption because of ensuing hard feelings. The appellant has cited no authority for this proposition. Any time a school board is forced to reinstate a teacher it has dismissed, hard feelings may be the result. To refuse reinstatement on that basis would allow the board to succeed in its arbitrary action. Reinstatement was an appropriate remedy.

Affirmed.

HAYS and HICKMAN, JJ., dissent.

STEELE HAYS, Justice, dissenting. By this opinion the court has, I believe, assumed the role of deciding whether a teacher's

contract should or should not have been renewed. However, that responsibility under the law belongs neither to this court nor to the circuit court, but to the Leola School District. *Kirtly* v. *Dardanelle Public Schools*, 288 Ark. 86, 702 S.W.2d 25 (1986).

In *White* v. *Jenkins*, 213 Ark. 119, 209 S.W.2d 457 (1948), we said:

> It is well settled that courts may not intervene to control matters in the discretion of administrative bodies such as school boards, in the absence of a showing of an abuse of such discretion. Necessarily, some latitude in the exercise of this discretion must be given to these boards. They represent the people of the locality affected and naturally are closer to the problems to be solved than any court or other agency could be.

And in *Safferstone* v. *Tucker*, 235 Ark. 70, 357 S.W.2d 3 (1962):

> The law involved appears to be well settled. In this State a broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence.

The Teacher Fair Dismissal Act (Ark. Stat. Ann. § 80-1264 et seq., Repl. 1980)[1] provides that a teaching contract may be nonrenewed for *any reason*, so long as it is not arbitrary, capricious or discriminatory. By including the word "any" the legislature emphasized its intention not to invade the "broad discretion" of school boards in deciding which teachers should be retained, except where the nonrenewal is arbitrary, capricious or discriminatory. Ark. Stat. Ann. § 80-1264.9(b) reads in part:

> Any certified teacher . . . may be terminated or the board may refuse to renew the contract of such teacher for *any*

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[1] These proceedings occurred prior to the effective date of the Teacher Fair Dismissal Act of 1983.

> *cause* which is not arbitrary, capricious, or discriminatory . . . (My italics).

We have interpreted that provision to mean the board's action will not be reversed if "any rational basis" exists for nonrenewal, *Lamar School District No. 39* v. *Kindy*, 278 Ark. 11, 642 S.W.2d 885 (1982), and the board's discretion was not abused. "Since this determination not to renew the appellant's contract was a matter within the discretion of the school board, the reviewing court could not substitute its opinion for that of the Board in the absence of an abuse of discretion by the Board." *Chapman* v. *Hamburg Public Schools*, 274 Ark. 391, 625 S.W.2d 477 (1981).

There is substantial evidence in this record for Mrs. McMahan's nonrenewal by the Leola School Board. Mrs. McMahan's performance over a period of time was shown to be deficient in her relations with some parents and children. Her classes (first and second grade pupils) were divided into fast learners and slow learners, that the slow learners were ridiculed by the other students. One parent, on receiving her child's report card, was told by Mrs. McMahan, "The next one will be worse." There was evidence that some children were afraid of her, that she yelled at them, that she harassed and picked on some. Much of the proof centered on one pupil, Chad Williams, whose difficulties with Mrs. McMahan were the cause, at least as his parents saw it, of nervousness, bed-wetting and vomiting. On several occasions he wet his pants in the schoolroom, once after a request to go to the restroom had been refused. He was made to wipe up the floor in front of the other children. Mrs. Williams said that Mrs. McMahan's reaction to her concerns on her son's behalf was to refuse to speak to her when they met in public. There was other proof of a similar vein, including testimony that Mrs. McMahan questioned children indiscreetly about "problems at home."

It must be said in fairness there was much offsetting proof, there were parents who praised Mrs. McMahan, and Mrs. McMahan offered a number of letters from devoted children. But those conflicts were for the school board to weigh and resolve. Once particularly unfavorable incident is virtually undisputed and would provide in and of itself a basis for nonrenewal. Mr. Pharr and Mrs. Williams described the event: Mrs. McMahan

was unwilling to meet with Mrs. Williams without a witness present. She chose Mrs. Dennis, another teacher. When Mrs. Dennis interjected her own opinions concerning Chad, the three women consulted Mr. Pharr, the superintendent. His attempts to mediate were frustrated by what he described as insubordinate conduct by Mrs. McMahan to the extent that the meeting was disrupted. Finally, he asked Mrs. Williams and Mrs. McMahan to step outside while he spoke with Mrs. Dennis. He said after they went out Mrs. Williams came to the door and called him and Mrs. McMahan was lying on the floor outside the conference room "hollering and screaming." He said the incident disturbed other classes.

Mrs. Williams' description corroborated Mr. Pharr's. She said when she and Mrs. McMahan stepped outside, Mrs. McMahan listened at the door a few minutes and then lay down on the floor and "began screaming and hollering." Mrs. McMahan's explanation was that she had been under stress and had fainted, though how that explains the alleged screaming, is not clear. There was some suggestion that the onset was due to muscle spasms of her back, yet there was testimony that she was back at school that afternoon. Whether this bizarre scene was explainable in terms of a physical or an emotional cause, and to what extent it reflected on Mrs. McMahan's competence, was for the school board to decide.

The circuit judge virtually ignored the foregoing evidence, and looked instead to matters that were collateral to the issue of whether there was "any cause" to nonrenew Mrs. McMahan's contract. The fact that Mr. Pharr may have been ambivalent is entirely beside the point, as it is the school board's responsibility to decide on renewal. Nor is the fact that the school board would not hear Mrs. McMahan's supporters at the May 6 meeting of any relevance. The open meeting was held on May 18 and Mrs. McMahan was permitted to offer whatever she chose at the meeting. The board was not required to hold two open meetings on the issue. Lastly, the finding that 1976 charges were the basis for the current nonrenewal was clearly erroneous. Certainly the board had the right to discuss earlier problems. Had the board relied on outdated charges alone, such a finding would be appropriate, but the fact is there was ample evidence of recent origin to sustain the board's action.

I believe we should adhere to our many cases that say the courts will not invade the province of the school board in the exercise of its authority. *Chapman* v. *Hamburg Public Schools, supra.*

HICKMAN, J., joins in this dissent.

Mamie KNOX *v.* Billy GRAY, II

86-65 712 S.W.2d 914

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Gordon & Gordon, P.A., by: *Edward Gordon*, for appellant.

Matthews & Sanders, by: *Gail Matthews* and *Marci Talbot*, for appellee.

GEORGE ROSE SMITH, Justice. This is an action for personal injuries suffered by the plaintiff, Mamie Knox, when she fell as she was descending the two front-porch steps at the house she had been renting from the defendant, Billy Gray, II, for the preceding six months. The trial court sustained the defendant's motion for summary judgment, which was supported by affidavits and controverted by the plaintiff's affidavit. The appeal comes to us under Rule 29(1)(o).

It is important to state at the outset that the complaint does not allege a violation of any duty owed by Gray as landlord to Mrs. Knox as his tenant. Instead, the complaint specifically asserts that Gray was the owner of the premises, that the plaintiff was an invitee, and that Gray was negligent in failing to furnish

the plaintiff a safe place to descend from the porch to the ground. The proof is that the steps were decidedly unstable, consisting of boards laid loosely across concrete blocks near each end.

[redacted] The trial judge was right, because the plaintiff was not an invitee as a matter of law, no issue of fact being presented. A tenant has the exclusive right to possession of the property and thus, with regard to third persons, occupies a position on a parity with that of an owner and precisely opposite to that of an invitee. Chapter 11 of AMI, which treats this subject, is entitled "Owners and Occupiers of Land." The pertinent instructions state that an owner *or* occupant of land owes certain duties to a trespasser, a licensee, and an invitee. AMI Civil 2d, 1102, 1103, and 1106 (1974). In *DeVazier* v. *Whit Davis Lbr. Co.*, 257 Ark. 371, 516 S.W.2d 610 (1974), we discussed the duties owed to an invitee or licensee by the occupier or possessor of land.

Counsel for the appellant, in insisting that a tenant can also be an invitee, italicize the word "tenants" in this quotation from Prosser: "Thus salesmen, workmen seeking employment, or prospective purchasers or *tenants* of land are considered invitees when they come to a place which they have good reason to believe to be open for possible dealings with them. . . ." Prosser, Torts, 390 (4th ed. 1971). Prosser, however, was speaking not about tenants but about prospective tenants. All five of the cases cited to support the reference to tenants involved plaintiffs who were injured while they were inspecting premises with a view to renting them.

The duties owed by a landlord to his tenant are determined by principles quite different from those applicable to the owners or occupiers of land and their invitees. Upon the undisputed facts the plaintiff is not in a position to invoke the protection owed by a landowner to an invitee.

Affirmed.

HOLT, C.J., not participating.

Mildred McCARVER and MUNRO-CLEAR LAKE FOOTWEAR *v.* SECOND INJURY FUND

86-46 715 S.W.2d 429

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Barber, McCaskill, Amsler, Jones & Hale, P.A., for petitioner.

David L. Pake, Second Injury Fund, for respondent.

GEORGE ROSE SMITH, Justice. In this and a companion case we granted petitions to review decisions of the Court of Appeals reversing awards made by the Workers' Compensation Commission. *Second Injury Fund* v. *McCarver*, 17 Ark. App. 101, 704 S.W.2d 639 (1986); *Second Injury Fund* v. *Riceland Foods*, 17 Ark. App. 104, 704 S.W.2d 635 (1986). The two majority opinions of the Court of Appeals supplemented each other, but they dealt with a single issue, which is all we need consider.

The issue: Is the Second Injury Fund liable when an employee sustains a second injury while still working for the employer in whose employment he sustained the first injury? The Commission held the Fund liable; the Court of Appeals reversed.

In this case Ms. McCarver was working for Munro-Clear Lake Footwear when she suffered a back injury in 1979. She returned to work with an impairment of 5% to the body as a whole. In August, 1983, she suffered a compensable injury to her shoulder, arm, and hand. That too was a 5% impairment in itself, but the combination of injuries resulted in a total impairment of 30%. The claimant will be paid in any event. The question is

whether the extra 20% impairment is to be paid by the employer's insurance carrier or by the Second Injury Fund.

The policy reasons underlying the second injury statute, having to do with the continued employment and the reemployment of workers handicapped by an earlier injury, were considered by the majority and dissenting opinions in the Court of Appeals. The opinions also went into the basic question of statutory construction. We perceive nothing really new to add to the analysis presented by the Court of Appeals.

We are of the view that the majority opinions were right in putting primary emphasis on the language of the statute. On March 31, 1981, shortly before both the second injuries in these cases occurred, the legislature made this significant addition to the pertinent section of the Workers' Compensation Law:

> The Second Injury Fund established herein is a special fund designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred *while the worker was in his employment.* [Italics supplied.] Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985).

In commenting on the sentence just quoted, the majority in the *Riceland* case made this observation:

> Obviously, if as provided in the very first sentence of the statute—the sentence stating the reason and purpose for the statute—the employer employing a handicapped worker is to be liable *only* for the disability or impairment that occurs when the worker sustains an injury during the employment, then it must follow that such employer will be liable for *all* the disability or impairment that occurs when the worker is injured while in that employment.

We find the court's reasoning to be convincing.

Affirmed.

HICKMAN and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. I thoroughly disagree with the majority opinion in this case as well as in *Second Injury*

Fund v. *Riceland Foods* (86-50), which is being released today, to the extent it echoes this decision.

First, the majority says Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985) contains language persuasive to the effect that the second injury fund should not be liable because it precludes an employer from having to pay for any injury other than one sustained while the worker was in his employment. The simple answer to this point is that if the second injury fund has to pay in his case that statute will not be violated in any way. The employer will not be paying for any injury not incurred while the employee worked for him. He will only be paying for less than the entire disability.

Second, the majority is persuaded by the court of appeals' reference to that same statutory section and the court of appeals' reasoning that if the employer is required to pay for *only* such injury as the worker sustains in his employment "it must follow that such employer will be liable for *all* the disability or impairment that occurs when the worker is injured while in that employment." I cannot follow that reasoning. Why must the employer be liable for all? Neither the court of appeals majority nor that of this court explains. To the contrary, the employer need not be liable for all if the legislature has relieved the employer to the extent the sum of disability is greater than its parts by creating a second injury fund for that very purpose.

Third, looking at the opinion of the court of appeals majority, it becomes apparent that the principal reason for the result reached is fear of insolvency of the second injury fund. In this case the court of appeals cited the article by Bill Bassett expressing his personal fear of the fund's potential insolvency. W. Bassett, *Second Injury Law, Old and New*, The Arkansas Lawyer, July, 1983, p. 122 at p. 124. In the *Riceland* case, the court of appeals' opinion goes further, citing our opinion in *Arkansas Workmen's Compensation Commission* v. *Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950), where there is language requiring strict compliance with the statutory requirements for liability of the fund to avoid making it insolvent. Also cited in the *Riceland* case majority court of appeals opinion is Ark. Stat. Ann. § 81-1348(a) (Supp. 1985) which provides that if the fund becomes insolvent the payments from it will cease, and the

employer will, after July 1, 1983, not be liable to pay what would otherwise have been paid by the fund.

The court of appeals' quotation from the *Sandy* case was not even the language of this court. Rather, it was language from the workers' compensation commission's opinion in that case which our opinion quoted but neither approved nor disapproved. Our decision was only not to reverse the commission's factual conclusions as to the extent of the disability of the worker. The case was a far cry from a decision stating policies with respect to the extent of the second injury fund's exposure. Nor does the cited statute do more than provide for the contingency of the fund's insolvency. It gives no guidance whatever as to the Arkansas General Assembly's intent in creating the fund and, specifically, whether the fund should pay for disability in excess of that created by a second injury in the employment of the same employer who employed the worker when the first injury occurred.

Fourth, scant attention, if any, is paid by the court of appeals majority, or the majority of this court, to the policy behind the second injury fund legislation. As Professor Larson says, second injury funds have been created to solve the dilemma of apportionment of injury. His example is that an employee who loses one eye is far less disabled than he would be if he should lose the other eye in a later accident. Thus, the employer is subject to far higher insurance rates if he hires a person with only one eye. The employer thus has a strong financial incentive to discharge the worker who, by virtue of his handicap resulting from the loss of one eye, causes this "kind of aggravated liability." 2 A. Larson, Workmen's Compensation Law, § 59.31(a) (1983). The policy of eliminating this financial incentive is directly implicated whether an employer is considering hiring a handicapped worker whom he had not previously employed or retaining a worker who is permanently injured while working for him. I agree with Judge Glaze's dissent in the *Riceland* case to the effect that it is no answer to this problem to cite Ark. Stat. Ann. § 81-1335(b) (Repl. 1976). The fact that an employer may be sanctioned for *firing* an employee for bringing a workers' compensation claim places no requirement on an employer to *hire* or retain a handicapped employee. Nor should a handicapped employee be put in the position of having to show his dismissal was wilfully discriminatory on the basis of his having filed a claim when the

employer's intent may have nothing to do with retaliation but is simply a recognition that his insurance rate would be lower with a non-handicapped employee on the job.

Sixth, I believe it is traditional and useful to look to decisions in other jurisdictions when we have, as here, a question of first impression. Although the workers' compensation laws and second injury fund statutes may differ in detail from ours, surely the method of implementation of the policy behind the second injury fund law in other states is relevant. In *Estep* v. *State Workmen's Compensation Commissioner*, 298 S.E.2d 142 (W.Va. 1982), the West Virginia Supreme Court of Appeals was faced with this same question and said:

> It is the Commissioner's view that the second injury statute applies in circumstances where the employee suffers both injuries while employed by the same employer as well as when the injuries are suffered during employment with different employers. We agree. "The second injury life award statute, W. Va. Code § 23-3-1, was purposely designed to encourage employers to hire disabled workers by not charging an employer for preexisting disabilities." Syllabus Point 2, *Pertee* v. *State Workmen's Compensation Commissioner*, W. Va. 255 S.E.2d 914 (1979). This policy would be defeated if the second injury statute did not apply to cases where the employee suffered both injuries while working for the same employer. In such cases, the employer would have a financial incentive to dismiss the injured employee and hire a non-disabled worker. Application of the second injury statute here places all injured workers on the same footing regarding the employer's compensation liability for subsequent injury resulting in permanent total disability.
>
> Therefore, when an employee suffers a second injury, which when combined with the effect of a prior injury results in permanent total disability, and both injuries occurred while the claimant worked for the same employer, the employer is chargeable for the compensation resulting from the second injury and the second injury fund is chargeable for the remainder due the claimant.

Other cases in which a second injury fund has been held liable for

disability resulting from more than one injury while the worker was in the employ of a single employer include: *Zabita* v. *Chatham Shop Rite, Inc.*, 505 A.2d 194 (N.J. App. 1986); *Vaughn* v. *United Nuclear Corporation*, 650 P.2d 3 (N.M. App. 1982); *Stanick* v. *Seiberling Rubber Co.*, 253 N.Y.S. 548 (App. Div. 1964); and *O'Grady* v. *Sealright Corp.*, 374 N.Y.S. 424 (App. Div. 1975). I have found no cases from other jurisdictions to the contrary.

I respectfully dissent.

HICKMAN, J., joins.

Renee THIGPEN *v.* Glen Richard POLITE and Barbara POLITE

86-32 712 S.W.2d 910

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Gary Eubanks & Associates, by: *James Gerard Schulze* and *William Gary Holt*, for appellant.

Wright, Lindsey & Jennings, for appellees.

GEORGE ROSE SMITH, Justice. Following a minor collision on an apartment parking lot, Renee Thigpen brought this suit for personal injuries and property damage against the other driver, Glen Polite, then 17, and his mother, who had signed his application for a driver's license. The jury returned a verdict for the defendants. In a motion for a new trial the plaintiff asserted that since the defendants admitted negligence and did not claim contributory negligence, the verdict awarding no damages was clearly against the weight of the evidence and entitled the plaintiff to a new trial. The only point for reversal is that the court erred as a matter of law in refusing to grant a new trial. We can find no merit in the appellant's argument and affirm the judgment.

It is an appellant's responsibility to bring up a sufficient record, but there are omissions in this record. At an unreported pretrial conference there was an admission of liability by the defendants, but neither they nor their attorney has admitted that the plaintiff suffered any personal injury or property damage. Hence the plaintiff had the burden of proving her damages. The record does not contain the court's instructions to the jury; so we must presume that correct instructions were given. *Cotton* v. *Brasher*, 175 Ark. 209, 298 S.W. 1035 (1927). The appellees' brief states that the jury was instructed with regard to causation and damages; in any event we would assume such instructions were given.

We adhere to our practice of stating the facts most favorably to the verdict. The plaintiff testified that she was approaching a speed breaker at three or four miles an hour. Glen said he was backing out of a parking space and pulling to his left before going forward. He said he guessed the vehicles scraped (which would have been possible as he described the incident). He had not looked both ways and admitted the accident was his fault. The

only damage to Glen's pickup was a smudge of paint from the other car, on his righthand door. He had no idea whether the plaintiff's car had been damaged. She testified that her front fender was dented.

Immediately after the accident the plaintiff obtained information about the defendants' insurance. Her husband testified about his wife's asserted injury. On cross examination the defendants' attorney produced an estimate of damage, which the witness admitted he had submitted to the defendants' insurance company. The estimate totaled $551.22 and included not only $153.95 for a fender but also $102.20 for a wheel, a charge for aligning the front end, and other items the witness could not explain. He said the insurance adjustor refused to pay the bill because his insured had not caused the damage. That attempt to mulct the insurer may have aroused the jury's indignation.

