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John HINCHEY, Joyce HINCHEY, Darrell OLIGER, Clarence STRIPLING, Eva STRIPLING, Charles MARSH, Marilyn MARSH and N.A. CAUGHORN *v.* Patsy THOMASSON, et al., Individually, and as Directors of the Arkansas State Highway & Transportation Department

86-229 727 S.W.2d 836[1]

Supreme Court of Arkansas
Opinion delivered April 20, 1987
[Rehearing denied May 18, 1987.[2]]

[1] Justice Hickman's dissenting opinion appears at 730 S.W.2d 473.
[2] Purtle, J., would grant rehearing.

Stripling & Morgan, by: *Dan Stripling*, for appellant.

Chris O. Parker and *Thomas B. Keys*, for appellee.

JACK HOLT, JR., Chief Justice. At issue in this case is the authority of the Arkansas State Highway & Transportation Department Commissioners (Commissioners) to exchange roads with Van Buren and Searcy Counties. The chancellor found such action was "within the scope of its [the Commissioners] statutory and constitutional authority." We agree and affirm.

Arkansas State Highway 254 runs through Van Buren and Searcy Counties. It extends from Highway 16 northwesterly across Archey Creek for about six miles. There is a 1.2 mile gap in the highway system. Highway 254 then extends easterly about ten miles to Highway 65 at Dennard, Arkansas.

The Commissioners entered a minute order stating that the section of Highway 254 that crosses Archey Creek would be eliminated from the state highway system and instead would become part of the county road system by transfer. The order then provided that approximately twelve miles of county road were to be added to the remainder of Highway 254 and become a state highway. The added road would connect Highway 27 near the Pope County line with the remainder of Highway 254, so that Highway 254 would extend from Highway 65 to Highway 27.

The Van Buren and Searcy County Judges entered orders in which they agreed to the transfers.

Appellants own land on the section of Highway 254 that was turned over to Van Buren and Searcy Counties. They brought this suit claiming the Commissioners violated Ark. Stat. Ann. § 76-501 (Repl. 1981) when they authorized the road exchange with the counties.

Section 76-501 provides:

> State Highways are hereby declared to be those primary roads and secondary roads and connecting roads heretofore designated by the Highway Commission, as shown by a map on file in the office of the State Highway Commission, entitled "Map of the State of Arkansas Showing State Highway System," and marked "Revised March 1, 1929," including those portions of said roads extending into or through incorporated towns and cities. The State Highway Commission is hereby required to preserve said map as a permanent record.
>
> The State Highway Commission is hereby empowered, with any necessary consent of the proper Federal Authorities, to make, from time to time such necessary changes and additions to the roads designated as State Highways as it may deem proper, and such changes or additions shall become effective immediately upon the filing of a new map, as a permanent and official record in the office of the State Highway Commission. *Provided, however, the State Highway Commission shall not have authority to eliminate any part of the Highway System.*
>
> It is hereby declared to be the policy of the State to take over, construct, repair, maintain and control all the public roads in the State comprising the State Highways as defined herein and hereinafter. [Acts 1929, No. 65, § 3, p. 264; Pope's Dig., § 6523; Acts 1941, No. 6, § 1, p. 17.] (emphasis added).

The landowners correctly contend that the proposed exchange of roads with the counties would cause the elimination of part of the state highway system, which is prohibited by § 76-501.

Nevertheless, the landowners' argument must fail because of subsequent legislation enacted by the General Assembly. Act 150 of 1961 is entitled, "An Act Relating to the Improvement of Federal-Aid Secondary Highways; *to Authorize the State Highway Commission and the County Judges of the Respective Counties to Enter Into Agreements Providing for the Exchange of Highways in Their Respective Highway Systems*; and for Other Purposes." (emphasis added). Sections four and five of that Act provide:

> SECTION 4. The State Highway Commission and the County Judges of the respective counties are hereby authorized to enter into agreements whereof certain highways in the State Highway System become a part of the County Highway System, and certain highways in the County Highway System become a part of the State Highway System. All such transfer agreements shall be recorded in the minutes of the Commission and spread upon the appropriate county court record.
>
> SECTION 5. The provisions hereof are supplemental to existing laws relating to the subject matter of this Act.

The Commissioners through their minute order, and the county judges through their orders complied with the requirements of section four. The landowners point out that the county judges apparently did not enter their orders until after this lawsuit was filed. Section four, though, merely requires that the order be "spread upon the appropriate county court record." No time limit is placed on compliance with this provision.

The plain language of section four unambiguously authorizes the exact action taken by the Commissioners and the counties. This court has no authority to construe a statute that is plain and unambiguous to mean anything other than what it says. *Weston* v. *State*, 258 Ark. 707, 528 S.W.2d 412 (1975); *Johnson* v. *Lowman*, 193 Ark. 8, 97 S.W.2d 86 (1936). When a statute is clear and unambiguous, we do not resort to any exploration for the legislative intent because the intention of the legislature must be gathered from the plain meaning of the language used in the statute. *Cook* v. *Bevill*, 246 Ark. 805, 440 S.W.2d 570 (1969), (Fogleman, J., dissenting).

The landowners argue that Act 150, which has never been codified, was legislation only for the biennial period beginning January 1, 1961 and ending December 31, 1962, and that section four, therefore, was not general legislation and does not supersede § 76-501. Sections one through three of Act 150 do pertain to the biennial period only, as those sections relate to the improvement of federal-aid and secondary highways. The applicable time frame is specifically stated in those sections. Section four, on the other hand, concerns a different subject matter and no time frame is mentioned. As stated previously, inasmuch as the plain meaning of section four can be ascertained from the language used, this court may not speculate as to the legislative intent in passing this act. The fact that the act has never been codified is not proof that it is special legislation only. Statutory codes are private codes and the absence of an act in the statutes does not indicate that act is invalid. *See* Sutherland Statutory Construction, § 28.04 (4th ed. 1985).

Section five of Act 150 states that its provisions are "supplemental" to existing law. Because of the conflict, however, between § 76-501 and section four, a repeal by implication of this portion of the statute occurred with the passage of the act. We have explained that repeals by implication are not favored in the law and to produce this result "the two acts must be upon the same subject and there must be a plain repugnancy between their provisions." *Milord & Blanks, Trustees* v. *Arkmo Lumber & Supply Co.*, 272 Ark. 462, 615 S.W.2d 349 (1981), *quoting, Forby* v. *Fulk, Judge*, 214 Ark. 175, 214 S.W.2d 920 (1948). The act passed most recently operates in this situation as a repeal of the first, but only to the extent of the conflicting provisions. *Id.*; *Berry* v. *Gordon*, 237 Ark. 547, 376 S.W.2d 279 (1964).

Section 76-501 provides that the Commissioners may not eliminate any part of the highway system; Act 150 authorizes the Commissioners to exchange lands with the county highway system, which would in effect eliminate those parts being transferred from the state highway system. The two laws are plainly repugnant. The remainder of § 76-501 is unaffected by Act 150, however, and accordingly remains in force.

The chancellor's order upholding the action of the Commissioners is affirmed.

HICKMAN, PURTLE, and GLAZE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. In my judgment the majority goes to great lengths to uphold the action of the Arkansas State Highway Commission. I must respectfully dissent, because I would not declare an act valid that presumably has expired. Nor would I go so far as to hold that one provision of an obscure act was intended by implication to overrule a law that has been on the books since 1929. The majority concedes the Highway Department acted after the lawsuit was filed, that the obscure section was never codified (not published in the official edition of Arkansas Statutes Annotated) and that we do not favor repeal by implication. Casting off all these good reasons to reach one result, it reaches the other untenable position.

The Highway Department decided to abandon a short stretch of road linking two other state highways. A faint argument can be made that a part of the highway system was not "eliminated as whole" according to *Woollard* v. *Arkansas State Highway Comm.*, 220 Ark. 731, 249 S.W.2d 564 (1952); but that argument simply will not stand the light of day because this section of the system, running north and south, was the whole — not a part of a highway. The majority has seized the belated reason offered by the Highway Department to justify the abandonment of this road. An obscure section of an act passed in 1961 was resurrected to justify the action. The act was clearly not intended to live beyond December 31, 1962, its expressed lifetime. Would any legislator have thought section 4 was intended to expressly overrule a law that had been on the books since 1929? If so, the legislators were deceived. It should be noted that no mention was made the sections were severable. Those responsible for publishing permanent laws did not read the act as covering separate subjects. Would any layman reading this act think section 4 would stand alone? The act speaks for itself and I set it forth in its entirety:

> AN ACT Relating to the Improvement of Federal-Aid Secondary Highways; to Authorize the State Highway Commission and the County Judges of the Respective Counties to Enter Into Agreements Providing for the Exchange of Highways in Their Respective Highway Systems; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. As soon as may be done consonant with good business practices, the State Highway Commission shall, during the biennial period beginning January 1, 1961 and ending December 31, 1962, award contracts, and issue work orders thereon, for the improvement of federal-aid secondary highways in the State Highway System, the surfaces of which have not been paved with concrete or asphalt, of an amount not less than $7,500,000, whereof not less than $100,000 shall be for work in each county of this State. The records of the State Highway Department shall at all times reflect, with respect to each such contract: the project number and name; the date of the award; the amount thereof, and if in more than one county, the amount in each county; the date of the issuance of the work order to the contractor; and the amount paid or approved for payment on each such project, by counties. Provided, that in the event any such improvement project is undertaken by State forces, then the total amount thereof, by counties, shall be included in the records of the Department, and shall be considered a part of the improvements required to be made hereunder.

SECTION 2. If, not later than December 31, 1962, contract awards and/or work done by State forces as provided by Section 1 hereof shall amount to less than $100,000 in each county, then such amount shall forthwith be expended by the State Highway Department, either by contract or by State forces, on federal-aid secondary highways in the County Highway System of such county; and in respect thereof, the State Highway Commission shall consider the recommendations of the County Judge as to the particular improvement project, or projects, to be undertaken as in this section required.

SECTION 3. The State Highway Commission shall furnish the Governor and the County Judge of each county with progress reports in relation to the foregoing requirements, with each such report to be furnished not later than the 20th day next following: December 31, 1961, June 30,

1962, December 31, 1962 and June 30, 1963.

SECTION 4. The State Highway Commission and the County Judges of the respective counties are hereby authorized to enter into agreements whereof certain highways in the State Highway System become a part of the County Highway System, and certain highways in the County Highway System become a part of the State Highway System. All such transfer agreements shall be recorded in the minutes of the Commission and spread upon the appropriate county court record.

SECTION 5. The provisions hereof are supplemental to existing laws relating to the subject matter of this Act.

APPROVED: March 1, 1961.

Recently, we refused to hold a provision in the tax code could alter the Freedom of Information Act, though they were in direct conflict. *Ragland* v. *Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986); see also *Legislative Joint Auditing Committee* v. *Woosley*, 291 Ark. 89, 122 S.W.2d 581 (1987). Are highways less important to people? Are public roads and their maintenance not one of the main functions of state government? Can the rights of a few citizens be brushed aside?

If the Highway Department wants the authority to do what it did, the legislature is there to grant or deny that permission. The Highway Department has to follow the law just like everyone else, and is entitled to no more consideration than the least powerful citizen. If anything, a state agency's welfare comes after the welfare of the people.

Since the Highway Department did not follow the law, the road ought to remain in the state system until changed lawfully.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent from the majority opinion because I do not believe the Highway Commission has the authority to eliminate a portion of the state highway system. The majority opinion concedes that this "exchange of roads" is prohibited by Ark. Stat. Ann. § 76-501 (Repl. 1981). The opinion bases its decision on the rather tenuous premise that the relevant portion of § 76-501 was repealed by implication by Act 150 of 1961. Even if this proposition is

accepted as valid, however, I do not believe the "exchange" was accomplished in accordance with the law.

The commissioners entered minute order No. 84-413 and No. 84-414 on September 25, 1984. These orders added and deleted certain sections of State Highway 254, Van Buren County Road 68 and Searcy County Road 6. The state thereby incorporated 7.2 miles of road into its system and eliminated 6.1 miles. Although the state retained that portion of the road which transverses Farkleberry Creek, it eliminated the Archey Creek section from the state highway system. The terrain in the Archey Creek section is steep, and the road is narrow, rocky, and crooked. It was, and is, the expense of improving and maintaining this section which makes this road undesirable and motivated the state to abandon it.

Neither minute order No. 84-413 or No. 84-414 mentioned the exchange of roads between the counties and the state. In fact there were only two conditions contained in each order: these requirements were that each county furnish rights of way, clear of utility easements, to the added sections, and that the new sections be hard surfaced to meet the federal standards.

Other than the terrain features already mentioned, the effect of the change orders was to drop a 6.1 mile section of highway, which runs generally north and south, and add a 7.2 mile section, which runs east and west. Formerly, Highway 254's western (actually the southern end of the deleted section) terminus was at Highway 16, almost due south of where Highway 254 entered Searcy County. Now, the western terminus is at Highway 27, some 12 miles west of the former terminus.

Minute order No. 85-592 amended the two previously mentioned orders and provided for the immediate acceptance of the new section into the state highway system. The order stated that the new section of Highway 254, in the Chimes community, was causing the traveling public difficulty because of deteriorating road conditions and inclement weather. This amendment ordered the inclusion of this section without the fulfillment of the previously imposed conditions.

The appellants filed suit against the Commission on January 23, 1986. On February 12, 1986, the Searcy County Judge

entered an order reciting the Commission's minute order No. 85-592 and stating that the highways were "exchanged." A like order was entered by the Van Buren County Judge on February 18, 1986. This order also cited minute order No. 85-592 as authority for the "exchange." It is quite obvious that the county orders were entered in an effort to "shore up" the Commission's position. There is no need to shut the barn door after the horse is out.

I agree with the majority that Ark. Stat. Ann. § 76-501 clearly states that the Commission does not have the authority to eliminate any part of the state highway system. However, I disagree with the majority on the meaning of Act 150 of 1961. There was good reason not to codify Act 150 because it was clearly not intended to be a permanent statute. Section 1 of the Act provides that "during the biennial period beginning January 1, 1961 and ending December 12, 1962, the Commission shall. . . ." Section 3 provides that the Commission shall furnish annual reports each six months until June 30, 1963. All of the Act except Section 4 unquestionably applies solely to the period of time between January 1, 1961, and June 30, 1963.

Even if Section 4 is applicable beyond that period, we must still read it together with other law on the same subject. The last sentence of Section 4 of Act 150 states: "All such transfer agreements shall be recorded in the minutes of the Commission and spread upon the appropriate county record." Until after the present suit was filed, there was absolutely no mention of the transfer of the abandoned section of State Highway 254 to the counties. Certainly there was no transfer agreement even alluded to in the minute orders of September 25, 1984.

The majority correctly quotes the law of statutory construction. The basic rule is to read a statute according to its plain and unambiguous words. *Weston* v. *State*, 250 Ark. 707, 528 S.W.2d 472 (1975). We do not construe a statute when the language is clear and plain. *Johnson* v. *Lowman*, 193 Ark. 8, 97 S.W.2d 86 (1936). In keeping with these rules of construction, it is clear that the Highway Commission cannot abandon any part of the state highway system. Under the language of Act 150 the Commission may, however, exchange part of the state highway system by agreement with the respective counties. In the present case there

was no such agreement and consequently there could be no such exchange. Even if Act 150 is construed as general legislation, the law does not provide for the abandonment of any part of the state highway system.

UNITED PARCEL SERVICE, INC. *v.* PRIDGEN SECURITY, INC.

86-237 727 S.W.2d 381

Supreme Court of Arkansas
Opinion delivered April 20, 1987

Wright, Lindsey, Jennings, for appellant.

Harkey, Walmsley, Belew & Blankenship, by: *Leroy Blankenship*, for appellee.

DARRELL HICKMAN, Justice. This appeal is dismissed because the order appealed from is not an appealable order according to ARCP Rule 54(b). *Arkhola Sand & Gravel Co.* v. *Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

Wanda Beard, an employee of Pridgen Security, Inc., sued United Parcel Service for negligence as a result of injuries she suffered while working at UPS as a security guard. UPS filed a third party complaint against Pridgen asking for indemnification, because of an agreement between Pridgen and UPS. The agreement required Pridgen to indemnify UPS from any claim made

by a Pridgen employee except where UPS was solely negligent. Pridgen moved for summary judgment alleging any liability incurred by UPS would be due to its sole negligence. The trial court granted Pridgen's motion and dismissed Pridgen from the suit. UPS filed this appeal from that order. Later UPS "settled and compromised" with Beard, and an order was entered dismissing Beard's complaint with prejudice.

Rule 54(b) requires the order to state that it is a final judgment and there is no just reason for delay. See *Arkhola Sand & Gravel Co.* v. *Hutchinson, supra.* The order granting summary judgment did not meet these requirements.

Appeal dismissed.

HOLT, C.J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I respectfully disagree with the majority. The only reason an order of dismissal as to one of several defendants is not ordinarily appealable under ARCP Rule 54(b) is because other defendants remain and the litigation is not disposed of and piecemeal appeals would result. *Tulio* v. *Arkansas Blue Cross & Blue Shield*, 283 Ark. 278, 675 S.W.2d 369 (1984).

Pridgen Security, Inc. has been dismissed from the action under ARCP Rule 12(b)(6) and Wanda Sue Beard has been dismissed by virtue of a settlement. Thus, if United Parcel Service, Inc., cannot appeal from the order of dismissal as to Pridgen Security this litigation has ended.

I suppose it can be reasoned that since the dismissal of Pridgen Security was without prejudice, *Ratcliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984), United Parcel Service can bring a new action under the indemnity agreement against Pridgen Security. However, United Parcel's third-party complaint against Pridgen was allowed in this case under ARCP Rule 14(a), one of the purposes of which is to avoid a multiplicity of suits by settling all controversies in one proceeding. *Aclin Ford Co.* v. *Fiat Motors*, 275 Ark. 445, 631 S.W.2d 283 (1982). In the context of this case the dismissal of the appeal seems to me to defeat the

purpose of both rules. I would consider the appeal on its merits.

Donald FORE *v.* CIRCUIT COURT OF IZARD COUNTY

87-2 727 S.W.2d 840

Supreme Court of Arkansas
Opinion delivered April 20, 1987

David Hodges and *Lewis Jones*, for petitioner.

Bill W. Bristow, P.A., for respondent Peggy Carpenter, Administratrix of the Estate of Larry Preston Carpenter, deceased.

Tom Allen, for respondent Bobby Gene Dickerson and June Dickerson.

Gardere & Wynne and *Penix Law Firm*, for respondents Atlas Powder Co. and Deupree Distributing Co.

JOHN I. PURTLE, Justice. This case concerns tort claims arising out of an on-the-job accident that resulted in the death of one employee and the injury of another. Both claims have been accepted by the employer and its insurance carrier as compensable injuries. The plaintiffs' (respondents') complaints filed against the petitioner, who was the supervisor of the work being done at the time of the accident, allege that the supervisor was negligent in keying a microphone, causing dynamite to explode.

This explosion resulted in the injuries complained of by the respondents.

Depositions taken before the hearing revealed that the petitioner was the foreman of the injured employees at the time of the blast. The petitioner filed a motion to dismiss and a motion for summary judgment, alleging immunity from suit based upon the exclusivity of the Workers' Compensation Act. The trial court denied both motions. The petitioner then filed a petition for a writ of prohibition in this Court. The arguments for the issuance of this writ are that the petitioner is protected by the Workers' Compensation Act and that there is no adequate remedy at law. Under the facts and circumstances of this case, we agree and issue the writ.

The facts of the case are uncomplicated and undisputed for the most part. Donald Fore (the petitioner) was the supervisor of Larry Carpenter (the decedent) and Bobby Dickerson (the injured). All three men were employees of Drake's Backhoe Work, Inc. The death and injuries complained of arose out of and in the course of the employees' employment.

We first consider the threshold question of whether a writ of prohibition is the proper and correct remedy in this case. The respondents correctly quote our holding in *Farm Bureau Mutual Insurance Company of Arkansas* v. *Southall*, 281 Ark. 141, 661 S.W.2d 283 (1983), which states: "a petition for a writ of prohibition is not the proper remedy for failure of the trial court to grant a motion to dismiss." We reaffirm this statement; however, for reasons stated herein, we hold that the present case is an exception to the rule.

Prohibition is an extraordinary remedy and will not be granted unless the lower court clearly lacks jurisdiction or there is no adequate remedy at law. *Arkansas Nursing Home, Inc.* v. *Rogers*, 279 Ark. 433, 652 S.W.2d 15 (1983). The writ of prohibition has its genesis in the Ark. Const. of 1874, art. 4, § 7, which establishes the powers of the Arkansas Supreme Court and states in part:

> [I]n aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo

> warranto, and, other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs.

We have frequently stated that prohibition is a proper remedy to prevent a lower court from exceeding its jurisdiction. An examination of our cases reveals that we have not limited the term "jurisdiction" to only subject matter considerations; rather, we have used the term "jurisdiction" in a broad sense. We have issued writs of prohibition to prevent a court from doing an act clearly contrary to the undisputed facts, in excess of authority, or where the writ is clearly warranted. For example, in *Norton* v. *Hutchins*, 196 Ark. 856, 120 S.W.2d 358 (1938), this Court held that a writ of prohibition lies where an inferior court is proceeding in a matter beyond its jurisdiction. In *Norton* the petitioner sought a writ of prohibition to prohibit a chancellor from issuing a restraining order against her. The underlying action was against the petitioner's former husband to enforce a property settlement agreement. The petitioner obtained a temporary prohibition order from Associate Justice Baker and the full court later issued a permanent writ. The subject matter of the *Norton* case was clearly within chancery subject matter jurisdiction. However, the trial court was about to make an order which was not proper under the law. This same rationale applies to many of our cases concerning prohibition.

We issued a writ of prohibition in *Tucker Enterprises, Inc.* v. *Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983). There the question presented was one of venue, not subject matter jurisdiction. In *Goodall* v. *Williams*, 271 Ark. 354, 609 S.W.2d 25 (1980), we granted a writ prohibiting the circuit court from taking evidence de novo, in an appeal from a decision of the ABC. There we stated:

> A writ of prohibition is, of course, appropriate to relieve one from the onerous burden of litigation when the trial court is attempting to act wholly without jurisdiction or is threatening or about to act in excess of its jurisdiction.

In *Goodall* there was no question of subject matter jurisdiction; it was simply the manner in which the court intended to proceed on appeal from the decision of an administrative agency.

We also issued a writ of prohibition in *Curtis* v. *Partain*, 272 Ark. 400, 614 S.W.2d 671 (1981). There we stated:

> Ordinarily we would not issue a writ of prohibition in such a case. Such a writ is discretionary and is most often used when the trial court has no jurisdiction, has clearly exceeded its authority, or there are no disputed facts and the writ is clearly warranted.

We used the same language in *Webb* v. *Harrison*, 261 Ark. 279, 547 S.W.2d 748 (1977). Further citations are unnecessary to establish that we have used the term "lack of jurisdiction" in a manner so as to allow the issuance of the writ even when subject matter is properly in the lower court if the facts are undisputed and the writ is clearly warranted.

The respondents base their resistance to this petition on the allegation that the petitioner was responsible for his individual act of negligence and that such negligent act was unrelated to the employment relationship, thereby rendering him a third party tortfeasor and liable for his individual act of negligence. The trial court agreed with respondents' theory, subject to proof of the allegations.