The plaintiff admittedly said at the time that she was not hurt, but she claimed that she began having a headache later that day. At the trial her doctor testified that she had told him she had been in an automobile accident during which she sustained a jerking of her neck and torso. (She did not so testify.) The doctor found "a typical whiplash type of injury." In view of the parties' description of the accident, the jury could have found that two slowly moving vehicles made a scraping contact that was too slight for the plaintiff to have suffered any injury at all. The trial judge's refusal to grant a new trial, with the implication that he found the verdict not clearly against the preponderance of the evidence, was not a clear and manifest abuse of discretion, as we would have to find to justify a reversal. *Warner* v. *Liebhaber*, 281 Ark. 118, 661 S.W.2d 399 (1983).

In the motion for new trial counsel for the plaintiff recognized that the jury might have disregarded her proof of physical injury and property damage, but it was insisted that since the defendants had admitted "some damage" (apparently scraped paint) and also fault, the verdict for no damages was clearly against the weight of the evidence. If the jury had awarded nominal damages, the award might well have been sustained. But when there is no property right to be vindicated by nominal damages, the issue being negligence only, the jury's failure to award nominal damages is not reversible error. *Harlan* v. *Curbo*,

250 Ark. 610, 466 S.W.2d 459 (1971).

Both the dissenting opinions seem to be based on the trial court's asserted error in submitting a verdict form that permitted the jury to find for the defendants. The short answer to that argument is that the record shows no objection to the court's action; so it was too late for the point to be raised in a motion for new trial after the plaintiff had speculated on the possibility of a favorable verdict.

Affirmed.

PURTLE and NEWBERN, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. My understanding of this case and the arguments on appeal differ in several respects from that of the majority. As I understand the matter the only issue presented is whether the trial court was required to set aside the jury verdict under the circumstances of this case.

The defendant (appellee) admitted liability at the commencement of the trial and obtained a ruling in limine preventing the plaintiff (appellant) from producing evidence relating to liability during the course of the trial. However, throughout the trial, and brief in this court, appellee unmistakably refers to the liability aspect of the occurrence.

It is my opinion that having admitted liability the court and the jury were bound to find in favor of the plaintiff (appellant). I do not read *Harlan* v. *Curbo*, 250 Ark. 610, 446 S.W.2d 459 (1971), to stand for the proposition for which it is quoted in the majority opinion. The jury in *Harlan* was asked to apportion the negligence and they found it to be 60%-40% in favor of the plaintiff-appellants. The question came up on the inadequacy of damages — not liability. The holding in *Harlan* was: "We must therefore adhere to our usual rule, that the trial court's failure to award nominal damages is not reversible error."

In *Brophy* v. *Mahaffey & Associates*, 252 Ark. 811, 481 S.W.2d 360 (1972), we held that it was not error to submit only one verdict form to the jury — a form finding for the plaintiff. The appellants in *Brophy* had conceded they were indebted to the appellees in some amount. In the case before us there should have been only one verdict form submitted to the jury. It should have

been in favor of the plaintiff with the amount of damages left blank. It should have been up to the jury to place some figure in the blank.

In the case of *Smith* v. *Arkansas Power & Light Co.*, 191 Ark. 389, 86 S.W.2d 411 (1935), this court stated:

> When the undisputed evidence shows that plaintiff is entitled to recover substantial damages, a judgment will be reversed which awards only nominal damages, because a judgment for nominal damages is, in effect, a refusal to assess damages. When substantial damages are awarded, a judgment will not be reversed because of inadequacy, if there be no other error than that committed by the jury in measuring the damages. But a judgment even for substantial damages will be reversed where the undisputed testimony shows the damages to be inadequate, if error of a substantial and prejudicial nature was committed at the trial of the case.

This same language was approved in *Worth James Constr. Co.* v. *Herring*, 242 Ark. 156, 412 S.W.2d 838 (1967). I am of the opinion there was no substantial evidence upon which the jury could have found for the appellee. Also, see *Barger* v. *Farrell*, 289 Ark. 252, 711 S.W.2d 773 (1986).

The trial court's denial or granting of a new trial is governed by A.R.C.P. Rule 59. On review the test depends on whether the motion was granted or denied; if the motion was granted we will affirm absent a manifest and clear abuse of discretion. If the motion was denied we will also affirm if there is substantial evidence to support the verdict. *Landis* v. *Hastings*, 276 Ark. 135, 633 S.W.2d 26 (1982).

The majority makes the same mistake the trial court and the jury made. The majority opinion is an obvious attempt to show how the jury could have decided liability and damages had the issues been open for them to decide. Apparently the appellee's strategy of admitting liability and bridling the appellant's witnesses about describing the accident worked. The majority takes three pages arguing the facts which are not in issue. No doubt the appellant could have presented a much stronger case had it been known that liability was still an issue.

An additional reason why the trial court should be reversed is A.R.C.P. Rule 59(a) which sets out the grounds for granting a new trial. One of the grounds stated is: "(6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law." The verdict in the present case meets both criteria. I think the trial court had an absolute duty to set aside this verdict.

I would reverse and remand for a new trial.

DAVID NEWBERN, Justice, dissenting. The majority opinion notes that the appellees conceded "liability" in this case. It was more than a concession of "negligence." One of the elements of the tort of negligence is damages. Dean Prosser stated the distinction as follows:

> Negligence, as we shall see, is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct. The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:
>
> 1. . . . .
>
> . . .
>
> 4. Actual loss or damage resulting to the interests of another. Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

As there must be injury or damages to produce liability, a concession of liability is a concession that there was injury or damages.

The only question before the jury should have been the amount of damages, if any, suffered by the appellant. The jury,

however, returned a verdict for the appellees (defendants). The majority opinion ignores the problem by saying the trial court's refusal to grant a new trial "with the implication that he found the verdict not clearly against the preponderance of the evidence" was not an abuse of discretion. There clearly is no question in this case about the preponderance of the evidence on the issue of liability. The jury's verdict, like the majority opinion, is completely inconsistent with the appellees' concession of liability.

Our rules permit not only review but appeal of an order denying a motion for new trial. Ark. R. App. P. 2(a)3. If we were deciding whether a new trial should or should not have been granted because the jury misjudged the preponderance of the evidence, the narrower controversy over the impropriety of appellate review of that matter would be implicated. *See* 11 C. Wright and A. Miller, Federal Practice and Procedure, Civil, § 2818 (1973). Again, that is not the issue here.

In my view, it was an abuse of the trial court's discretion not to have granted a new trial, given the clear mistake of the verdict for the defendants. The appellees cite *Landis* v. *Hastings*, 276 Ark. 135, 633 S.W.2d 26 (1982), for the proposition that when a defendant has admitted "fault" in an accident case it is not improper for the jury to return a verdict for the defendant. That is correct, but there is a difference, as discussed above, in admitting "fault" as opposed to admitting "liability." More appropriate in this case is the appellant's citation of *Brophy* v. *Mehaffey & Associates*, 252 Ark. 811, 481 S.W.2d 360 (1972), where we upheld the trial court's action in giving the jury only a plaintiff's verdict form where the defendant had admitted he owed some money to the plaintiff for services, and the only question was the amount.

Ark. R. Civ. P. 59(a) provides:

> Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:
>
> (1) . . . .
>
> . . .

> (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law . . . .
>
> . . .
>
> (8) error of law occurring at the trial and objected to by the party making the application . . . .

The majority attempts to bolster its opinion by pointing out that no objection was made to verdict forms given to the jury. If this appeal were based on denial of a motion for a new trial which was made to seek correction of a specific error on the part of the court, pursuant to Rule 59(a)(8), I could agree. However, the motion for a new trial and this entire appeal are on the ground that it was simply a mistake to reach a result which is patently inconsistent with the appellees' concession of liability. I could understand the position of the majority better, and I would vote to affirm, had the jury returned a verdict for the appellant but found "0" damages due to the weakness of the appellant's evidence on the amount of his loss. But here the jury returned a defendants' verdict altogether. While this may seem to be a highly technical distinction, to me the return of a flat defendants' verdict showed there was serious confusion either on the part of the jury or the judge or both. In my opinion, it was within the trial judge's discretion to grant a new trial pursuant to Rule 59(a)(6), and he clearly should have done so.

The majority opinion has focused on the wrong element of Rule 59(a)(6) by discussing whether the verdict was clearly contrary to the preponderance of the evidence. The preponderance of the evidence on the matter of liability became moot when the appellees (defendants) conceded it. The verdict in this case was, in the words of Rule 59(a)(6), "contrary to the law" because the defendants, who had conceded liability, were not entitled to a verdict, *Brophy* v. *Mehaffey and Associates, supra*, no matter how indignant the jury may have been.

I respectfully dissent.

Julia HUGHES *v.* STATE of Arkansas

CR 86-28 712 S.W.2d 308

Supreme Court of Arkansas
Opinion delivered July 21, 1986

William R. Simpson, Jr., Public Defender, and *Howard W. Koopman*, Deputy Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Julia Hughes was convicted of murdering her two year old son, Anthony, by throwing him into a ditch where he drowned. Hughes had been in and out of the Arkansas State Hospital in recent years and although she had three children, none of them were in her exclusive custody. But on May 6, 1985, Anthony was with her.

There was an abundance of evidence of Hughes' guilt and she was sentenced to life imprisonment. Her conviction must be reversed because at one time during her interrogation she asked for a lawyer and the questioning did not cease. Her statements and actions thereafter should have been excluded from the evidence.

Hughes' parents notified the police after she left the house in the morning with Anthony and then returned home without him. When the child was not found, Hughes was picked up for questioning. She was read her rights and said she understood them, although she refused to sign a rights waiver form claiming that she could not read or write. She told the police she had thrown Anthony in the river and it was too late to get him any help. These statements were made to two police officers, Beavers and Alexander. No objection was made to their introduction.

Several hours later Detective LeMaster questioned her about Anthony's disappearance. Hughes stated that she did not know what they were talking about. Later she remarked it did not make any difference because he was gone. She said he was dead but then said maybe he was not and they should check on him. Eventually the conversation led back to her saying she did not know what the officers were talking about. Those statements are also not challenged by Hughes.

About 5:30 p.m., Eddie Montgomery, a deputy prosecuting attorney, and Becky Fribourgh, an employee of the prosecutor's office, were introduced to Hughes by LeMaster. At that point Hughes said she wanted to talk to a lawyer. LeMaster asked her who she wanted them to call and she did not reply; then he said, "Do you want us to call your attorney?" She still did not reply. LeMaster said it was very important that Anthony be found and that this was the most important thing right then. Montgomery and LeMaster left the room. Fribourgh, who knew Hughes previously through the SCAN program, got Hughes matches for her cigarettes and water and returned to the interview room. Hughes made an irrelevant remark that Fribourgh had crooked teeth, then apologized. Fribourgh asked Hughes what she had done that day and Hughes said she did not know what Fribourgh was talking about. Hughes then again asked Fribourgh what she had done that day. Fribourgh told her and Hughes said, "Well, you're too pretty to feel guilty about my baby. Do you think my baby's still alive?" Fribourgh said she did not know and asked where the baby was.

Several times Hughes said she did not know what Fribourgh was talking about. Fribourgh said she would ask another question or start talking about something else and Hughes would return to asking whether her baby was still alive. Once when Fribourgh asked where the baby was, Hughes said that she had "pitched him in the river." Fribourgh asked where and Hughes said Sweet Home and tried to give Fribourgh directions. She then offered to take Fribourgh to the spot. She asked if Fribourgh would get LeMaster. LeMaster came in and Hughes told him that she had thrown Anthony in the river around Sweet Home. He continued to talk to her and "finally" she said she would take him and show him. She led the officers and Fribourgh to the place where Anthony was found dead. After her return to the station, Hughes signed a waiver of rights and dictated an incriminating statement.

[redacted] The trial judge ruled that Hughes had initiated further conversation and that she had waived her right to a lawyer. That is decidedly not the case. She did not waive the request and she did not initiate further conversation. The police and officials were bound to stop the interrogation when Hughes asked for a lawyer, which they did not do. Therefore her statements made after the request are inadmissible.

Edwards v. *Arizona*, 451 U.S. 477 (1981), laid down a clear and easy rule that interrogation must stop when a suspect asks for counsel. The Court said:

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

We have followed *Edwards*. *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985); *State* v. *Branam*, 275 Ark. 16, 627 S.W.2d 8 (1982); *Dillard* v. *State*, 275 Ark. 320, 629 S.W.2d 291 (1982).

In *Smith* v. *Illinois*, 469 U.S. 91, 105 S.Ct. 490 (1984), the United States Supreme Court elaborated further on *Edwards*:

> 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

There is no doubt that Hughes asked for a lawyer. That is conceded. Furthermore, the police officials knew it was their duty to furnish Hughes a lawyer. The questions to Hughes about who she wanted to call were obviously meant to discourage her from exercising her rights and not a good faith effort to comply with the law. The interrogation continued until she told them what they wanted to know.

[redacted] The United States Supreme Court defined interrogation in *Rhode Island* v. *Innis*, 446 U.S. 291 (1980):

> 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating

response.

When Hughes asked for counsel, LeMaster asked who she wanted them to call and then emphasized that the most important thing was to find Anthony. Fribourgh went in with refreshments and asked Hughes what she had done that day. Fribourgh and LeMaster should have known that those remarks were likely to elicit an incriminating response. Hughes was already suspected of murder, she had been interrogated for several hours, and after she asked for a lawyer her request was not honored.

The *Edwards* rule is a clear one and officials can easily comply with it. Furthermore, it is also easy to determine when an accused initiates further conversation. For example in *Dillard* v. *State, supra*, Dillard told the sheriff he wanted an attorney but continued to ask questions and talk about the case. He was repeatedly told that if he wanted an attorney he should not say more, but Dillard chose to continue the conversation. We affirmed the admission of the statements.

Here the evidence obtained was not even necessary for the state's conviction. The state could have followed the *Edwards* rule and still would have had ample incriminating evidence. All the statements after Hughes requested counsel should have been excluded; that includes her statements to Fribourgh, the agreement to lead the police to the child, her statements in the car, and the statement she made upon her return to headquarters.

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 other points argued or in the other objections abstracted for review.

Reversed and remanded.

HOLT, C.J., not participating.

RICELAND FOODS, INC. and LIBERTY MUTUAL INSURANCE CO. *v.* SECOND INJURY FUND

86-50 715 S.W.2d 432

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Friday, Eldredge & Clark, by: *Barry E. Coplin*, for appellant.

Thomas J. O'Hern, Second Injury Fund, for appellee.

JOHN I. PURTLE, Justice. We granted petitions for review of the decisions of the Court of Appeals in this case and the case of *McCarver* v. *Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986), to consider Workers' Compensation Commission decisions relating to the Second Injury Fund. The cases involve employees who received first and second injuries while employed by the same employer. The first injury in each case resulted in permanent partial disability. The nature, extent and duration of the injuries in the two cases are different; therefore, only the injuries of the employee in this case will be discussed in this

opinion.

The Court of Appeals reversed the Commission's decision that the Second Injury Fund was liable for compensation due an employee in cases where a second injury rendered an employee permanently and totally disabled. The Commission held that the relationship of the first disability or injury and the employment was not an element to be considered. The Court of Appeals reversed and held that if the first injury arose out of and in the course of the same employment, then the Second Injury Fund was not responsible for payment of benefits above and beyond those mandated by the second injury alone. We affirm the decision of the Court of Appeals.

The employee, Harry Brown, was able-bodied when he commenced work for the petitioner-employer in 1946. Sometime in 1955, he was exposed to noxious gases which exposure, among other things, resulted in toxic hepatitis. The inhalation of the noxious gases gave rise to a compensable injury. The employee was last paid disability compensation in 1958; however, the employer's insurance carrier, Liberty Mutual, continued to pay medical benefits for several years. Twenty-five years after inhaling the toxic gas, the employee received a second injury while still in the employ of Riceland Foods. His second compensable injury was an injury to his left ankle which resulted in a 15% permanent partial disability to the left leg. This injury when combined with the first injury rendered the employee totally and permanently disabled.

Before the second injury occurred the petitioner-carrier had destroyed the file relating to the first injury. The "A-11 Form" (the final report filed with the Workers' Compensation Commission) for the first injury reveals that the employee was paid 15 weeks temporary total disability. Throughout the record it is evident that the employee never really recovered from the toxic gas exposure although he continued his employment with the same employer for more than 25 years. At the time of the second injury in 1981 the employee had to use a cane in order to walk. He also had developed congestive heart failure.

Brown and his wife both testified that he never fully recovered from the toxic gas injuries. He stated that after his first injury his doctors had not wanted him to return to work.

Eventually he obtained permission to return to work, performing only limited duties. Doctor John Wilson treated the employee for his second injury. In obtaining the patient's health history, the doctor was told that the employee had heart, liver and lung disease as a result of the poisoning. The doctor's report in part stated: "However, due to his general physical condition, from what I'm told, he is unable to return to gainful employment because of the poisoning that occurred in the past." There is no dispute over the fact that the employee was considerably disabled prior to his second injury. The factual dispute arises over the employer-carrier contention that the disability existing prior to the second injury was a result of heart disease and other ailments not connected to the first injury.

In an opinion filed on August 3, 1984, the Administrative Law Judge made findings of fact and conclusions of law which were later adopted by the full Commission. The findings of fact included the following statement:

> [I]t is apparent from both the lay testimony and the medical evidence that claimant was substantially disabled or impaired as a result of a previous injury, as well as the deterioration of his general physical condition.

The law pertaining to second or successive injuries is codified as Ark. Stat. Ann. § 81-1313(f)(1) (Repl. 1976) and reads as follows:

> If an employee receives a permanent injury after having previously sustained another permanent injury in the employ of the same employer, for which he is receiving compensation, compensation for the subsequent injury shall be paid for the healing period and permanent disability by extending the period and not by increasing the weekly amount. When the previous and subsequent injuries received result in permanent total disability, compensation shall be payable for permanent total disability as provided in Section 10(a) [§ 81-1310] of this Act.

Section 4 of Act 290 of 1981 dealt with the Second Injury Fund and has been compiled as Ark. Stat. Ann. § 81-1313(i) (Supp. 1985) which in part states:

> The Second Injury Fund established herein is a special

> fund designed to insure that an employer *employing a handicapped worker* will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred *while the worker was in his employment*. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined. . . .
>
> If the previous disability or impairment or disabilities or impairments whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself. . . . [Emphasis added.]

The Second Injury Fund (respondent) argues that Ark. Stat. Ann. § 81-1313(f) (1) still controls even though Act 290 of 1981 when read alone might support the opposite view. The petitioners, on the other hand, argue that Act 290 clearly requires the Second Injury Fund to pay for benefits beyond those which are solely attributable to the second injury. Given the state of the law in its present form it is understandable that reasonable minds might reach different conclusions. Either statute standing alone would not be difficult to understand; however, we must examine them together and give meaning to both if possible. *Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984). When construing a statute we must compare it with other statutes on the same general subject matter and if possible reconcile them. *Sargent* v. *Cole*, 269 Ark. 121, 598 S.W.2d 749 (1980). All acts passed upon the same subject matter should be construed together and made to stand if capable of being reconciled. *Vandiver* v. *Washington County*, 274 Ark. 561, 628 S.W.2d 1 (1982).

The first sentence of Ark. Stat. Ann. § 81-1313(i) states that an employer shall not "be held liable for a greater disability or impairment than actually occurred while the worker was in his employment." There is no dispute over the fact that the employee was employed by petitioner at the time of both the first and second injuries. The first injury was obviously a serious one and left the

employee with an undetermined anatomical impairment and loss of earning capacity. We agree with the decision of the Court of Appeals that the employee is permanently and totally disabled and that both injuries actually *occurred while the worker was in petitioner's employment*. Therefore the petitioners are responsible for all the compensation and benefits due the claimant.