The petitioner relies upon Ark. Stat. Ann. § 81-1304 (Supp. 1985) as a defense to personal liability. This statute is part of the Workers' Compensation Act and in pertinent part states:

> The rights and remedies herein granted to an employee subject to the provisions of this Act [§§ 81-1301—81-1349], on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next [of] kin, or anyone otherwise entitled to recover damages from such employer, or any principal, officer, director, stockholder, or partner acting in their capacity as an employer, on account of such injury or death, and the negligent acts of a co-employee shall not be imputed to the employer.

The respondents rely upon another part of the Act, Ark. Stat. Ann. § 81-1340(a)(1) (Repl. 1976), which states in part:

> The making of a claim for compensation against any employer or carrier for the injury or death of an employee

> shall not affect the right of an employee, or his dependents, to make claim or maintain an action in court against any third party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action.

This Court has held many times that an employer is immune from liability for damages in a tort action brought by an injured employee. See *Brown* v. *Patterson Construction Co.*, 235 Ark. 433, 361 S.W.2d 13 (1962). There are a few narrow exceptions to this general rule. Liability on the basis of a wilful and malicious act by an employer's supervisor will not render the employer liable to the employee. We have also stated that if the acts of the employer are wilful and intentional, the employee has the right to elect his remedy. *Sontag* v. *Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1983). In the cases of *Lewis* v. *Industrial Heating and Plumbing*, 290 Ark. 291, 718 S.W.2d 941 (1986) and *Simmons First National Bank* v. *Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985), we held that immunity from personal liability would be extended to supervisors acting on behalf of their employer. In the present case there is no allegation that the act of the supervisor was either wilful or intentional. Therefore, the petitioner was acting as the alter ego of the employer and was acting in conformity with the duties owed to his employer.

In *Simmons* and *Lewis* we addressed the immunity of employers' supervisors with respect to the failure to furnish a safe work place. These cases were appealed from the trial courts' granting of summary relief. However, based upon the undisputed facts of the present case, it is inescapable that we would have affirmed the trial court if summary relief had been granted in favor of the petitioner. Also, it is equally clear that if the case were here on appeal from a judgment in favor of the employees or their dependents, we would be compelled to reverse and dismiss.

Although failure to grant a motion for summary judgment is not generally an appealable order, we held in *Robinson* v. *Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987), that the defense of qualified immunity presents an exception to this rule. The present defense is based upon a claim of statutory immunity. A petition for a writ of prohibition, under the facts of this case, occupies the office of an appeal from a refusal to grant a summary

judgment. The denial of the petitioner's motion for summary judgment in this case, like in *Robinson*, destroyed the immunity defense claim. Had it been granted, it would have discontinued the action. The undisputed facts in this case are that the petitioner was acting within the scope of his supervisory duties during the course of his employment. Therefore *Simmons* and *Lewis* are controlling.

Under the undisputed facts of this case, it is certain that we would uphold a verdict in favor of the petitioner because the Workers' Compensation Act is the exclusive remedy available to respondents. It would no doubt be a laborious and expensive process to allow this case to proceed to trial against Fore. A trial would be a futile gesture. The writ is clearly warranted when the result of the trial, under any factual situation alleged or any reasonable inferences deducible therefrom, is a foregone conclusion. Therefore, to prevent untold time and expense, as well as unnecessary grief to the parties, we hold that the writ should be granted.

Writ granted.

DUDLEY, J., concurs.

NEWBERN, J., not participating.

Roy GRAY *v.* Kenneth E. SUGGS

86-244 728 S.W.2d 148

Supreme Court of Arkansas
Opinion delivered April 20, 1987

Morgan E. Welch, P.A., for appellant.

Wright, Lindsey & Jennings, by: *Roger A. Glasgow*, for appellee.

JOHN I. PURTLE, Justice. The trial court granted summary judgment in favor of the appellee on the ground that there was no genuine issue as to any material fact. The only issue on appeal is whether the trial court erred in granting summary judgment. We hold that the trial court correctly dismissed the complaint.

The appellant, Roy Gray, brought an action for loss of parental consortium on behalf of his two minor children. Mattie Jones, the mother of the children, had been involved in a one-car accident. She was a passenger in the car that was driven by Leslie M. Murphy (who is now deceased as a result of causes that are unrelated to the accident). Mattie Jones was rendered a quadriplegic from the injuries sustained in the accident. Upon settling her damage claim with the driver's insurance carrier, she executed a release. The release relieved the potential defendant from liability for damages to the appellant; however, it did not release Murphy, or his carrier, from liability to anyone other than Mattie Jones.

At all times prior to the accident, Mattie Jones had been the sole supporting parent of her two children. After the accident the father of the two children was granted guardianship and subsequently filed suit on behalf of his children. A special administrator was appointed to represent the estate of Murphy, the deceased.

During the pendency of this action, this Court rendered the opinion of *Lewis* v. *Roland*, 287 Ark. 474, 701 S.W.2d 122 (1985). We hold that the *Lewis* case is controlling in the present situation. We reaffirm our reasoning in *Lewis* that to recognize an independent claim on behalf of the minor children would open the floodgates of litigation.

Apparently the mother of the children gave a valid release of liability to the tortfeasor and his insurance carrier. The release was for any, and all, claims which she had, or might have, arising out of the accident. In reaching our decision, no reliance has been placed upon this release. The sole question presented and decided here is whether we should recognize a new cause of

action for loss of parental consortium by dependent, minor children of an injured parent. We have conscientiously considered this matter and we agree with the conclusion reached in *Lewis* that the creation of such a cause of action is not properly a function of the judiciary; rather, it is a matter for the legislature.

Affirmed.

Billy WARD *v.* FIRST NATIONAL BANK OF SEARCY, ARKANSAS

86-240 728 S.W.2d 149

Supreme Court of Arkansas
Opinion delivered April 20, 1987

J.T. Skinner, for appellant.

Lightle, Beebe, Raney & Bell, for appellee.

ROBERT H. DUDLEY, Justice. On March 5, 1984, Garold Bennett executed a promissory note and security agreement in favor of appellee First National Bank of Searcy. The security agreement listed as collateral all equipment of the debtor presently owned or after acquired. On that same date, First National filed a financing statement which listed the collateral as follows:

1971 Chev. 3-ton truck s/n EC631P105202
1952 American 32' Tandem Trailer s/n 5927
1968 JD 4020 Tractor s/n T213P284845R
1976 Modenway 8' Dirt Blade s/n 48617
1974 Midland 19' Disc 15036374
1973 Vibra Shank 18' Barker Shank
1 JD 6 Row Cultivator
1 JD 6 Row Planter
1 4 Wheel Trailer w/1000 gal. diesel tank 1977
JD 5 Bottom Breaker
JD 20' Harrow
28' 3 Axle Gooseneck Equipment Trailer
1 20' WA Do-All
1 JD 3 Bottom Breaker
JD 4520 Tractor w/front end loader s/n 004291R
1 Midland 15' Disc
1 Bushhog
1 300 gal. Spray Tank
1 250 gal. Tank and 4 Wheel Trailer.

The financing statement did not mention after acquired property. On June 12, 1984, another security agreement on additional equipment was executed, and another financing statement filed with a similar description of collateral. This second financing statement, like the first one, did not mention after acquired property.

On July 2, 1984, appellant Billy Ward sold the combine to Bennett, and at that time, executed a document which purported to retain title to the combine in Ward. The agreement listed Ward as seller, and Garold Bennett was listed as buyer. On October 12, 1984, Ward filed the agreement as a financing statement. The combine was destroyed by fire, and $10,000 in insurance proceeds became available to replace it. First National Bank of Searcy filed suit to collect on the promissory note and foreclose on the security, and through an amended complaint, sought to collect the insurance proceeds. Ward, in turn, contends his interest is superior to the insurance proceeds. The Chancellor found that appellee First National's interest was prior to any the appellant might have, and granted judgment for the bank. We reverse.

[redacted] The Chancellor determined that First National

Bank had perfected its security interest in after acquired property through the financing statements. While the trial court was correct in determining that a financing statement does not necessarily have to include a specific reference to after acquired property to perfect such an interest, we hold that the language describing the collateral must be at least broad enough to encompass the after acquired property. In *Security Tire and Rubber Co., Inc.* v. *Hlass*, 246 Ark. 1113, 441 S.W.2d 91 (1969), we held that "a description is sufficient which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property." *Hlass*, 246 Ark. at 1117, 441 S.W.2d at 94. Here the instrument does not suggest any inquiry that would disclose a security interest in after acquired property. Nothing in the description of collateral suggests that other than specific individual items are to be included. There is nothing in the financing statements which "should reasonably notify third parties that after acquired property is part of the subject matter of the financing statement." *United States* v. *Riceland Foods, Inc.*, 504 F. Supp. 1258, 1262 (E.D. Ark. 1981). Accordingly, First National's security interest in after acquired property is unperfected.

The appellant has argued that the appellee had no perfected security interest. That issue would be before us if we were faced with a question of priority between perfected security interests. However, because we have decided the appellee has no perfected security in the combine, we need not decide an issue of priority, and thus, we do not address whether the appellant's security interest can be considered to be perfected under the Uniform Commercial Code. Accordingly, we reverse the decision of the trial court and remand for entry of an order consistent with this opinion.

HICKMAN, J., not participating.

Charles PHILYAW *v.* STATE OF Arkansas

CR 86-181 728 S.W.2d 150

Supreme Court of Arkansas
Opinion delivered April 20, 1987

Marc Aaron Kline, for appellant.

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

STEELE HAYS, Justice. Charles Philyaw was convicted in

1981 of the aggravated robbery of a Texarkana liquor store. A sentence of life imprisonment and a $12,000 fine were imposed. Philyaw filed a timely notice of appeal but no further action was taken toward an appeal.

On September 8, 1986, the United States District Court for the Western District of Arkansas ordered the State of Arkansas by its Attorney General to either request this court to grant Charles Philyaw a belated appeal or to try him a second time on the charge of aggravated robbery. The state chose to request a belated appeal, which we granted and have now considered. Two points for reversal are argued—there was insufficient evidence to support the conviction and defense counsel failed to provide effective assistance against all of the charges. We find the arguments untenable.

Sufficiency of the Evidence

Charles Philyaw's involvement in the crime was proved by a combination of direct and circumstantial evidence. Officer Charles Lambert testified that at around 9:30 on the morning of May 11, 1981, he, Lt. Duvall and Sgt. R.D. Branch of the Arkansas State Police drove past the Cabana Liquor Store in Texarkana. They noticed an automobile parked some distance away and watched as a man later identified as Fabian Costillo got out of the passenger side and started toward the liquor store. An unidentified man remained behind the wheel of the automobile. One of the officers remarked that the man approaching the liquor store appeared capable of robbing it. Five or ten minutes later they learned the store had just been robbed.

Ms. Mary Nell Clingan testified that she opened the Cabana at 9 o'clock. At about 9:45 a man entered the store, pointed a gun at her and asked for "Friday and Saturday night's money." She told him she had already been to the bank and he ordered her to open the cash register, which she did, handing him the contents, about $280. He said, "give me the money under the counter." Ms. Clingan gave him a bank bag containing rolled coins. He directed her to the back of the store and left the building. Ms. Clingan called the police promptly. She did not see the man leave. At trial she identified Fabian Costillo as the man who robbed her.

Ms. Clingan also identified Charles Philyaw as the husband

of Joyce Philyaw, who had worked for Ms. Clingan at the Cabana. While Ms. Philyaw worked there it was the custom to open earlier and to deposit Friday and Saturday's receipts at about 1:00 p.m. on Monday. She also said cash was kept in a bank bag under the counter and that Charles Philyaw was familiar with these customs. She admitted not having seen Charles Philyaw at the store at the time of the robbery.

Shortly after 10 o'clock Officer Alen Craig received a radio report of the robbery as he was patrolling on Interstate 30 near Hope. He observed a vehicle occupied by Philyaw and Costillo and followed it off the interstate at Hope into a service station. The officer got out of his car and approached the passenger side of the vehicle, noting that the passenger fit the description of the robbery suspect. As the officer began to search Costillo, Philyaw went to the driver's side of the car, got a pistol and pointed it at Craig as Costillo and Craig struggled. The officer managed to draw his own weapon and fire five times, striking Philyaw twice. Craig identified the weapon used by Charles Philyaw, and though he could not say with certainty that Philyaw had fired the pistol, an empty cartridge was found in the chamber. Other evidence linked Philyaw to the robbery, including the bank bag and cash and ownership of the automobile. The defense rested without offering any evidence. We regard the proof as fully sufficient to sustain a verdict of guilt.

We have examined other objections made during the trial pursuant to Rule 11(f), Rules of the Supreme Court, Ark. Stat. Ann. Vol. 3A (Repl. 1977), and find no error. See *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

Ineffective Assistance of Counsel

Ordinarily we would not address Rule 37 issues in a direct appeal from a judgment of conviction. *Knappenberger* v. *State*, 278 Ark. 382, 647 S.W.2d 417 (1983). However, we make exception in this case because this federally ordered belated appeal comes after attempted post-conviction remedies were begun by Philyaw in 1984, when he filed a 39 page Rule 37 petition in the trial court. The trial court denied the petition by order dated July 19, 1985.

We will not list all of appellant's 11 points for reversal

for alleged ineffective assistance of counsel. They are too generalized and non-specific to be treated ("No objections were made to the misstatement of the burdens of proof by the appellee"—"The redirect examination of Ms. Clingan was improper, as it was outside the scope of cross-examination and even the original direct examination, yet no objection was made,"—"No objection was made regarding Officer Lambert's testimony of Sgt. Branch's statement and speculation"—"No objection was made to illiciting (sic) testimony regarding the 'shoot-out.' This would be improper as being irrelevant to proving the elements of the robbery"). The arguments are facially without merit. For example, appellant argues that counsel was ineffective because he "passively accepted" the trial judge's denial of motions for a directed verdict based on insufficiency of the evidence. But we have held that a failure to move for a directed verdict is not cognizable under Rule 37. *Guy* v. *State*, 282 Ark. 424, 668 S.W.2d 952 (1984).

Counsel for the defendant is presumed to be effective, and when a convicted defendant complains of ineffective assistance of counsel he must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's unprofessional errors the result of the trial would probably have been different. *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Jones* v. *State*, 288 Ark. 375, 705 S.W.2d 874 (1986). Appellant's allegations of ineffective assistance do not meet either requirement.

The judgment of conviction and the order denying Rule 37 relief are AFFIRMED.

Gene HOWARD and Lillian HOWARD *v.* John G. GLAZE, Administrator of the Estate of Chloe Sheffield, Deceased, and Bill FLATTE

86-227 727 S.W.2d 843

Supreme Court of Arkansas
Opinion delivered April 20, 1987

Trafford & Bray, by: *Winfred A. Trafford* and *C. Norton Bray*, for appellants.

Tapp Law Offices, by: *J. Sky Tapp*, for appellees.

DAVID NEWBERN, Justice. This appeal results from the chancellor's decision that a deed from Chloe Sheffield to the appellants, Gene and Lillian Howard, should be set aside. The action was brought by the appellees who are the brother of the now-deceased Chloe Sheffield and the administrator of her estate.

The appellees contended that Mrs. Sheffield was incompetent at the time she made the deed and that she was subjected to undue influence by the appellants.

The appellants have stated only one point for appeal: The chancellor's decision was clearly against the preponderance of the evidence. In his letter opinion, the chancellor did not state directly that he was finding incompetency or undue influence. He referred to a number of irregularities on the face of the instrument as well as factors which might have borne upon the motives of the appellants who arranged the execution of the deed. His opinion continued, in pertinent part:

> Each side has presented their case and . . . seems to prove their case. However, when all of the evidence is considered Mrs. Sheffield's age, situation, and the location and manner of preparation of the deed, the addition of information to the deed, I am convinced that the deed should fall. I'm not satisfied that Mrs. Sheffield was fully and completely exercising her own will and control. Deeds that are executed in the manner of this one, in my opinion, on the very face are suspect.

While he did not say so precisely, we find the chancellor's opinion sufficient to permit us to conclude he held the deed was invalid because of undue influence, incompetency of the grantor, or both. The evidence and the chancellor's opinion also raise an issue as to the effect of the alteration of a deed after it has been delivered. We hold that the conclusion that there was undue influence or incompetency was not justified by the evidence presented, and we hold that the alteration of the deed was not the sort which required it to be set aside, thus we reverse.

1. Incompetency and undue influence

Chloe Sheffield was a twice-widowed lady who had accumulated considerable property in the form of a residence, land, cattle, and cash. The appellants, Gene and Lillian Howard, are distant relatives of the late Mr. Sheffield, Mrs. Sheffield's second husband. Appellee John Glaze, a nephew of Mrs. Sheffield, testified that when she died in October, 1983, he became aware of the deed in question. It did not "look right" to him, so he brought this action to have it set aside, alleging incompetency on the part

of the grantor and undue influence on the part of the appellants.

It is undisputed that in August of 1983 Mrs. Sheffield called the appellants and asked them to come to get her because she was unable to care for herself. The appellants moved her into their home where, with the exception of two periods when Mrs. Sheffield was hospitalized, they cared for her until her death in October, 1983. The deed which is the subject of this litigation was allegedly executed while Mrs. Sheffield was hospitalized in Little Rock and undergoing chemotherapy treatment in August, 1983.

The evidence of the appellants showed that they had made an agreement with Mrs. Sheffield for a "support deed." That is, she agreed to deed property to them in exchange for their agreement to support her and care for her for the remainder of her life. The evidence of the appellees did not contradict that conclusion, however, but tended to show that the agreement was that the appellants would live with Mrs. Sheffield at her home in Mount Ida rather than take her into their home in Pine Bluff. As it turned out, Mrs. Sheffield called the appellants to fetch her from Mount Ida to their home in Pine Bluff when she became too ill to care for herself, and although the parties contemplated that they would all move back to her property in Mount Ida, she died unexpectedly before their plan could go into effect. The evidence showed the appellants had begun moving to Mount Ida before Mrs. Sheffield died.

The appellants make a strong argument that the appellees have presented no evidence which would justify the chancellor's conclusion with respect to either incompetency or undue influence. Both the abstract and the record support the appellants' claim. While the brief for the appellees makes references to testimony showing irregularities in the deed and incidents from which it could have concluded the motives of appellant Gene Howard may have been impure, nothing shows either incompetency or undue influence.

The only testimony tending to show incompetency was given by Mrs. Sheffield's sister, Ollie Busby, who said that after Mrs. Sheffield began chemotherapy treatments she told Mrs. Busby she did not "feel human" and that her head was "not right." Others testified that Mrs. Sheffield's illness caused her great pain, but no witness said that she was not alert and cognizant of her

surroundings except for the day or so before her death, a time not relevant here. Mrs. Sheffield's treating oncologist executed an affidavit to the effect that it was his opinion that Mrs. Sheffield was competent to make a deed on August 6, 1983. In his deposition, which was admitted into evidence, he was questioned closely by the appellees' counsel about the affidavit, and he refused to recant it.

In *Housing Authority of the City of Little Rock* v. *Peters*, 244 Ark. 478, 425 S.W.2d 720 (1968), this court reversed a chancellor's holding that a deed had been the result of incompetency because the weight of the evidence supported a finding that the grantors did have the capacity to make the deed. That is our holding here. As far as we know, no request was made of the chancellor that he enter separate findings of fact and law. *See* Ark. R. Civ. P. 52(a). In this instance we are not constrained by the requirement of Rule 52(a) that a chancellor's factual findings be overturned only on the determination that they are clearly erroneous. We find no fault with the chancellor's factual conclusions, so far as we can determine them from his opinion and order. Rather, we are simply unable to find, in the record before us, factual support for the result he reached.

Lack of competency to make a deed and undue influence are often closely related, and the evidence of one may be relevant to the evidence presented to the other. Thus, we review such allegations together. *Rose* v. *Dunn*, 284 Ark. 42, 697 S.W.2d 180 (1984). As noted above, the appellees refer us to considerable evidence which was sufficient to raise the suspicion of the chancellor as to the impurity of the appellants' motives, particularly their motives in assuring that they came into the property of Mrs. Sheffield when it became apparent to all that her illness was quite serious. However, we cannot find any evidence that they said or did anything to put Mrs. Sheffield in a position of fear or that they committed any fraud upon her or overreached her or coerced her in any way.

2. Deed alteration

Mr. Mullenix, a Montgomery County abstractor, was the scrivener who prepared the deed. His testimony was that Mrs. Sheffield called him and asked him to prepare the deed from her to the appellants. He testified that the deed, as initially drafted by

him, retained a life estate in Mrs. Sheffield. That testimony was contradicted by appellant Gene Howard who testified that he returned the deed to Mr. Mullenix, after it had been executed by Mrs. Sheffield, for the addition of the language retaining the life estate. Without the life estate reservation, the conveyance to the appellants would have been in fee simple absolute. Thus, the testimony of appellant Gene Howard was contradictory of that of Mr. Mullenix, but contradictory in a manner unfavorable to the appellants, given the appellees' contention that any alteration of a deed invalidates it.

The appellees' contention, that the deed was thus altogether void, is based upon *Inglish* v. *Brenemen*, 5 Ark. 377 (1844), in which this court held that the alteration of a promissory note by the insertion by the payee of a date which had the effect of accelerating the due date invalidated the note. While this court made it clear that any such insertion, absent authority from the payee to make it, would invalidate the note, it was also stated that such an alteration "without the consent" of the payor would vitiate the instrument. The opinion thus concluded that when the payee made the insertion in the note, it became incumbent upon him to show by what authority he did so. That is a far cry from holding that any alteration, no matter what it might be and no matter by whom it was made or under what circumstances, vitiates an instrument as the appellees suggest.

Nor is the case of *Perry* v. *Perry*, 234 Ark. 1066, 356 S.W.2d 419 (1962), also cited by the appellees, helpful to their position. There, J.C. Perry and his wife Mabel Perry purchased land for $1,100, using $900 which belonged to their son. The deed showed the elder Perrys as grantees. When their son, Charles, returned home from the service, Mrs. Perry gave him the deed. He had it altered to show that he was the grantee, and then he recorded it. J.C. and Mabel later separated, and Charles conveyed the land to Mabel who then sought to eject J.C. We held that the alteration of the deed by Charles was of no effect other than a mere spoliation of the deed. We quoted Tiffany on Real Property, 3rd Ed., Vol. 4, page 43, as follows: "The substitution of another name as that of the grantee, without the grantor's consent, can obviously not operate to vest title in the person whose name is substituted." We thus held that despite the alteration the deed was valid, and we would not permit one of the grantees, J.C., to be ejected from the

land. The invalidity of the attempted alteration was again, as in *Inglish* v. *Brenemen*, *supra*, conditioned upon the lack of consent of the original parties to the instrument.

III *American Law of Property*, § 12.85 (1974), recognizes that the early common law, following *Pigot's Case*, 11 Coke 26b, 27a, 77 Eng. Rep. 1177 (1696), was that any alteration of a deed after execution and delivery rendered the instrument void. The treatise then discusses the many exceptions to that rule but remains somewhat equivocal as to the effect of a "material alteration" under circumstances such as those in this case. We are, however, not troubled here by the early common law rule. We have held that alteration by interlineations purporting to add to the description additional land in a handwritten deed did not affect the original conveyance. *Faulkner* v. *Feazel*, 113 Ark. 289, 168 S.W. 568 (1914). It would make no sense to hold that a grantee, by altering a deed, could effect a reconveyance to his grantor and thus avoid all the formalities of conveyancing designed to protect the parties to a deed and third persons. Although we need express no opinion on the validity of the attempted reservation of a life estate, we hold the deed was not altogether invalidated by it.

Reversed.

Ricky Alan WHISENHUNT *v.* STATE of Arkansas

CR 86-202 727 S.W.2d 847

Supreme Court of Arkansas
Opinion delivered April 20, 1987

Phil Barton, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. On January 12, 1984, appellant pled guilty and was sentenced to twenty-five years for aggravated robbery and six years for being a felon in possession of a firearm. The sentences were to run concurrently. About one and one-half years later, appellant filed a petition under A.R.Cr.P. Rule 37, contending that he was denied mental testing and effective assistance of counsel. An attorney was appointed to represent appellant and, following a hearing, the trial court denied the petition. We affirm.

On appeal, appellant basically argues that his guilty plea was not knowingly and voluntarily made because of the ineffectiveness of his counsel. Specifically, appellant contends that (1)

his attorney had a conflict of interest, failed to explain appellant's right to a jury and failed to investigate the facts of his case, and (2) appellant was physically and emotionally incapable of understanding his plea.

The law is settled that there is a presumption that counsel is competent, and the burden is on appellant who must show more than mere errors, omissions, mistakes, improvident strategy or bad tactics. *Smith* v. *State*, 291 Ark. 496, 725 S.W.2d 849 (1987). To prove ineffective assistance of counsel, appellant must establish that his counsel's advice was not within the range of competence demanded of attorneys in criminal cases, and he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hill* v. *Lockhart*, ___ U.S. ___, 106 S.Ct. 366 (1985) and *Strickland* v. *Washington*, 466 U.S. 668 (1984).

Appellant first argues that his attorney, who represented him when he pled guilty, was, at the same time, representing appellant's wife in her divorce proceeding against him. While he complains now that such a conflict of interest on his attorney's part somehow prejudiced him, we find the record reflects the attorney, most pointedly, brought this fact to the court's attention at appellant's plea and arraignment proceeding. That disclosure prompted the judge to ask appellant if he had any objection to the attorney, and appellant replied no, "I'm not going to fight her [his wife]." Appellant declared to the court that he was satisfied with the services of his attorney. We also find from our review of the record that appellant's right to a jury trial was fully revealed and discussed at this same proceeding. In accepting appellant's plea, the trial judge asked appellant whether he understood he was waiving his right to a jury trial, and appellant responded, "Yes, sir." On this point, we should note, too, that appellant was not a stranger to the criminal justice system procedure, as he had pled guilty once before to an earlier aggravated robbery charge. Thus, we conclude that these two issues appellant now assigns as error were correctly considered and dealt with by appellant's attorney and the trial court.

Appellant also complains his counsel was ineffective for having failed to investigate the similarities and differences

between his case and the one relied upon by the prosecutor. Appellant fails, however, to demonstrate exactly what his attorney should have done but failed to do, and, specifically, how the attorney's inaction prejudiced his case.

Finally, appellant contends that, because of his suicide attempt prior to his plea and arraignment hearing and because of his wife filing for a divorce, he was not physically or emotionally capable of understanding his plea. This, too, has no merit. The record reflects conflicting testimony concerning the seriousness of his suicide attempt and how distraught he was at his plea and arraignment. Appellant claimed he slashed his arms and lost a lot of blood, but the sheriff testified that appellant merely scratched his arms with something like a plastic fork. The sheriff also testified that appellant did not appear so distraught as to not understand his rights when appellant entered his guilty plea. Appellant's attorney testified the appellant expressed interest in undergoing a mental examination, but lost interest when he advised appellant there was little chance such an exam would result in appellant serving his time in a mental institution rather than in a penitentiary. Of course, to reverse the trial judge's denial of post-conviction relief under Rule 37, we would have to find the court's decision was clearly against the preponderance of the evidence. *Hall* v. *State*, 285 Ark. 38, 684 S.W.2d 261 (1985). The appellant has failed to demonstrate the trial court was clearly erroneous in denying his requested post-conviction relief.

Because we believe the trial court was justified in finding that the guilty pleas were knowingly and intelligently given, we affirm.

Allen Bruce WOODS *v.* A.L. LOCKHART, Commissioner, L.E. LAGRONE, Warden, Don MASSEY, Records

86-226 727 S.W.2d 849

Supreme Court of Arkansas
Opinion delivered April 20, 1987

Appellant, pro se.

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

TOM GLAZE, Justice. Appellant, a Correction Department inmate, filed for a declaratory judgment and writ of mandamus in Jefferson County Circuit Court, requesting that appellees be required to recompute appellant's parole eligibility date. The trial court denied appellant's request, and he brings this appeal.

Appellant has been convicted and sentenced for felonies on three separate occasions. First, in February 1976, he was sentenced for an armed robbery committed in 1975, and given thirty-two years. He was paroled in August 1982, and, in August 1985, he was convicted of other crimes for which he received four

concurrent twenty-year terms to run consecutively to his earlier thirty-two year sentence—making a cumulative sentence of fifty-two years. Next, appellant was sentenced to ten years in March 1986, for another or second armed robbery crime that he committed in September 1983. This ten-year term was made to run concurrently with the twenty-year sentences but consecutively to the thirty-two-year term.

Relying upon Ark. Stat. Ann. § 43-2807.1 (Supp. 1985), appellees determined that appellant is ineligible for parole until he serves his ten-year sentence for his second conviction for armed robbery. The trial court agreed with appellees, and we affirm.

Section 43-2807.1, enacted in 1983, provides, in pertinent part, that any person who commits aggravated robbery subsequent to March 24, 1983, and who has previously pled guilty, nolo contendere or been found guilty of aggravated robbery, shall not be eligible for release on parole. Clearly, § 43-2807.1 was in effect when the appellant committed his second aggravated robbery in September 1983. Therefore, he was charged with the knowledge of that law when he committed the crime, and, in fact, we said as much in *Tisdale* v. *Lockhart*, 288 Ark. 203, 703 S.W.2d 849 (1986).

In *Tisdale*, the defendant had two prior felony convictions when he was paroled on his second one in 1978. Under the laws in effect then, Tisdale was eligible for parole after having served one-third of that sentence with credit for good time. In 1983, he was convicted and sentenced to a ten-year term to run concurrently with a twenty-one-year sentence upon which he had been paroled in 1978. In determining Tisdale's parole eligibility after his third offense, the Correction Department, under Act 93 of 1977 [Ark. Stat. Ann. § 43-2829(B)(4) (Repl. 1977)], decided he must serve three-fourths of his ten-year sentence. This resulted in a parole eligibility date which was later than what his parole date would have been under his earlier twenty-one-year sentence. Tisdale argued on appeal that his twenty-one-year sentence should have controlled when determining parole eligibility. We rejected Tisdale's argument and said:

> This argument disregards not only the language of Act 93 but also its obvious intent, which was to lengthen the period of confinement before parole eligibility as the number of

> prior convictions increases. *Everyone is charged with knowledge of the criminal law. Hence, when Tisdale was released on parole in 1978 he must be taken to have known that if he committed a third felony and was convicted, he would be compelled to serve three-fourths of his sentence before being eligible for release on parole. That Tisdale happened to be serving a 21-year sentence has nothing whatever to do with his parole eligibility under Act 93.* We are certain that the legislature did not intend, as Tisdale in effect argues, that because Tisdale was serving a 21-year sentence he is entitled to greater leniency than if he had been serving only a 15-year sentence. Act 93 changed the law and thereby gave Tisdale notice of what would happen if he should be convicted a third time. He was so convicted and must suffer the consequences imposed by law. (Emphasis supplied.)

288 Ark. at 244.

Our holding in *Tisdale* controls here. Appellant committed his second armed robbery when the law (§ 43-2807.1) unequivocally provided no parole eligibility existed for the commission of aggravated robbery, second offense. Therefore, appellant must suffer the consequence of his criminal acts as was imposed by law when he committed his second robbery.

In conclusion, we briefly mention appellant's misplaced reliance on *Bosnick* v. *Lockhart*, 283 Ark. 206, 672 S.W.2d 52 (1984). There, Bosnick was convicted of a murder committed in December 1968, and sentenced to life in prison. At the time of the crime and Bosnick's conviction, Arkansas law authorized parole eligibility to individuals sentenced to life terms of imprisonment. *See* Section 28 of Act 50 of 1968. Nevertheless, the Correction Department later denied Bosnick any parole after he was convicted of escape in 1978 because the Department said his parole eligibility had to be determined under a later act—Act 93 of 1977—which was effective at the time Bosnick escaped. Unlike the 1968 law, Act 93 specifically disallowed parole eligibility for persons sentenced to life imprisonment. In *Bosnick*, we merely held that it was unconstitutional to apply the 1977 act retroactively to Bosnick's first conviction and that his parole eligibility had to be determined under the law effective when the crime was

committed in 1968.

Of course, the situation here differs from the one in *Bosnick* because the Department made no attempt to apply a new or different law to lengthen appellant's parole eligibility under his earlier convictions. Instead, and consistent with our holding in *Bosnick*, the Department calculated appellant's parole time in accordance with the law in effect at the time his second aggravated robbery was committed, and in doing so, it correctly determined he must serve the entire ten-year sentence he received for that robbery. While such a determination may indirectly affect any parole eligibility he may have otherwise received for his other prior convictions, his parole status was determined by the correct parole statutes in effect at the time appellant committed his numerous crimes.

Accordingly, we affirm.

Fred Roosevelt DANDRIDGE *v.* STATE of Arkansas

CR 86-190 727 S.W.2d 851

Supreme Court of Arkansas
Opinion delivered April 27, 1987
[Rehearing denied May 26, 1987.]

ERRATA

292 ARKANSAS REPORTS at page 41

Detach at perforation, moisten the back, and paste over the first two lines of the second full paragraph of the text of the opinion in *Dandridge v. State* on page 41:

The victim was a high school student, who was raped twice, once on May 22, 1985 and again on September 11, 1985. The first

William C. McArthur, for appellant.

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

DARRELL HICKMAN, Justice. Fred Roosevelt Dandridge was convicted by a jury of two counts of rape, two counts of kidnapping, terroristic threatening and a felon in possession of a gun. He was sentenced to a total of 182 years imprisonment. On appeal he objects to certain testimony as hearsay and to a remark made by the prosecuting attorney during closing argument.

The victim was a high school student, who was raped twice, once on May 22, 1985 and again on September 22, 1985. The first rape occurred when Dandridge forced the victim at gunpoint into his car, drove her to a nature trail behind the high school, and raped her. A witness, Barbara Montague, was driving near the school about 4:15 p.m. and saw the victim stumbling along the road. She stopped and found the victim crying and hysterical. The victim was holding her stomach and her shirt and pants were open. The victim told Mrs. Montague that a man held a gun on her and raped her. Dandridge objected to the statement as hearsay. The trial judge held the statement admissible as an excited utterance.

The record reflects the rape occurred about one half hour or less before the statement was made. The victim was crying and hysterical. We find no abuse of the trial court's discretion in finding the testimony admissible. *Fountain* v. *State*, 273 Ark. 457, 620 S.W.2d 936 (1981); *Burris* v. *State*, 265 Ark. 604, 580 S.W.2d 204 (1979).

[redacted] Montague drove the victim to a grocery store to call her father. Montague testified that the victim became upset because she thought a car, which was parked next door, belonged to her assailant. Dandridge also objected to this statement as hearsay. We do not agree. It was not offered to prove the car belonged to her assailant but to show that the victim made the statement and was upset. A.R.E. Rule 801(c); *Bliss* v. *State*, 288 Ark. 546, 708 S.W.2d 74 (1986).

The second rape occurred when Dandridge and another male forced the victim into their car and took her to the same nature trail. Dandridge held her while the other male raped her. Two days later the victim and some of her friends saw Dandridge drive by the school and pull into the parking lot. The victim became upset and went inside the school. One of her friends started to follow her, but Dandridge grabbed her, threatened her, and told her not to tell the victim his name. The friend, however, did identify Dandridge to the victim. On that same day, Carol Kimble, a deputy sheriff, showed the victim a series of photographs of different men. The victim identified Dandridge.

During cross-examination, Kimble was asked whether another student had identified Dandridge to the victim. Kimble did not believe so. On redirect examination, Kimble said Dandridge was in the lineup because other students had said that "Little Fred" (Dandridge) was the person involved in the incident at school that day. The defense objected to this testimony as hearsay.

[redacted] This was not hearsay. An out of court statement is not hearsay if it is offered to show the basis of action. A.R.E. Rule 801(c); *Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984); *Jackson* v. *State*, 274 Ark. 317, 624 S.W.2d 437 (1981). The credibility of the photographic lineup was being challenged, and Officer Kimble was explaining why Dandridge was included in the lineup.

[redacted] The trial court first ruled it was not hearsay. Later the court corrected itself and ruled it was not prejudicial error because other references were previously made to the same statement. We do not reverse a judgment because a trial judge uses the wrong reason to reach the right result. *Marchant* v. *State*, 286 Ark. 24, 688 S.W.2d 744 (1985).

During the prosecuting attorney's closing argument, he referred to Dandridge as a "gross animal." A mistrial motion was denied, but the jury was admonished to disregard the remark. The remark was improper but cured by the admonishment. *Bliss* v. *State, supra; Moore* v. *State*, 251 Ark. 436, 472 S.W.2d 940 (1971); *Henshaw* v. *State*, 67 Ark. 365, 55 S.W. 157 (1900).

Affirmed.

Fabian COSTILLO *v.* STATE of Arkansas

CR 86-212 728 S.W.2d 153

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Hubbard, Patton, Peek, Haltom & Roberts, by: *William G. Bullock*; and *Lavender, Rochelle, Barnette, Franks & Arnold*, by: *Jerry A. Rochelle*, for appellant.

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

JOHN I. PURTLE, Justice. The appellant filed a Rule 37 petition in the trial court on June 17, 1985. The appellant's primary argument for post-conviction relief is that he was denied his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. He also argues that the submission to the jury of evidence of his prior convictions was in violation of Ark. Stat. Ann. § 41-1005 (Supp. 1985). At a hearing on May 23, 1986, the trial court denied any relief. It is from this Rule 37 proceeding that the appellant brings this appeal. We hold that both of appellant's arguments are meritorious.

On May 11, 1981, the appellant was arrested and charged with an aggravated robbery which occurred earlier that same day. Eight days later the trial court sounded the docket for trials to be held in June, 1981. An affidavit of indigency had been filed by the appellant and the court appointed counsel to defend him at a trial scheduled for June 10, 1981. On June 9, 1981, the appellant requested a continuance in order to employ counsel of his own choosing. He objected to appointed counsel because neither appointed counsel nor his partner had had much criminal defense experience. He requested a ninety day extension, then sixty days, and finally thirty days. The court reset the trial for June 23, 1981, and released appointed counsel. The appellant was unable to obtain funds to employ counsel before the trial. On the day of the trial appellant appeared in chambers and requested two more weeks within which to employ a lawyer. The request was refused.

The following colloquy occurred on the morning of June 23,

1981:

> DEFENDANT: I cannot try the case, Your Honor. I'm not capable of it.
>
> COURT: That was the condition on which the setting was postponed on the 10th of June. Now, this dilatory tactic, in the view of the court will not be tolerated.
>
> DEFENDANT: Your Honor, I'm not trying to postpone anything. I just want someone to represent me.

The court then directed the appellant to defend himself but did require previously appointed counsel to sit at counsel table to answer any legal questions the appellant had. During the trial, counsel offered no advice to the appellant except in direct response to his questions. The appellant protested throughout the trial that he desired competent counsel to represent him. The jury returned a verdict of guilty.

During the sentencing phase the trial court allowed the state to present evidence of alleged prior convictions and the underlying offenses to the jury. The jury determined the number of prior convictions and imposed a sentence of seventy-five years.

Although a notice of appeal was filed with the trial court, the record was never filed with the clerk of this Court and the appeal was never perfected. The appellant filed a Rule 37 petition with the trial court in June of 1985. As required by Arkansas Rules of Criminal Procedure Rule 37.3, a hearing was held on the petition in May of 1986. The hearing was conducted before a different judge as the trial judge was a witness at the hearing. The court found that the appellant was not entitled to the relief requested. The appeal from that decision was timely filed.

The Sixth Amendment to the United States Constitution guarantees an accused the right to the assistance of counsel in his defense, and this right is made obligatory on the states by the due process clause of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U.S. 335. Moreover, before a trial court can find that an accused has knowingly and intelligently waived counsel and allow the accused to proceed *pro se*, the trial court must determine: (1) that the request is unequivocal and timely asserted; (2) that there has been a knowing and intelligent waiver of

the right; and (3) that the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues. *Philyaw* v. *State*, 288 Ark. 237, 704 S.W.2d 608 (1986), citing *Barnes* v. *State*, 258 Ark. 565, 528 S.W.2d 370 (1975). Mr. Costillo was not represented by counsel at his trial and there is no showing that he knowingly and intelligently waived this right. The state concedes error. We agree. Accordingly, the decision of the Rule 37 trial court must be reversed and the case remanded for a new trial on the merits.

An additional error asserted by the appellant concerned the sentencing phase of the trial. The jury heard all of the evidence presented by the state regarding Mr. Costillo's prior convictions, and it was the jury that determined not only the sentence to be given the appellant, but the actual number of prior convictions as well. The Honorable John Goodson, the trial judge, testified at the Rule 37 hearing that under the law in effect when this trial occurred (A.S.A. § 41-1005 (Supp. 1985)), the jury should not have heard the state's evidence of prior convictions, and should not have been called upon to determine the number of prior convictions. We discussed the proper procedure for introduction of prior convictions in *Graham* v. *State*, 290 Ark. 107, 717 S.W.2d 203 (1986), where we stated:

> The correct statutory procedure in a bifurcated trial is, after a finding of guilt, for the trial court to hold a hearing, out of the presence of the jury, to determine the number of prior convictions and to then instruct the jury as to the number to be considered by them in fixing the punishment. Although evidence of prior convictions is made a part of the record for appeal purposes, such material is not introduced into evidence to be considered by the jury.

(This decision was subsequent to the trial of the appellant.)

In view of the improper introduction of evidence of prior convictions, and the denial of the Sixth Amendment right to counsel, the case must be reversed and remanded for a new trial.

Reversed and remanded.

Sanford L. BESHEAR, Jr. *v.* Steve CLARK, Attorney General for the State of Arkansas, William A. McLEAN, Prosecuting Attorney, Thirteenth Judicial District

86-245 728 S.W.2d 165

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Sanford L. Beshear, Jr., for appellant.

Steve Clark, Att'y Gen., by: *E. Jeffery Story*, Asst. Att'y Gen., for appellees.

ROBERT H. DUDLEY, Justice. The appellant, Sanford L. Beshear, Jr., a taxpayer and resident of Rison, filed a petition for a Writ of Mandamus in the Circuit Court of Cleveland County seeking to compel the Prosecuting Attorney or the Attorney General to file either a civil complaint or a criminal charge for usurpation against Ronnie A. Phillips for usurping the office of Municipal Judge of Rison. The underlying contentions of Beshear, an attorney, are that: (1) Phillips was appointed as municipal judge in 1977 by the joint action of the City Council of Rison and the Quorum Court of Cleveland County, (2) such an appointment was invalidated by the plurality opinion plus one of the concurring opinions in *Pulaski County Municipal Court* v. *Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981), and (3) the appointment was invalid because Phillips is not "an elector of the judicial subdivision wherein the court sits." *See* Ark. Stat. Ann. § 22-704 (Repl. 1962), *but see* also § 22-705.2 (Supp. 1985) (providing that the governing body of a city may appoint the municipal judge from an adjoining county when no qualified attorney from the seat of the court is elected) and Ark. Const. art. 19, § 4 (providing for residency).

The trial court held that the office of municipal judge is a municipal office; that the civil action for usurpation of municipal office must be instituted and prosecuted by the Attorney General; that the petition for the Writ of Mandamus seeking to compel the Attorney General to file a civil action can be brought only in Pulaski County; and therefore, the Circuit Court of Cleveland County is without venue to direct the Attorney General to file a civil suit for usurpation. We affirm that ruling.

First, we discuss that part of the petition which seeks to compel the filing of a civil suit for usurpation pursuant to Ark. Stat. Ann. § 34-2201 through -2209 (Repl. 1962). In *Smith* v. *State ex rel. Duty*, 211 Ark. 112, 199 S.W.2d 578 (1947), a case in point, we held that the office of Judge of Municipal Court is a municipal office, not a county office, and an action brought pursuant to the civil usurpation act, § 34-2201 through -2209, to test the right of the claimant to hold such office could be brought only by the Attorney General and not by the Prosecuting Attorney of the district. In *Logan* v. *Harris*, 213 Ark. 37, 210 S.W.2d 301 (1948), another case in point, we said that neither a private individual nor the prosecuting attorney has the right to

question the title to the office of Municipal Judge; rather, it can only be questioned by the Attorney General. Just as in *Smith, supra*, the basis of the holding was that the office of Municipal Judge is a municipal office and Ark. Stat. Ann. § 34-2205 (Repl. 1962) provides: "For usurpation of other than county offices or franchises, the action by the State shall be instituted and prosecuted by the Attorney General." Following our cases, we hold that the office of Municipal Judge is a municipal office and that an action brought pursuant to the civil usurpation statute to test the right of the claimant to hold such office can be brought only by the Attorney General.

Venue for the petition for a Writ of Mandamus against the Attorney General lies in the county of residence of the Attorney General. The case of *Reed* v. *Wilson*, 163 Ark. 520, 260 S.W. 438 (1924), cogently sets out the reasoning:

> Where a public official fails to perform a purely ministerial duty, involving no discretion, he may be compelled to do so by mandamus; but, if it be contended that the facts stated in the complaint are sufficient to call for an award of the writ of mandamus as an appropriate remedy . . . , that remedy being of a strictly legal nature, . . . such an action must be prosecuted as a personal one against the officer who refuses to perform his duty, and must be brought in the county where the officer resides [Ark. Stat. Ann. § 34-201]. That answer is complete. The only theory upon which the officer can be sued at all is that he is not the representative of the State, but that his wrongful act of omission is attributable to his refusal to discharge a duty imposed upon him by law. That being true, he must be sued in the county of his residence, in accordance with the provisions of the statute.

The petition for a Writ of Mandamus to direct the Attorney General to perform a ministerial duty must be brought in the county of the General's residence, in this case, Pulaski County. Thus, the trial court properly dismissed the petition for a writ of mandamus seeking to compel the civil usurpation action for lack of venue.

On appeal, the appellant additionally contends that the trial court erred by failing to compel the Prosecuting Attorney to

file a criminal usurpation action pursuant to Ark. Stat. Ann. § 41-3956. The appellant did cite the criminal statute in his petition, but did not bring it to the trial court's attention. He only mentioned the civil usurpation statute, § 34-2204, and argued that venue of the Writ of Mandamus for the civil usurpation action was properly in Cleveland County. He did not ask for a ruling on the criminal usurpation phase of the case, nor did he bring it to the trial court's attention. Since the matter was not brought to the trial court's attention and since the trial court did not rule on the issue, we will not consider it. A matter cannot be raised on appeal for the first time.

Affirmed.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. We cannot say with a straight face that the office of municipal judge is a municipal office as opposed to a county office, not as long as the decision in *Pulaski County Municipal Court* v. *Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981), stands. In that case we held that a county municipal court is constitutional. Obviously, that judge is a county officer.