[redacted] When read together these two statutes can be reconciled. Act 290 did not specifically repeal Ark. Stat. Ann. § 81-1313(f)(1). Repeals by implication are not favored in the law, and such repeals will not be allowed unless the implication is clear and irresistible. *Davis* v. *Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980); *Rightsell* v. *Carpenter*, 188 Ark. 21, 64 S.W.2d 101 (1933). Prior to 1979 employers were obligated to pay benefits for prior existing disabilities if an injury covered by the Workers' Compensation Act together with the prior disability resulted in permanent total disability. The opinion and dissent in the Court of Appeals very adequately point out the advantages and disadvantages of different interpretations of the present state of the law. See *Second Injury Fund* v. *McCarver*, 17 Ark. App. 101, 704 S.W.2d 639 (1986); and *Second Injury Fund* v. *Riceland Foods*, 17 Ark. App. 104, 704 S.W.2d 635 (1986).

[redacted] If successive injuries in the same employment cause total and permanent disability the employer or his insurance carrier is responsible to the employee for all benefits. If the previous disability or impairment did not arise out of the employment by the same employer, the Second Injury Fund must pay the benefits. We agree with the result reached by the Court of Appeals.

Affirmed.

HICKMAN and NEWBERN, JJ., dissent.

Thomas Edwin RUSSELL *v.* STATE of Arkansas

CR 86-19 712 S.W.2d 916

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Darrell E. Baker, Jr., Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. At trial, the appellant was convicted of two counts of rape and two counts of sexual abuse in the first degree. The victim was a nine year old girl. The single point of appeal concerns a question asked of the State's first witness, Dr. Donna Van Kirk, a licensed psychologist. The Deputy Prosecuting Attorney first asked Dr. Van Kirk if in her opinion the victim had been sexually abused. The appellant objected, and the trial court correctly ruled that the witness could not give her opinion about whether sexual abuse had, in fact,

occurred. Shortly afterward, the following took place:

> [MR. ZISER, DEPUTY PROSECUTING ATTORNEY]:
>
> Q. You have told us already that you took a history from Jennifer?
>
> A. Yes.
>
> Q. I assume that Jennifer told you some things about what may have happened to her?
>
> A. Yes.
>
> Q. And based on what she told you and based on your expertise in this area, is it consistent, is what she told you consistent with a child who has been abused?
>
> A. Yes.
>
> MR. BAKER: [DEFENSE ATTORNEY]:
>
> Objection, Your Honor.
>
> THE COURT:
>
> Overrule the objection and permit it.

The appellant argues that the trial court erred in allowing the witness to answer whether the child's statements were consistent with sexual abuse because the subject matter was not beyond the common knowledge of the jury. The argument is meritorious.

The general test for admissibility of expert testimony is whether the testimony will aid the trier of fact in understanding the evidence or in determining a fact issue. Unif. R. Evid. 702; *B&J Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984). An important consideration in determining whether the testimony will aid the trier of fact is whether the situation is beyond the trier of fact's ability to understand and draw its own conclusions. *B&J Byers Trucking, Inc.* v. *Robinson*, *supra*. Here, lay jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse.

Accordingly, we conclude the trial court erred in

admitting the testimony. The issue then becomes whether the error was prejudicial. The State's case against the appellant was so strong, and the error so inconsequential, that we find no prejudice.

The overwhelming evidence came primarily from the victim and a pediatrician. The victim's testimony was explicit, graphic, and unequivocal. Examples of her testimony are:

> [BY MR. ZISER, DEPUTY PROSECUTING ATTORNEY]:
>
> Q. Okay. And then what did he do?
>
> A. Then he took his penis and he rubbed it up and down in my vagina, and he said — I jumped a little bit, and he said, "Don't jump or I'll stick it all the way in."
>
> Q. Did he stick his penis part of the way in?
>
> A. Yes. The head.
>
> Q. Did he stick it all the way in or just part way?
>
> A. Part of it.
>
> . . .
>
> Q. Okay. What did he do?
>
> A. Well, he had — he told me to take my pants off, and he took his off, and he had this lotion that he rubbed on his penis and my vagina. He told me to lay down on the bed. And he — he was — well, his knees were around me. He was kneeling on the bed and rocking back and forth with his penis run into my vagina.
>
> Q. Did his penis go actually part of the way inside you?
>
> A. Yes.
>
> Q. Just partially in?
>
> A. Yes.
>
> . . .
>
> Q. After he stuck his penis part of the way inside of you, did you see anything else happen?

A. Well, the next thing that happened, he told me — well, we got up and he told me that he was going to lay down, and he told me that I had to do the same thing that he did, just opposite, and I had to rock back and forth.

Q. Okay. And what happened after that?

A. Then he stood up and he told me to sit on the bed, and he told me to suck his penis.

Q. Did you, in fact, do that?

A. Yes.

Q. Can you describe his penis when you put it in your mouth?

A. (There is a long pause.) It was — it was sort of hanging. It wasn't real straight, but it was sort of hanging down a little bit.

The pediatrician testified that at the time of her examination the victim had a stretched labia minora with healed lacerations. The healing of the lacerations indicated the tearing occurred at the time the victim said it did, and the tearing was consistent with partial penetration.

While the psychologist should not have been allowed to testify that the history given by the victim was consistent with sexual abuse, in truth, the testimony merely provided the jurors with a hint of the testimony which they would receive from the victim. The error was harmless and did not affect the judgment.

Affirmed.

HOLT, C.J., not participating.

HICKMAN and HAYS, JJ., concur.

PURTLE and NEWBERN, JJ., dissent.

STEELE HAYS, Justice, concurring. I concur in the result, but not in the view that the opinion given by Dr. Van Kirk was inadmissible. The appellant denied the acts altogether and claimed the accusations were inspired by the victim's mother in revenge for having been "jilted."

Thus, the basic fact issue was sharply controverted, and U.R.E. 702 recognizes determining a fact issue as one basis for the use of expert testimony. Whether Dr. Van Kirk's testimony cast a relevant light on that issue, and whether its probative value outweighed any prejudice was, I believe, a matter for the trial court's "broad discretion." *Ray* v. *Fletcher*, 244 Ark. 74, 423 S.W.2d 865 (1968); *Ark-La Gas Co.* v. *Maxey*, 245 Ark. 15, 430 S.W.2d 566 (1968); *Caldwell* v. *State*, 267 Ark. 1053, 594 S.W.2d 24 (C.A. 1980).

JOHN I. PURTLE, Justice, dissenting. I agree with the majority that it was error to allow witness Van Kirk to testify as set out in the first page of the opinion. However, I disagree with their conclusion that it was harmless error. The testimony was presented at the start of the state's case. Although such testimony may have been proper in the appropriate circumstances it was obviously prejudicial as presented in the case before us. At the time the witness testified, the 9 year old victim had not yet taken the stand nor had any of the "overwhelming evidence" relied upon by the majority been presented.

It is extremely difficult to state in exact or express terms the meaning of "prejudicial error." I have found no case which specifically defines "prejudicial error." *Black's Law Dictionary*, Fourth Edition, defines the term as: "Error substantially affecting appellant's legal rights and obligations."

Neither the majority nor the dissenters can determine the effect this testimony had on the jury. This victim had been the prosecuting witness in a previous sexual abuse case against another defendant. The evidence thus becomes less convincing with respect to this defendant. With which incident was the victim's testimony consistent? It may be sound judicial economy to refuse to reverse this case but judicial economy should not be accomplished at the expense of the criminal justice system and more particularly at the expense of individual rights.

This witness testified to the same effect in *Hall* v. *State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985). In *Hall* the Court of Appeals stated:

> It is our conclusion from the record in the case before us that the evidence of the expert, Dr. Van Kirk, tended to

> focus the attention of the jury upon whether the evidence against the defendant matched the evidence in the usual case involving sexual abuse of a young child. . . . Other details could be recited but it is enough to say that we feel this type evidence was not of proper benefit to the jury in this case and that, as in *Bledsoe*, it was not introduced to rebut a misconception about the presumed behavior of a rape victim but to prove, as in *Saldana*, that the circumstances and details in this case match the circumstances and details usually found in child abuse cases. Of course, some of the expert's testimony in this case could be of benefit to the jury. Her testimony regarding the vocabulary that young children have to express their experience in sexual abuse cases is legitimate and beneficial evidence for the jury. But, overall, we find much of the expert's testimony distractive and prejudicial. . . .
>
> Because of the admission of the evidence discussed above, over objections to testimonial generalities concerning the "dynamics" of child abuse, the conviction in this case must be reversed and the matter remanded for a new trial.

The testimony of Dr. Van Kirk was not relevant at this point of the trial. It may have never been relevant. Perhaps the victim would not have testified exactly as she did, or maybe not at all, if this witness had not paved the way and set the pattern of thinking for the jury. Certainly the "dynamics" of "child abuse syndrome" is of great assistance to society in general and people involved in matters relating to sexual abuse of children. It may have been proper later in the present trial but as in *Hall* I find it was prejudicial in this case. The "overwhelming evidence" referred to in the majority opinion is only the testimony of the victim. While her testimony alone might have been sufficient to sustain the conviction, in my opinion it does not, merely by virtue of its detailed nature, in the circumstances of this case, become so overwhelming as to overcome the error I regard as prejudicial.

I would reverse and remand for a new trial.

NEWBERN, J., joins in this dissent.

EAST TEXAS MOTOR FREIGHT LINES, INC. *v.* Ellen FREEMAN, Denise CLARK, Ted Clifton TULLOS, Sr., Individually and For the Use and Benefit of Ted Clifton TULLOS, Jr., A Minor, and Clifford GILLESPIE

85-240 713 S.W.2d 456

Supreme Court of Arkansas
Opinion delivered July 21, 1986
[Rehearing denied September 15, 1986.*]

* Purtle, J., would grant.

Wright, Lindsey & Jennings, for appellant.

Hale, Fogleman & Rogers, for appellees Ellen Freeman, Denise Clark, and Ted Clifton Tullos, Sr., Individually and for the use and benefit of Ted Clifton Tullos, Jr., a minor.

Moore, Moore, Hart & Barton, for appellee Clifford Gillespie.

STEELE HAYS, Justice. At about 6 o'clock on the evening of June 15, 1981 eleven vehicles collided in dense smoke along a stretch of Interstate Highway 55 in Crittenden County, Arkansas. Earlier that day farm workers of Clifford Gillespie set fire to a wheat field being prepared for soybean planting. The wheat field was to the east of the highway and the smoke carried to the west, primarily affecting north bound traffic.

Appellee Ellen Freeman was driving her car in a north bound lane with her daughter, Denise Clark, and her grandson Cliff Tullos, Jr., who are also appellees, riding as passengers. When Mrs. Freeman encountered the smoke she reduced her speed and as vision became increasingly difficult she saw one vehicle in the left lane and a tractor trailer of Abbott Laboratories, driven by Donald Sosnowski, partially blocking the right lane. She came to a stop and moments later an East Texas Motor Freight tractor trailer struck her vehicle and the Abbott vehicle simultaneously.

Its driver, Noble McCreary, died in the collision.

This litigation in Crittenden County began when Abbott filed an action against East Texas Motor Freight, Ellen Freeman, Clifford Gillespie and others. Denise Clark and Ted Tullos intervened seeking damages for their injuries and Mrs. Freeman claimed damages for property loss and personal injuries against Gillespie and East Texas Motor Freight. There were cross claims for contribution.

Subsequently the wife and children of Noble McCreary filed a wrongful death action in federal court against Clifford Gillespie. Ellen Freeman, ETMF and others were joined as third party defendants in that litigation for purposes of contribution. In the course of those proceedings the district judge entered an order that all parties would be deemed to have sought contribution from all other parties and all such claims would be treated as disputed. Mrs. Freeman tried unsuccessfully to consolidate her claims in state court with the proceedings in federal court.

The federal case was tried in September of 1983 and resulted in verdicts in favor of McCreary's heirs and other claimants against Gillespie. The jury found that Gillespie was entirely at fault and that McCreary, Freeman and Sosnowski were not at fault.

Based on those findings ETMF moved for summary judgment in the state proceedings on grounds of res judicata and alternatively that Freeman, Clark and Tullos were collaterally estopped from relitigating the issues in state court. Summary judgment was denied and the case was tried, resulting in verdicts against ETMF for Mrs. Freeman of $41,849 for Ms. Clark of $27,086 and for Ted Tullos of $325. Gillespie was exonerated. A remittitur of $12,000 was ordered by the trial court as to the verdict on behalf of Mrs. Freeman.

ETMF has appealed. Appellees are Freeman, Clark, Tullos and Gillespie. Our jurisdiction attaches because the case involves the law of torts. Rule 29(1)(o).

ETMF challenges the trial court's rulings on the issues of res judicata and collateral estoppel, the admissibility of the testimony of a state trooper, the propriety of several jury instructions, in limiting the cross-examination of Ellen Freeman, and in

allowing prejudgment interest on the property damage award.

Res Judicata and Collateral Estoppel

The similarity between the doctrines of res judicata and collateral estoppel has been the cause of some confusion, but the two are distinct. Res judicata or claim preclusion bars the relitigation of issues which were actually litigated or which *could* have been litigated in an earlier suit. *Allan* v. *McCurry*, 449 U.S. 90 (1980). Whereas, collateral estoppel requires four elements before a determination is conclusive in a subsequent proceeding: 1) the issue sought to be precluded must be the same as that involved in the prior litigation; 2) that issue must have been actually litigated; 3) it must have been determined by a valid and final judgment; and 4) the determination must have been essential to the judgment. Newbern, Arkansas Civil Practice and Procedure (The Harrison Company, 1985) § 26-12, p. 262. *Smith* v. *Roane*, 284 Ark. 568, 683 S.W.2d 935 (1985); *Lovell* v. *Mixon*, 719 F.2d 1373 (8th Cir. 1983).

Here, Denise Clark and Ted Tullos were not parties to the federal case, and Mrs. Freeman was joined only for purposes of contribution. Mrs. Freeman was not obligated to counterclaim against ETMF in the federal action because of her pending state claim. See F.R.C.P. 13(a). Moreover, the attempt to consolidate her claims pending in state court with the federal action was rejected by the federal judge. Hence, the issues involving the liability of ETMF for the injuries and property claims of the appellees, Freeman, Clark and Tullos, had not been litigated prior to the trial in Crittenden County.

In several cases we have applied the doctrine of collateral estoppel to attempts to relitigate issues of negligence where the liability was derivative. In *Barnett* v. *Isabell*, 282 Ark. 88, 666 S.W.2d 393 (1984), the Barnett family, after successfully suing the employer of Robert Isabell, sued Isabell for injuries arising out of the same occurrence. We affirmed the trial court's granting of summary judgment because the liability was entirely derivative and the issues had been decided. The rationale for the doctrines is the policy of the law to end litigation "by preventing a party who had had one fair trial of a question of fact from again drawing it into controversy . . ." See also *Davis, Admn.* v. *Perryman*, 225 Ark. 963, 286 S.W.2d 844 (1956) and *Ted Saum*

& Co. v. *Swaffor*, 237 Ark. 971, 377 S.W.2d 606 (1964).

[redacted] But we have never extended the concept of collateral estoppel to the point that claimants who have had no trial at all, nor any opportunity to present their claims, are precluded by the outcome of litigation to which they were not privy. We believe justice preserves to everyone the right to his "day in court."

Testimony of Trooper Whitley

ETMF insists the trial court should have granted its motion for a mistrial when the trial court permitted State Trooper Terrie Whitley, to testify about "extra" skid marks which could be seen in photographs of the accident scene but which she had not observed during her investigation, nor noted on her accident report. On her accident report she indicated the ETMF vehicle had twenty-four feet of skid marks. ETMF contends the effect of the trial court's ruling qualified Trooper Whitley to testify on accident reconstruction which she was not competent to do.

We have been unable to find anything in the officer's testimony which is particularly damaging to ETMF. The length of the "extra" skid marks is never stated and so far as we can determine, the testimony may have been inconsequential. The only conceivable conclusion which might arise from extra skid marks would relate to the speed and the officer made it perfectly plain that she was not able to determine the speed of any of the vehicles and made no attempt to do so. The officer's testimony involved essentially what she could see in several photographs. All parties were permitted to question her on these details and the trial court offered to caution the jury to make its own interpretation of the photographs. The offer was refused. In short, we find nothing in Officer Whitley's testimony that meets the requirement of substantial prejudice under Rule 103 of the Uniform Rules of Evidence.

Future Pain and Suffering

[redacted] ETMF urges the jury should not have been instructed to consider future pain and suffering, mental anguish or the permanency of injuries in assessing damages. We concede the proof is marginal but on balance we cannot say it was so deficient as to fail to produce a submissible issue for the jury. No hard and

fast rule exists by which to test the permanency of injuries and to a degree each case must be examined on its own.

ETMF cites *St. Louis Iron Mountain & Southern Ry. Co.* v. *Bird*, 106 Ark. 177, 153 S.W. 104 (1913) and other cases holding that a jury may not consider any claims for permanent injuries unless they are proved to a reasonable certainty, supported by affirmative proof of permanency. *Midwest Bus Lines, Inc.* v. *Williams*, 243 Ark. 854, 422 S.W.2d 869 (1968).

Ms. Clark testified that she sustained a head injury and suffered nausea, vomiting and severe and continuing headaches up to the time of trial, a period of approximately three and a half years. Viewing that testimony in a light most favorable to the appellees a jury could conclude that consequences of injuries which continue over three and a half years will occur in the future. *Bailey and Davis* v. *Bradford*, 244 Ark. 8, 423 S.W.2d 565 (1968). Moreover, lay testimony without expert corroboration is sufficient. Id.

Mrs. Freeman's injuries are more emotional than physical. She sustained a blow to the forehead, a cut on her back and a contusion on her leg the size of a fist. Ms. Clark testified that since the accident her mother avoids driving or permitting her grandchildren to go with her when she is driving, that she makes excuses to keep from driving and becomes a "total wreck" a couple of days before a trip; that she "goes all to pieces just from driving" home from Ms. Clark's house and is paranoid about 18-wheelers behind her.

While we have held that future pain and permanency must be established with reasonable certainty and not left to the jury's speculation and conjecture, *Handy Dan Improvement Center, Inc.* v. *Peters*, 286 Ark. 102, 689 S.W.2d 541 (1985), we have also said the jury may consider the nature, extent and persistency of the injuries and may rely on lay testimony. Id. Between the two extremes of objective injuries on the one hand and subjective complaints on the other, lies a grey area "in which the issue of permanency becomes a matter of judgment." *Belford* v. *Humphrey*, 244 Ark. 211, 424 S.W.2d 526 (1968). All in all we are satisfied there was enough evidence of permanency to submit the issue to the jury.

AMI 901(b)—Danger Ahead

The trial court instructed the jury in accordance with AMI 901(b):

> When the driver sees danger ahead, then he is required to use ordinary care to have his vehicle under control as to be able to check its speed or stop it, if necessary, to avoid damage to himself or others.

And the trial court gave AMI 614:

> A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation.

ETMF submits AMI 901(b) should not be given when a driver is confronted without warning to an emergency situation. *Home Insurance Co.* v. *Harwell*, 267 Ark. 884, 568 S.W.2d 17 (1978). We believe both instructions were appropriate to the proof.

[redacted] It is evident the drivers could see smoke crossing the highway from some distance away. That circumstance was enough to alert approaching motorists of a potential danger and to justify the jury being told the requirements of the law in response to those conditions. Appellants argue that Noble McCreary had no reason to expect the smoke to be so thick he could not see. But that was for the jury to determine, as we know of no rule that permits a motorist, on seeing smoke ahead, to assume it will be so lacking in density that vision will not be impaired.

The emergency instruction was appropriate to the conditions which were shown to have existed when the smoke screen was actually entered and blockage of the highway encountered. The trial court was right to give both instructions.

AMI 902—Superior Right of the Forward Vehicle

ETMF objects to the giving of AMI 902:

> When two vehicles are traveling in the same direction, the vehicle in front has the superior right to the use of the

> highway for the purpose of stopping to avoid vehicles ahead, and the driver behind must use ordinary care to operate his vehicle in recognition of this superior right. This does not relieve the driver of the forward vehicle of the duty to use ordinary care and to obey the rules of the road.

It contends this instruction applies only to vehicles that are traveling, and here the forward vehicle was stopped. Appellees point out that the instruction obviously contemplates the situation presented by this case, as it mentions the right of the forward driver to stop, to avoid vehicles ahead, which is exactly what Mrs. Freeman did. We agree.

Obviously this instruction is not intended to apply in every situation where one vehicle strikes another from behind. For example, in *Harlan* v. *Curbo*, 250 Ark. 610, 446 S.W.2d 459 (1971), it was held inapplicable where one vehicle struck another just as the forward vehicle had pulled out of a driveway. And in *Saliba* v. *Allison*, 192 Ark. 1021, 96 S.W.2d 934 (1936) where a truck, after turning across the highway, continued onward or stopped partially on the highway. We said:

> The only error in this contention is that Saliba had ended his forward trip on highway No 61, had stopped on the roadside, then had turned sharply to his left and had driven upon the highway. No kind of watchfulness could have anticipated this action.

But the instruction has a wider application than when two vehicles are moving in tandem along the highway. In *Cohen* v. *Ramey*, 201 Ark. 713, 147 S.W.2d 338 (1941) the forward car slowed down and signaled a left turn. While signalling the driver moved slightly to the right to permit cars behind her to pass, continued signalling and was struck as she turned onto an adjoining road. The trial court gave an earlier version of 902 and we affirmed:

> The short or temporary stop that Flora Ramey made to allow two cars close to her to pass did not in any sense amount to a parking or stopping on the roadside. It was a momentary or temporary stopping and a thing she had to do before she could continue the turn to the east side of the road she was making . . . The momentary stopping of her

car did not relieve appellant who was travelling behind her of taking notice of the movement of her car or of the signals being given by her.

[redacted] While there is no testimony as to the distance between the Freeman car and the ETMF truck prior to the impact, it is clear the two vehicles were traveling north in close proximity, as the truck struck the car momentarily after the car stopped to avoid other vehicles. That is a sufficient basis for the instruction. *Smith* v. *Alexander*, 245 Ark. 567, 433 S.W.2d 157 (1968).

Limitation on Cross-Examination

ETMF contends it should have been permitted to question Mrs. Freeman about loss of time on the job due to her injuries. On direct examination she said she missed a month of work. On cross-examination she was asked:

Q: I believe you testified you missed three or four weeks of work?

A: A month.

Q: A month's work. But you didn't lose any wages—

Counsel for the appellee objected and after an unreported discussion the court sustained the objection and instructed counsel to rephrase his question. The matter of wages was not pursued.

[redacted] ETMF argues it should have been permitted to show Mrs. Freeman lost no wages as a result of her injuries. We disagree. Assuming the issue was whether or not she was paid during the time she was off, the collateral source rule applies. *Amos, Administrator* v. *Stroud and Salmon*, 252 Ark. 1100, 482 S.W.2d 592 (1972). Whether she received the money from her employer or from an insurance policy, she, rather than the alleged tortfeasor, is entitled to the benefit of the collateral source, even though in one sense a double recovery occurs. *Vermillion* v. *Peterson*, 275 Ark. 37, 630 S.W.2d 30 (1982). The law rationalizes that the claimant should benefit from the collateral source recovery rather than the tortfeasor, since the claimant has usually paid an insurance premium or lost sick leave, whereas to the tortfeasor it would be a total windfall.

Prejudgment Interest

Over East Texas Motor Freight's objection the trial court awarded prejudgment interest of six percent from June 25, 1981 until March 15, 1985 on $6,681.26, the sum of Mrs. Freeman's property damage claim. Because the verdict did not distinguish between property damage and personal injuries, ETMF argues that prejudgment interest is not recoverable. *Lovell* v. *Marianna Federal Savings & Loan*, 267 Ark. 164, 589 S.W.2d 597 (1979). It contends that without a special verdict covering property damage it is impossible to determine whether the jury intended to award any property damage.

Mrs. Freeman's response is that an exhibit itemizing her property loss was introduced without objection and the amounts of her property claims were never questioned by ETMF. Even so, we are unwilling to establish a precedent for allowing prejudgment interest where only a general verdict is returned which includes an award for personal injuries. If a plaintiff intends to claim prejudgment interest, we think he must request a specific verdict on property damage.

The judgment is modified to eliminate prejudgment interest and with that modification is

Affirmed.

HOLT, C.J., not participating.

RAD-RAZORBACK LIMITED PARTNERSHIP, REALTY ASSOCIATES DEVELOPMENT, INC., John MARCON, Bruce BURROW, Samuel LASUSA, RAZORBACK SQUARE SHOPPING CENTER, a Joint Venture, FIRST REAL ESTATE DEVELOPMENT CORPORATION *v.* B.G. CONEY CO.

85-281 713 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered July 21, 1986
[Supplemental Opinion on Partial Rehearing September 22, 1986.[1]]
[Rehearing denied October 20, 1986.[2]]

[redacted]

[1] Holt, C.J., and Purtle and Hays, JJ., not participating.
[2] Hickman, J., would grant. Holt, C.J., and Hays, J., not participating.

[redacted]

Friday, Eldredge & Clark, by: *Bill S. Clark*, for appellants.

Wood Law Firm, for appellee and cross-appellant B.G. Coney Company.

Walter A. Murray, for cross-appellees Shrader Construction Company and Shirley's Excavating & Clearing, Inc.

Southern, Allen, East, James & Jones, by: *Jack East, III*, for cross-appellee River Valley, Inc.

STEELE HAYS, Justice. This case involves disputes that arose during the construction of The Razorback Square Shopping Center in Little Rock. Appellants are the developers, RAD-Razorback Limited Partnership and others, and appellee is the contractor, B.G. Coney Company. The disputes center primarily around site preparation and earthwork.

Coney brought suit against RAD-Razorback for items of work he claimed were not part of the contract, but were "extra work" that warranted compensation above the contract price. RAD-Razorback took the position that the items were called for by the contract and it counterclaimed for approximately $200,000 in credits to be back charged against Coney for failure to meet the completion date, and for the cost of correcting some parts of Coney's work which RAD-Razorback claims were improperly performed. The chancellor found for Coney on his claims for extra work and against RAD-Razorback on its counterclaim. RAD-Razorback moved for the appointment of a master and that a new trial be ordered. Those motions having been denied, RAD-Razorback now brings this appeal.

Review of Chancery Cases

[redacted] Chancery cases are tried de novo on the record on appeal. *Dopp* v. *Sugarloaf Mining Co.*, 288 Ark. 18, 702 S.W.2d 393 (1986); *Rose* v. *Dunn*, 284 Ark. 44, 679 S.W.2d 180 (1984); *Walt Bennett Ford* v. *Pulaski County Special School District*, 274 Ark. 208, 624 S.W.2d 426 (1981). However, we will not reverse the findings of the chancellor unless clearly against the preponderance of evidence. ARCP 52. After giving due deference to the superior position of the chancellor to determine the credibility of the witnesses and the weight to be given their

testimony, we come to the conclusion that some of the findings are clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364 (1947).

When arguing on appeal, the burden is on the appellant to demonstrate error and to bring up a record which so demonstrates. *S.D. Leasing* v. *RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). It is appellant's burden to present an abstract that will sufficiently show the error. *Burgess* v. *Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985). However, if the appellant's abstract demonstrates error and a portion of the record has been omitted that would support the court's finding, the appellee must respond through Rule 9(e)(1) and supply the deficiency in the abstract. *Murphy* v. *Wilson*, 228 Ark. 727, 310 S.W.2d 1 (1958).

Undercutting Dispute

The first item for which Coney sought compensation as "extra" work outside the contract, was for undercutting done throughout the construction site. Undercutting is the removal of unsuitable soils and replacement with soil that will properly compact. It is RAD-Razorback's position that the contract included the undercutting and, alternatively, that Coney waived any right to payment by not presenting a claim for extra work, a procedure specifically required by the contract.

Under the contract Coney was to complete three major phases of the development: the construction of a K-Mart store, site preparation for the entire 18 acre shopping center, and all paving. The contract provisions outlining these phases provide only a sketchy description of the work, with references to other documents for specificity. The three primary items of work are described as follows:

A. [Complete construction of the K-Mart store].

B. Site clearing, demolition, excavation, cut and fill, borrow material to bring entire site to subgrades in building and parking areas *including all undercutting of the K-Mart building* as outlined in the soils reports prepared by Southwestern Laboratories, Soils Engi-

neering Division, of Little Rock, Arkansas, dated February 9, 1982 and March 23, 1982, all in accordance with site grading plans. (Our italics).

C. All asphalt paving consisting of 8-inch base and 2½-inch asphalt topping in parking areas and 10-inch base and 2½-inch asphalt topping in heavy-duty areas, *all in accordance with Soils Engineering's recommendations*, including all paving work on Cantrell Road in accordance with Highway Department specifications. (Our italics).

The soils report was incorporated by reference.

In defense of his position, Coney simply quotes Section B, with the unsupported claim that this provision excludes all other undercutting. Coney may be relying on the rule of construction, *expressio unius est exclusio alterius*. 17A C.J.S. Contracts, § 312. [redacted] That rule is not overriding, however, and must bow to an examination of the entire transaction which indicates the contrary. *Id.* In seeking to harmonize different clauses of a contract, we should not give effect to one to the exclusion of another even though they seem conflicting or contradictory, nor adopt an interpretation which neutralizes a provision if the various clauses can be reconciled. The object is to ascertain the intention of the parties, not from particular words or phrases, but from the entire context of the agreement. *Wynn* v. *Sklar & Phillips Oil Co.*, 254 Ark. 332, 493 S.W.2d 439 (1973).

When Section B is examined in isolation, Coney's theory seems correct. While there is no analogous section in the soils report relating to general site preparation, there are two sections in the report that deal with site preparation for construction, and floor slab preparation, both pertinent to the construction of the K-Mart building and both requiring undercutting.

[redacted] But by reading further in Section C we find the paving project also is referenced to the soils report. A reading of the soils report makes it clear under the section devoted to paving that some undercutting is contemplated to properly prepare for the paving. Of the six paragraphs in the paving section, half are devoted to discussion of soil content and measures which must be taken by the contractor to deal with each of those problems,

including undercutting. The other paragraphs deal with recommended thicknesses of the asphalt and base and with the type of stone to be used in the base.

Given the wording from the soils report, it would be difficult to come to any conclusion except that undercutting was included as part of the obligation in the paving section of the contract. This would necessitate undercutting for a large portion of the shopping center, i.e. the parking lot. And under Section B, Coney is expressly responsible for the undercutting of K-Mart. Thus, the contract includes undercutting on the entire project, except for the other building sites, for which Coney was not responsible. Further preparation of the remainder of the site, including the undercutting, is covered by the requirements in the paving section of the contract.

This interpretation effectively harmonizes conflicting clauses and gives a reasonable reading to the entire contract. But even if we rejected that interpretation, based on a finding the language is ambiguous, we would come to the same result. Where a contract is ambiguous, the court will accord considerable weight to the construction the parties themselves give to it, evidenced by subsequent statements, acts and conduct. *Wynn* v. *Sklar, supra; Organized Security Life* v. *Munyon*, 247 Ark. 449, 446 S.W.2d 233 (1969); *Asimos* v. *Reynolds & Sons*, 244 Ark. 1042, 429 S.W.2d 102 (1968). This record reflects that throughout the performance of the contract, Coney did all the undercutting that was required. Not only were there no claims for extra work, there is virtually nothing in the record to indicate the undercutting was of any serious concern to Coney prior to this litigation. Coney insists that complaints were made, but his citations to the record do not bear this out. In fact, Coney admitted that he had never written a letter nor contacted the owner about the undercutting. This position was echoed by his chief superintendent, Charles Toland, who said they had no way to get back to the company and tell the owners about the problem. Yet the evidence shows that throughout the project there were other requests for change orders made by Coney. RAD-Razorback's expert witness, an architect, testified it is in the contractor's best interest to have the change order signed prior to going ahead with work and that the order must be signed before the contractor is completely covered on his expenses. He also testified

that if the contractor proceeded to perform new work covered by an addenda without saying anything to the owners, without protesting, and without asking for a change order, he would assume the contractor accepted the performance of that portion of the work.

In the face of Coney's long experience as a contractor and the $30,000 to $40,000 he was claiming for undercutting, it is difficult to understand why there was neither a change order nor a complaint made for the work he now claims was outside the contract. Even where a contract is ambiguous, the parties will be bound to the construction which they themselves have placed upon it. *Organized Security Life, supra.*

But were we to interpret the contract as Coney urges, we must come to the same view, precluding an award on a quantum meruit basis. The contract contained the standard construction industry provision which requires that a claim for extra work must be made and approved before the work is begun, and without such authorization the contractor cannot recover for that work. No claim was ever made by Coney. Coney's explanation for this omission was that he thought it was the owner's responsibility or that the job was "just moving too fast." Coney testified that he had built three K-Mart stores and about one hundred Wal-Mart stores. From that background it is incredible that Coney would not be fully aware of the consequences of failing to file a work claim for the added compensation he now demands. Nor do we find from the record that this provision in the contract had been waived by previous conduct on the part of RAD-Razorback, as occurred in *Sellers* v. *West-Ark. Construction*, 283 Ark. 241, 676 S.W.2d 726 (1984). The general rule pertaining to construction contracts is, absent a waiver or certain circumstances not evident from the record in this case, if it is required, a request for additional compensation must be in writing and cannot be made after the work is completed. *Ida Grove Roofing* v. *City of Storm Lake*, 378 N.W.2d 313 (Iowa 1985); *Elec-Trol, Inc.* v. *C. J. Kern Contractors*, 284 S.E.2d 119 (N.C. 1981); *Chambless* v. *J.J. Fritch*, 336 S.W.2d 200 (Tex. 1960); 13 Am Jur2d § 22, Building and Construction Contracts; 2 ALR3d, Private Construction Contracts-Extras.

We must conclude on the state of this record and the

arguments presented by RAD-Razorback, the chancellor's finding that the undercutting was not required under the contract is clearly against the preponderance of evidence and, accordingly, we reverse the decree on that point.

Sewer Compaction Dispute

Another item in dispute involves a sewer easement of the City of Little Rock. The easement crosses the entire site, a distance of some 1,300 feet. During the course of the construction the city decided to replace the sewer line, creating a problem because the city's backfill of the trench did not meet the 95% compaction density required under the contract. RAD-Razorback contends Coney agreed to bring the compaction to contract specifications, and to perform this admittedly "extra work" for $7,500. RAD-Razorback relies on a signed change order which reads as follows:

> Remove excess dirt placed by city installation of sewer line front and parallel with front of K-Mart store and provide compaction of backfill as required in K-Mart paving specification.

The filling of the trench became a long and involved process due to heavy rains, poor drainage and unsuitable soils and Coney claims approximately $80,000 over the original contract for this work.

The chancellor made no specific finding of fact, he simply announced a judgment for Coney. The record consists of seventeen volumes and countless exhibits, abstracted into 300 pages, with few exhibits abstracted. On issues largely involving an accounting, it is impossible to arrive at any definitive conclusions. Thus, on de novo review we cannot determine whether the judgment is supported by the preponderance of the evidence. While it appears that no change order was ever filed by Coney for the amount claimed over the $7,500 assertedly agreed to, we cannot say with certainty what effect that omission may have had in this case. Nor can we tell whether Coney has documented the expenditures he claims.

Ordinarily we try chancery cases de novo from the record and render the decree which should have been rendered below; however, when the record is such that we cannot end the

controversy in this court we will remand that part of the case as justice requires for further proceedings. *Walt Bennett Ford* v. *Pulaski County Special School District No. 213*, 274 Ark. 208, 624 S.W.2d 426 (1981). *Fish* v. *Bush*, 253 Ark. 27, 484 S.W.2d 525 (1972). We are forced to that recourse in this case, leaving to the chancellor whether to make that determination himself or appoint a master for the purpose of taking proof and making a recommendation. The issues remanded are whether the parties agreed this phase of the work would be performed for $7,500 and, if not, what was the cost to Coney of completing the work.

RAD-Razorback's Claim

After encountering difficulties with Coney over the completion date and Coney's financial problems, RAD-Razorback and Coney agreed to a termination before the completion of the project. Coney acknowledged that RAD-Razorback would be due compensation by back charging for the cost of finishing the project and for any remedial work. RAD-Razorback counterclaimed in this suit for the amount it calculated was due which had not yet been recovered from Coney. The court denied the claim.

On appeal, RAD-Razorback has presented a clear case for recovery on its counterclaim and we find no impediment to that claim. Coney does not dispute that RAD-Razorback is entitled to recovery on the completion and remedial work nor does he specifically challenge the amount. Coney makes several arguments attacking the claim on other grounds, none of which are sufficient to defeat RAD-Razorback's claim.

Coney's primary defense is the issue of undercutting, arguing that since it was not part of the contract, it could not be charged to him. However, as we found undercutting to be included in the work Coney had contracted to do, this argument is without merit. Coney makes several other arguments to attack RAD-Razorback's claim but they are conclusory, unconvincing or unsubstantiated by the proof. RAD-Razorback has presented sufficient evidence to show that the dismissal of its claim was clearly against the preponderance of the evidence.

The decree is reversed as to RAD-Razorback's claim and remanded for further proceedings to establish an accurate

accounting of the amounts due.

Cross Appeal from the Judgment Awarded River Valley, Inc.

Cross-appellee, River Valley, Inc., subcontracted with Coney to install a waterline and fire hydrants around the shopping center and to install all plumbing work in connection with the K-Mart store. The chancellor found River Valley, Inc. was entitled to a judgment for $33,380.80 for the balance of its subcontract and at an April 1, 1985 hearing Coney acknowledged the validity of the River Valley claim in full.

On appeal Coney asserts a set-off of $275, and a set-off in an amount due Lewis Trenching from River Valley. The latter issue, so far as we can determine, was not presented to the chancellor. River Valley has abstracted a significant portion of the proceedings below to sustain its position that Coney's appeal from that part of the decree is made in bad faith, and solely for delay. The argument is convincing. The decree with respect to River Valley, Inc. is affirmed and in addition to its printing costs of $276.00, counsel for River Valley, Inc. is allowed a fee of $1,750.

Cross Appeal from the Judgments Awarded to Shrader Construction Company and Shirley's Excavating and Clearing, Inc.

The chancellor found that Shrader Construction Company and Shirley's Excavating and Clearing, Inc., joint subcontractors were entitled to a judgment for $107,369.60 representing the unpaid balance of their subcontract with Coney to perform drainage work in connection with the site. Coney has cross-appealed alleging that it was error to allow the full amount of their claims, that he was due a set-off against the amount claimed. We find no proof to support Coney's position and we have been cited to nothing in the record. It being Coney's burden to demonstrate error, the judgment awarded these cross-appellees is affirmed. *Dale* v. *Sutton*, 273 Ark. 396, 620 S.W.2d 293 (1981); *Poindexter* v. *Cole*, 239 Ark. 471, 389 S.W.2d 869 (1965).