The majority does attempt to put some distance between it and that case by describing the decision as a "plurality" decision. But we are mainly responsible for the mess that exists in the "municipal court" system. Our original error was made in 1915 in the case of *State* v. *Woodruff*, 120 Ark. 406, 179 S.W. 813, when we held a city or municipal court had countywide jurisdiction. It led to the mischief that has resulted in a plethora of municipal courts in Arkansas, all sharing the same countywide jurisdiction and many created purely for local political reasons and to raise money. For example, Pulaski County has seven municipal courts, all equally free to hear any case arising from any place in the county. For example, a citizen of Little Rock can be arrested in North Little Rock and tried in Sherwood. Evidently, a gentleman's agreement only prevents such cases.

We have done the very thing we have told the legislature numerous times that it cannot do under the constitution: create a court. *Walker* v. *Arkansas Department of Human Services*, 291 Ark. 43, 722 S.W.2d 558 (1987). The existing municipal court

system is loose, running free of the constitution and subject only to our decisions and legislative acts, which are usually local acts in violation of Amendment 16 to the Arkansas Constitution. We have on two occasions struck down such courts. See *Littleton* v. *Blanton*, 281 Ark. 395, 665 S.W.2d 239 (1984); *Lawson* v. *City of Mammoth Spring*, 287 Ark. 12, 696 S.W.2d 712 (1985). Others, for one reason or another, we have yet to deal with. See *Horn* v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1984).

We can correct our mistakes or continue to brood this system we have hatched. It is doubtful the legislature will deal with the question, and the municipal judges have shown no inclination to address the problem. The longer we wait to acknowledge our mistakes the worse it will get. I agree that the municipal court judge is a municipal officer and that's all he or she is or can be. For that reason I join in the decision.

Allen DUNLAP d/b/a AMERICAN ARCADE *v.* STATE of Arkansas

CR 86-138 728 S.W.2d 155

Supreme Court of Arkansas
Opinion delivered April 27, 1987

[redacted]

[redacted]

[redacted]

John Wesley Hall, Jr., for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant was convicted of promotion of obscene material under Ark. Stat. Ann. § 41-3585.2 (Supp. 1985). He argues five points of appeal, but since none of the points involves the sufficiency of the evidence, we need not recite the facts. We affirm the conviction.

Appellant's first point is that the material statute, § 41-3585.2, is void for vagueness under the Free Speech and Due Process provisions of the first and fourteenth amendments to the Constitution of the United States.

In *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Supreme Court gave a concise review of its holdings and guidelines in the field of obscene materials.

> *Roth* [*Roth* v. *United States*, 354 U.S. 476 (1957)] held that the protection of the First Amendment did not extend to obscene speech, which was to be identified by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.*, at 489 (footnote omitted). Earlier in its opinion, *id.*, at 487, n. 20, the Court had defined "material which deals with sex in a manner appealing to prurient interest" as:
>
> "*I.e.*, material having a tendency to excite lustful

thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines "prurient," in pertinent part, as follows:

" '. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . ."

"Pruriency is defined, in pertinent part, as follows:

" '. . . Quality of being prurient; lascivious desire or thought . . .'

"See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 242 (1915), where this Court said as to motion pictures: '. . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* . . .' (Emphasis added.)

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz*:

" '. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . .' See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

Under *Roth*, obscenity was equated with prurience and was not entitled to First Amendment protection. Nine years later, however, the decision in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), established a much more demanding three-part definition of obscenity, a definition

that was in turn modified in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* guidelines for identifying obscenity are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229] at 230, quoting *Roth v. United States, supra*, [354 U.S.] at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

Miller thus retained, as had *Memoirs*, the *Roth* formulation as the first part of this test, without elaborating on or disagreeing with the definition of "prurient interest" contained in the *Roth* opinion.

The statute at issue was obviously drafted pursuant to the guidelines set out in *Miller* v. *California*, 413. U.S. 15 (1973). Appellant argues, however, that the *Miller* majority was slim; that the composition of the Supreme Court of the United States has changed since 1973; and that in the more recent case of *Kolender* v. *Lawson*, 461 U.S. 352 (1983), the Supreme Court has established a new vagueness analysis under which the critical inquiry is whether an allegedly vague statute encourages arbitrary, discriminatory enforcement by police, prosecutors, judges, and juries.

We recognize the difficulty in defining obscenity. In fact, barely more than a decade after the Supreme Court defined obscenity in *Roth* v. *United States*, 354 U.S. 476 (1957), Justice Harlan in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), stated "the subject of obscenity has produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication. In the 13 obscenity cases [as of 1968] in which signed opinions were written, [there] has been a total of 55 separate opinions among the Justices." 390 U.S. at 704-5. True to form, in *New York* v. *Ferber*, 458 U.S. 747 (1983), there were four separate opinions. Although the Supreme Court has had

difficulty with the definition of obscenity, and even though the composition of the Supreme Court has changed, we are constrained to follow *Miller*. In addition, we are not convinced that the guidelines pronounced in *Miller*, and thus also our statutory definition of "obscene material," have been made constitutionally infirm by the opinion in *Kolender, supra*. In *Kolender*, which did not involve obscenity, the Court explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. The Court noted that although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, it has recently recognized that the more important aspect of the doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. Thus, even if the Court has recently focused more attention on the second phase of the analysis, it was nevertheless a consideration before *Kolender*. Further, even if we examine the statute with special emphasis on the question of whether it encourages arbitrary, discriminatory enforcement, we find that it does not. Our obscenity statutes provide sufficient guidelines to law enforcement personnel to prevent arbitrary, discriminatory enforcement.

Ark. Stat. Ann. § 41-3585.1(4) (Supp. 1985) defines "obscene material":

> (4) "Obscene material" means that material which:
>
> (a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;
>
> (b) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Appellant argues that the statute is additionally void for vagueness because it uses the term "prurient interest of the average person" in subsection (4)(b) which is undefined in the

statute and which no longer has any substantive meaning. Appellant quotes several dictionary definitions of "prurient" from 1935 forward and argues that the more recent definitions do not contain "shamefulness" or "morbidness," but rather describe normal human responses which cannot be considered obscene; that the jury was instructed that " '[p]rurient interest' is a morbid, sick, or shameful interest in sex, as distinguished from a normal interest in sex"; that two defense witnesses, Dr. Stevens and Dr. Moneypenny, testified that "average persons" do not have "morbid, sick or shameful interests in sex"; that the term is thus vague and confusing and cannot provide notice; and, therefore, use of the term in our statute makes it void for vagueness. This argument is also without merit.

According to appellant's own history of Webster's definitions, the 1961 edition did not use the terms "shameful" or "morbid" in defining "prurient," yet in *Miller, supra*, which was decided in 1973, the Supreme Court used the term "prurient" in establishing guidelines for defining "obscenity." Further, the Court has continued to use the term "prurient interest" in discussing obscenity cases, and the definition of that term contained in the jury instruction in the instant case was tacitly approved by the Supreme Court as recently as 1985 in *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Further, the term "appeal" is defined as follows:

> 1. An earnest or urgent request, entreaty, or supplication. 2. A resort or application to some higher authority, as for sanction, corroboration, or decision . . . 3. The power of attracting or of arousing interest . . .

The American Heritage Dictionary of the English Language 62 (1981).

After examining our statute as a whole, we are convinced that the legislature intended for the word "appeals," in the following statutory definition of "obscene material," to have the first definition quoted above:

> (4) "Obscene material" means that material which:
>
> . . .
>
> (b) Taken as a whole, *appeals* to the prurient interest of the

> average person, applying contemporary statewide standards;

(Emphasis added.)

Thus, "obscene material" is that which, taken as a whole and applying contemporary statewide standards, *attempts* to activate prurient interests. The average person is quite capable of making that determination and whether or not the material is successful in doing so is beside the point.

As mentioned previously, our obscenity statute was obviously drafted pursuant to the guidelines established in *Miller*. The first of those guidelines is: "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . ." *Miller*, 413 U.S. at 24. At first blush, it might seem that the legislature had mistakenly transposed the words of the *Miller* guideline and, thereby, created a new concept by using the phrase "prurient interest of the average person." However, in *Hamling* v. *United States*, 418 U.S. 87, 128-30 (1974), the Supreme Court stated:

> Petitioners contend that the District Court's instruction was improper because it allowed the jury to measure the brochure by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group. Our decision in *Mishkin* v. *New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), clearly indicates that in measuring the prurient appeal of allegedly obscene materials, *i.e.*, whether the "dominant theme of the material taken as a whole appeals to a prurient interest in sex," consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups. Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded.
>
> . . .
>
> The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex.

In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups. Such an instruction was also consistent with our recent decision in the *Miller* case. We stated in *Miller*:

> "As the Court made clear in *Mishkin v. New York*, 383 U.S., at 508-509 [16 L. Ed. 2d 56], the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, *so far as material is not aimed at a deviant group*, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one." 413 U.S., at 33, 37 L. Ed. 2d 419 (emphasis added).

The legislature's phrasing of subsection (4)(b) does not violate the standard established in *Miller* and further explained in *Hamling*. Consequently, it does not render the statute void for vagueness.

Appellant's final vagueness argument is that the statute uses a circular definition which ordinary persons cannot understand in defining "obscene material." He argues that the result of the circularity is that, in effect, our statute defines "obscene material" as a patently offensive depiction done in a patently offensive manner. This argument is also without merit and requires little discussion. Again, Ark. Stat. Ann. § 41-3585.1 (Supp. 1985) provides the following definition of "obscene material":

> (4) "Obscene material" means that material which:
>
> (a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;
>
> . . .

"Sadomasochistic abuse," "sexual conduct," and "hard-core sexual conduct" are all defined in the same statute as follows:

> (2) "Hard-core sexual conduct" means patently offensive

acts, exhibitions, representations, depictions, or descriptions of:

(a) Intrusions, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal openings of any person's body.

(b) Cunnilingus, fellatio, anilingus, bestiality, lewd exhibitions of the genitals, or excretory functions, actual or simulated.

. . .

(8) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed, in a sexual context.

(9) "Sexual conduct" means human masturbation or sexual intercourse.

The statutory definition read as a whole, and not as appellant has abbreviated it, is simply not circular.

Appellant's second point of appeal also contains subpoints. He argues that the trial court erred in barring him from presenting evidence of the general availability of sexually explicit adult materials in the Little Rock metropolitan area at the time of the alleged offense as evidence of tolerance of the material or of community standards. He further argues that the trial court thereby shifted to him the burden of proving community standards which violated the due process clause. The arguments have no merit.

Appellant proffered testimony that several commercial sources of material similar to that in question were "fairly busy" when visited by the witness. All of the commercial sources were located in the Little Rock metropolitan area. The trial court ruled that the testimony was not admissible. The ruling was correct for a number of reasons.

In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), decided on the same day as *Miller, supra*, the Court held that it

was not error for the trial judge "to fail to require" expert evidence that the materials were obscene when the materials themselves were placed in evidence. "The films, obviously, are the best evidence of what they represent." 413 U.S. at 56. Footnote 6 to the foregoing sentence provides in pertinent part:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed.) (1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. *See United States* v. *Groner*, 479 F.2d ___, ___ (slip opinion, at 19-20) (1973); *id.*, ___ (slip opinion, pp. 24-25) (Ainsworth, J., concurring). "Simply stated, hard core pornography . . . can and does speak for itself." *United States* v. *Wild*, 422 F.2d, at 34, 36 (CA2 1970), cert. denied, 402 U.S. 986, 29 L.Ed. 2d 152, 91 S. Ct. 1644 (1971).

Here, the State met its burden of proof of obscenity by introducing the materials themselves. No separate proof of community standards was necessary. Appellant was not required to prove that the materials were not obscene, nor was he required to prove community standards. The fact that he chose to offer such proof does not mean that the burden was shifted.

The trial judge ruled correctly in excluding the proffered evidence. The proffered evidence would have tended to prove only that similar hard-core pornographic materials could be purchased at other locations in the Little Rock area.

As set out in J. Monahan and L. Walker, *Social Science in Law: Cases and Materials* 118 (1984): "Surveys of the jurisdiction in which prosecution is initiated, employing the specific magazine or film implicated in the charge, are frequently commissioned in obscenity cases. Usually, but not always, they are commissioned by the defense. Their admissibility is a function of the validity of the researcher's methodology." Here, as in *United States* v. *Boltansky*, 346 F. Supp. 272 (D.C. Md. 1972), the trial court found that the survey was unrepresentative of the

community standard, and that it would be more confusing than probative in determining whether the material was obscene. The ruling was correct because the availability of similar illicit material would not necessarily show acceptance of the material. *Hamling* v. *United States*, 418 U.S. 87, 125-26 (1974). Even if availability did in some manner demonstrate acceptability, a survey of nine establishments selling obscene materials in the state's most urban area would not be representative of a statewide standard, as is required. *See* Ark. Stat. Ann. § 41-3585.1(4)(b) (Supp. 1985). We do not reverse a trial court's ruling on the admissibility of evidence unless there is a clear abuse of discretion. The survey had no validity in methodology. *David* v. *State*, 286 Ark. 205, 691 S.W.2d 133 (1985). There was no abuse of discretion in excluding the evidence.

Appellant's third allegation of error is that the trial court wrongly refused to permit him to prove that community standards would tolerate the materials which he promoted; the court wrongly refused to permit him to argue the point to the jury; and, the court wrongly denied his proffered instruction on the issue. Again, the arguments are without merit.

Appellant renews his argument that he should have been allowed to put on proof of the availability of obscene materials at other places in the Little Rock area as evidence that community standards would tolerate the materials. The evidence was not admissible for the reasons previously stated. Since the proffered evidence was not admitted, the trial court ruled correctly in refusing to allow argument about that evidence.

The trial court instructed the jurors that they were not to judge the allegedly obscene material on the basis of their personal opinions, but were to consider the material on the basis of a community standard encompassing all levels of sensitivity, of religiousness and of economic, educational, and social standings. This instruction sufficiently covered the issue and the trial court did not commit reversible error by refusing to give appellant's requested instruction on the same issue. *Henderson* v. *State*, 284 Ark. 493, 684 S.W.2d 231 (1985).

Appellant next argues that the trial court erred in refusing to let him put on evidence of the context in which the material was sold, in refusing to let him argue about the context of the sales,

and in refusing to instruct the jury on the use of context as a factor in determining the community standard. Appellant does not specify a particular evidentiary ruling which he contends is erroneous. He only states: "Appellant made several attempts to put into evidence the context of the dissemination of the material as bearing on the issue of obscenity. The State did not object to some of it, but it did object to quite a bit pertaining to the context of dissemination and to closing argument on that issue and the trial court sustained those objections."

On direct examination of one of his witnesses, appellant put into evidence a large photograph of his business building which shows a sign on the front door that provides "Members Only." His attorney called a police detective to the witness stand and on direct examination elicited the following:

Q. And when you come up outside, it has a sign that's — That tells you it's an adult establishment?

A. Yes, sir.

Q. So you're aware of that going in?

A. That's correct.

Q. Did you ever become a member of that club when you went in to buy the evidence?

A. Yes. I had to purchase a membership before I was allowed access into the club.

Five pages of transcript later the following question and answer took place:

Q. And there's a sign that tells you that you have to be eighteen to get in?

A. Yes, sir.

After the above answer was completed, the State objected. A lengthy dialogue (four pages of transcript) between the attorneys and the court took place, and the court ultimately sustained the objection but did not strike the answer. Appellant made no offer of proof on any additional "contextual" material.

Since appellant did not tell us which ruling relating to the context of promotion of materials he thinks is erroneous, we can

only assume it is the one set out above. In it, the question was answered before an objection was made, so appellant could not possibly have suffered any prejudice, even if the subsequent ruling had been erroneous. In fact, the trial court later asked the prosecutor why he was making an issue over the matter since it was already in evidence.

Appellant argues that the trial court erred in prohibiting him from arguing about the context of the rule. However, he does not set out such a ruling, and we do not find one in the abstract. The colloquy on the subject which we find in the abstract is as follows:

> BY THE COURT: Why do we need to get into it a great deal more?
>
> BY MR. HALL [Appellant's Attorney]: Because I can argue to the jury, I believe, that they can determine the community standards based on the context in which this material was disseminated. That is, an adult establishment, limited solely to adults. Nobody was forced to come in off the street in there. [A]nd the State's offered jury instruction even refers to the average adult in the community.
>
> BY THE COURT: It doesn't say anything about minors in there whatsoever. You can argue that just as well. There's no dispute as to all of that . . .

Appellant next argues that the trial court erred in refusing his proposed instruction on the subject of context. The trial judge ruled that the proposed instruction misstated the law, conflicted with other instructions, and would confuse the jury. The proposed instruction would have told the jury that the test of obscenity is whether the material was offensive to the clientele of appellant's store. Such an instruction would have constituted a misstatement of the law because the test is not whether appellant's clientele finds the material to be obscene, but rather whether the average person finds that the material appeals only to the prurient interest.

Appellant's final point of appeal is that the trial court erred in not sustaining his objection to comments made by the prosecutor in closing argument. The argument has no merit.

During appellant's closing argument, his attorney stated that the case involved "prosecution for an idea." In the State's closing argument the deputy prosecutor responded:

> Now, I like Mr. Hall's representation that this is an idea.
>
> . . .
>
> The thing that really offended me about — Most about Mr. Hall is the freedom of choice. That this is an idea. And that somehow, that I'm trompling on ideas here. Ladies and gentlemen, there's many ideas in our society that we simply cannot tolerate. We have to have laws to prohibit those types of ideas. We — The fact that somebody may think that overthrowing the government of the United States, and setting up a dictatorship — That's an idea. But we've got to stop it, because it's wrong. And it's a decline in our community that we cannot tolerate.

Appellant objected, arguing that the law does not prohibit ideas but rather the conduct which furthers certain ideas. In response to appellant's objection, the trial court merely stated that, "I'm not going to talk about this. I'm going to let the jury decide this case on the instructions I've given you." Appellant did not pursue the matter and thus failed to get a ruling on his objection. He may not now pursue the matter on appeal. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

Even if we considered the court's statement to be the same as "objection overruled," we would not reverse because appellant is unable to show that he was prejudiced in any manner. *See Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). The trial court's instructions made clear the elements of the charged offense and that counsel's arguments were not evidence. The jury is presumed to follow the court's instructions. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982). There is simply no reason for us to hold that the jury thought it was to convict appellant because of his "ideas" about pornography.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent. It is my opinion that Ark. Stat. Ann. § 41-3585.1—.2 (Supp. 1985)

is void for vagueness and amounts to the denial of due process and free speech. The statute does not define "obscene" in such terms as to give fair notice that sale or distribution of such materials is a violation of state law. The definition of "obscenity" has escaped definition; "obscenity" remains a rather amorphous concept until it is "defined" by a conviction.

Neither the statute nor our decisions have been able to define "obscenity" until after an arrest and conviction, and then it's too late. Our present statute is an obvious attempt to codify the definition found in *Miller* v. *California*, 413 U.S. 15 (1973). However, the statute failed in its attempt; instead the legislature enacted a statute that is so vague and uncertain as to practically require enforcement officers to act in a discriminatory and arbitrary manner in selecting arrestees. For example, § 41-3585.1(4)(b) describes "obscene material" as material which: "Taken as a whole appeals to the prurient interest of the average person, applying contemporary statewide standards . . ."

The *Miller* opinion states that:

> The basic guidelines for the trier of facts must be: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Obviously even the drafters of the statute here in question did not know the meaning of the word "prurient." As used in the statute, the average person has a "prurient" interest. The *Miller* case did not so state.

Admittedly, I do not know the meaning of the word "prurient" and certainly cannot tell from our statute what it means. The average person should be able to read a law and understand what is prohibited before the act is done. Certainly this Court should be able to determine what will violate the law before reviewing the evidence. We cannot take this statute and give the words their plain meaning and define exactly what conduct is permitted and what conduct is prohibited.

The majority opinion takes several quotes from *Brockett* v. *Spokane Arcades, Inc.* 472 U.S. 491 (1985) as the basis for the decision. The first is an attempt to explain the holding in *Roth* v. *United States*, 354 U.S. 476 (1957), which defines prurient as "i.e., material having a tendency to excite lustful thoughts." The opinion then cites Webster's New International Dictionary indicating that "prurient" means: "Itching, longing, uneasy with desire or longing; of persons having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . ." The best quote of all is: "pruriency is defined, in pertinent part as follows: '. . . quality of being prurient . . . ' "

It seems to me that the statute and the precedent cited by the majority opinion are attempts to curb the thoughts of the average person. The first thing wrong with the statute is that it attempts to legislate statewide standards on obscenity and even goes so far as to prohibit cities from enacting contrary laws. Neither *Miller* nor any other case attempts to set *statewide* standards. Furthermore, *Miller* required contemporary community standards. The Arkansas statute makes no attempt to define "contemporary" or "community" standards, but instead attempts to set "statewide" contemporary standards anchored on a 1973 opinion.

The Arkansas statute is without doubt a laudable, but futile, attempt to control the sale and distribution of material which the average person in the state might consider indecent and immoral. However, instead of coming right out and stating what was prohibited in plain language, the legislature became entangled in a mass of conflicting statutes, opinions and ideas and enacted an impossible statute. There is a maxim that morals cannot be legislated. Neither can the minds of man be controlled. This attempt to do so must fail.

Nudity, sex, lust, desire and related topics have been present as long as man has existed. All of them are normal to humans. Laws cannot extinguish the thoughts and desires of man. Traffic in obscenity cannot exist without willing customers. None of the material was shown publicly nor was any person required to view it.

The majority quotes (4)(a) three or four times with a different meaning each time. The different meaning of words and acts is primarily what makes it near impossible to define an

appropriate statute warning people of what will and will not be allowed. No statute that I have read has defined "obscenity" in such terms as to notify the average person of what acts will violate the law. The definitions of obscenity will be different in the opinion of everyone attempting to define it.

The majority opinion is typified in the statement: "[I]t was not error for the trial judge to fail to require expert evidence that the materials were obscene when the materials themselves were placed in evidence." What more proof is needed to reveal that this is a case of not knowing how to define it or what it is "until we see it." The opinion goes on to state that the materials are the "best evidence of what they represent." The opinion is bottomed upon the statement: "*Here the state met its burden of proof of obscenity by introducing the materials themselves*" (emphasis added). The opinion continues by stating: "No separate proof of community standards was necessary." This completely ignores the *Miller* holding and is in fact contrary to the criteria stated in *Miller*. The net effect of the majority opinion is that "obscenity" cannot be defined but becomes apparent when the materials are presented to a trier of fact or to an appellate court. As the opinion states, the appellant was not required to prove that the materials were not obscene, but neither was the state required to prove the materials were obscene.

To be valid a statute must provide fair notice to dealers of newspapers, magazines, movies, video tapes and other methods for the exchange of ideas, that sale or distribution of such materials may bring prosecution. Justice Brennan, dissenting in *Miller*, stated: "[A]fter sixteen years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas [on obscenity], including the one announced today, can reduce the vagueness to a tolerable level . . ."

I think the trial court here wrongly refused to allow proof of community standards. Availability of the same materials at many other retail and wholesale outlets in Pulaski County was, in my opinion, relevant and material. Acceptability is one criterion to be considered when trying to determine what constitutes obscenity. No reason is given for selection of the defendant for prosecution for doing that which others may continue to do. Apparently the legislature intended to "set a net large enough to

catch all *possible* offenders" and leave it to the prosecuting authorities to step in and select those who will be detained and punished. If this was the intent of the legislature, then it has been successful. The statute as it is written leaves the police and prosecutor in a position to proceed discriminately against persons or groups who incur disfavor. What is obscene to one policeman or prosecutor may not be obscene to another policeman or prosecutor. We should not invite arbitrary or erratic law enforcement. The trial court refused to allow evidence of tolerance in the community unless it was first shown that such materials were acceptable. Tolerance is quite different from acceptance, which connotes approval. The Court thus created an impossible and improper burden for the appellant.

Censorship violates the mandates of the First Amendment to the Constitution of the United States. There *are* limitations to the guarantee of free speech. However, such limitations are not relevant to the present situation. It is my opinion that Ark. Stat. Ann. § 41-3585.1—.2 is an impermissible intrusion into the right of freedom of speech and freedom of the press. However offensive the materials may be to some people, they may be completely acceptable to others. Since the trial court prohibited proof of tolerance in the community, we do not know how acceptable such materials may be to the community. Therefore, even if the statute is constitutional, the case should be remanded to allow proof on the question of whether these materials are considered obscene by state or community standards.

James Edwin CLARK *v.* STATE of Arkansas

CR 86-179 727 S.W.2d 853

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Hanks, Gunn & Borgognoni, by: *Mary Ann Gunn*, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. James Edward Clark, appellant, was charged along with Louis Ricarte and Terry Brannen with three counts of aggravated robbery, three counts of kidnapping and with two counts of theft of property. The cases were severed and Clark was convicted on each count resulting in sentences totaling 135 years. Three points for reversal are presented on appeal: (I)

The trial court erred in submitting the three counts of kidnapping to the jury as Class "Y" felonies; (II) The courtroom identification of the appellant was tainted by suggestive photographic lineups prior to trial; and (III) The trial court abused its discretion by admitting evidence of a prior conviction of the appellant during cross-examination of a witness for the defense. We affirm the judgment of conviction.

At around nine o'clock on the evening of March 2, 1982 Robert Perry was accosted by three men as he parked in the driveway of his Fayetteville home. One of them said, "This is a robbery. Be quiet and go in the house." Perry, his wife and son were blindfolded and Perry was taken upstairs where he spent much of the night talking with one of the robbers. He was questioned about safes in the home and at a local jewelry store belonging to the Perrys.

Early next morning Perry was taken downstairs where Mrs. Perry and Hoyt Perry were handcuffed to a column in the garage. Perry and the three men went to the jewelry store where Perry opened a safe and the robbers removed the contents and left the store, leaving Perry handcuffed to a banister where he remained until employees arrived at nine o'clock to open the store. Robert Perry estimated the value of property taken in the robbery at $575,000.

I.

The trial court instructed the jury in accordance with Ark. Stat. Ann. § 41-1702(2) (Repl. 1979) that kidnapping is a Class Y felony, except when the victim is voluntarily released alive in a safe place then it is a Class B felony. The jury fixed the sentences for kidnapping according to Class Y felonies.

Clark contends that these kidnappings were Class B felonies as a matter of law and the jury should not have been permitted to determine which of the two classes of felony applied. We disagree.

The simple fact is the Perrys were not released at all. While it can be argued the Perrys were left in safe places — their home and store — it is not open to argument that they were not released. It is undisputed that they were left handcuffed to immovable structures and thus dependent on being discovered

and freed before their release was complete. Under these circumstances it was, at best, a fact question for the jury to decide as to which of the kidnapping felonies applied. *Whitt* v. *State*, 281 Ark. 466, 664 S.W.2d 876 (1984).

II.

Appellant's second point for reversal involves his in-court identification by the Perrys as being one of the three robbers. Clark submits the identification should have been suppressed as unreliable and induced by suggestive police procedures. We reject the argument.

The Perrys identified Clark as the oldest of the three men and the one they referred to as "No. 1." On two occasions they were shown photographic lineups which included Clark's photograph. Mrs. Perry identified Clark in both instances, Mr. Perry in one. Both were positive in their identification. They had some 20 to 30 minutes to observe Clark before being blindfolded and in Mr. Perry's case he talked with the robber during the night in an upstairs bedroom. He said the man had an unusual voice, like that of actor Richard Boone of the television series, "Paladin." He maintained that it was Clark's voice he heard the night of the robbery.

In determining whether in-court identifications are permissible we look to various factors bearing on the reliability of the witness's knowledge: the opportunity to observe the perpetrator; the passage of time between the crime and the identification; any discrepancies between the description as reported to the police and the true characteristics of the defendant; the degree of certainty of the witness; and any other factors affecting the identification. *Penn* v. *State*, 284 Ark. 234, 681 S.W.2d 307 (1984). Here there is no basis for prohibiting the witnesses from identifying the man they believe to be the perpetrator. While there were some discrepancies in the Perrys' original description — they thought "No. 1" was several inches taller than Clark — that is hardly sufficient to suppress an identification. Indeed, the accuracy of their identification of Clark was dramatically corroborated by one of the principals, Terry Brannan, who testified for the state under immunity that Clark was one of three robbers. Clark's argument that the photo lineups were suggestive because in one he was pictured in front of a blue background whereas the

other two were in front of a brown background, is of no consequence. The photos are in the record and demonstrate the lack of suggestiveness.

III.

Clark's final point is that the trial court erroneously permitted the state to introduce evidence of a prior conviction of Clark over the objection of the defense. There was no error.

Clark's wife, Tommie Lou Clark, was a witness in behalf of her husband. During defense counsel's questioning of Mrs. Clark she was asked, "Is there any doubt in your mind that Jim Clark did not commit this crime?" When she shook her head in the negative she was asked why she felt that way. She said, "I just don't feel he would do anything like that. He's too well educated, too intelligent a man to do something like that."

On cross-examination the prosecutor asked (R. p. 999):

> Q: Mrs. Clark, I believe you told [defense counsel] that you didn't think Jim had done that and that was because he wouldn't do something like that?
>
> A: No.
>
> Q: What do you mean by that?
>
> A: Well, that's committing a crime.
>
> Q: You don't think he'd commit a crime?
>
> A: No, I don't.
>
> Q: Would it surprise you to learn that he committed a crime in Louisiana, that marijuana he got caught with and sentenced for?
>
> A: It surprised me.
>
> Q: It surprised the heck out of you, I imagine?
>
> A: Right.
>
> Q: Wasn't it a hundred and something pounds — ?
>
> [Defense Counsel]: Objection, Your Honor.

Aside from the fact that no ruling was ever made on the

objection, the questions asked on direct examination clearly put the character of the accused in issue and enabled the state to test the witness's knowledge of facts bearing on her opinion of the character of the accused. *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986).

The judgment is affirmed.

William B. POTTER, By His Attorney, Michael REDDEN
v. FIRST NATIONAL BANK, Guardian of the Estate of
William B. POTTER, Incompetent and Debbie Potter
LYNCH, Guardian of the Person of William B. POTTER,
Incompetent

86-212 728 S.W.2d 167

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Michael Redden & Assoc., for appellant.

Lightle, Beebe, Raney & Bell, for appellee.

STEELE HAYS, Justice. On January 8, 1985 Debbie Potter Lynch petitioned for the appointment of First National Bank of Searcy as guardian of the estate of her seventy-eight year old father, William B. Potter, who had inherited a sizeable sum from his son's estate. Mr. Potter was notified of the proceedings on January 9 and on January 14 the petition was granted. Mr. Potter did not appear at the hearing.

Thereafter a car was purchased by the guardian and a home belonging to Mrs. Lynch and her husband was purchased by the guardian at a cost of $17,500. Repairs amounting to $6,233.36 were subsequently authorized.

In September, 1985 Mr. Potter's former wife and the mother of Debbie Lynch petitioned for Mrs. Lynch's appointment as guardian of the person of Mr. Potter. First National Bank joined in the petition, which alleged that Mr. Potter had become unmanageable and needed custodial care. The petition was granted on the same day it was filed without notice to Mr. Potter.

On October 25 attorney Michael Redden, purporting to act on behalf of William Potter, filed a petition to set aside the appointment of First National Bank as guardian of the estate and

in the alternative that a hearing be held to determine whether Mr. Potter is competent.

The bank moved to dismiss the petition on grounds that no appeal had been taken from the order appointing a guardian of the estate and that since more than ninety days had elapsed the court was without jurisdiction to vacate the order, no grounds having been alleged under ARCP Rule 60. The motion also questioned Mr. Redden's standing to act on behalf of Mr. Potter.

By amended petition Redden also moved to set aside the order appointing Mr. Lynch as guardian of the person or, in the alternative, that a hearing be conducted to determine whether Mr. Potter is competent. The bank and Mrs. Lynch renewed the petition to dismiss.

At a hearing on the motions it developed that Mr. Redden had been employed by Mr. Warren T. Lipscomb, Minister of the Westgate Apostolic Church in Searcy and Mr. Potter's pastor. He testified that he had known William Potter for about seven years, that Potter had attended church services regularly prior to his stroke in 1981 and that Lipscomb had visited him on a weekly basis since his confinement. At one point Mr. Lipscomb had contacted the bank in regard to what he believed to be Potter's desire to contribute a tithe to the church. In connection with that endeavor Mr. Lipscomb had employed a psychologist who twice interviewed Mr. Potter and pronounced him competent. Mr. Lipscomb maintained that he was authorized orally by Mr. Potter to employ Redden to challenge the guardianships, though whether Redden and Potter had ever had direct contact, he did not know.

Mr. Wayne Hartsfield, President of First National Bank testified that when he originally met with Mr. Potter in January 1985 Potter was very irrational but had no opposition to the appointment of a guardian of his estate. At later times Mr. Potter was much more rational and had never expressed opposition to the guardianship. He said that in response to Mr. Lipscomb's inquiries concerning a tithe, a monthly contribution was being made to the church.

Mr. Robert Edwards of Searcy testified concerning contacts by Mr. Lipscomb in behalf of Mr. Potter, and Mrs. Lynch

testified that her father had been placed in a nursing home because he was difficult to manage.

At the conclusion of the hearing the probate judge found that Mr. Lipscomb, while an interested party, did not have standing to contest the two orders in question and Mr. Redden did not "at this time" represent Mr. Potter; that the question of William Potter's competency was properly before the court and that a hearing would be conducted into that question when Mr. Redden and Mr. Bell, who represented the guardians, could advise the court how long they thought it would take to try the issues. When Mr. Redden asked whether Mr. Lipscomb were free to hire representation concerning the competency issue, the court answered in the affirmative, "unless I am shown something different." The court noted that Mr. Potter could be present at the competency hearing and state who he wanted to represent him and the purpose of the hearing would be to see if the previous orders should be modified. Thus the net effect of the findings was to grant the alternative relief sought by the petition.

When the formal order was entered some weeks later it recited that neither Redden nor Lipscomb had standing to represent William Potter, or to attack the order appointing a guardian of the person; that the order appointing a guardian of the estate was not subject to attack because no motion was filed within ninety days and none of the exceptions in ARCP Rule 60(b) applied; that the only relief to which William B. Potter was entitled was pursuant to Ark. Stat. Ann. § 57-865 (Supp. 1985) to determine whether guardianship should be dismissed or modified. Michael Redden has appealed on behalf of William B. Potter, alleging that it was error to rule that he had no standing to act for Mr. Potter, that the dismissal of his motions denied Potter due process of law and were an abuse of discretion by the trial judge.

We disagree with the probate court that there was no showing that Mr. Lipscomb was authorized to act for Mr. Potter. His testimony that Potter directed him to employ an attorney to challenge the guardianships was unequivocal and was essentially uncontroverted. Evidently the bank recognized that Lipscomb derived some authority from Potter, as the bank began making monthly contributions to Westgate Apostolic Church after Lips-

comb contacted it.

Obviously William Potter has standing to attack a guardianship of his person and estate. *Randolph* v. *Porter*, 188 Ark. 729, 67 S.W.2d 574 (1934); *Gimbaugh* v. *Superior Court*, 221 P. 635 (S.Ct. of Cal. 1923); *Strickland* v. *Peacock*, 77 S.E.2d 14, 18 (S.C. of Ga. 1963); Ark. Stat. Ann. § 57-865 (Cumm. Supp. 1985). The question is whether Michael Redden has the authority to act in William Potter's behalf, and under the circumstances presented by the case, the proof sustains that conclusion.

Appellees cite us to *McKenzie* v. *Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), where by dictum it is said that a defendant has standing to challenge the authority of an attorney to represent the opposing litigants in a medical malpractice case. The holding in *McKenzie* v. *Burris*, is not applicable here — we refused to issue a writ of prohibition to the circuit court against recognizing the attorney (a non-resident) as co-counsel of record in the case. More nearly applicable is *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979), where we said an attorney who appears in court is presumed to be authorized to represent the client, citing *Broadway* v. *Sidway*, 84 Ark. 527, 107 S.W. 163 (1907) and *United Equitable Ins. Co.* v. *Karber*, 243 Ark. 631, 421 S.W.2d 338 (1967).

On the issue of standing itself neither side cites anything directly in point and we have found nothing definitive. In general, the law with respect to standing is not to be narrowly or restrictively interpreted. *Wisconsin Environment Decade, Inc.* v. *Public Service Commission*, 230 N.W. 2d 243 (S.C. of Wisc. 1975); C.J.S., Vol 67 A, Partee's, § 12. "Standing is not a rigid and dogmatic rule, but one to be applied with some view of the realities and practicalities of the situation." *Washakie County School District* v. *Herschler*, 606 P.2d 310 (S.C. of Wyo. 1980).

When the realities of this case are considered we think the trial court's discretion would have been better exercised on the side of standing. Without suggesting that there are no outer limits to the question of standing the testimony of Mr. Lipscomb that he was instructed by Mr. Potter to hire a lawyer on his behalf stands largely undisputed. We find that testimony persuasive. We do agree with the trial court that an attack on the

order of January 14, 1985 appointing the bank as guardian of the estate is untimely and no grounds were alleged to vacate the order under ARCP Rule 60(b) and to that extent we affirm the order appealed from.

Affirmed in part, reversed in part and remanded for further proceedings.

HICKMAN, J., not participating.

Sanford L. BESHEAR, Jr. *v.* W.J. RIPLING, Mayor of the City of Rison, et al.

86-246 728 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Sanford L. Beshear, Jr., for appellant.

Armstrong & Binns, by: *Murry F. Armstrong*, and *Bill*

McLean, Prosecuting Att'y, by: *Tom Wynne, III*, for appellee.

DAVID NEWBERN, Justice. The appellant, Sanford L. Beshear, Jr., filed a complaint alleging that he was a resident and taxpayer of Rison, Cleveland County, Arkansas. He alleged that one of the appellees, Ronnie A. Phillips, a resident of Dallas County, Arkansas, had been illegally made municipal judge of Rison and Cleveland County. The other appellees, who, along with Mr. Phillips, were defendants, included the mayor, city clerk, and city council members of the City of Rison and the members of the Cleveland County Quorum Court. Most of the thirty-four paragraphs of the complaint were devoted to allegations that Mr. Phillips was a usurper of the position of municipal judge because he had not taken the oath of office, had not been properly appointed, and had not been issued a commission. The appellant further alleged that he was an attorney at law and, presumably because he was the only attorney at law residing in Rison and Cleveland County, he was the only person eligible to hold the office of municipal judge for the city and for the county. In paragraph 30, the appellant alleged he was bringing the action as a taxpayer of Rison and of Cleveland County. In paragraph 31, he alleged that the salary of the municipal judge should be held in abeyance. The complaint sought declaration of a vacancy in the office, an order that the council and quorum court seek a lawful appointment by the governor to fill the office, and an order restraining Mr. Phillips from holding court.

After further pleadings by all parties, the mayor and council members filed a motion to dismiss the complaint on the ground that a usurpation action with respect to a municipal office could be brought only by the attorney general, and thus the appellant lacked standing. The other appellees adopted the motion as their own. In response to the motion, the appellant stated, in part, that the city and the county lacked the authority under the Arkansas Constitution to hire or elect Mr. Phillips as municipal judge. He argued that as a taxpayer he was authorized to bring an illegal exaction action according to Ark. Const. art. 16, § 13.

The action was dismissed solely on the basis that the appellant had no standing to bring a usurpation action. No mention was made in the court's order of the illegal exaction part of the complaint. We hold the dismissal of the illegal exaction

allegation of the complaint was reversible error.

In his brief in chief, the appellant argues the trial court erred in failing to declare the office vacant, in failing to find an illegal exaction, and in holding that usurpation was an exclusive remedy. In response, the appellees point out that as of January 1, 1987, the appellant assumed the office of municipal judge and that the issues raised by the appellant are now moot.

We agree with the appellees that the usurpation claims of the appellant are now moot. However, it was error for the trial court to ignore the appellant's illegal exaction claim. He clearly had standing as a taxpayer to pursue the relief authorized by Ark. Const. art. 16, § 13, which provides, "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." It is self-executing, and it permits taxpayers to challenge the legality of expenditures of public funds. *Starnes* v. *Sadler*, 237 Ark. 325, 372 S.W..2d 585 (1963); *Samples* v. *Grady*, 207 Ark. 724, 182 S.W.2d 875 (1944).

The specific relief sought by the appellant with respect to his illegal exaction claim, that is, the holding in abeyance of the municipal judge salary being received by Mr. Phillips, is probably no longer appropriate, assuming no additional salary is owed to Mr. Phillips by the city or the county for his services as municipal judge. However, the appellant's complaint sought "all other proper relief." This court has held that one who holds a public office illegally may be required to pay back money received as salary. *Revis* v. *Harris*, 219 Ark. 586, 243 S.W.2d 747 (1951). It has also been held that one who, in good faith, performed the duties of a public office held in violation of a constitutional prohibition would not be required to pay back salary received and thus create a windfall to the state. *Martindale* v. *Honey*, 261 Ark. 708, 551 S.W.2d 202 (1977). The point here is that we cannot get into these issues or even the issue of the illegality or unconstitutionality of Mr. Phillips's service as municipal judge, as there has been no trial and no reviewable decisions on these issues have been made. The appellant was given no opportunity to develop his illegal exaction case because of the erroneous dismissal of that part of his complaint.

We note that illegal exaction actions have traditionally been brought in chancery courts; however, the question of propriety of filing this action in the circuit court was not raised by the parties, and we will thus not consider it.

Reversed and remanded.

FIRST COMMERCIAL BANK, N.A. *v.* Bettye A. KREMER

86-263 728 S.W.2d 172

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Friday, Eldredge & Clark, by: *C. Tab Turner*, for appellant.

Robert A. Newcomb, for appellee.

DAVID NEWBERN, Justice. This appeal is from a judgment, based on a jury verdict, holding the appellant liable in a malicious prosecution case. The appellant contends first that the evidence is insufficient to support the verdict. Second, the appellant claims the court erroneously refused to instruct the jury that if in this action the jury found the appellee to have been guilty of the criminal offense with which she was previously charged because of the appellant's allegations, it should find for the appellant. The third point is that the punitive damages awarded are so large as to shock the conscience of the court and should be reduced or a new

trial granted. We affirm, as we find the jury's verdict was supported by substantial evidence, the instruction proffered was not a sufficient statement of the law, and the jury's verdict was not so large as to shock the conscience of the court.

[redacted] In a case in which a defendant's directed verdict and judgment notwithstanding the verdict motions were denied and it is contended that the evidence was insufficient to support the plaintiff's claim, we view the evidence in the light most favorable to the plaintiff. If we find any evidence sufficient to warrant the verdict, we affirm the trial court's refusal to direct a verdict. *Higgins* v. *Hines*, 289 Ark. 281, 711 S.W.2d 281 (1986); *Downey* v. *Jones Mechanical Contractors*, 273 Ark. 207, 619 S.W.2d 614 (1981).

The appellee is a recovering alcoholic who, after six months of sobriety, engaged in a serious drinking bout. In a very intoxicated condition she called a friend, Ms. Bruno, for help. Ms. Bruno called Arkansas Rehabilitation Institute (ARI) and learned that the appellee could be admitted there but would have to bring $400 as a deposit, pending confirmation of insurance coverage, to pay for her stay at ARI. Ms. Bruno made out a check for $400 on the appellee's account and had the appellee sign it. In the process of having the appellee admitted to ARI, the check apparently was displayed, but Ms. Bruno left the facility with the check after the appellee had been admitted. The check Ms. Bruno testified she filled out is not the one which became the subject of this litigation. The appellee checked out of ARI the following day. Sometime later, she discovered that a $400 debit, not shown in her personal check records, had been made on her checking account at the appellant bank. At her request, the appellant mailed her the check representing the debit. It was a check to ARI, but the appellee did not recall having made any such check to ARI, and she concluded some other person had signed her name. Her conclusion was based on the signature, which she did not recognize as her own, and particularly on the fact that the middle initial "K" was used rather than her middle initial which is "A." The check introduced into evidence showed the appellee's name printed on the check form as "Bettye K. Kremer" and signed "Bettye K. Kre*n*er." The printing apparently had been done erroneously, as it was undisputed that the signature card on file with the appellant showed the signature as "Bettye A.

Kremer."

After concluding there had been a forgery of her signature, the appellee called the appellant and spoke with an employee who explained that the appellee would have to make out an affidavit that the check had been forged in order to receive credit for the $400. The appellee signed the affidavit which stated that the signature on the check was not hers, that the check was made without her knowledge and consent, that she never received any benefit or value for the check, and that she had not presented it for negotiation or payment. The appellant's employee helping the appellee asked if she knew who would forge a check on her account to ARI, and the appellee replied that she had been at ARI over the weekend.

The appellant then placed the matter in the hands of its employee David Butler. Mr. Butler called ARI and spoke with Ms. Hoppis who told him she had seen the appellee sign the check. He then compared the signature on the check with that on the signature card and noted that the middle initials were different. Mr. Butler then took the matter up with Detective Matlock of the Little Rock Police Department. At Detective Matlock's request, the appellee provided handwriting samples for comparison purposes, and an analysis was done by the State Crime Laboratory which concluded that it could not identify the writing contained in the signature on the check. Detective Matlock attempted to speak to Ms. Hoppis but was told she could not speak with him because of the institute's policy of confidentiality. He then spoke with Deputy Prosecutor Cairns who advised him that no criminal charges should be filed, but the matter should be handled as a civil suit. Detective Matlock reported the results of the handwriting analysis to Mr. Butler. He told Mr. Butler that he and Mr. Cairns felt there was no criminal prosecution evidence, and further that he thought that Ms. Hoppis had written the signature on the check with no criminal intent but had done so just to help the appellee. Mr. Butler disputed Detective Matlock's testimony, saying Matlock did not inform him of Mr. Cairns's recommendation.

Mr. Butler then spoke to another deputy prosecutor, Mr. Douglass. In discussing the case with Mr. Douglass, Mr. Butler did not mention that the check had been to the laboratory. He did

not tell Mr. Douglass that another deputy prosecutor had reviewed the case, made a negative recommendation, and expressed suspicion of Ms. Hoppis. Neither could Mr. Douglass recall that Mr. Butler told him about the disparity in the middle initials. Mr. Douglass thereafter obtained a sworn statement from Ms. Hoppis that she had seen the appellee sign the check. Mr. Douglass's testimony was that he would not have issued the warrant for the appellee's arrest when he did so had he known the facts known to Mr. Butler. However, the warrant was issued, and the appellee was arrested at her apartment, on charges of false swearing and theft by deception, by two uniformed policemen, one of whom testified that she was crying and shaking uncontrollably. She was taken to the police station where she was fingerprinted and "booked." Although it was not his custom to do so, one of the officers called a municipal judge and obtained his permission to release the appellee on her own recognizance because the officer had decided that in view of her "upset" condition it would be best that she not be placed in the detention center. The policemen detected no evidence that the appellee had been drinking that evening.