Affirmed in part, reversed in part and remanded.

HOLT, C.J., and PURTLE, J., not participating.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. The appellants are entitled to a trial and a trial court decision. The trial judge acknowledged he could not decide the case because it was too complicated and further time spent would only delay the case anyway. He simply passed it on to us. We are an appellate court and have no authority to weigh evidence and enter findings of fact. We may only review findings of facts already determined.

It is elementary that every litigant is entitled to a trial. The trial judge quite candidly conceded a master or "panel of experts" should have been used. He should have gone one step further. Conceding the trial was beyond him, he should have appointed a master and ordered a new trial or granted a new trial and asked for another judge to hear the case.

We cannot allow a party to have no trial judgment. However disagreeable and difficult, a decision must be made; however wrong it may be, a litigant is entitled to a decision by a trial court. At least then one can use the reasoning and judgment to argue for correction. The appellants have no remedy in this case. A trial court that cannot render a decision has defaulted. A decision by an appellant court without the power to try the case amounts to no decision at all. I would remand this case for a trial.

Supplemental Opinion on Partial Rehearing
September 22, 1986

713 S.W.2d 462

Petition for Rehearing; granted in part and denied in part.

PER CURIAM. In a petition for rehearing Coney argues that the judgment in his favor in the amount of $338,638.00 was admitted by RAD-Razorback to be owed to Coney and that this portion of the judgment should be affirmed. In response, RAD-Razorback admits that it offered to pay that amount but not as a final payment under the contract, for that might mean that it waived its claims against Coney for remedial work and back-charges. RAD-Razorback states that Coney refused to accept the offer. In the circumstances, the judgment in favor of Coney for $338,638.00 is affirmed in the sense that Coney's underlying cause of action for that amount is no longer in issue, but the

affirmance is without prejudice to Rad-Razorback's claims against Coney with regard to other matters.

There having been no petition for rehearing with respect to the judgments in favor of River Valley, Inc., and Shrader Construction Company, Inc., and Shirley Excavating & Clearing Company, Inc., those judgments have become final.

In other respects Coney's petition for rehearing is denied. Hays, J., not participating in the consideration of the case on rehearing.

HOLT, C.J. and PURTLE, J., not participating.

Rickey Lewis JAMES *v.* STATE of Arkansas

CR 86-23 712 S.W.2d 919

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Williams Law Firm, by: *Lynn Williams*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant was charged with capital murder in 1983. The charge was reduced to first degree murder pursuant to a plea bargain and appellant entered a plea of guilty. He was sentenced to life imprisonment in the Arkansas Department of Correction. He subsequently filed a motion for transcript and wrote a letter to the circuit judge stating his intention to proceed under Criminal Procedure Rule 37 to vacate the guilty plea. The judge treated the motion and letter as a request for a hearing and appointed counsel to represent the appellant. Counsel filed an amended Rule 37 petition, alleging in essentially conclusory fashion that (1) appellant did not have a good working relationship with the attorney who represented him when he pleaded guilty, (2) his confession was not voluntary as it was made only to obtain the benefits of a plea bargain, (3) counsel's advice on the plea bargain was "overreaching," and (4) counsel failed to bring a prior felony conviction to the attention of the court and further failed to advise him on the effect of the prior conviction on his chances for parole. Appellant did not contend that he was in fact not guilty.

Immediately after the hearing on the petition convened, counsel informed the court that appellant wished to withdraw his petition because he feared that if he were successful in vacating the plea, the prosecutor would be free to charge him with capital felony murder which could result in a sentence of life without parole or death. The trial judge explained to appellant that Rule 37.2(b) provides that a petitioner may file only one petition under the rule, unless his original petition was denied without prejudice to filing a second petition. Despite the fact that appellant was not allowed to simply withdraw the petition and was fully informed that his petition would be dismissed with prejudice, appellant still persisted in his request that the petition be dismissed.

In 1985 appellant filed a second Rule 37 petition, this time contending that the State did not honor the plea bargain. His only support for the allegation was that the maximum sentence for first degree murder was imposed under the plea bargain. He did not assert that he was not guilty of first degree murder. The trial court denied the petition on the ground that appellant had already exhausted his remedy under Rule 37. 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 thirty days. *See* Rules of the Supreme Court, Rule 11(h), Ark. Stat. Ann. Vol. 3A (Supp. 1985). He did not file a brief. The State concurs that the appeal has no merit.

This Court has consistently upheld the provision of Rule 37.2(b) by which a petitioner is limited to one petition for postconviction relief under the rule, unless the first petition was specifically denied without prejudice to filing a second petition. *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984); *Williams* v. *State*, 273 Ark. 315, 619 S.W.2d 628 (1981). The record clearly indicates that appellant voluntarily dismissed his original petition. His fear of a more severe sentence on retrial did not render his decision to dismiss the petition involuntary. *See Mitchell* v. *State*, 271 Ark. 512, 609 S.W.2d 333 (1980); *see also Ruiz* v. *State*, 275 Ark. 410, 630 S.W.2d 44 (1982).

If appellant had been found guilty by a jury of first degree murder, he could not have been tried for capital murder since capital murder is a greater degree of the same crime, *Fuller* v. *State*, 246 Ark. 704, 439 S.W.2d 801 (1969), *see also Green* v. *State*, 355 U.S. 184 (1957), but a petitioner who pleads guilty does not have the same protection. The petitioner who succeeds in having his plea overturned wipes the slate clean and begins anew.

When accepting appellant's guilty plea to first degree murder, it is obvious the trial judge could not have considered any greater charge. As a result, appellant was never in jeopardy of being convicted of capital murder. The acceptance of a guilty plea to an offense is not an implicit acquittal of all greater included offenses of the crime. *Klobuchir* v. *Pennsylvania*, 639 F.2d 966 (1981), *cert. denied*, 454 U.S. 1031 (1981). A petitioner who attacks his guilty plea is choosing to surrender whatever benefits he may have derived from his plea bargain. *See Hawk* v. *Berkemer*, 610 F.2d 445 (6th Cir. 1979); *United States* v. *Williams*, 534 F.2d 119 (8th Cir.) *cert. denied*, 429 U.S. 984 (1976). The State may charge him with whatever offense is appropriate under the facts of the case so long as the decision to

charge with a greater crime is not prompted by vindictiveness on the part of the prosecutor to retaliate against the defendant for successfully attacking his original conviction based on his guilty plea. *United States* v. *Williams, supra.*

The trial judge questioned appellant at considerable length about his desire to dismiss the petition and the consequences of that decision. Appellant did not allege in his second petition that he did not voluntarily and intelligently choose to dismiss the petition with prejudice, and there is nothing in the record from which we could find that the trial judge was wrong to decline to consider a subsequent petition. On appeal, we affirm the decision of the trial court unless it is clearly against the preponderance of the evidence. *Knappenberger* v. *State*, 283 Ark. 210, 672 S.W.2d 54 (1984).

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.

HOLT, C.J., not participating.

Darrell PATTERSON *v.* Melba SMITH, et al.

86-99 712 S.W.2d 922

Supreme Court of Arkansas
Opinion delivered July 21, 1986

Appellant, pro se.

No response.

PER CURIAM. Appellant Patterson filed a *pro se* petition for writ of mandamus in the Circuit Court of Lincoln County, alleging that the keeper of the records for the Arkansas Department of Correction had misfigured his parole eligibility date. Appellant, who was classified by the Department as a third offender pursuant to Act 93 of 1977, Ark. Stat. Ann. § 43-2828 et seq. (Supp. 1985), contended that he should have been classified as a second offender. Under Act 93 a petitioner classified as a third offender must serve at least three-fourths of his sentence, less credit for good behavior, before being eligible for parole. A second offender under Act 93 is eligible for release on parole after serving one-half of his sentence with credit for good behavior. The trial court found that appellant had been convicted three times and was thus properly classified as a third offender for the purposes of Act 93 and denied the petition for writ of mandamus. An attorney was appointed to represent the appellant in the appeal of the trial court's decision. Counsel for appellant and the State have each filed a brief on appeal; both argue that the appeal has no merit.

Appellant seeks permission to file a *pro se* supplemental brief. Even though counsel for appellant has conceded that the appeal is without merit, appellant is not entitled to file a supplemental brief unless he can establish that some significant point for reversal has been omitted from counsel's brief. If this were a criminal appeal, he would be entitled to file a supplemental brief pursuant to our Rule 11(h), which sets out the procedure to be followed when an attorney wishes to withdraw from a criminal appeal which has no merit. Because a petition for writ of mandamus against the Department of Correction challenging the computation of a parole eligibility date is a civil action, *Virgin* v. *Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986), the appellant is not

permitted to file a supplemental brief as a matter of course.

The appellant here has not demonstrated that counsel omitted a meritorious point for reversal. Ark. Stat. Ann. § 43-2828(3) provides:

> Third offenders shall be inmates convicted of three or more felonies and who have been twice incarcerated in some correctional institution in the United States . . . for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or offenses which they are being classified.

Appellant was convicted of a felony in Pulaski County in 1975 and served one year of a five-year sentence with four years suspended. He violated parole and was returned to the Arkansas Department of Correction to serve the remaining four years in 1978. In 1979, he was convicted of a felony in Craighead County and sentenced to five years imprisonment. In 1983, he was convicted in Pulaski County of five felonies and received five concurrent ten-year sentences. According to § 43-2828(3), a third offender is one who has been *twice* incarcerated in some correctional institution for a felony prior to being sentenced to a correctional institution for the offense for which he is being classified. Appellant was classified for the 1983 offenses based on his prior felony convictions in 1975 and 1979; he is therefore a third offender under the statute and not entitled to be classified by the Department of Correction as a second offender.

As appellant has not made a substantial showing that he was entitled to a petition for writ of mandamus against the Arkansas Department of Correction, the motion to file a supplemental brief must be denied. We note secondarily that the handwritten brief which appellant has attached to his motion for permission to supplement could not be accepted under this Court's Rules in any event. *Pro se* briefs in civil cases must be typewritten unless this Court has given the appellant permission to file a handwritten brief. Such permission is granted only when an appellant makes a substantial showing that his suit has merit and that he is unable to submit a typed brief. *Glick* v. *Lockhart*,

288 Ark. 417, 706 S.W.2d 178 (1986).

In the course of reviewing the briefs and record in regard to the instant motion, we have concluded that the appeal is without merit. It is therefore pointless to consider the matter a second time when the briefs are submitted to this Court. Therefore the appeal is dismissed.

Motion denied; appeal dismissed.

HOLT, C.J., not participating.

[redacted]

Ruth Lucille WILLIAMS *v.* STATE of Arkansas

CR 84-45 712 S.W.2d 924

Supreme Court of Arkansas
Opinion delivered July 21, 1986

[redacted]

Achor & Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

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

Gen., for appellee.

PER CURIAM. The appellant was convicted of robbery and was sentenced as an habitual offender to 23 years' imprisonment. The judgment was affirmed by the Court of Appeals. *Williams* v. *State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984). In the last paragraph of the opinion the Court of Appeals found no merit in an objection to certain testimony introduced by the State on rebuttal, but the opinion implied that the testimony might have been excluded had the proper objection been made. That implication doubtless led to this petition, in which petitioner argues that counsel's failure to object amounted to ineffective assistance of counsel. We find no basis for ordering a hearing upon the matter, which can be fully determined on the record.

The facts, as developed before the jury, are simple. The appellant and her codefendant, Kenneth Parker, were tried separately. Both were known professional shoplifters. Parker stated on cross examination that he worked in his folks's construction business "when I am not stealing." Pictures of the appellant and of Parker were posted in the observation booth of the Safeway store where the robbery was committed. All employees knew them by sight.

On the day in question the head clerk, Bettis, saw the appellant when she entered the store. Bettis told Tucker, the assistant manager, he was going up to the observation booth to watch her. From that point he had a clear view of the appellant when she took six steaks and put them underneath her clothing. Bettis ran down to catch the appellant, who at once tried to run away. Bettis and Tucker grabbed her, but she fought back, biting Bettis's arm several times. Parker, the codefendant, then appeared and helped the appellant free herself. The two ran away and were arrested later.

The appellant and Parker both testified for the defense, denying that the appellant had taken anything. On direct examination Parker said that he had been arrested many times and always went with the arresting officer. On rebuttal the prosecutor called the court's bailiff, who testified that when he was a deputy sheriff four years earlier he had seen Parker shoplifting and told him he was under arrest, but Parker fled. The only objection to the bailiff's testimony was that he had been in

the courtroom during the trial. The Court of Appeals intimated a doubt about whether the bailiff's testimony was either relevant or proper for impeachment.

It is now argued that counsel's failure to make the proper objection amounted to ineffective assistance of counsel. For that conclusion to be reached it must be shown that counsel's failure to object undermined the adversarial process and so greatly prejudiced the appellant that she did not receive a fair trial. *Elmore* v. *State*, 285 Ark. 42, 684 S.W.2d 42 (1985).

We perceive no substantial prejudice. The State's proof of guilt was overwhelming, despite the defense testimony that the appellant was simply standing quietly in the store when the two employees seized her. Parker's credibility had already been demolished by his own admissions and his previous convictions for assault with intent to rob and for thefts. The fact that he had fled four years earlier when placed under arrest was actually irrelevant and certainly did not undermine the fairness of the appellant's trial. Counsel insists that the matter should be remanded for a hearing, but there is no suggestion of what testimony could be offered that is not already in the record. Such a hearing would be of no value to anyone.

Petition denied.

HOLT, C.J., not participating.

Gloria JOLLY *v.* George HARTJE, Jr., Circuit Judge; Charles CASTLEBERRY, Faulkner County Sheriff; and Sandy E. JOLLY

86-68 713 S.W.2d 241

Supreme Court of Arkansas
Opinion delivered July 28, 1986

William J. Velek, for petitioner.

Ronald L. Burton, for respondents.

PER CURIAM. The petitioner has asked us to clarify our order of April 1, 1986, in which we temporarily stayed proceedings below in response to a habeas corpus petition filed by the petitioner, Gloria Jolly. By our order we granted the habeas corpus upon condition the petitioner post a $2,500 bond. We stayed all proceedings while the issues were to be briefed under Rule 16. The only proceedings stayed are those related to the question whether it was or shall be proper to hold petitioner in confinement.

Mike WALL *v.* STATE of Arkansas

CR 86-43 715 S.W.2d 208

Supreme Court of Arkansas
Opinion delivered September 15, 1986

Ed McCorkle, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, Mike Wall, was charged with rape in that he had engaged in deviate sexual activity with his stepdaughter, then ten years old. The sufficiency of the evidence is not questioned, it being undisputed that Wall fondled the child and caused her to perform an act of oral sex upon him. The jury found the defendant guilty and fixed his punishment at 40 years' imprisonment. Three points of error are argued, but they are all without merit.

It is first argued that defense counsel should have been supplied with funds for the employment of a psychiatrist and a psychologist to assist in the presentation of an insanity defense. The trial court had granted a defense request that Wall be sent to the State Hospital for a mental examination. There Wall was examined by a psychiatrist and a psychologist. In a joint report they found that he had a dysthymic disorder (a tendency to despondency) and a mixed personality disorder with antisocial and passive-aggressive traits. The doctors found that Wall appeared to be aware of the nature of the charges, that he was capable of cooperating effectively in his defense, and that at the time of the commission of the offense he did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The report provides no basis for the defense of mental disease or defect, as defined by

Ark. Stat. Ann. § 41-601 (Repl. 1977).

After the hospital report had been filed defense counsel made their motion for funds, stating merely that they anticipated raising the defense of insanity and that the requested funds were necessary to provide for that defense. No facts were stated to suggest any basis for the defense. The motion was denied. At a pretrial hearing counsel renewed the motion, but again no facts were stated or proffered. The motion was again denied.

[redacted] Under our prior cases the denial of the motion was proper, because Wall's rights were adequately protected by the examination at the State Hospital, an institution which has no part in the prosecution of criminals. *Andrews* v. *State*, 265 Ark. 390, 578 S.W.2d 585 (1979); *Hale* v. *State,* 246 Ark. 989, 440 S.W.2d 550 (1969). An indigent defendant's constitutional right to an examination by a psychiatrist was recently discussed in detail in *Ake* v. *Oklahoma,* 105 S.Ct. 1087 (1985). There the Supreme Court emphasized the risk of error, absent a psychiatric examination, "when the defendant's mental condition is seriously in question." As far as our present case is concerned, the Court stated the appropriate rule as follows: "When the defendant is able to make an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." P. 1097. Here there was no showing, either before or during the trial, that Wall's sanity was seriously in question.

[redacted] The appellant's second and third arguments relate to his confession, which was introduced by the State. We have reviewed the testimony and find no basis for disagreeing with the trial judge's conclusion that the taped statement was voluntary. Wall was warned of his Miranda rights. Both the deputy prosecutor and the police officer who were present when the statement was taken testified that Wall cried at times and appeared to be upset, but he freely admitted his guilt and said he was ready to take his punishment. The verbatim transcription of the statement confirms the other proof of voluntariness. There is no indication of coercion.

[redacted] The last argument is that the trial court did not delete all inadmissible portions of the statement before it was read to the jury. The statement was in question-and-answer form, just as it

took place, and there were implications that Wall had previously engaged in similar conduct with this same stepdaughter. Under our law, however, direct proof of Wall's earlier sexual relations with the child would have been admissible in evidence. *Williams* v. *State,* 156 Ark. 205, 246 S.W. 503 (1922); *Williams* v. *State,* 103 Ark. 70, 146 S.W. 471 (1912). The trial court was right in not deleting the implication of facts that might have been proved outright.

Affirmed.

John Ben COLEMAN *v.* Floyd J. LOFTON, Judge, First Division, Pulaski County Circuit Court

CR 85-209 715 S.W.2d 435

Supreme Court of Arkansas
Opinion delivered September 15, 1986

Henry N. Means, III, for appellant.

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

DARRELL HICKMAN, Justice. The issue in this case concerns the constitutional right to a speedy trial. John Ben Coleman argues that the state's ten month delay in serving the warrants of arrest irreparably harmed his defense. We find the petition for prohibition unconvincing and deny it.

Coleman was charged with rape and kidnapping. The arrest warrants were issued April 4, 1984, about ten days after the alleged crimes occurred. The warrants were served on February 26, 1985, over ten months later. A jury trial was set for November 4, 1985.

Three days before the trial, Coleman filed a motion to dismiss the charges because of the delay in bringing him to trial. Coleman primarily argues that a key defense witness, John Kelly, could not be located as a result of the delay in serving the warrants.

A hearing was held on the motion. Coleman testified about his efforts to locate Kelly. Coleman backtracked the places he and Kelly frequented asking about Kelly. He said he went to Marianna where Kelly lived prior to coming to Little Rock. Coleman heard Kelly had moved to Houston, but said he could not locate him. Coleman also testified as to Kelly's possible testimony. The trial judge ruled the motion untimely. The trial resulted in a mistrial because of a deadlocked jury.

Coleman petitioned this court for a writ of prohibition to prevent a second trial and to dismiss the charges on the same

grounds raised in his motion to dismiss. The only new argument is that another defense witness, Leslie Murphy, who testified at the trial, has since died.

Coleman argues that the trial was not held within the 18 months required by A.R.Cr.P. Rule 28.1. He contends the time begins to run from the date the charges are filed; therefore, his trial was held too late (19 months after the charges were filed). This argument fails because the time does not begin to run until the date of arrest. A.R.Cr.P. Rule 28.2 (a); *Walker* v. *State,* 288 Ark. 52, 701 S.W.2d 372 (1986); *Glover* v. *State,* 287 Ark. 19, 695 S.W.2d 829 (1985). Coleman's trial was held nine months after his arrest. He was in custody, if at all, only briefly.

Alternatively, Coleman argues that even if the time had not run, he was prejudiced by the delay in serving the warrants and entitled to dismissal of the charges. *Barker* v. *Wingo,* 407 U.S. 514 (1972); *Matthews* v. *State,* 268 Ark. 484, 598 S.W.2d 58 (1980). *Wingo* set no hard and fast rule regarding a speedy trial. Instead the United States Supreme Court established four factors to be considered in determining if an accused is denied a speedy trial. Those factors are the length of the delay, the reason for delay, the defendant's assertion of his right to a speedy trial, and actual prejudice to the defendant. Unless there is some delay which is presumptively prejudicial, there is no need to examine the other factors. *Barker* v. *Wingo, supra.*

Coleman's argument must focus on the pre-arrest delay because he did nothing to call the matter to the trial court's attention during the eight months after the arrest or at the arraignment until the motion to dismiss was filed three days before the trial. Coleman did not request a continuance to permit him more time to locate Kelly. We do not know why the sheriff's office did not serve the warrants in a timely manner. The warrants contained the following information: "John Coleman, B/M, Brown St., Little Rock, AR, Employed at one of the Safeway Stores on 12th LR, AR." The information for warrant section contained: "John Coleman, Brown St., Little Rock, AR exact address unknown 897-5188 Manager at Safeway 12th St., Little Rock, AR." However, Coleman's testimony at the hearing sheds some light on the situation. Coleman testified he lived on Brown Street in Wrightsville, not Little Rock. Coleman also testified he

was listed in the telephone directory with the same phone number since 1974 and he worked at Safeway since 1969, but he was off work for a period of time due to an illness. There is no evidence that the warrants were not served deliberately or intentionally to prejudice the defense. Coleman said he had no knowledge about the charges until he was arrested. The victim testified that she told Coleman she would report him to the police.

Any delay between the time the charge is made and the arrest, unless deliberately intended to prejudice the defendant, is not a consideration when determining if his constitutional rights have been violated. *United States* v. *Marion*, 404 U.S. 307 (1971). Indeed the petition would be denied perfunctorily if only lapse of time were the argument. In our judgment the rules of criminal procedure requiring trial within a specified period are the outer limits of time to bring a defendant to trial, and trials occurring within those limits are not presumptively prejudicial. *Matthews* v. *State, supra.* Therefore, the lapse of time in this case was not presumptively prejudicial. The burden of proof was on Coleman to show he was prejudiced by the pre-arrest delay.

Coleman's testimony was vague and uncertain about his efforts to locate John Kelly. He argued he could not find Kelly after he was arrested, but in his testimony at the hearing, he indicated that he had mentioned the charges to Kelly. His assertion of what he thought Kelly's testimony would be was uncorroborated. Even if the testimony was corroborated, it would not go to the issue of guilt or innocence of Coleman but to the victim's credibility.

The testimony of Murphy, the deceased witness who testified for Coleman at the first trial, can be used at a second trial. Coleman argues that Murphy and Sadie Jiles rented the house from Coleman where the alleged rape occurred. Murphy, however, did not mention to Coleman's lawyer that the bedroom doors had dead bolt locks and only Murphy and Jiles had keys. Coleman argues this testimony would contradict the victim's testimony that the rape occurred in the bedroom. Murphy's unavailability does not prejudice Coleman since Jiles is still available for the second trial and Murphy was available at the first trial for questioning. The trial court denied the petition and necessarily found that the evidence was unconvincing. We agree

and find the added allegation far short of the evidence of prejudice required to warrant an outright dismissal of the charges.

Petition denied.

Charles R. SINGLETON, Director, et al. *v.* Harvey E. SMITH and BENEVOLENT PROTECTIVE ORDER OF ELKS LODGE NO. 1987

86-44 715 S.W.2d 437

Supreme Court of Arkansas
Opinion delivered September 15, 1986

Donald R. Bennett, for appellants.

Murphy & Carlisle, by: *Marshall N. Carlisle*, for appellees.

JOHN I. PURTLE, Justice. The Alcoholic Beverage Control Board (Board) levied a fine against the Elks Lodge, the holder of a private club permit, for violating the statute concerning advertisements in newspapers. Ark. Stat. Ann. § 48-955 (Repl. 1977). Pursuant to the Arkansas Administrative Procedure Act (APA), the appellee requested judicial review in the circuit court which reversed the decision of the Board. The appellant argues that the circuit court erred in finding the decision by the Board was not supported by substantial evidence. We hold that there was no substantial evidence to support the decision of the Board.

On October 14, 1984, advertisements appeared in two newspapers in Washington County. The advertisements announced that an organization known as "Ducks Unlimited" would hold a banquet at the Elks Lodge on October 17, 1984.

The ads listed a telephone number which could be called for additional information. Also, the sponsors of the ads were identified as name-brand beer distributors. The local Board enforcement officer mailed the ads to the Board. Subsequently a hearing was held before the Director who entered an order finding the appellee guilty of prohibited advertising. The order was appealed to the Board which held that there was substantial evidence to support the decision of the Director. No testimony was offered at the hearing before the Board.

At the hearing the parties stipulated that identical ads (except for the sponsors) appeared in the *Northwest Arkansas Times* and the *Springdale News*. The ads began "ATTENTION SPORTSMEN" and announced that the 12th annual "Ducks Unlimited" banquet would be held at the Fayetteville-Springdale Elks Lodge. About half of the ad displayed pictures of ducks in

flight and a large portion of the remainder listed door prizes. The only reference to alcoholic beverages was the names of the sponsors of the ads. The telephone number listed was not the telephone of the appellee or any of its employees. The violation report, dated October 18, 1984, charged Harvey Smith and the Elks (appellees) with the violations of advertising beer and advertising without the prescribed "Notice to Members."

At the administrative hearing two affidavits were introduced. Harvey Smith, agent for appellee, attested that neither he nor the Lodge had any notice or knowledge that the ads would run. Glen Goode, representing Ducks Unlimited, stated that he prepared, delivered and paid for the ads without the aid, knowledge or consent of the appellee. In reaching its decision, the appellant relied upon Board Regulation Section 1.79, which states:

> All acts of any servant, agent or employee of the Permittee shall be imputed to the permittee and deemed to be an act of the permittee if done within the scope of such servant, agent, or employee's scope of authority under the permittee.

The relevant section of the APA (Ark. Stat. Ann. § 5-713 (Supp. 1985)) provides that any person who considers himself injured in his person, business, or property by final agency action shall be entitled to judicial review upon petition to the circuit court and that the agency shall transmit to the court the entire record of the proceedings before the agency. The reviewing court may allow additional evidence to be taken if it is material and there is good reason for the failure to present the evidence at the agency hearing. The circuit court may affirm the agency decision, remand for further proceedings, or reverse or modify the decision "if the substantial rights of the petitioner have been prejudiced because the findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion."

By the express terms of the APA, the circuit court may reverse the agency decision if it is not supported by

substantial evidence of record. We have previously confirmed this statement of law in the case of *Arkansas Real Estate Commission* v. *Harrison,* 266 Ark. 339, 585 S.W.2d 34 (1979), wherein we stated:

> Upon review of the action of an administrative board or agency, the circuit court's review of the evidence is limited to a determination of whether there was substantial evidence to support the action taken, and upon appeal to this court, our review of the evidence is similarly limited. [Citations omitted.]

In *Woodyard, Comm'r* v. *Diversified Insurance,* 268 Ark. 94, 594 S.W.2d 13 (1980), we held that a decision by an administrative agency will be reversed if it is arbitrary or capricious or is not supported by substantial evidence. *Woodyard* expanded *Harrison* by discussing an additional statutory ground for reversing an agency decision. We reversed the circuit court decision, which had reversed the agency decision, in the case of *Ark. ABC Bd.* v. *King,* 275 Ark. 308, 629 S.W.2d 288 (1982). In *King* we stated:

> When reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, or was there arbitrary and capricious action, or was it characterized by abuse of discretion. [Citation omitted.]

We again addressed the standard of judicial review of decisions of administrative agencies in *Williams* v. *Scott, Director,* 278 Ark. 453, 647 S.W.2d 115 (1983). The principles governing judicial review of agency decisions were determined to be the same as those set forth in *Harrison, Woodyard* and *King.* In *Williams* we stated:

> An administrative agency, like a jury, is free to believe or disbelieve any witness. . . . We give the evidence its strongest probative force to support the administrative decision. . . . To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded men could not reach its conclusion.

In the present appeal we think the trial court correctly

held that there must be substantial evidence to support the agency decision before it will be affirmed. No testimony was taken before the agency. Only the two newspaper ads and the two affidavits were presented to the Board. There was no evidence before the Board that the appellee or its agents, servants, or employees procured the newspaper advertisements. It is undisputed that "Ducks Unlimited" was solely responsible for the production and publication of the ads. There was no knowledge on the part of appellee that the ads were to be published. The Smith affidavit indicated that the appellee actually lost money on the banquet. The only basis for the Board's decision was that somehow or in some way the appellee must have known about the ads or they would not have been published.

There is no substantial evidence in the record to support the agency decision. Our standard of review, like that of the circuit court, is whether there is substantial evidence to support the agency decision. Under the circumstances and facts of this case we affirm the decision of the circuit court in reversing the decision of the administrative agency.

Affirmed.

HICKMAN, SMITH, and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. The holder of a private club permit with the Arkansas Beverage Control Division is responsible for activities at the club and any action of its agent, servants or employees. Otherwise the rules and regulations of the ABC cannot be enforced.

There is no doubt that the Northwest Arkansas Ducks Unlimited had permission to use the club and placed the illegal advertisement. The Elks Club granted the permission and has to be responsible for the violation. One cannot lend its private club and disclaim responsibility; accountability has to be with the permit holder.

Rule 1.79 of the ABC Regulation provides:

> All acts of any servant, agent, or employee of the permittee shall be imputed to the permittee and deemed to be an act of the permittee if done within the scope of such servant, agent, or employee's scope of authority under the

permittee.

The Elks and Ducks Unlimited are respectable organizations, but private clubs which dispense alcoholic beverages have to be rigidly regulated. Those who seek liquor permits accept certain responsibilities which cannot be avoided; those who operate private clubs with a liquor permit do so with the knowledge that their acts and the use of the club are strictly regulated. The permit is a license, not a recognition of a right. The commission and board were clearly justified in this action. I would reverse the trial court.

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

Bobbye Farrar BONDS *v.* SANCHEZ-O'BRIEN OIL AND GAS COMPANY

86-48 715 S.W.2d 444

Supreme Court of Arkansas
Opinion delivered September 15, 1986

Steve R. Crane, for appellant.

Keith, Clegg & Eckert, for appellee.

ROBERT H. DUDLEY, Justice. The sole issue in this case is whether the lessee of an oil and gas lease has an implied duty upon termination of production, or upon the drilling of a dry hole, to restore the surface of the land, as nearly as practicable, to the same condition as it was prior to drilling. We hold that the lessee has such a duty.

Eddie Smith, the predecessor in title to appellant, Bobbye Bonds, executed an oil and gas lease in July 1977. In 1979, a well was drilled and completed as a producer on the land. At that time the Cotton Petroleum Corporation, the owner of the lease, paid Smith for all location damages and took a release from liability for those damages. In January 1981, Smith executed a warranty deed for the surface to appellant Bonds. In December 1984, the operator of the well, appellee Sanchez-O'Brien Oil and Gas Company, plugged and abandoned the well, but left water pits, concrete slabs, dams, and winrock stone on the surface.

There is no need to recite all of the other facts or the pleadings since the parties agree that the issue before this court is whether the operator has a duty to restore the surface. The issue is a matter of first impression in this State.

Some states have adopted reclamation statutes. For example, the Kansas statute requires an operator to remove all equipment, structures and obstacles placed upon the land and to grade the surface, so as to leave the land, as nearly as practicable, in the same condition as it was before the operation, unless the parties have entered into a contract providing otherwise. Kan. Gen. Stat. Ann. § 55-132a (Supp. 1961). The State of Arkansas has no such reclamation statute.

Only a limited number of courts have decided this issue, but the rule adopted by the majority of those that have decided it is that a lessee is under no implied duty to restore the surface of the land to the condition prior to commencement of the drilling. 1 H. Williams & C. Meyers, Oil and Gas Law § 218.12 (1985).

Commentators are divided in their writings. Davis, in "Selected Problems regarding Lessee's Rights and Obligations to the Surface Owner," 8 Rocky Mt. Min. L. Inst. 315, 374 (1963), writes:

> The conflicting positions taken by the courts in the cited cases have been both justified and condemned by legal writers. Williams and Meyers prefer the rule that refuses to imply the obligation. They reason:
>
> > It is well known that some surface damage inevitably results from oil and gas operations on the premises,

> *e.g.*, from the building of roads and slush pits. The parties to the deed or lease severing minerals must be viewed as having this fact in mind. Their deed or lease contemplates reasonable surface user by the mineral owner or lessee. If a restriction on the surface easements of the latter is intended, it is reasonable to require that such intent be explicit in the instrument; otherwise the risk of injury resulting from reasonable surface user is properly upon the surface owner. If this view is adopted, the liability of a mineral owner or lessee to the surface owner by reason of change of conditions of the premises as a result of drilling and related operations should be limited to those cases involving negligence, willful misconduct, excessive user, breach of duty imposed by statute or valid regulatory order, or breach of an express contractual duty. 1 Oil and Gas Law 239-240 (1959).

Dean Sullivan, on the other hand, expresses a contrary view:

> An analysis of the relationship of the parties and the underlying purpose of the lease would indicate that the lessee should be obligated to restore the surface, reasonable wear and tear excepted, even in the absence of an express provision to that effect. Sullivan, Oil and Gas Law 91 (1959).

Davis concludes by suggesting that it is the modern practice of prudent operators to clean up and restore the surface and he urges that:

> The failure or refusal to do so would, in fact, constitute an unreasonable surface use that was not contemplated as being included in the rights granted to the lessee. Williams and Meyers argue that if the landowner wants to have his premises cleaned up after operations are completed, he should be required to spell out such requirement in the lease. I would put the shoe on the other foot and require the lessee to negate this obligation expressly or suffer the judicial implication of the duty.

Davis, "Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner," 8 Rocky Mt. Min. L. Inst. 315,

349 (1963).

Cole, in "Oil & Gas: Does the Oil and Gas Lessee Have a Duty to Restore the Surface?," 25 Okla. L. Rev. 572, 573 (1972) states: "Until recently most courts which had considered the question held that a duty to restore would not be implied. Legislative initiative and changes in the viewpoint of courts, however, have now established a definite trend toward placing the burden of restoration on the lessee."

We are persuaded that the current trend toward placing the burden of restoration on the lessee is the better view. This viewpoint recognizes a legitimate legal concern for the environment. In recognition of this concept, many responsible members of the oil industry have already voluntarily begun to clean up their abandoned sites, and we must base decisions upon current concepts of what is right and just. To hold otherwise would allow the lessee to continue to occupy the surface, without change, after the lease has ended. This would constitute an unreasonable surface use, and no rule is more firmly established in oil and gas law than the rule that the lessee is limited to a use of the surface which is reasonable. Accordingly, we hold that the duty to restore the surface, as nearly as practicable, to the same condition as it was before drilling is implied in the lease agreement.

Reversed and remanded for proceedings consistent with this opinion.

SMITH, PURTLE, and NEWBERN, JJ., dissent.

JOHN I. PURTLE, Justice, concurring in part and dissenting in part. I concur in that part of the majority opinion which holds that restoration is the responsibility of the lessee. However, it is a matter which is subject to contract. I would hold that the appellant in the present case purchased this property with knowledge of the existence of these structures and therefore waived the right to have the appellee remove them.

DAVID NEWBERN, Justice, dissenting. The appellant describes herself as an oil well operator who is very experienced in the oil business. She testified she had $400 per acre invested in the two acres which are the subject of this action. She acknowledged she is asking the appellee to spend over $10,000 to repair the two acres despite the payment of $1,700 to her predecessor in title for

damages to the land in question. Her position, apparently accepted by the appellee, is that she is not bound by the release given by her predecessor because she was unaware of it when she purchased the land.

The majority opinion cites no case holding that a lease of mineral rights carries an implied obligation of the lessee to restore the leasehold, as nearly as practicable, to the condition it was in before drilling. There may be one such case. In *Smith* v. *Schuster,* 66 So. 2d 430 (La. App. 1953), the court found such a duty. The basis of the duty was not discussed, and no authority for it was cited. That case was overruled by implication in *Rohner* v. *Austral Oil Exploration Co.,* 104 So. 2d 253 (La. App. 1958). In the latter case, the mineral lease expressly required the lessee to pay for damages to crops and timber. The court allowed damages for lost corn and watermelons but refused to go further, stating there was no duty beyond the duty not to be negligent in the use of the land. More recently the Louisiana Court of Appeals has found an implied duty to restore the surface, but it has been based on the Louisiana Mineral Code rather than the lease between the parties. *See Broussard* v. *Waterbury,* 346 So. 2d 1342 (La. App. 1977).

I agree with the scholarly articles cited in the majority opinion that there has been a trend to enact legislation imposing the duty to restore upon mineral lessees. Montana (Mont. Code Ann. § 82-10-501 to § 82-10-511 (1983); Illinois (Ill. Rev. Stat. Ch. 100½ § 26 (1983); Kansas (Kan. Stat. Ann. § 55-132(a) (1983); Oklahoma (Okla. Stats. Ann. tit. 52 § 318.2 to § 318.9 (West Supp. 1984-85); and South Dakota (S.D. Cent. Code § 38-11.1-01 to § 38-11.1-10 (1980 and Supp. 1983) have such statutes.

Before the enactment of its statute, Oklahoma allowed the lessor to recover under a nuisance theory, *Tenneco Oil Co.* v. *Allen,* 515 P.2d 1391 (Okla. 1973), or negligence theory, *Nichols* v. *Burk Royalty Co.,* 576 P.2d 317 (Okla. 1977), for surface damages, but I find no Oklahoma case imposing an implied restoration duty in a mineral lease. Likewise, in Kansas, prior to legislation, there was no implied duty. *Duvanel* v. *Sinclair Refining Co.,* 227 P.2d 88 (Kan. 1951); *McLeod* v. *Cities Service Gas Co.,* 131 F.Supp. 449 (D.C. Kan. 1955).

Other jurisdictions having no legislation covering the matter hold there is no implied duty upon the mineral lessee to restore the surface. *Warren Petroleum Corp.* v. *Monzingo,* 304 S.W.2d 362 (Texas 1957); *Amoco Production Co.* v. *Carter Farms,* 703 P.2d 894 (N.M. 1985).

I find no evidence whatever of the "changes in the viewpoint of courts." While I find some evidence of the legislative trend, I find the judicial one exists only in the hopes and dreams of the authors cited in the majority opinion. In my view we have no business making a blatant change in the law of mineral leases. Rather, I agree with the conclusion of the author of one article cited by the majority:

> The best solution to this problem seems to be the adoption of a statute, similar to the Kansas and Illinois statutes, requiring restoration of the premises upon completion of operations.

L. Davis, Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner, 8 Rocky Mtn. Min. L. Inst. at 349 (1963).

I respectfully dissent.