Both of the charges against the appellee were dismissed by the municipal court for insufficient evidence of intent and lack of probable cause. Thereafter, employees of the appellant asked the prosecutor's office to file the theft by deception charge with the circuit court despite the municipal court's ruling. The request was refused.

1. Failure to direct a verdict

The first point for reversal is stated in the appellant's brief as follows:

> The trial court erred when it failed to grant defendant's [appellant's] motions for directed verdict and judgment notwithstanding the verdict on the issue of probable cause where eyewitness testimony formed the basis of defendant's [appellant's] initiating criminal proceedings and the jury's verdict is not supported by substantial evidence.

The argument under this point is primarily that the appellant was entitled to a directed verdict as a matter of law because in *Malvern Brick and Tile Co.* v. *Hill*, 232 Ark. 1000, 342 S.W.2d

305 (1961), we held that one who bases a criminal prosecution upon an eyewitness identification of the accused cannot lack probable cause. We had taken that argument and citation to contend that because the appellant had the statement of Ms. Hoppis that she saw the appellee sign her name to the check and the appellant also knew that the appellee had sworn she had not signed the check, it was the obligation of the trial court to direct a verdict because, as a matter of law, the appellant had probable cause to prosecute. However, in oral argument the appellant asserted that this point for reversal had another aspect. It contended that the evidence was insufficient to show a lack of probable cause because it was undisputed that the appellee had received a benefit from the funds represented by the check, whereas her sworn affidavit stated that she had not received any such benefit.

a. Receipt of benefit

The appellee testified that when she went to the appellant to execute the forgery affidavit she did not have her glasses and could not read the document she was asked to sign. She said the appellant's employee who helped with the document explained only that it was a statement that someone other than the appellee had signed the check. The employee testified that she explained the document fully, including the part about not receiving a benefit. The one clear thing about what was said in that encounter is that the appellee did not try to hide the fact that she had had a recent relationship with ARI. The appellant's employee testified that the appellee told her she had been at ARI the previous weekend.

An employee of ARI testified that the appellee's bill at ARI of over $1,000 had not been paid, but the appellee testified that when she checked out of ARI she was told her bill would be covered by insurance. The appellee also testified that she did not know how much of her bill at ARI remained unpaid.

Even if it were undisputed that the bill had not been paid, that would not resolve the factual question whether there was probable cause for the appellant's employees to charge the appellee with false swearing or theft by deception. Both the offense of false swearing, *see* Ark. Stat. Ann. § 41-2603 (Repl. 1977), and theft by deception, *see* Ark. Stat. Ann. § 41-2203

(Repl. 1977 and Supp. 1985), require knowledge on the part of the perpetrator. There clearly was a question for the jury whether the appellant had a reasonable belief that the appellee knowingly executed the affidavit falsely with respect to whether she received a benefit from ARI in exchange for the funds represented by the check.

b. Probable cause as a matter of law

As noted above, the appellant contends that because the prosecution of the appellee was based on Ms. Hoppis's eyewitness testimony it had probable cause as a matter of law, citing *Malvern Brick and Tile Co.* v. *Hill, supra.* In that case, one Mendenhall alleged he had been beaten by seven persons. The altercation had to do with a labor dispute at Malvern Brick and Tile Co. where Mendenhall was employed. He reported to Mr. Garvan, the executive vice-president of the company, and told him that shots had been fired into his home. Garvan inspected Mendenhall's home to see the bullet damage, and then he took Mendenhall to the prosecutor's office where Mendenhall named the seven people who had battered him, including Hill. All seven were prosecuted on the basis of an affidavit for warrant for arrest executed by Mendenhall. The company posted $100 as "advance court costs" to assure the prosecution of the seven persons named. At the trial, Hill testified he had been elsewhere at the time of the battery, and he was ultimately acquitted of the battery of which the other six named were convicted. Hill sued Mendenhall, the company, and Garvan for malicious prosecution. A jury verdict found all three liable. Reviewing the evidence to determine whether the jury could properly have determined that Garvan and the company lacked probable cause to sponsor the prosecution of Hill, we found no evidence that probable cause was lacking. Rather, we found that Garvan and the company had done what any good employer would have done in the same circumstances, and that it was proper to have relied on the identification of Hill by Mendenhall. Our opinion contained the following:

> In malicious prosecution cases we have defined the words, "probable cause," as "such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of

> ordinary caution and prudence to believe, and did induce the prosecutor to believe, that the accused was guilty of the crime alleged, and thereby caused the prosecution." *Hitson* v. *Sims*, 69 Ark. 439, 64 S.W. 219 [1901]; *Whipple* v. *Gorsuch*, 82 Ark. 252, 101 S.W. 735 [1907].
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> . . .
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> In the annotation in 43 A.L.R. 2d p. 1048, cases from several jurisdictions are cited to sustain the statement: "Where the defendant in good faith has relied on an apparently sound identification by some other person, the Courts have held that there is no liability in malicious prosecution." [232 Ark. at 1004-1005, 342 S.W.2d at 308.]

That is, of course, the language upon which the appellant in the case before us has relied. However, there is much more to the opinion:

> Furthermore, the evidence established without contradiction that when Mendenhall went to the office of Malvern [the company] . . . and told Garvan of the assault, then before doing anything, Garvan consulted immediately with the regular retained attorneys of Malvern. Garvan and Malvern relied on the advice of competent and qualified counsel. We have a long list of cases in Arkansas — and the general rule over the country is to the same effect — that when one recites the full facts to a competent attorney, such is a complete defense against the charge of acting without probable cause. . . . In view of these cases, it is clear that Garvan and Malvern, by acting on the advice of competent counsel, entirely dispelled any claim that they acted without probable cause; and until Hill could establish that Garvan and Malvern acted without probable cause, he could not hold them liable in this malicious prosecution action. Therefore, as to Garvan and Malvern, the judgment is reversed and dismissed.

While we noted the propriety of the reliance on Mendenhall's statement, it is apparent that our holding in the case was that Garvan and the company had not been shown to lack probable cause in view of their having recited the full facts to a

competent attorney and having been advised by him to proceed. Obviously, the appellant in the case before us now cannot rely on that holding.

This case, and *Malvern Brick and Tile Co.* v. *Hill, supra*, differ importantly in another aspect. There the defendant possessed no information which would contradict the content of the third party's statement. Here the defendant had other information available which was at odds with the eyewitness's statement.

[redacted] The existence of probable cause is determined by an examination of the information known to the defendant at the time the proceedings were instituted. *See Carroll* v. *Gillespie*, 14 Mass. App. 12, 436 N.E.2d 431 (1982), a case very similar to this one, which provides an excellent overview of this subject. Where the only information known to the defendant is contained in a third party's statement, and he is possessed of no information inconsistent with that statement, probable cause may exist as a matter of law.

[redacted] In this case, the appellant relied on an eyewitness statement, but was also in possession of the following contradictory facts: the differing middle initial, the inability of the crime laboratory's handwriting expert to identify the signature as that of the appellee, Detective Matlocks's suspicion of Ms. Hoppis as the author of the signature, and Mr. Cairns's assessment of the matter as lacking in evidence to prosecute.

The jury should be allowed to consider all the evidence available to the defendant to determine if ordinary caution was exercised in bringing the charges. To hold otherwise would allow the defendant to avoid the jury's scrutiny of evidence known which could make prosecution unreasonable.

The appellant could not rely on a full and fair disclosure to counsel as a defense in this case. It has quite properly not asserted that this case should be reversed because of undisputed evidence that it made such a disclosure to counsel. We are not creating a straw man to be knocked down by reciting that there was no such disclosure. Rather, the point is that in assessing the reasonable belief of the appellant the jury could consider not only Ms. Hoppis's testimony identifying the appellee as the person who signed the check but the other information as well in deciding

whether there was probable cause.

We hold the appellant was not entitled to a directed verdict as a matter of law.

2. The instruction

We do not disagree with the appellant's assertion that if the jury had found that the appellee was guilty of the offenses with which she was charged the appellant would have established a defense to her claim. *See* Restatement (Second) of Torts § 657 (1977). However, the instruction offered by the appellant was insufficient to permit the jury to reach any such conclusion, as it did not state the elements of the offenses with which the appellee had been charged. We do not question the statement in the appellant's reply brief that in considering this defense the jury need not find that the appellee was guilty of each element of the offenses beyond a reasonable doubt. However, if the jury is to consider her guilt or innocence using the preponderance of the evidence standard, it surely must be instructed on the elements of the offenses.

The appellant also argues that the jury was informed of the basis of the charges by the deputy prosecutor. The pages in the record to which the appellant refers contain the testimony of Mr. Douglass explaining why he would not have filed the charges had he known all the facts known to Mr. Butler. While there is some discussion about how the offenses of false swearing and theft by deception go hand in hand but are separate criminal acts, the discussion there is woefully short of explaining to the jury the elements of the offenses.

3. The damages

The jury initially awarded the appellee compensatory damage of $5,000 plus punitive damages of $150,000. The trial judge gave the appellee a choice of accepting a remittitur of $75,000 or a new trial. The appellee accepted the $75,000, and the judgment was for that amount plus the compensatory damages. We are asked to hold that the punitive award is so excessive, in comparison with the compensatory award, as to shock the conscience of the court. We decline to do so.

There is no fixed standard for the measurement of

punitive damages, and even if the proportionality of punitive damages to compensatory damages is an appropriate consideration, it is only one such consideration among others equally important. *Ray Dodge Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972). Another consideration which may be weighed by the jury, as was done in this case, is the net worth of the defendant (appellant). *Matthews* v. *Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983). Given the evidence of malice, including the appellant's decision to proceed with the prosecution after having been advised against it by one deputy prosecutor, the failure to disclose all the facts to the second deputy prosecutor, and its persistence in the case even after its dismissal by the municipal court, which could have been considered by the jury, we cannot say punitive damages were generally improper in this case. Nor can we say the amount shocks the conscience of the court.

Affirmed.

HAYS, J., not participating.

Wanda J. BALLHEIMER *v.* SERVICE FINANCE CORPORATION

86-223 728 S.W.2d 178

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Phil Stratton and *Casey Jones, Ltd.*, by: *Phil Stratton*, for appellant.

Julius C. Acchione, for appellee.

TOM GLAZE, Justice. This case involves an action on a debt owed for medical services incurred by appellant on June 22, 1983, at the Baptist Medical Center in Little Rock. Appellant admits owing the debt, but argues the appellee, assignee of the Baptist Medical Center, is barred from bringing the suit since it delayed in doing so for thirty-three months from the date appellant incurred the debt. Appellant's argument is based upon Ark. Stat. Ann. § 37-245 (Supp. 1985), which provides that "[n]o action shall be brought to recover charges for medical services performed or provided prior to April 1, 1985, by a physician or other medical service provider after the expiration of eighteen (18) months after the date such services were performed or provided."

The trial court rejected appellant's argument, holding § 37-245 did not apply, but instead applied Ark. Stat. Ann. § 37-209 (Repl. 1962). Section 37-209 provides that actions on promissory notes or other instruments in writing must be commenced within five years after the cause of action accrues.

On appeal, appellant contends the trial court erred in applying § 37-209. Appellee responds the court was correct, but, in addition, it asserts § 37-245 was inapplicable because the medical center was not a provider of medical services under the terms of that statute. Appellee also asserts § 37-245 violates the equal protection clause because it singles out medical service providers by treating them differently from other creditors. We hold that § 37-245 is applicable to this cause of action and is not a denial of equal protection of the law.

When appellant entered the Baptist Medical Center, she signed a financial agreement, promising to pay the hospital for services and supplies rendered during her stay. She was discharged two days later, owing the hospital $1,028.75. Much of the parties' argument concerns the validity or enforceability of the agreement signed by appellant and whether it was an instrument in writing that effectuated the longer five-year statute of limitations (§ 37-209) thereby avoiding the shorter one (§ 37-245) dealing specifically with the recovery of charges for medical services.[1]

In support of appellee's position that § 37-209 applies, it cites *Jefferson* v. *Nero*, 225 Ark. 302, 280 S.W.2d 884 (1955), which relates the rule that if there is doubt as to which of two or more statutes of limitation applies to a particular action or proceeding, and it is necessary to resolve the doubt, it will generally be resolved in favor of the application of the statute containing the longest limitation. That rule is certainly a valid and settled one, but it is not applicable here where no doubt exists concerning what the General Assembly intended when it enacted the later but shorter limitation statute of § 37-245.

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[1] Act 638 of 1984, Ark. Stat. Ann. § 37-245, enacted on March 22, 1983, provided for an eighteen-month statute of limitations. Act 894 of 1985 amended § 37-245, and provided a two-year statute of limitations to recover charges for medical services performed or provided after March 31, 1985.

As we have said before, where a special act applies to a particular case, it excludes the operation of a general act upon the same subject. *Williams* v. *City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985), and *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984). Prior to § 37-245, actions brought to recover medical services were subject to the general limitation provisions governing (1) contracts not in writing (and open accounts) under Ark. Stat. Ann. § 37-206 (Repl. 1962) and (2) promissory notes and instruments (contracts) in writing under § 37-209. Under appellee's theory, § 37-209 applies instead of § 37-245 because appellant signed a written agreement to pay for the medical services rendered. It does so, appellee argues, because both § 37-209 and § 37-245 arguably apply under these circumstances, so the court must resolve the conflict by employing the statute with the longest limitation. Using this same logic, § 37-206, Arkansas's three-year general limitation statute, would apply in actions for medical service charges when no written contract (or open account) was involved — again because it has the longer period of limitation. Obviously, to accept such a construction of these two statutes would render the General Assembly's special enactment of § 37-245 meaningless since § 37-245 could never apply. Thus, to give § 37-245 the effect intended by the General Assembly, we reach the plain and simple conclusion that it intended § 37-245 to cover all actions brought to recover charges for medical services.

Appellee further contends that § 37-245 is inapplicable since it applies to a medical service provider and the Baptist Medical Center "does not provide medical services as such." Appellee offers no proof that the Baptist Medical Center is not a medical services provider, and, in fact, what evidence appellee did present runs counter to its contention. Appellee sued appellant on her debt which admittedly resulted from "services rendered by the hospital." Appellee attached to its complaint an itemized account that listed each service rendered and the charge for that service. Those services included neurological exams, x-rays, laboratory tests and medication. Under the circumstances presented here, we are unaware of any reason why the Baptist Medical Center should not be designated a medical service provider under the terms of § 37-245. Appellee fails to argue any legal authority to show the Baptist Medical Center is not a medical service provider, and because the record clearly demon-

strates otherwise, we conclude it is. We believe § 37-245 clearly is applicable to the situation before us.

Lastly, we consider appellee's argument that § 37-245 violates the equal protection clause because it treats physicians and other medical service providers differently than other creditors who enjoy a longer statute of limitations. Such legislative action creating different statutory periods within which actions must be commenced has been upheld as constitutional by this court. *See Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); *Carter* v. *Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970). In *Owen*, we said the vital question is one of reasonableness, and the courts may not strike down a statute of limitations unless the period before the bar becomes effective is so short that it amounts to a virtual denial of the right itself or it can be said that the legislature has committed palpable error. Adhering to this test, we hold the limitation period in § 37-245 is both reasonable and constitutional.

Because we conclude the trial court should have applied § 37-245 as a bar to appellee's action against appellant, we reverse and dismiss.

HICKMAN, J., dissents.

Bobby Ray FRETWELL *v.* STATE of Arkansas

CR 85-208 728 S.W.2d 180

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Richard R. Medlock, for appellant.

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

PER CURIAM. Petitioner Bobby Ray Fretwell was found guilty of capital felony murder and sentenced to death. We affirmed. *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Petitioner now seeks an evidentiary hearing in circuit court pursuant to Criminal Procedure Rule 37 on the ground that he was not afforded effective assistance of counsel in either the guilt or penalty phases of his bifurcated trial.

Petitioner initially argues that counsel was ineffective in the sentencing phase in that he failed to object to the submission to the jury of "pecuniary gain" as an aggravating circumstance. Petitioner contends that since he was accused of aggravated robbery as the underlying felony to capital murder, the aggravating circumstance that the crime was committed for pecuniary gain duplicated an element of the offense of capital murder.

We do not find that counsel was ineffective for failing to

assert the issue. At the time petitioner was tried, the question had not been raised in this court. An attorney is not ineffective for failing to raise every novel issue which might conceivably be raised.

Petitioner also contends that counsel should have moved to preclude submission to the jury of the aggravating circumstance that the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody. As the jury did not find that the aggravating circumstance existed, petitioner could have suffered no prejudice from counsel's failure to object to the submission of the aggravating circumstance.

Petitioner alleges that counsel in his opening statement irrevocably committed him to the improvident strategy of admitting to the jury that he was guilty of shooting the victim during the robbery and relying on the jury's leniency to avoid the death penalty. Petitioner asserts that the tactic went beyond the bounds of ordinary trial strategy and virtually guaranteed a death sentence.

While another attorney may well have taken another course, trial strategy, even if it proves unsuccessful, is a matter of professional judgment. We have consistently held that it is inappropriate to grant an evidentiary hearing on an allegation of ineffective assistance of counsel related only to matters ordinarily within the realm of counsel's judgment. *Leasure* v. *State*, 254 Ark. 961, 497 S.W.2d 1 (1973).

Douglas Stevens, a psychologist, was appointed at petitioner's request to assist in the preparation of his defense. Dr. Stevens testified at trial but was not available to testify at a pretrial hearing on the admissibility of petitioner's confession. Petitioner's attorney moved for a continuance until Stevens could appear for the hearing but the motion was denied. Petitioner contends that counsel was ineffective because he failed to prepare for the hearing and secure Dr. Stevens' presence.

The State presented evidence from the officers who took petitioner's confession and from a forensic psychologist and a psychiatrist, both of whom had examined petitioner at the Arkansas State Hospital. The officers testified that petitioner had

been advised of his constitutional rights, no promises or threats had been made to induce the confession and that petitioner stated he understood his rights. Petitioner conceded that he said he understood his right but maintained that he had not actually understood them. After hearing the testimony, the court found the confession admissible but noted that its credibility could be attacked at trial.

[redacted] To prevail on an allegation of ineffective assistance of counsel, the petitioner must meet the criteria set out in *Strickland* v. *Washington*, 466 U.S. 668 (1984). In *Strickland*, the court held that the benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. A petitioner must not only show that counsel made an error so serious that he was not functioning as the "counsel" guaranteed by the sixth amendment, but he must also demonstrate that the error resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Even if counsel's conduct is shown to be professionally unreasonable, the judgment must stand, unless the petitioner demonstrates that the error had a prejudicial effect on the actual outcome of the trial. A reasonable probability that but for counsel's conduct the result of the trial would have been different is a probability sufficient to undermine confidence in the outcome. *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985). While petitioner alleges that Dr. Stevens' testimony was of singular importance, he does not cite any specific information that would lead to the conclusion that counsel's failure to secure Dr. Stevens' testimony at the pretrial hearing had a prejudicial effect on the proceedings sufficient to undermine confidence in the outcome of the trial. The general claim that Dr. Stevens would have told the court that petitioner was susceptible to coercion is not persuasive.

The jury was instructed at the close of the guilt phase of the bifurcated trial on both capital murder and murder in the first degree. At the request of counsel for the petitioner, the instruction on first degree murder specified that to sustain the charge the jury would have to find that the murder occurred in the course of an *aggravated* robbery or burglary. Counsel said that the word

"aggravated" should be included since the State had charged him with aggravated robbery. Petitioner argues that the insertion of the word "aggravated" rendered the instructions for capital murder and first degree murder virtually identical. He further argues that counsel was wrong to also request that the words "the State has charged the defendant with the offense of murder in the first degree" be omitted from the beginning of the instruction on first degree murder. He alleges that the omission of the words negated the instruction on first degree murder as a lesser included offense to capital murder.

We cannot conclude from the allegations that counsel was ineffective within the guidelines of *Strickland* v. *Washington*. The jury was instructed that the offense of murder in the first degree was a lesser included offense of capital murder and that the jury could find the accused guilty of either capital murder or the lesser included offense. Except for the changes suggested by counsel, the instructions conformed to the Arkansas Model Criminal Instructions. Petitioner has not shown that the instructions did not adequately inform the jury of the law and its choices under the law.

As his final allegation of ineffective assistance of counsel, petitioner notes that only he and Dr. Stevens testified for the defense in the penalty phase of the trial. He contends that his parents, aunt and grandmother were all present and could have testified to a "tumultuous family background." He also states that he was not aware that he would be called as a witness in either the guilt or penalty phases until after the trial began.

The accused is not entitled to have every possible witness testify. *See Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984). Although petitioner states that family members were available to testify and he states that he was not aware that he would take the stand until after the trial began, he does not state what the family members' testimony would have been or how his testimony would have been different if he had known in advance that he would be called to testify. When a petitioner fails to provide a summary of the testimony which could have been given and does not explain why the testimony was important, there is no basis for a finding that counsel was ineffective.

Petitioner concludes the petition with a challenge

to the sufficiency of the evidence to support the jury's finding that there were no mitigating circumstances. The argument is not cognizable under Rule 37. An attack on the weight and sufficiency of the evidence is a direct challenge to the judgment, and, as such, is not proper under our postconviction rule. The rule affords a remedy when the sentence in the case was imposed in violation of the Constitution of the United States or this State or is otherwise subject to collateral attack. *Pitcock* v. *State*, 279 Ark. 174, 649 S.W.2d 393 (1983). A direct attack on the evidence must be made in the trial court and on the record on direct appeal. *McCroskey* v. *State*, 278 Ark. 156, 644 S.W.2d 271 (1983).

Petition denied.

Harless Dale MAULDING *v.* STATE of Arkansas

CR 87-54 727 S.W.2d 855

Supreme Court of Arkansas
Opinion delivered April 27, 1987

Chet Dunlap, for appellant.

No response.

PER CURIAM. This motion to proceed in forma pauperis is accompanied by appellant's affidavit pursuant to Rule 28 of the Rules of the Supreme Court and the Court of Appeals. The affidavit, dated March 2, 1987, reflects no assets or income. However, a partial record filed in connection with the appeal

contains an order of the trial court dated March 5, 1987 reciting that a hearing was held on February 27, 1987 on appellant's oral motion to proceed in forma pauperis and was denied upon a finding that the appellant is not indigent and has funds available to him. Appellant's motion in this court makes no reference to the order of the trial court, nor presents any record or argument demonstrating where the trial court was wrong. *Puckett* v. *Puckett*, 289 Ark. 67, 709 S.W.2d 82 (1986). Accordingly, the motion is denied.

PURTLE, J., and NEWBERN, J., would grant.

Jerry Lee SUTHERLAND *v.* STATE of Arkansas

CR 86-177 728 S.W.2d 496

Supreme Court of Arkansas
Opinion delivered May 4, 1987
[Rehearing denied June 8, 1987.]

William R. Simpson, Jr., Public Defender, *Jerry Sallings*, Deputy Public Defender, by: *Steff Padilla*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. At issue in this case is the admissibility of a statement made by appellant, Jerry Lee Sutherland. The statement concerned a burglary and was made while Sutherland was incarcerated on a drug charge and without

benefit of counsel, even though an attorney had been appointed for Sutherland with reference to the drug charge.The trial court ruled the statement was admissible. Because of a deficient abstract, we are not able to reach this issue on appeal. Accordingly, the judgment of the trial court is affirmed.