SMITH, J., joins in this dissent.

Lonnie HOWARD *v.* STATE of Arkansas

CR 86-30 715 S.W.2d 440

Supreme Court of Arkansas
Opinion delivered September 15, 1986

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

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

DAVID NEWBERN, Justice. This is an appeal from denial of a habeas corpus petition. The appellant was convicted of failure to appear, a felony. *See* Ark. Stat. Ann. § 41-2820(2) (Repl. 1977). At the same trial he was convicted of misdemeanor theft by receiving. *See* Ark. Stat. Ann. § 41-2206(5)(c) (Repl. 1977). The judge sentenced the appellant on the felony conviction to serve three years in the Arkansas Department of Correction with two years suspended. On the misdemeanor conviction, the appellant was sentenced to serve one year in Pulaski County jail, to pay a $250 fine, and to make restitution of $50. The sentences were to be served consecutively.

After the appellant had served the one year not suspended on the felony charge, in the Arkansas Department of Correction, he was transferred to the county jail. He then brought a petition for habeas corpus, contending his sentence to the county jail was unlawful. The trial judge held a hearing at which it was agreed among all parties that the judge had made it clear when sentencing the appellant that the sentences were to run consecutively, and neither the appellant nor the state had advised him of the illegality of the sentences. The judge stated for the record his opinion that by failure to contend the misdemeanor sentence was

illegal when it was imposed in conjuction with the felony sentence the appellant had waived his right to challenge it and thus was not entitled to a writ of habeas corpus.

The misdemeanor sentence imposed in this case was void because the court lacked the authority to impose it. Ark. Stat. Ann. § 41-903(3) (Repl. 1977) states:

> The power of the court to order that sentences run consecutively shall be subject to the following limitations:
>
> (a) a sentence of imprisonment for a misdemeanor and a sentence of imprisonment for a felony shall run concurrently and both sentences shall be satisfied by service of sentence for a felony . . . .

When we are confronted with an allegation that a sentence is void or illegal, we consider it a matter of subject matter jurisdiction which we may review whether or not an objection was made in the trial court. *Coones* v. *State,* 280 Ark. 321, 657 S.W.2d 553 (1983). *See also Lambert* v. *State,* 286 Ark. 408, 692 S.W.2d 238 (1985).

The denial of the writ of habeas corpus is reversed, and the case is remanded to the circuit court for entry of an order not inconsistent with this opinion.

Johnny Bill JOHNSON *v.* STATE of Arkansas

CR 86-45 715 S.W.2d 441

Supreme Court of Arkansas
Opinion delivered September 15, 1986

Fritzie Vammen, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, for appellee.

DAVID NEWBERN, Justice. The appellant was found guilty of burglary of, and theft of property from, a warehouse. An accomplice testified that he and the appellant and another person committed the offenses. The appellant argues the accomplice's testimony was not corroborated and the evidence was not sufficient to show the identity of the allegedly stolen property and value in excess of $200 which is required to support the appellant's conviction of a class C felony on the theft charge. Ark. Stat.

Ann. § 41-2203(2)(b)(i) (Supp. 1985).

Murie, the accomplice who testified, said the appellant had gone into the warehouse and had removed property and passed it through a broken window into a dumpster outside. Murie said while this was going on he, Murie, was waiting outside by a truck in which they had driven to the warehouse. Murie testified that when the police arrived on the scene he ran into the building to warn the others. The evidence given by police officers showed the appellant and Murie were found on the roof of the warehouse.

Officer Blair testified that when he came to the warehouse he saw an arm sticking out of the broken window dropping merchandise into the dumpster. The arm was clad in a blue denim sleeve. When the appellant and Murie were apprehended, Murie was wearing a denim jacket and the appellant was wearing only a "T" shirt.

1. Corroboration

The appellant argues there was no substantial evidence to show that he entered the warehouse other than Murie's testimony. His brief suggests he could have climbed up a drain spout on the exterior of the building to get to the roof.

The corroboration of an accomplice's testimony required by Ark. Stat. Ann. § 43-2116 (Repl. 1977) is sufficient if it shows independently that a crime occurred and the accused was connected with its commission. *Linell* v. *State,* 283 Ark. 162, 671 S.W.2d 741 (1984); *Henderson* v. *State,* 279 Ark. 435, 652 S.W.2d 16 (1983) (reversed on other grounds). Although Murie, and not the appellant, was found wearing the denim jacket, a fact which tends to detract from Murie's testimony that he, Murie, was outside the warehouse when the police arrived, it does not detract at all from Officer Blair's corroborating testimony. In *Bly* v. *State,* 267 Ark. 613, 593 S.W.2d 450 (1980), and in *Henderson* v. *State, supra,* we held that flight by an accused may constitute a corroborating circumstance. Completely disregarding Murie's testimony, we have Officer Blair's testimony that he saw the crime being committed and found the appellant and Murie on the roof of the building which was the scene of the crime. The appellant and Murie were cold and wet, as Officer Blair testified, because they had been lying on the roof. We hold the corrobora-

tion was sufficient. The fact that the appellant was discovered on the roof of the warehouse with no apparent reason for being there other than to escape detection as a participant in the burglary is sufficient.

2. Property Identity and Value

The state called James Edgecomb, a maintenance man at the warehouse, as a witness to establish the identity and value of the property allegedly stolen from the warehouse. Edgecomb had gone to the warehouse the evening of the burglary in response to a burglar alarm call. He testified he later went to the police station and picked up property which was normally carried in the warehouse stock. The police had photographed the property, and Edgecomb identified the property in the photograph as being that which he had retrieved from the police station. He recited values of the various items which, added together, far exceeded $200.

The only objection made by the appellant to Edgecomb's testimony was that the police should have brought the merchandise rather than a photograph of it to the trial. He cites no authority for that argument. It is well established that, in a criminal case, a witness may testify concerning tangible objects which are involved without producing the articles. *Washington* v. *State,* 254 Ark. 121, 491 S.W.2d 594 (1973); *Washington* v. *State,* 248 Ark. 318, 451 S.W.2d 449 (1970). It is not a violation of the best evidence rule which applies only to writings, photographs and recordings, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Uniform Rules of Evidence 1002; *Redman* v. *State,* 265 Ark. 774, 580 S.W.2d 945 (1979), nor does it violate the hearsay rule for a witness to testify about a physical object not presented in court. Ark. Stat. Ann. § 28-1001 (Repl. 1979), Uniform Rules of Evidence 801(c); *Redman* v. *State,* supra. An accused has no constitutional right to confrontation in the case of physical objects as opposed to witnesses who testify against him. *Southern* v. *State,* 284 Ark. 572, 683 S.W.2d 933 (1985); *Redman* v. *State, supra.*

He also contends that property retrieved from a dumpster is likely to have been placed there by someone else and is likely not to have been in working order. The photograph in the record shows apparently undamaged boxes which Edgecomb said contained the merchandise in question. A police detective, Officer

Briggs, testified the photograph depicted the merchandise recovered from the dumpster outside the warehouse on the night of the burglary. No evidence was presented to show any of the recovered items were broken.

We find the evidence on identity and value of the property was sufficient. We decline to consider the appellant's arguments that Edgecomb was allowed to testify to hearsay as to the retail prices of the recovered items and that a proper custody chain was not established with respect to the merchandise because these objections were not raised at the trial. *Fretwell* v. *State,* 289 Ark. 91, 708 S.W.2d 630 (1986); *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

Affirmed.

Michael Earl ABRAHAM *v.* STATE of Arkansas

CR 81-90 715 S.W.2d 443

Supreme Court of Arkansas
Opinion delivered September 15, 1986

Appellant, pro se.

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

PER CURIAM. Petitioner Michael Earl Abraham was convicted of aggravated robbery and sentenced as an habitual offender with six prior felonies to life imprisonment and a fine of $15,000. We affirmed. *Abraham* v. *State,* 274 Ark. 506, 625 S.W.2d 518 (1981). Petitioner now seeks a copy of the transcript

of his trial so that he may proceed in federal court on a petition for writ of habeas corpus. Petitioner contends that he has a compelling need for a copy of the transcript in that he cannot effectively prepare the habeas corpus petition without the transcript.

[redacted] The motion for transcript is denied. When a petitioner in federal court has a compelling need for a copy of the transcript to proceed under 28 U.S.C. § 2254 (1977), he must make his request to the federal court. If that court finds merit to the request, it will order expansion of the record and compel the state to supply the needed record. *See* Rules 5 & 7, Rules Governing § 2254 Cases In The United States District Court.

Motion denied.

ARKANSAS BAR ASSOCIATION, IN THE MATTER OF INTEREST ON LAWYERS' TRUST ACCOUNTS

84-90 709 S.W.2d 400

Supreme Court of Arkansas
Delivered May 5, 1986

PER CURIAM. On September 17, 1984, we granted a petition by the Arkansas Bar Association requesting that we permit establishment of a program for collecting interest on monies deposited in lawyers' trust accounts and for use of the interest earned for certain purposes having to do with furthering legal education and the sound administration of justice in Arkansas. *In the Matter of the Arkansas Bar Association, Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984).

On May 13, 1985, this court rendered a *per curiam* opinion which modified the client notice provision of the court's original opinion in this matter, providing:

> Client consent is not an element of the IOLTA program. However, on the same day as a client's money is first deposited in a participating attorney or law firm's trust account, the attorney or law firm shall mail a notice to that client in the form set out below, providing information concerning the procedures and the uses of trust earnings. Subsequent deposits of money of a client who has once been notified may be made without repeating the notice.

Arkansas Bar Association, In the Matter of Interest on Lawyers' Trust Accounts, 286 Ark. 64, 689 S.W.2d 352 (1985).

The petitioner now asks that we amend and modify our opinion to permit a lawyer to give notice to his clients by posting it in the lawyer's office.

Our opinion is hereby modified by replacing the language quoted above with the following:

> Client consent is not an element of the IOLTA program. However, attorneys and law firms participating in the program shall inform their clients of their participation by posting in their office a conspicuous notice in the form approved by this court and set out in our per curiam order of September 17, 1984, 283 Ark. 252, 261, 675 S.W.2d

355, 358 (1984), providing information concerning the procedures and uses of trust earnings. It is permissible for the Arkansas IOLTA Foundation to provide this required notice to participating attorneys and law firms.

PURTLE, J., not participating.

IN RE: James F. DICKSON

709 S.W.2d 404

Supreme Court of Arkansas
Delivered May 12, 1986

PER CURIAM. On recommendation of the Committee on Professional Conduct, the Court accepts the surrender by James F. Dickson of his license to practice law.

PURTLE, J., not participating.

IN RE: George L. TAYLOR

Supreme Court of Arkansas
Delivered June 2, 1986

710 S.W.2d 201

PER CURIAM. Upon recommendation of the Supreme Court Committee on Professional Conduct, George L. Taylor's license to practice law is hereby reinstated.

IN RE: ARKANSAS BAR ASSOCIATION RULES AND REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION

85-302 711 S.W.2d 446

Supreme Court of Arkansas
Delivered May 30, 1986

PER CURIAM. We approve the concept of mandatory continuing legal education for all members of the bar of this court. We commend the Arkansas Bar Association and its Special Committee for Mandatory Continuing Legal Education chaired by W. Russell Meeks, III, for the effort it has expended in placing before us a proposal of rules and regulations for the creation and implementation of such a program.

As the ultimate sanctions for failure to participate in any mandatory continuing legal education scheme must include revocation of the license of the nonparticipant, we feel a deep responsibility for close supervision of any such program we may eventually adopt. Although the proposal before us gives us virtual control of the membership of the commission to be in charge of the proposed program, we would like to have it operated by and through a more closely associated agency of our court.

For this purpose and many others we find ourselves in need of a court administrator, one of whose functions would be to supervise and direct mandatory continuing legal education with, perhaps, an advisory board composed much as the proposed commission. At present we have no authority or funds to employ such an administrator. We are considering, among other alternatives, raising our supreme court bar membership dues sufficiently to cover the cost. We are directing our Judicial Department to study the means by which other states' highest courts maintain supervisory control of and support financially their continuing legal education efforts.

We also view an effective program of continuing legal education as being inextricably related to the matter of legal specialization. The inordinately slow development, thus far, of a legal specialization program for the members of our bar has been, in part, the result of lack of a focal point for supervision of the program. We likewise applaud the efforts of the Arkansas Bar Association and its Board of Legal Specialization for the volun-

tary work of its members in generating proposals in the specialization program. However, until we are able to come up with the means of supervising and funding both these programs, we do not want them to start. We know and appreciate our responsibility in these matters, but we must decline to be involved in any program in which we are not exercising that responsibility as directly and as well as we possibly can.

We share with the Arkansas Bar Association and other members of our bar the desire to institute programs of legal specialization and mandatory continuing legal education which are highly competent. Our plan is to have those programs as soon as we can assure ourselves we are able properly to exercise our supervisory authority and responsibility.

We wish to thank also the many individuals and groups who responded to our invitation for comments on the Arkansas Bar Association proposal. We will maintain those responses in our file, and we will find them useful when we are ready to begin establishment of the program.

Petition denied.

PURTLE, J., not participating.

HICKMAN, J., concurs that it is premature to decide this matter.

IN RE: BOARD OF CERTIFIED COURT REPORTER EXAMINERS

711 S.W.2d 775

Supreme Court of Arkansas
Delivered June 16, 1986

PER CURIAM. The Board of Certified Court Reporter Examiners has recommended that Regulation 13 be amended so that a trial judge may grant an emergency non-renewable certificate for a period of one hundred twenty days. Therefore, the first paragraph of Regulation 13 is amended to read:

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 one hundred twenty day, non-renewable emergency certificate in order to continue the conduct of the court's business; provided a copy of the one hundred twenty day emergency certificate shall be forthwith filed with the Clerk of the Arkansas Supreme Court and Secretary of this Board.

IN RE: THE BOARD OF CERTIFIED COURT REPORTER EXAMINERS AND RULE 12, RULES OF THE SUPREME COURT AND COURT OF APPEALS

82-283 711 S.W.2d 831

Supreme Court of Arkansas
Delivered July 7, 1986

PER CURIAM. The Board of Certified Court Reporters has petitioned us to adopt a uniform set of standards for all transcripts. The Board's recommendations have been approved by the Arkansas Court Reporters Association.

Interested parties have generously given their advice, opinions, and recommendations regarding what these standards should be. The great majority responding to the petition favors some sort of uniform guidelines. A majority is against abandoning legal size paper. Most of the specific objections made regard the form to be used in transcribing the questions, answers, colloquy, and other material. Many prefer a form that sets the testimony apart completely from the symbols "Q" and "A" for easy reference.

We have adopted the proposal of the Board of Certified Court Reporters with some exceptions. We are not yet ready to abandon the use of legal size paper, and we are not yet convinced we should require the use of lined and numbered pages. Most all of those responding agree that the left margin should begin 1⅜ inch from the edge of the page. However, since we accept the fact that the number of lines on a page may be reduced to 25, we see no reason to not require that the margin begin at one inch. No longer will we make exceptions to our rules requiring that all records be bound at the top; reporters and clerks are reminded that records not so bound will be rejected by the clerk. Such transcripts are far

easier to read than those bound at the side and will give the transcript purchaser more for the money.

It is difficult to find a consensus on the form to be used for questions and answers, colloquy and other exhibits. Nearly all responding proposed a slightly different form. We have adopted a standard which we think satisfies the need for substance on a page and a form that provides ready reference to the reader.

The example attached to the Board's petition is all in capital letters which is generally referred to as the upper case. We were unaware this was an acceptable practice for transcripts. We will require all transcripts to be in the lower case.

We amend Rule 12 of the Rules of the Supreme Court to read:

(i) MUST BE RIBBON PRINT.—The record must be made out in plain typewriting of first impression, not copies, on 8½" x 14" paper and fastened at the top of the page. Records prepared with the aid of a computer may be on 8½" x 11" paper. All transcripts shall be prepared by certified court reporters according to the following rules:

(1) No fewer than 25 typed lines on standard 8½" by 14" paper.

(2) No fewer than 9 or 10 characters to the typed inch.

(3) Left-hand margins to be set at no more than 1".

(4) Right-hand margins to be set at no more than ⅜".

(5) Each question and answer to begin on a separate line.

(6) Each question and answer to begin at the left-hand margin with no more than 5 spaces from the "Q" and "A" to the text.

(7) Carry-over "Q" and "A" lines to begin at the left-hand margin.

(8) Colloquy material, quoted material, parentheticals and exhibit markings to begin no more than 15 spaces from the left-hand margin with carry-over lines to begin no more than 10 spaces from the left-hand margin.

(9) All transcripts must be prepared in the lower case.

(10) All depositions prepared for use as evidence in any court shall comply with these rules with these

exceptions:

(A) 8½" x 11" paper may be used.

(B) The left-hand margin to be set at no more than 1¾".

(C) Binding may be on the left.

This rule is effective January 1, 1987. All depositions prepared and all transcripts certified after December 31, 1986, shall conform to these guidelines.

Justice Hickman, being a member of the Certified Court Reporters Board, did not participate in the final approval of the standards.

AMENDMENT TO RULE 11(g) OF THE RULES OF THE SUPREME COURT AND COURT OF APPEALS

712 S.W.2d 291

Supreme Court of Arkansas
Delivered June 30, 1986

PER CURIAM. Paragraph (g) of Rule 11 of the Rules of the Supreme Court and Court of Appeals is amended, effective today, so that the paragraph will read:

> (g) Printing of Abstracts and Briefs for Indigent Appellants.—When an indigent appellant is represented by appointed counsel or a public defender, his attorney may have the abstract and briefs reproduced by submitting the double-spaced typewritten manuscript to the Attorney General not later than the due date of the brief. In such instances the time for the filing of the Attorney General's brief is extended by five days.

IN THE MATTER OF THE RULES OF THE SUPREME COURT AND THE COURT OF APPEALS

712 S.W.2d 295

Supreme Court of Arkansas
Delivered July 7, 1986

PER CURIAM. In order to bring Rule 8(c) and Rule 11(f) of the Rules of the Supreme Court and the Court of Appeals into agreement, Rule 11(f) is hereby modified by striking out the following sentence:

> The appellant's brief in chief, before its printing, shall not exceed 40 double-spaced typewritten pages, with a similar 10-page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case it may be waived by the Court on Motion.

And substituting therefor the following:

> The argument portion of the appellant's brief shall not exceed 25 double-spaced typewritten pages or 30 printed pages, with a similar 15 typewritten and 20 printed page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case it may be waived by the Court on Motion.

IT IS SO ORDERED.

IN RE: CHANGES TO THE ARKANSAS RULES OF CIVIL PROCEDURE AND THE ARKANSAS RULES OF APPELLATE PROCEDURE

712 S.W.2d 296

Supreme Court of Arkansas
Delivered July 7, 1986

PER CURIAM. The following changes in the rules were drafted by our Committee on Rules of Pleading, Practice, and Procedure in Civil Cases. We wish to thank the committee chairman, Judge Henry Wilkinson, and the committee reporter, Professor John J. Watkins, as well as all of the members of the committee, for the continuing superb job they have done.

The changes prescribed in this opinion will become effective September 15, 1986. Between now and that date we will welcome suggestions and comments on them from bench and bar.

Rule 4, Ark. R. Civ. P.

Rule 4 of the Arkansas Rules of Civil Procedure is amended as follows:

(1) By deleting the present language of subsection (e)(3) and substituting:

> (e)(3) By any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee.

(2) By adding a new subsection to be designated (k):

> (k) *Service of Other Writs and Papers.* Whenever any rule or statute requires service upon any person, firm, corporation or other entity of notices, writs, or papers other than a summons and complaint, including without limitation writs of garnishment, such notices, writs or papers may be served in the manner prescribed in this Rule for service of a summons and complaint. Provided, however, any writ, notice or paper requiring direct seizure of property, such as a writ of assistance, writ of execution, or order of delivery shall be made as otherwise provided by law.

The following addition is made to the Reporter's Note accompanying Rule 4:

Addition to Reporter's Note, 1986 Amendment: Rule 4(e)(3) is amended to make explicit that service by mail outside the state must be sent with restricted delivery, thus harmonizing the provision with Rule 4(d)(8), which governs service by mail within the state. New subsection (k) is primarily aimed at making clear that the service-by-mail provisions of Rule 4(d)(8) may be utilized to serve writs of garnishment.

Rule 5, Ark. R. Civ. P.

Rule 5 of the Arkansas Rules of Civil Procedure is amended by adding the words "or any statute" following the word "rule" in the first sentence of subsection (b), to wit:

(b) *Service; How Made.* Whenever under this rule or any statute, * * * *

The following addition is made to the Reporter's Note accompanying Rule 5:

Addition to Reporter's Note, 1986 Amendment: The 1986 amendment adds the words "or any statute" following the word "rule" in the first sentence of subsection (b). The rule thus applies not only to those papers required to be filed by the Rules of Civil Procedure, but also to documents that must be filed under the provisions of particular statutes, *e.g.*, Ark. Stat. Ann. § 34-2617 (Supp. 1985) (notice of intent to sue in medical malpractice proceedings).

Rule 6, Ark. R. Civ. P.

Rule 6 of the Arkansas Rules of Civil Procedure is amended as follows:

By deleting from the third sentence of subsection (a) the phrase "seven (7) days" and substituting "eleven (11) days."

The following addition is made to the Reporter's Notes accompanying Rule 6:

Addition to Reporter's Note, 1986 Amendment: Rule 6(a) is amended, consistently with the federal rule, to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the former version of the rule, parties bringing motions under rules with 10-day periods could have as few as five working days to prepare their motions.

Rule 11, Ark. R. Civ. P.

Rule 11 of the Arkansas Rules of Civil Procedure is amended to read as follows:

Signing of Pleadings, Motions,
and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically

provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The following addition is made to the Reporter's Note accompanying Rule 11:

Addition to Reporter's Note, 1986 Amendment: Rule 11 has been completely rewritten. It is now substantially identical to Federal Rule 11, as amended in 1983. As adopted in 1979, Arkansas Rule 11 was virtually identical to its federal counterpart, providing for the striking of pleadings and imposition of disciplinary sanctions to check abuses in the signing of pleadings. Experience under original Rule 11 in the federal courts demonstrated that the rule was not effective in deterring abuses, and confusion existed as to the circumstances that could trigger striking a pleading or taking disciplinary action, the standard of conduct expected of attorneys who sign pleadings and other papers, and the range of available sanctions. The amended rule is intended to reduce the reluctance of the courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

As amended, Rule 11 expressly applied to pleadings, motions, and other papers. It therefore includes discovery requests, discovery motions, and any other paper that must be filed and

served under Rule 5, Ark. R. Civ. P. Moreover, amended Rule 11 provides that, in addition to disciplinary sanctions, the trial judge may impose other sanctions upon an offending attorney, including a reasonable attorney's fee for the opposing party. The assessment of attorney's fees for violation of procedural rules is currently found in other Rules of Civil Procedure, *e.g.*, Rules 37(a)-(d), 56(g), and 26(b) & (c).

Amended Rule 11 states that the signature of an attorney constitutes a certificate by him "that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." This language is substantially stronger than in the former rule. In addition, the recently adopted Arkansas Rules of Professional Conduct emphasize that a lawyer may not ethically bring or defend a proceeding or an issue unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. *See* Rule 3.1, Arkansas Rules of Professional Conduct.

Under the former version of Rule 11, the signature of an attorney certified that the suit or motion was not interposed for purposes of delay. The new rule is broader in stating that the pleading, motion or other paper "is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." This provision is consistent with the newly adopted ethical rules. For example, Rule 3.2 of the Arkansas Rules of Professional Conduct provides that a lawyer "shall make reasonable efforts to expedite litigation consistent with the interest of the client."

Rule 30, Ark. R. Civ. P.

Rule 30 of the Arkansas Rules of Civil Procedure is amended by adding the following new subsection (b)(7):

(b) * * *

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For purposes of these rules, a deposition by telephone is taken at the place where the deponent is to answer questions propounded to him.

The following addition is made to the Reporter's Note

accompanying Rule 30:

Addition to Reporter's Note, 1986 Amendment: New subsection (b)(7) is based upon the corresponding federal rule. Although depositions by telephone have been available by stipulation under Rule 29, this subsection authorizes that method by order of the court as well. The second sentence of the new subsection, under which the telephone deposition is deemed "taken" at the place where the witness is to answer the questions (rather than the place where the questions are propounded), is necessary as a definitional provision in light of other rules involving the place of a deposition. *See* Rules 37(a)(1), 37(b)(1), and 45(d).

Rule 36, Ark. R. Civ. P.

Rule 36 of the Arkansas Rules of Civil Procedure is amended by adding the following as new subsection (c):

(c) Requests for admissions must be filed in a separate document so titled and shall not be combined with interrogatories, document production requests, or any other material.

The following addition is made to the Reporter's Note accompanying Rule 36:

Addition to Reporter's Note, 1986 Amendment: Under new subsection (c), it is impermissible to combine requests for admissions with interrogatories or other discovery devices. The amendment is consistent with the practice followed in the Arkansas federal courts. *See* Rule 15(e), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas (as amended effective May 1, 1985).

Rule 45, Ark. R. Civ. P.

Rule 45 of the Arkansas Rules of Civil Procedure is amended as follows:

(1) By deleting the first sentence of subsection (c) and substituting the following:

> A subpoena may be served by the sheriff of the county in which it is to be served, by his deputy, by any other person who is not a party and is not less than 18 years of age, or by mail in the same manner permitted for service of process

pursuant to Rule 4(d)(8).

(2) By deleting the second paragraph of subsection (c) and substituting the following:

> A witness, regardless of his county of residence, shall be obligated to attend for examination on trial of a civil action in the State of Arkansas when properly served with a subpoena at least five (5) days prior to the trial; provided, however, that the witness must be paid or tendered at the time and place of trial reasonable expenses for loss of time based on the witness' present earnings or $30 per day for his attendance, whichever is greater, and $0.20 per mile for travel from his home to the place of trial. Should a continuance in the cause be granted and the witness be provided adequate notice thereof, reservice of the subpoena shall not be necessary. If now exempt by law from personal attendance at trial, the witness shall be required to give his deposition in accordance with subsection (d) of this rule.

(3) By deleting "three (3) days" in the last paragraph of subsection (c) and substituting "five (5) days."

(4) By adding the following new sentence at the end of the first paragraph of subsection (d):

> The witness must be properly served at least five (5) days prior to the date of the deposition, unless the court grants leave for a subpoena to be issued within that period. The witness must be paid or tendered at the time of deposition reasonable expenses for loss of time based on the witness' earnings or $30 per day for his attendance, whichever is greater, and $0.20 per mile for travel from his home to the place of deposition.

Ark. Stat. Ann. § 28-524 (Repl. 1979), is deemed superseded to the extent that it conflicts with this rule.

The following addition is made to the Reporter's Note accompanying Rule 45:

Addition to Reporter's Note, 1986 Amendment: Rule 45(c) is substantially revised. The 1986 amendment changes prior Arkansas practice by permitting any person who is not a party and is not less than 18 years of age to serve a subpoena, thus

adopting the federal practice. Moreover, the amended rule permits service of a subpoena by mail in the same manner as service of process under Rule 4(d)(8). The 1986 amendment also eliminates the distinction between witnesses residing in the county of trial and those residing outside the county. All witnesses must be served at least five days prior to trial, unless the court grants leave to allow service within that period, and all must be paid the same attendance fee and travel expenses. These fees, specified in the amended rule, must be paid at the time of trial, a change from the prior practice of requiring payment or tender of the fees at the time of service. Rule 45(c) also now makes plain that reservice of the subpoena is not necessary if a continuance is granted in the matter and the witness is given sufficient notice prior to his attendance. In that situation, the witness would be compelled to attend trial on the new date, and a new subpoena would not be required. Subsection (d) is also amended to make plain that the five-day minimum for service and the attendance and travel fee requirements apply to subpoenas for taking depositions as well as to subpoenas for appearance at trial. However, there is no change in the requirement that a deposition witness can be deposed only in the county where he resides, is employed, or transacts his business in person, absent a court order.

Rule 72, Ark. R. Civ. P.

The Arkansas Rules of Civil Procedure are amended by adding the following as new Rule 72, which supersedes Ark. Stat. Ann. § 27-402 (Supp. 1985):

Rule 72.
SUITS IN FORMA PAUPERIS

(a) Every indigent person not being of ability to sue, who shall have a cause of action against another, may petition the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute his suit in forma pauperis and to have counsel assigned to conduct his suit.

(b) All such petitions shall be accompanied by an assertion of indigency, verified by a supporting affidavit. The affidavit form will be provided by the court for such purposes. Any petition not in compliance with this provision will be returned to the petitioner.

(c) The court to which such petition is presented, if satisfied of the facts alleged that the petitioner has a colorable cause of action, may by order allow him to prosecute his suit in forma pauperis and may assign him counsel, who shall do his duty therein without taking any fee or reward therefor.

(d) Every person so permitted to proceed in forma pauperis may prosecute his suit without paying any fees to the officers of the court, and shall not be prevented from prosecuting the same by reason of his being liable for the costs of a former suit brought by him against the same defendant.

(e) No person shall be permitted to prosecute any action of slander, libel or malicious prosecution in forma pauperis.

(f) If the person proceeding in forma pauperis is guilty of any improper conduct in the prosecution of his suit, or of any wilful or unnecessary delay, the court may, in its discretion, annul the order permitting him to proceed in forma pauperis. The petitioner shall thereafter be deprived of all privileges conferred by such order.

The following Reporter's Note is adopted to accompany the rule:

Reporter's Note. New Rule 72 tracks, with minor linguistic changes, the former statutory provisions governing suits by indigents. These statutes, Ark. Stat. Ann. §§ 27-401, 27-403—27-406 (Repl. 1979), were repealed by Act 208, 75th General Assembly, 1985. Section 27-402, adopted in 1981 to replace an earlier provision, was not repealed; however, it is superseded by this rule, which adopts the requirements of section 27-402 as subsection (b). The rule does not change prior Arkansas law.

Rule 3, Ark. R. App. P.

Rule 3 of the Arkansas Rules of Appellate Procedure, is amended by adding the following at the end of subsection (b):

> (b) * * * Failure of the appellant or cross appellant to take any further steps to secure review of the judgment or decree appealed from shall not affect the validity of the appeal or cross appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or cross appeal. If,

however, the record on appeal has not been filed pursuant to Rule 5, the parties, with the approval of the trial court, may dismiss an appeal or cross appeal by stipulation filed in that court, or that court may dismiss an appeal or cross appeal upon appropriate motion and notice by either party.

The following addition is made to the Reporter's Note accompanying Rule 3:

Addition to Reporter's Note, 1986 Amendment. Rule 3(b) is amended to incorporate provisions of statutes superseded when the rules of appellate procedure were adopted. The revised rule makes plain that the appellate court may, in its discretion, dismiss an appeal if the appellant has not taken the appropriate steps to secure review after filing the notice of appeal. However, if the record has not yet been filed in the appellate court, the trial court may dismiss the appeal upon stipulation of the parties or upon motion of either party. With respect to the latter provision, the rule represents a slight change in prior practice, under which dismissal in the trial court was by stipulation only and an appellee was required to file a partial record in the appellate court in order to move for dismissal there. *See Norfleet* v. *Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954). Leaving the matter to the trial court when no record on appeal has been filed is consistent with Rule 5, which permits the trial court to extend the time for filing the record, and is perceived as less expensive and cumbersome than the prior practice.

Rule 4, Ark. R. App. P.

Rule 4 of the Arkansas Rules of Appellate Procedure is amended as follows:

(1) By adding the following at the end of subsection (a):

(a) * * * Upon a showing of failure to receive notice of entry of the judgment, decree or order from which appeal is sought, the trial court may extend the time for filing the notice of appeal by any party for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules. Such an extension may be granted before or after the time otherwise prescribed by these rules has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem

appropriate.

(2) By inserting the word "or" after the phrase "under Rule 52(b)," in subsection (b) and deleting the phrase "or of a motion to alter or amend a judgment under Rule 59(f)," in the same subsection.

The following addition is made to the Reporter's Note accompanying Rule 4:

Addition to Reporter's Note, 1986 Amendment:

Rule 4(a) is amended to empower the trial court to extend the time for filing a notice of appeal when the party has not received notice of the entry of the judgment or order from which he seeks to appeal. The amendment represents a narrow exception to the rule that the filing of a notice of appeal is jurisdictional and, unless timely filed, there can be no appeal. *White* v. *Avery*, 226 Ark. 951, 291 S.W.2d 364 (1956). The change was deemed necessary to ensure fairness when counsel has not received notice of the entry of the judgment or other appealable order. *Cf. Karam* v. *Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976). Although under longstanding Arkansas custom opposing counsel have been given an opportunity to approve a judgment or order prepared by opposing counsel, circumstances have arisen where counsel did not receive that opportunity and did not otherwise receive notice that a judgment had been entered.

The reference in Rule 4(b) to Rule 59(f), Ark. R. Civ. P., was rendered obsolete when Rule 59(f) was deleted in 1983. *See* Reporter's Note, Rule 59(f). Moreover, a new Rule 59(f) was added in 1984, thus making the reference in Rule 4(b) even more confusing. This amendment deletes the language referring to Rule 59(f).

Rule 5, Ark. R. App. P.

Rule 5 of the Arkansas Rules of Appellate Procedure is amended by adding the following sentence before the last sentence in subsection (b):

> An appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment, decree and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from.

The following addition is made to the Reporter's Note accompanying Rule 5(b):

Addition to Reporter's Note, 1986 Amendment: The new language is designed to address a problem stemming from the relationship between Appellate Rules 4 and 5. Under prior practice and under certain circumstances, Rule 5 required that the record on appeal be filed before Rule 4(c) required the filing of a notice of appeal in the trial court. *See Yent* v. *State*, 279 Ark. 268, 650 S.W.2d 577 (1983) (concurring opinion). While the most recent amendment to Rule 5(b) was aimed at this anomaly, difficulties persist when the postjudgment motion is (1) limited to a single issue, although other errors are to be presented on appeal, and (2) the trial court properly takes under advisement such a motion. In such a situation, counsel for the appellant must lodge the record on appeal within seven months from the date of the original judgment in order to preserve an error not raised in the motion for new trial, even though the time for filing the notice of appeal would not begin to run until disposition of the motion, which under Rule 4(c) could occur more than seven months after entry of judgment. Under the amended rule, however, an appeal from the order disposing of the motion raises not only the issue presented by the motion, but also other issues properly preserved at trial. The time for filing the record on appeal would run from disposition of the motion.

IN RE: CHANGES TO THE ARKANSAS RULES OF CIVIL PROCEDURE AND THE ARKANSAS RULES OF APPELLATE PROCEDURE

715 S.W.2d 209

Supreme Court of Arkansas
Delivered September 15, 1986

PER CURIAM. In our *per curiam* order of July 7, 1986, we promulgated a new Arkansas Rule of Civil Procedure 72, entitled "Suits in Forma Pauperis," to become effective September 15, 1986. The new Rule 72 was one proposed to us by our Committee on Rules of Pleading, Practice, and Procedure (Civil). Through its reporter, the committee has asked that the rule be withdrawn for further study. We grant the committee's request; therefore, that portion of our order of July 7, 1986, promulgating Rule 72 is rescinded.

[redacted]

IN THE MATTER OF THE SUPREME COURT COMMITTEE ON RULES OF PLEADINGS, PRACTICE AND PROCEDURE IN CRIMINAL CASES

Supreme Court of Arkansas
Delivered May 12, 1986

PER CURIAM. The Honorable Stevan E. Vowell of Berryville, Arkansas, is hereby appointed to our Committee on Rules of Pleading, Practice and Procedure in Criminal Cases, replacing the Honorable Priscilla Karen Pope of Fayetteville, Arkansas.

The court expresses its gratitude to the Honorable Priscilla Karen Pope, for her faithful service as a member of this committee.

PURTLE, J., not participating.

IN THE MATTER OF THE BOARD OF LEGAL SPECIALIZATION

708 S.W.2d LXVII

Supreme Court of Arkansas
Delivered May 27, 1986

PER CURIAM. The terms of Mr. Randall W. Ishmael, of Jonesboro, Mr. John A. Lewis, of Fort Smith, and Mr. John Stroud, of Texarkana, as members of the Board of Legal Specialization have expired. Mr. Bill Penix, of Jonesboro, is appointed to replace Mr. Ishmael for District 1. Mr. Charles R. Ledbetter, of Fort Smith, is appointed to replace Mr. Lewis for District 3. Mr. Toney D. McMillan, of Arkadelphia, is appointed to replace Mr. Stroud for District 4.

The court expresses its gratitude to the outgoing members of the Board for their faithful service.

PURTLE, J., not participating.

IN THE MATTER OF THE BOARD OF LEGAL SPECIALIZATION

Supreme Court of Arkansas
Delivered July 7, 1986

PER CURIAM. Pursuant to the Arkansas Plan of Specialization approved July 12, 1982, the following persons are named to the Advisory Commission for three year terms:

Dr. Jim Sloan, of Little Rock, Arkansas.

Fred I. Brown, Jr., of Little Rock, Arkansas.

In addition, Mrs. LaVerne Feaster of Little Rock, Mr. George L. McClure of Malvern, and Mrs. Carol Williams of Little Rock are reappointed for three year terms.

The terms of Rev. James Burns and Mr. D.L. D'Auteuil have expired. This Court expresses its gratitude to Rev. Burns and Mr. D'Auteuil for their service.

IN THE MATTER OF THE BOARD OF LAW EXAMINERS

713 S.W.2d 241

Supreme Court of Arkansas
Delivered July 21, 1986

PER CURIAM. The Honorable Philip E. Dixon is hereby appointed to serve as a member of The Board of Bar Examiners for the examination to be given in July 1986.

IN RE: ARKANSAS SUPREME COURT BOARD OF CERTIFIED COURT REPORTER EXAMINERS

Supreme Court of Arkansas
Delivered June 23, 1986

PER CURIAM. The Honorable Jack Lessenberry, Circuit Judge, and Ms. Maude Parkman, of Little Rock, are hereby appointed to three year terms as members of the Board of

Certified Court Reporter Examiners. Judge Lessenberry will replace the Honorable Darrell Hickman, Justice, Arkansas Supreme Court, and Ms. Parkman will replace Ms. Marjorie Gachot, of Little Rock.

The court expresses its gratitude to Justice Hickman and Ms. Gachot for their faithful service on the Board of Certified Court Reporter Examiners.

IN THE MATTER OF THE CLIENT SECURITY FUND

711 S.W.2d 836

Supreme Court of Arkansas
Delivered July 14, 1986

PER CURIAM. The Honorable Dewain W. Hodge, of Waldron, Third Congressional District, is hereby appointed to our Committee on the Client Security Fund for a term expiring June 30, 1991.

The court expresses its gratitude to the Honorable Robert Cloar, of Fort Smith, for his faithful service as chairman of this committee.

[redacted]

[redacted]