The facts, as revealed by the abstract, are as follows. While investigating a gas station burglary, the police interviewed Sutherland. He denied any involvement and the police searched his house and his car. One of the officers found some drugs in Sutherland's house and arrested him for possession of a controlled substance with intent to deliver. Sutherland was incarcerated on the drug charge, arraigned, and appointed an attorney. While still incarcerated on the drug charge, police interrogated him about the burglary. Sutherland was advised of his rights, signed a waiver form, and indicated he did not want an attorney. He then made the statement described in appellant's brief as "inculpatory."

At an omnibus hearing on the burglary charge, Sutherland's attorney learned for the first time that another attorney had been appointed to represent his client on the drug charge before the "inculpatory" statement was taken. In light of this information, the attorney made an oral motion to suppress the statement. The trial judge questioned Sutherland, who admitted that he did not ask for an attorney before the interrogation, although he knew he had a right to one. The judge ruled the statement was admissible.

[redacted] Sutherland argues on appeal that his statement was inadmissible because it was taken in violation of his sixth amendment right to counsel. There is, however, an obstacle to our ability to review Sutherland's contention. There is no abstract of Sutherland's statement. For this reason, we do not know if it was "inculpatory". The record on appeal is confined to that which is abstracted. *Adams* v. *State*, 276 Ark. 18, 631 S.W.2d 828 (1982). Without knowing the contents of the statement, this court cannot assess the impact its admission had on Sutherland's trial, nor can we determine whether prejudice resulted. We have held that when an error is alleged, prejudice must be shown, since we do not reverse for harmless error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984).

In *Richardson* v. *State*, 283 Ark. 82, 671 S.W.2d 164

(1984), the same problem arose when the appellant challenged the admission of custodial statements and the statements were not abstracted as required by Sup. Ct. R. 9. We stated in clear terms:

> Whether the nature of the statements requires reversal cannot be determined, as none of the three statements is abstracted and their admission may have been harmless. At least we are not willing to presume that the statements are prejudicial when their content is not divulged and we have no way of knowing whether they are incriminating. Rule 9(d) of the Rules of the Supreme Court provides that appellant's abstract should include "such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision." While the rule uses the word "*only*", that cannot excuse the total omission of exhibits or other material, the substance of which is essential to a determination of whether appellant's argument has merit, and warrants a reversal of the judgment.

In a supplemental opinion issued when rehearing was granted, the court in *Richardson* decided that, while the statements were not abstracted, the court could determine the substance of two of them from other abstracted testimony. Accordingly, in the supplemental opinion, the court held that the statements should have been suppressed. Here, we cannot determine the substance of the statement from the abstracted testimony contained in the briefs. Accordingly, in light of our requirement that an error must be prejudicial before we will reverse a trial court's holding, the omission of Sutherland's statement from the transcript prevents our review of the issue raised in this case. We have no choice but to affirm the trial court's holding.

Affirmed.

Ruby BARR, et al. *v.* Albert W. EASON

86-193 728 S.W.2d 183

Supreme Court of Arkansas
Opinion delivered May 4, 1987
[Rehearing denied June 8, 1987.]

Williams & Kemp, for appellant.

James H. Pilkinton, Jr., for appellee.

JOHN I. PURTLE, Justice. This is an appeal from a decree holding that the appellee was the owner of the surface rights of land in the S ½ of the SE ¼ of Section 6, Township 20 South, Range 27 West, Miller County, Arkansas, containing 80 acres more or less. The decree also held that the appellee was the owner of his intestate share of the mineral rights in the NW ¼ of the NE ¼ and the NE ¼ of the NW ¼ of Section 7, Township 20 South, Range 27 West, Miller County, Arkansas, containing 80 acres more or less.

On appeal the appellants argue that the court erred in vesting title to the surface rights of the Section 6 lands and the mineral rights in the Section 7 lands in the appellee. We agree with the appellants' first point. However, we disagree with the appellants' argument as to the ownership of the mineral interests in the Section 7 lands.

Parts of Sections 6 and 7 were once owned by S.S. Eason who died intestate prior to 1959. Since his death his heirs have been unable to agree as to the ownership of the surface and mineral rights of the land. The decedent was the father of 15 children. His first wife, Louella, bore him nine children (the "first family"), and he had six children by his second wife, Clementine (the "second family"). Prior to his death S.S. Eason deeded the lands in Section 7 to Clementine. A dispute between the first and second Eason families culminated in chancery court actions during 1944 and 1945. Decrees were entered granting all 15 children an equal interest in the mineral rights to the lands in both Sections 6 and 7. No appeal was taken from the final decree.

One area of contention between the two families concerns

the ownership of the surface rights of the lands in Section 6. From the record we find that these lands were forfeited for the 1959 taxes and were sold to H.M. McIver on November 20, 1962. McIver was a stranger to title prior to the tax purchase. The property was conveyed by quit claim deed from McIver and his wife to John Edward Eason on January 18, 1963. The grantee was the son of S.S. Eason and the father of Albert W. Eason, the appellee herein. The appellee's father deeded the property to the appellee on January 19, 1963. There was no monetary consideration for this transfer. However, the appellee testified that he gave his father the money to redeem the property from McIver.

We first consider the chancellor's ruling concerning the mineral rights to the Section 7 property. This point merits little discussion. The final decree adjudicating the mineral rights was filed on December 12, 1945. The decree determined that all 15 children of S.S. Eason owned an equal interest in the mineral rights of the lands in Sections 6 and 7. There is no evidence that any of the heirs have acquired title to the mineral interests except through inheritance from S.S. Eason. The appellee's father was one of the 15 children of S.S. Eason. We do not disturb the trial court's determination that the appellee owns his pro rata share of the mineral interests to the lands in Sections 6 and 7, since this finding was not against the preponderance of the evidence.

We next consider the ownership of the surface rights of Section 6. There is no dispute that the appellee's father was a cotenant with the other children of S.S. Eason. Neither is it disputed that McIver was a stranger to the title when he purchased the land at the tax sale. Less than two months after purchase at the tax sale, McIver deeded the land to the appellee's father. The testimony reveals that appellee's father deeded the property to the appellee on January 19, 1963, one day after John Edward Eason received the deed from the McIvers.

The appellee claimed the surface rights to the Section 6 property by both deed and adverse possession. We first discuss the claim under the tax deed. The general rule is that a person who is in possession and receiving benefits from the property cannot acquire title by permitting the property to sell for taxes and then buying it at a tax sale. *Zimmerman* v. *Franklin County Bank*, 194 Ark. 554, 105 S.W.2d 1074 (1937).

In this case of *Smith* v. *Smith*, 210 Ark. 251, 195 S.W.2d 45 (1946), we considered a similar situation. In the *Smith* case this Court considered the rights of the decedent, his son and grandson. The decedent, D.L. Smith, died in 1931. Several children survived. The eighty acres of land owned by D.L. Smith at the time of his death was forfeited for the 1932 taxes. The land was subsequently redeemed by Laura B. Smith, the wife of Benton Smith, a son of the decedent. In 1945 litigation concerning the title to the property arose among the children and grandchildren of the decedent. In *Smith* this Court, discussing the rights of the children of decedent Smith and the redemption of the land at the tax sale, stated:

> We think however, that in the case at bar Benton, Laura, and G.L. Smith, were too intimately identified with the D.L. Smith estate to make personal purchases in the manner shown. Redemption by one tenant in common or one of several cotenants inures to the benefit of all, in the absence of special circumstances or waiver. Effect of *Spikes* v. *Beloate*, 206 Ark. 344, 175 S.W.2d 579, is that a tenant in common cannot strengthen his interest by bidding in the entire property at a tax sale, or by purchasing it from a stranger who has bought at such sale. These acts amount to no more than redemption. This confers no right upon the purchaser except to justify a demand that contribution be made by other tenants.

We next consider the appellant's claim of adverse possession. This Court expounded on the rights of heirs and cotenants in a similar situation in the case of *Zackery* v. *Warmack*, 213 Ark. 808, 212 S.W.2d 706 (1948). The mother of Zackery died intestate in 1919. At the time of her death she owned the 40 acres of land. Her heirs were her son, John Zackery, the appellant, and his four siblings. The taxes for 1929 and 1930 became delinquent, and Zackery purchased the land at a tax sale. He paid taxes thereafter until 1945, the last year taxes were paid prior to the commencement of the suit.

Warmack filed suit claiming ownership in the same land that Zackery claimed. Zackery filed an answer and cross-complaint wherein he claimed full title to the property based upon the tax deed and adverse possession. The trial court found the tax

sale void but concluded that the deed operated as color of title. This Court held that the redemption for the tax forfeiture inured to the benefit of all relatives and tenants in common. We affirmed the trial court's holding permitting Zackery to retain proceeds of timber sales as reimbursement for taxes paid on the lands. The taxes in the *Zackery* case were paid in the name of the decedent from 1919 until 1929. After the purchase at the tax sale Zackery paid the taxes in his own name. The *Zackery* opinion went on to state:

> The reason that the possession of one tenant in common is prima facie the possession of all, and that the sole enjoyment of the rents and profits by him does not necessarily amount to a disseizin, is because his acts are susceptible of explanation consistently with the true title. In order, therefore, for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of an unequivocal character that notice may be presumed.

The appellee in the present case was never in actual physical possession of the land. There has never been any kind of fence, house or other structure on the section 6 land here in dispute. Appellee sold the timber in July of 1978 and later planted most of it in fingerling pine. The property was neither fenced or marked to indicate the boundaries. Appellee was in the armed forces when the deed between McIver and his father was executed. He has lived out of state during the entire time in question. In a letter to Ruby Barr, dated August 27, 1983, appellee stated his father deeded the land to him "that the land might be more easily handled." He further stated: "as the years went along and as I continued to pay taxes, and with all apparent opportunities to settle the dispute which has been going on now for around 50 years. . . ." The letter never expressed the opinion that he was the sole owner of the property. (A new oil well had just been finished on or near some of the land formerly owned by S.S. Eason, appellee's grandfather.)

[redacted] The appellee testified that he did not know if the other heirs knew that he claimed the property in his own name. He relies on the deed from his father as color of title. Even if the deed

was color of title, it did not ripen into ownership by adverse possession. Ruby Barr is the only heir he claimed to have notified of his adverse claim. Appellee apparently had some clearing done at the time he had the young trees planted. There is no testimony that either the sale of the timber or the clearing was performed more than seven years prior to the suit. Nothing had been done previous to the sale of the timber that could be deemed notice to the other heirs that someone was claiming adversely to them.

This case is factually quite similar to *McGuire* v. *Wallis*, 231 Ark. 506, 330 S.W.2d 714 (1960). Wallis died in 1937 and was survived by a widow and eight adult children. Allie, one of the children, took possession of part of his father's land and held it until his death in 1945. Thereafter Clovis Wallis, son of Allie, took possession and claimed it until suit was filed in 1948. Clovis had been in actual possession since his father's death. The trial court found in favor of Clovis' adverse claim and this Court reversed. *The Court treated the grandson (Clovis) as a cotenant when it stated*: "It must be remembered at the outset that the possession of one tenant in common is presumed to be the possession of all and, further, that in view of the family relation stronger evidence of adverse possession is required in this case than in one where no such relation exists."

The dissent relies on *Watkins* v. *Johnson*, 237 Ark. 184, 372 S.W.2d 243 (1963) as controlling in this case. In *Watkins* a cotenant sold to a "stranger" (actually the son of the seller) who entered into exclusive possession under the deed. The lands were and continued to be fenced, with part in crops and part in pasture. This is not the case here, because the appellee did not enter into exclusive possession. *Watkins* is sound law, but has no application here.

Since color of title and payment of taxes alone are insufficient to ripen into ownership by adverse possession, the appellee never acquired title adverse to the other heirs. Therefore, the trial court decree is reversed as to the section 6 land. The decree is affirmed as to the section 7 land.

Affirmed in part, reversed in part and remanded.

HOLT, C.J., and HAYS and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. I dissent from that part of

the majority opinion that reverses the trial court's decree quieting title to the surface rights of Section 6 in appellee, Albert W. Eason.

The majority cites several cases which I simply feel are not applicable to the situation before us. More importantly, however, I believe the majority is reversing the chancellor when the record clearly supports the holding he reached. Before analyzing the cases relied on by the majority, I will discuss first those relevant facts that I believe support the trial court's holding that title to Section 6 should be quieted in appellee, Albert Eason, because he is record title owner of it and held it adversely under color of title.

The property in dispute, Section 6, was originally owned by S. S. Eason, who died leaving fifteen heirs. Those heirs included Albert's father, John. The other heirs are appellants in this appeal. The taxes on Section 6 were delinquent in 1959 and in November 1962, the property was sold to H. M. McIver, an admitted stranger to the title. Albert subsequently paid McIver $250.00 for the property, but requested McIver deed it to his father, John, which was done on January 18, 1963. The next day, January 19, 1963, John deeded the property to Albert. John died later that same year.

After having been deeded the Section 6 property, Albert was assessed taxes on it and he commenced paying them in 1963; he did so annually up to the time he brought this quiet title action in 1982. Albert said that every time he contacted one of the appellants and this property was mentioned, he referred to the fact that his father and mother had deeded him this 80-acre tract. While two of the appellants denied any knowledge that Albert had claimed the property, Albert offered proof that belied such lack of knowledge. For example, appellant Ruby Barr testified Albert had never notified her that he claimed title to Section 6, but Albert undisputably refunded tax monies to Ruby's husband, Sherman, for taxes the Barrs mistakenly paid on Section 6 for the years 1963 and 1972. Albert first reimbursed the Barrs in November 1964, for the 1963 taxes, and then reimbursed them again in October 1973, for the 1972 taxes. Another instance reflecting appellants' knowledge that Albert was claiming Section 6 occurred when Albert was farming timber on the property and had difficulty in locating a buyer. He said J. B. Eason, one of

the appellants, had informed him of a man who would be willing to buy the timber, and when telling Albert this, Albert said J. B. claimed no interest in the timber but was merely acting as a friend. That testimony was not rebutted. In fact, J. D. Eason's wife, Myrtis, conceded at the trial below that her husband had told her timber had been cut on Section 6—an admission which tended to corroborate (or at least is consistent with) Albert's testimony concerning his conversation with J. B.

Finally, there is no dispute that the acreage in question was unimproved and unenclosed. John Dobbins, a U.S.D.A. Soil Conservation Service employee, testified the property was mostly culled hardwood with scattered pines and was good for tree farming. Dobbins said that Albert had made substantial improvements to the land which increased its value about $100.00 to $150.00 per acre.

Based upon the foregoing evidence, the chancellor was justified in finding Albert had acquired title to Section 6. *See* Ark. Stat. Ann. § 37-102 (Repl. 1962) (person who holds unimproved and unenclosed property under color of title and pays its taxes for at least seven years is deemed to be in possession); *see also* Ark. Stat. Ann. § 37-103 (Repl. 1962). The majority court asserts the chancellor was wrong, and, in support of its position, relies on cases I feel are not controlling or applicable to the situation posed here.

First, the majority cites *Zimmerman* v. *Franklin County Bank*, 194 Ark. 554, 105 S.W.2d 1074 (1937) for the general rule that a person who is in possession and receiving benefits from the property cannot acquire title by permitting the property to sell for taxes and then buying it at a tax sale. Here, Albert Eason was not in possession of Section 6, nor was he receiving benefits from it at the time the property went into tax default and was sold to McIver. Neither was he in possession nor was he receiving benefits when he paid McIver for the property, and requested McIver to convey title to Albert's father, John. In addition, the record in no way reflects that John possessed or received any benefits from Section 6 either before or during this time of tax sale or when he received title from McIver. The rule in *Zimmerman* simply does not apply to the facts in this case.

Even if we were to stretch the rule, so-to-speak, and infer

from the facts that John enjoyed some benefit from the property at the time it was sold for taxes and redeemed in his name, the most that situation would pose is whether these transactions or conveyances involved fraud. For example, in *Lewis* v. *Fidelity Savings & Trust Co.*, 207 Ark. 433, 181 S.W.2d 22 (1944), this court, quoting from *Renn* v. *Renn*, 207 Ark. 147, 179 S.W.2d 657 (1944), said: "Where property is allowed to forfeit for taxes, and then some member of the family (or other confederate) acquires a deed from the state or taxing agency, equity will examine the transaction to see if it was a fraudulent conveyance; and upon ascertaining such to be the fact, then the purchaser will be held a trustee, or the entire transaction will be held a redemption by the original owner." Here, the trial judge made no mention of fraud, not surprisingly so, because no one alleged or even suggested fraud when this cause was tried below. In sum, I must reach the result, based upon the record and facts before us, that the redemption rule related in *Zimmerman* cannot be used to defeat Albert Eason's claim to Section 6.

Next, the majority cites *Smith* v. *Smith*, 210 Ark. 251, 195 S.W.2d 45 (1946) and the rule that a redemption by one tenant in common or one of several cotenants inures to the benefit of all, in the absence of special circumstances or waiver. That rule is not applicable here either because Albert was not a cotenant or tenant in common. Of course, John, Albert's father, was a cotenant of the appellants. To again summarize the evidence, McIver purchased Section 6 at the tax sale, and later deeded it to John, a cotenant of appellants; John, a day after acquiring title to the property, then deeded it to Albert, who was not a cotenant, but the son of one. There is no need to reiterate what occurred after Albert obtained record title to the property except to say he paid its taxes for twenty-two years, improved and farmed it and apprised some of the appellants, at least, that his father and mother conveyed the property to him and he made claim to it. Based on this evidence, the trial judge, apparently resolving the doubts or credibility issues in Albert's favor, quieted title in him to Section 6. Again, appellants alleged no fraud on John's or Albert's behalf and the trial judge found none.

Finally, the majority cites *McGuire* v. *Wallis*, 231 Ark. 506, 330 S.W.2d 714 (1960) for the point that this court has on one occasion, at least, treated the son of a cotenant-heir as if he, too,

were a cotenant. That being so, the majority says the rule that "the possession of one tenant in common is presumed to be the possession of all" is applicable and that Albert merely held or possessed Section 6 for all heirs, *viz.*, the appellants. *McGuire*, of course, did not involve unimproved property or § 37-102, *supra*; but, more importantly, its holding turned on whether the son (Clovis) or his father (Allie—a cotenant) held the subject property adversely to the other heirs-cotenants. The *McGuire* court, in its review of the record, found no proof of any acts so as to charge the other heirs with knowledge of Clovis's (or Allie's) adverse claim. I submit that, clearly, is not true in the instant case, and the evidence I set forth earlier supports the conclusion that the appellants here did have knowledge of Albert's claim.

Another case, again not involving unimproved property or § 37-102, is *Watkins* v. *Johnson*, 237 Ark. 184, 372 S.W.2d 243 (1963), wherein this court correctly considered the situation where the son of a cotenant went into possession of disputed property. There, this court alluded to a long line of cases where we held when a cotenant executes a deed to a stranger to the title, describing the entire land, and such grantee enters into exclusive possession under the deed, then such deed constitutes color of title, and such entry commences the running of limitation in favor of the grantor and against all the other cotenants of the grantor. *See Landman* v. *Fincher*, 196 Ark. 609, 119 S.W.2d 521 (1938) and *Parsons* v. *Sharpe*, 102 Ark. 611, 145 S.W. 537 (1912). The *Watkins* court determined W. H. Johnson was a cotenant with the heirs of Lewis Watkins but that Johnson sold the parties' property in its entirety to his son, A. W. Johnson, who took possession of it and paid taxes on it. The court held that even though A. W. Johnson was a first cousin of the Watkins children, nevertheless A. W. Johnson was a "stranger to the title" because he was not a privy of the Watkins heirs. Consistent with the holding in *Watkins*, Albert, in the case at hand, clearly was a stranger to the title when his father conveyed all of the Section 6 property to him.

In conclusion, the majority indicates that Albert said that he did not know if the heirs (appellants) knew he claimed the property and that Ruby Barr was the only heir he claimed to have notified of his adverse claim. Actually, Albert was steadfast throughout his testimony that he had made known to appellants

that he claimed ownership to the property. After having said so earlier in his testimony, he was again asked, "Is there any doubt in your mind that the members of the second family (appellants) knew that you claimed ownership of that 80 (acres)?" Albert responded, "I don't think so. I don't see how it could be, but I can't answer the question. You will have to ask them, sir." Obviously, the chancellor believed Albert's testimony that appellants knew he claimed ownership and evidence exists in the record for him to have inferred and found as much. It is not within this court's province to reverse a trial judge by drawing a different inference unless the judge's finding was clearly erroneous. On this same point, Albert testified he had contacted other heirs regarding his claim to the property, and from the evidence, it is obvious appellants Ruby and Sherman Barr and J. B. and Myrtis Eason had some knowledge of Albert's claim. From the evidence, the chancellor had every right to infer more than Ruby Barr knew of Albert's claim.

In my opinion, the record clearly reflects that Albert acquired record and color of title to the disputed property and appellants had chargeable knowledge that he was holding the property adversely, claiming title and paying taxes on it. At the least, I am unable to say the chancellor was clearly wrong in so finding.

HOLT, C.J., and HAYS, J., join in this dissent.

Haskell Wayne SNELGROVE *v.* STATE of Arkansas

CR 86-224 728 S.W.2d 497

Supreme Court of Arkansas
Opinion delivered May 4, 1987

[redacted]

Pruitt & Hodnett, by: *Roger T. Jeremiah*, for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant, Haskell Wayne Snelgrove, was originally charged with capital murder. The information alleged that he caused the deaths of his mother and his wife in the course of the same criminal episode. As a result of plea bargaining, the capital charge was reduced to two counts of first degree murder. He entered pleas of nolo contendere and was sentenced to life imprisonment in each case. In a post-conviction proceeding, he now collaterally attacks both convictions pursuant to A.R.Cr.P. Rule 37. We affirm the trial court's denial of relief.

Appellant contends the trial court erred in accepting his pleas of nolo contendere because there was no recitation of the allegations which formed the basis for the pleas and because the court did not require him to state personally that there was a factual basis for the pleas.

A.R.Cr.P. Rule 24.6 provides:

> RULE 24.6. *Determining Accuracy of Plea.*
>
> The court shall not enter a judgment upon a plea of guilty *or nolo contendere* without making such inquiry as will establish that there is a factual basis for the plea.

(Emphasis added.)

Compliance with Rule 24 is mandatory, but substantial compliance will suffice. *McDaniel* v. *State*, 288 Ark. 629, 708 S.W.2d 613 (1986). Further, if the factual basis is not sufficiently determined during the plea proceedings, it may be established at the Rule 37 post-conviction hearing. *Davis* v. *State*, 267 Ark. 507, 592 S.W.2d 118 (1980). Appellant is correct in stating that the following colloquy, which took place at the time of the pleas, did not establish a factual basis for his plea:

THE COURT: Is there a factual basis for the pleas, Mr. Marquette?

MR. MARQUETTE [APPELLANT'S ATTORNEY]: Yes, Sir.

THE COURT: Mr. Fields?

MR. FIELDS [PROSECUTING ATTORNEY]: Yes, Sir.

However, the deficiencies in establishing a factual basis were supplied in other responses and at the post-conviction hearing.

At the post-conviction hearing, appellant admitted that before he entered his pleas of nolo contendere, he attended an evidence suppression hearing and there heard the trial court rule on the admissibility of the following evidence:

(1) The testimony of a minister to whom appellant had confessed that he was a beast-man who ate raw flesh and drank blood, and that demons and devils had told him to kill his mother and his wife;

(2) A letter written by his mother which expressed fear of appellant;

(3) Evidence which showed the victims were stabbed to death;

(4) A pocket knife, which was found in appellant's possession, had human blood on it, and the size of the blade was consistent with the width and depth of the stab wounds in the victims;

(5) A medical report which established that semen, which could have been appellant's, was found in his mother; and

(6) Evidence about prior convictions for rape which involved two women, one of whom was made to lie in the bathtub filled with gasoline, while appellant forced the other to have sexual intercourse by threatening to throw a lighted match into the gasoline.

The trial judge reserved ruling on the mother's letter and the prior rape convictions, but refused to suppress the other evidence. Obviously, in allowing the appellant to enter the pleas, the trial

court was aware of these facts, as was appellant. The attorneys who represented appellant testified at the Rule 37 hearing that they explained the nature of the crimes to appellant, discussed all of the evidence with him, gave him a scenario of how they thought the trial would proceed, and discussed the possible sentences.

At the plea hearing the trial court determined that:

(1) Appellant knew the nature of the charges;

(2) Appellant knew the possible sentences;

(3) Appellant understood his nolo contendere pleas;

(4) Appellant's attorneys had explained the plea statement to him four times;

(5) Appellant understood he was giving up his right to appeal, to be tried by a jury, to cross-examine witnesses and to testify;

(6) Appellant understood he was to receive two life sentences, and;

(7) Appellant was not coerced into making the pleas.

Standard 14-1.6 of the American Bar Association's Standards for Criminal Justice defines the requirement of a factual basis as follows: "The requirement of a factual basis refers to the presence of sufficient evidence, adduced at the taking of a guilty plea or plea of nolo contendere, upon which a judge may fairly conclude that a defendant could be convicted if the defendant elected to stand trial."

The record from the plea hearing and the post-conviction hearing establish that there was a factual basis for the pleas and there was sufficient evidence from which the trial court could conclude that appellant would be found guilty if he elected to proceed to trial.

Next, appellant argues that he did not personally answer the court's inquiry about whether there was a factual basis for the pleas, but instead his attorney answered and, therefore, this case should be reversed. He cites *McDaniel* v. *State*, 288 Ark. 629, 708 S.W.2d 613 (1986), as authority for his argument. *McDaniel* holds that, in a plea of guilty, the trial court

shall ask the accused personally if he committed the act with which he is charged and whether he is pleading guilty because he is guilty. We do not consider the issue in this case because it was not raised in the petition for post-conviction relief. Rule 37.2(b) and (e) provide that, in order to be considered, an issue must be raised in the original or amended petition, and an issue is waived if it is not raised in the petition. We have long upheld this provision. *Wiser* v. *State*, 256 Ark. 921, 511 S.W.2d 178 (1974). Even though we do not consider the issue as it applies to this appellant, it is a subject of first impression, and one on which we have never given the trial courts any direction. We take this opportunity to notify the trial bench that, from this time forward, the *McDaniel* rationale will be applicable to pleas of nolo contendere. Contrary to the Federal Rules of Criminal Procedure, our Rules of Criminal Procedure require a factual basis for the nolo contendere plea as well as the plea of guilty. Since the sentencing power of the court is not reduced upon the entry of the nolo plea, it is equally important to make certain that the accused actually be guilty of the offense to which the nolo plea is offered. While the insistence upon a factual basis may make the nolo plea less attractive because a disclosure of the accused's misdeeds will be made public, this is a reasonable price to pay for the assurance that the accused is not innocent of the charge for some reason. Further, it will eliminate difficulty at post-conviction proceedings in determining the accuracy of the plea, and it will be useful to the trial court in determining the sentence. The form of the personal question can be concise. After the prosecutor makes a proffer of the facts which he would prove, the judge can ask the accused: "Are these the facts which you do not contest?"

Appellant next argues that he did not understand the sentence he was to receive and, therefore, his plea was not voluntarily, knowingly, and intelligently entered. The argument is without merit.

A.R.Cr.P. Rule 24.5 provides:

> The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also

address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea.

The following colloquy took place at the plea proceedings:

THE COURT: Is this plea of nolo contendere based upon a plea agreement, do you know what you are to receive here, today?

MARQUETTE [APPELLANT'S ATTORNEY]: The judge wants to know if there has been some type of agreement between the prosecuting attorney's office and us?

APPELLANT: Yes, Sir.

THE COURT: What is that agreement, what are you supposed to receive?

APPELLANT: A sentence of a life sentence.

THE COURT: Two of them?

APPELLANT: One that I know of.

FIELDS [PROSECUTING ATTORNEY]: Two together, right? There will be two as one.

MARQUETTE [APPELLANT'S ATTORNEY]: There will be two sentences, they will run concurrently or at the same time; they will not be consecutive, one after the other, they will run at the same time.

THE COURT: Now, do you understand what you're supposed to receive?

APPELLANT: Yes, Sir.

THE COURT: And what is it?

APPELLANT: Life sentence.

THE COURT: How many?

APPELLANT: It could go two.

THE COURT: Two?

APPELLANT: Two?

THE COURT: I need it to be a little more definite.

APPELLANT: Two life sentences.

THE COURT: Do you understand that the Court doesn't have to go along with that agreement if it doesn't want to?

APPELLANT: Yes, Sir, I understand.

THE COURT: Was any force, threats, promises, coercion of any kind used against you to get you to enter these pleas?

APPELLANT: No Sir, there wasn't.

As is readily seen, the appellant apparently did not initially understand the intricacies of how the agreement would result in him serving the equivalent of one life sentence by allowing him to serve two sentences concurrently. It is clear, however, that the trial court took pains to make certain that, before the plea proceedings went further, appellant not only understood the terms of the agreement, but that he also understood that the court was not bound by the agreement. Further, the court did order that the two life sentences run concurrently. Appellant admits that he has not suffered any hardship by serving two life sentences concurrently, as opposed to one. He argues, however, that his initial misunderstanding of the terms was so obvious that the plea became involuntary and should have been rejected. He cites no cases in support of his argument, and we have found none. The requirements of A.R.Cr.P. Rule 24.5 were met.

Appellant's final contention is that he received ineffective assistance of counsel because he was given inaccurate parole information. Appellant testified at the rule 37 hearing that his two attorneys left him with the impression that he would be paroled in two and one-half to three years. The attorneys, however, testified that they never told appellant that he would be paroled after a certain number of years. One of the attorneys explained: "We never specifically told him when he will be able to get out on parole. I think we told him that if his sentence were reduced to a number of years, there's a possibility that he would be eligible for parole in approximately eight to nine years."

The trial court is in the best position to resolve any conflicts in testimony. As we stated in *Huff* v. *State*, 289 Ark. 404, 711 S.W.2d 801 (1986):

> 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 [otherwise]. 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. . . . We cannot say his findings are against a preponderance of the evidence.

Affirmed.

HICKMAN, J., concurs.

Carroll GILBERT *v.* GILBERT TIMBER COMPANY, et al.

86-247 728 S.W.2d 507

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Art Anderson, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, for appellee.

STEELE HAYS, Justice. In this appeal of a workers' compensation case the Court of Appeals affirmed the Workers' Compensation Commission and we granted a petition for review of that decision.

Appellant Carroll Gilbert is the owner of Gilbert Timber Company and was injured when struck by a falling tree limb. At the time of the injury a workers' compensation policy issued by CIGNA was in effect. It was stipulated that Gilbert's business was a sole proprietorship.

CIGNA contends that Gilbert was not covered because he failed to comply with Ark. Stat. Ann. § 81-1302(b) (Supp. 1985),

which provides, in pertinent part:

> The term "employee" shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be included in the definition of "employee" by filing written notice thereof with the Division of Worker's Compensation.

The notice required under § 81-1302(b) is filed with the Commission on a form known as an A-18. Appellant never filed an A-18, either at the time of, or subsequent to, the issuance of the policy. However, he contends he was not required to file the form because of the following language contained in Ark. Stat. Ann. § 81-1320(a) (Supp. 1985):

> Provided, however that *any officer of a corporation or self-employed employer* who is not a subcontractor and who owns and operates his own business may by agreement or contract exclude himself from coverage or waive his right to coverage or compensation under the Act. [Emphasis added.]

Gilbert contends the term "self-employed employer" includes sole proprietors and he would therefore be eligible under the Act unless he waived coverage. He submits there is a conflict between the two statutes and the conflict should be resolved in his favor since he is the claimant. We find no conflict between the two statutes and affirm the Court of Appeals.

There is no definition in the Workers' Compensation Act of "self-employed employer," but the act, its history and our case law satisfy us that as used in § 81-1320, that phrase refers to corporate officers and does not include sole proprietors.

There was no express coverage of sole proprietors or partners until the 1979 amendment of § 81-1302 quoted above. Prior to that amendment, we held that sole proprietors and partners were not covered under the Act and one could not, as a sole proprietor or partner, qualify as an employee for coverage. Corporate officers however, could qualify. Unlike officers of a corporation, sole proprietors and partners are not separate entities and are in actual possession of the powers of the employer. *Brinkley Heavy Hauling Co.* v. *Youngman*, 223 Ark. 74, 264 S.W.2d 409 (1954). We concluded in *Brinkley* that, "For a person to be at once an

employer and an employee would manifestly involve the contradiction of liability to himself."

The two statutory provisions at issue in this case were passed subsequent to the *Brinkley* decision. The amended provision of § 81-1320, quoted earlier, was passed in 1971. The emergency clause to that amendment stated:

> It is hereby found that the present workers' compensation laws provide for coverage of self-employed employers, and that clarification thereof is necessary to enable officers of a corporation to exclude themselves from coverage under workers' compensation laws. . .

The 1979 amendment to § 81-1302 was added to the statute with the following emergency clause:

> It is hereby found and determined by the General Assembly that under the present workers' compensation law a sole proprietor or partner is not eligible to obtain compensation coverage for himself; that the inability to obtain such coverage is creating a serious hardship of such sole proprietors and partners as well as general contractors for whom they provide services; that this Act is designed to alleviate this problem by enabling such person to obtain workers' compensation coverage and should be given effect immediately.

Given the interpretation of the act prior to these amendments and reading the amendments together, along with the respective emergency clauses, it is clear that the term self-employed employer as used in § 81-1320 is surplusage—a synonym for corporate officers—and does not include sole proprietors and partners. Our prior interpretation of the Act in *Brinkley* did not find sole proprietors or partners eligible under the act and if they were to have been included within the term self-employed employers in the amendment to § 81-1320, there would have been no reason to later amend § 81-1302 to specifically provide for their eligibility. Furthermore, the legislature specifically stated in the emergency clause to the § 81-1302 amendment, that prior to that amendment sole proprietors and partners were not covered under the act. As there was no question that Gilbert was a sole proprietor, he would not fall within the provisions of § 81-1320,

but rather would be subject to the provisions of § 81-1302.

[redacted] There was some confusion in the arguments by both parties as to the effect of coming within the provisions of § 81-1320, and we point out the purpose of that statute for clarification. "This section was intended to protect employees against the archaic procedure so prevalent in the early history of Workers' Compensation Law, when unscrupulous employers were able to avoid compensation liability by the simple device and procedure of having the employee sign a contract waiving all rights to compensation in consideration of being employed." *Bryan* v. *Frod, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969). The amendment to this statute in 1971 allowed certain persons in executive positions to waive coverage, but the implication is clear—the statute is designed for permissive waiver of coverage by executives and it does not confer employee status on such executives automatically. Whether a corporate officer is an employee for the purposes of the act is to be determined by the nature of the work and the circumstances of each case. *Fraternal Order of Eagles* v. *Kirby*, 6 Ark. App. 198, 639 S.W.2d 529 (1982); *Continental Insurance Company* v. *Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ark. App. 1980). While we have no cases on this point, it would seem that under § 81-1302, one claiming eligibility for coverage as a sole proprietor or partner, would not automatically be covered by simply electing coverage, but in a particular case would have to show that he was in fact an employee.

Having determined that Gilbert does fall within § 81-1302, the remaining question is whether filing the A-18 form with the Workers' Compensation Commission is essential. Gilbert suggests it is not and there is some authority for this view. See, Larson, Workmen's Compensation, Vol. 4, § 92.25. However, we do not have to reach that question because even if Gilbert had filed, and was eligible for coverage under the Act, insurance coverage was never obtained.

Gilbert had a number of insurance policies, both personal and business, that he had obtained through an independent agent, Mike Powers. Gilbert decided he needed workers' compensation coverage and contacted him. Powers obtained coverage for Gilbert's business with Insurance Company of North America,

the predecessor in interest to CIGNA, through an assigned risk pool.

Powers testified he did not act as agent for CIGNA and had no authority to bind that company. He filled out the application form for Gilbert and signed his name to save time. In response to a question asking whether Gilbert wanted to be covered individually by workers' compensation insurance Powers answered "no." Powers testified he was in a hurry to get the application in and could not recall anything about checking the box or discussing coverage with Gilbert. Gilbert testified that he specifically requested that he get coverage for himself as well as his workers.

From the record before us there was no agency relationship between Powers and the insurance company. The evidence showed that the insurance carrier came from the assigned risk pool as provided by Ark. Stat. Ann. § 81-1309. In a similar case cited by appellee insurance company, we held that an agent securing coverage through an assigned risk pool, was not an agent for the carrier that was assigned coverage. *Manufacturers Insurance Co.* v. *Hughes*, 229 Ark. 503, 316 S.W.2d 827 (1958).

In that case we found a member of the assigned risk plan for automobile insurance did not take on an independent agent who obtained the coverage, as its own agent. We found language in the application and the regulations of the Insurance Commission that indicated such an agent was that of the insured. But we went on to say that this was in accord with reason and logic. "To hold otherwise would have the effect of making each licensed casualty insurance agent in the State of Arkansas, the potential general agent of every casualty company doing business in the state. How can one be a general agent for, issue a policy, or bind, a company that he has never heard of?"

On that basis, and with no evidence to the contrary, we find that CIGNA, as a member of the assigned risk pool, did not take on Powers as its agent and was not bound by anything Powers did or did not do. The insurance company therefore has no obligation to honor a claim for which it was never bound by contract for insurance coverage.

Affirmed.

GLAZE, J., not participating.

Gail GLADDEN *v.* ARKANSAS CHILDREN'S HOSPITAL, Cindy VAN WINKLE and Larry WOODARD
and
Loretta SAMPLES *v.* SALINE MEMORIAL HOSPITAL

86-199 & 86-201 728 S.W.2d 501

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Jim O'Hara, for appellants.

Friday, Eldredge & Clark, by: *James W. Moore* and *Michael S. Moore*, for appellee Arkansas Children's Hospital.

Joe Kelley Hardin, for appellee Saline Memorial Hospital.

STEELE HAYS, Justice. These cases, *Gladden* v. *Arkansas*

Children's Hospital, et al., and *Samples* v. *Saline Memorial Hospital* are certified to us by the Court of Appeals under Rule 29(4)(b) and are consolidated for purposes of appeal. We are again asked to modify the employment at will doctrine. Neither case squarely presents the issue which we said in *Gauldin* v. *Emerson Electric Co.*, 284 Ark. 149, 680 S.W.2d 92 (1984) and *Jackson* v. *Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984) we would reexamine in light of current law, because in neither case was the employment for a definite term nor was there an express agreement that an employee would be dismissed only for cause. However, we take this opportunity to more fully explain our position with respect to the at will rule.

Samples v. Saline Memorial Hospital

Appellant Loretta Samples began working as a nurse at Saline Memorial Hospital in 1981. She was given a hospital manual dealing with a wide variety of administrative and personnel policies. A provision on probation stated that "no rights are guaranteed" during a six month probationary period and a provision on termination stated, "any of the following items constitute grounds for termination." The list contains thirteen grounds ranging from public drunkenness to insubordination, including "chronic tardiness and/or absenteeism." Two written warnings and two suspensions without pay were required before termination for absenteeism.

On a Monday afternoon in April, 1985 Ms. Samples was called to the office of the hospital controller, Ron Morris, where she was handed a check and told she was discharged for absenteeism. Ms. Samples protested the allegation and went to the office of the hospital administrator, Mr. Busby. Busby told her he would talk with Morris, that she should go home and wait for him to call. Busby called that afternoon to say she was reinstated, subject to a ninety day probation, and to report to work the next morning. On Tuesday morning Ms. Samples called Morris to say she was not well enough to come in. She described his attitude as entirely cordial and he told her the severance check would be voided. On Wednesday Ms. Samples spent most of the day trying to meet with Busby and Morris. When she finally saw Morris he told her Busby had overturned his decision and decided to reinstate her on ninety days probation. When Ms. Samples again

denied being absent Morris referred her to Busby and she and Busby resumed the discussion with no understanding being reached. Ms. Samples persisted in her efforts to see Mr. Busby and on Friday she was told she could "either quit, or be fired or be on ninety days probation." When Ms. Samples refused to accept probation Mr. Busby told her she left him no choice but to terminate her.

Ms. Samples filed suit against the hospital for $50,000 for past and future wages, alleging that her discharge was arbitrary and in bad faith and constituted a breach of her employment contract. At the close of the plaintiff's proof, Saline Memorial Hospital moved for a directed verdict which the trial court granted. Ms. Samples has appealed. We affirm the trial court.

In the foregoing statement of facts we have observed the rule that on appeal from a directed verdict we view the facts most favorably to the appellant. *Goodnight* v. *Richardson*, 286 Ark. 38, 688 S.W.2d 941 (1985); *Stalter* v. *Coca-Cola Bottling Co.*, 282 Ark. 443, 669 S.W.2d 460 (1984).

On appeal Ms. Samples contends the personnel policy manual of the hospital constitutes a contract. She relies on *Toussaint* v. *Blue Cross and Blue Shield*, 292 N.W.2d 880 (Mich. 1980), *Pine River Bank* v. *Metille*, 333 N.W.2d 622 (Minn. 1983), *Weiner* v. *McGraw-Hill, Inc.*, 443 N.E.2d 441, 33 A.L.R. 4th 110 (1982), *Yartzoff* v. *Democrat Herald Publishing Company*, 576 P.2d 356 (Or. 1978), *Wagner* v. *Sperry Univac*, 458 F. Supp. 505 (E.D. of Pa. 1978) and *Osterkamp* v. *Arkhola Mfg., Inc.*, 332 N.W.2d 275 (S.C. 1983). But in those cases the discharge was in direct violation of an express provision of a personnel manual. In *Toussaint* the manual announced a policy of termination "for just cause only." In *Weiner*, "for just and sufficient cause only." In *Osterkamp*, "not without just cause." In *Metille* discharge was subject to review by the Executive Officer. In *Yartzoff*, the manual assured the employee of written warning of unsatisfactory job performance and two temporary suspensions before discharge. In *Wagner*, a reduction in force was to be governed by seniority in determining who would be laid-off and Wagner's discharge violated that provision.

We need not decide whether the hospital's manual constituted an employment contract, as we find no proof to

support the allegation the manual was breached. Ms. Samples submits the hospital promised to discharge her *only* for one of the thirteen reasons listed in the section on termination. We find no such provision. The manual simply lists conduct which could result in termination, with no implications that those infractions alone constitute cause for discharge. That does not meet what we have said we were willing to review. See *Bryant* v. *Southern Screw Machine Products Company, Inc.*, 288 Ark. 602, 707 S.W.2d 321 (1986).

Ms. Samples also contends the hospital breached provisions of the manual guaranteeing certain steps would be followed before discharge for absenteeism. That might be said of the attempted discharge by Morris, but that was promptly rescinded by Busby and Ms. Samples was reinstated subject only to a ninety-day probationary period. The manual gave the hospital the power to place an employee on disciplinary probation at any time. Moreover, the manual also provided that an employee who is promoted or transferred to another position must complete a six-month probation and Ms. Samples had been promoted from D.R.G. Code to Utilization Review Coordinator five months earlier. In sum, there was no proof that the hospital failed to substantially comply with the provisions of the manual in placing Ms. Samples on probation. See *Erickson* v. *Griffin*, 277 Ark. 433, 642 S.W.2d 308 (1982).

Gladden v. Arkansas Children's Hospital

After some 18 month's employment, appellant Gail Gladden was terminated in August, 1984 by Arkansas Children's Hospital. Initially Mrs. Gladden filed suit based on the tort of outrage against the hospital and against her supervisors, Cindy Van Winkle and Larry Woodard, alleging nightmares, crying spells, anxiety and depression resulting from wrongful discharge. She asked for compensatory damages of $50,000 and punitive damages of $50,000. The defendants moved for partial summary judgment, which was granted, and Mrs. Gladden amended her complaint to allege that personnel regulations of the hospital constituted a contract of employment between the parties which was breached by the defendants. The tort claim was not pursued. The defendants again moved for summary judgment and the motion was granted.

On appeal Ms. Gladden proposes that the employment at will doctrine be modified "to allow a written contract of employment to be enforced which limits the right of an employer to discharge an employee, in the absence of a definite term of employment."

Discussion

It might be well to note at the outset that the claim of wrongful discharge in the context of these cases is readily distinguishable from *M.B.M.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1981) where, without deciding the issue, we conceded merit in the argument that where an employee is discharged in violation of a well established public policy the law recognizes a cause of action. *Counce*, p. 273.

In *Griffin* v. *Erickson*, 277 Ark. 433, 642 S.W.2d 38 (1982) dictum of the opinion stated that the employment at will doctrine is deeply embedded in our case law. *See St. Louis I.M and S.R. Co.* v. *Matthews*, 64 Ark. 398, 42 S.W. 902 (1897); *Petty* v. *Missouri Pacific Railway Company*, 205 Ark. 990, 167 S.W.2d 895 (1943); *Tinnon* v. *Missouri Pacific Railroad Co.*, 282 F.2d 773 (1960); *Smithey* v. *St. Louis Southwestern Railway Co.*, 237 F.2d 637 (1956), and *Roberts* v. *Thompson*, 107 F. Supp. 775 (E.D. Ark. 1952). *Griffin* further stated that the doctrine recognizes the right of *either party* to terminate at will even where the conditions of employment are that an employee would not be discharged except for good cause, quoting from *St. Louis I.M. and S.R. Company* v. *Matthews, supra.*

In cases following *Erickson* v. *Griffin*, we expressed a willingness to reexamine the principle in the light of more recent trends in the law. See *Gauldin* v. *Emerson Electric Co.* and *Jackson* v. *Kinark Corp., supra.* But we have said as well that the review will be based on employment for a particular length of time or where an employee is discharged arbitrarily or in bad faith in violation of an agreement to discharge only for cause. *Bryant* v. *Southern Screw Machine Products Company, Inc.*, 288 Ark. 601, 707 S.W.2d 321 (1986). *Gauldin* v. *Emerson Electric Co., supra.*

Neither appellant claims she was employed for a definite length of time. Both contend the personnel manuals of the

hospitals limit the right to discharge except for cause. We disagree. While the manuals contain provisions describing methods for dismissal under certain circumstances and specifying kinds of conduct that could result in summary dismissal, they do not contain provisions that an employee will not be discharged except for cause. That being so, the cases do not present the issues we defined.

[redacted] We do, however, believe that a modification of the at will rule is appropriate in two respects: where an employee relies upon a personnel manual that contains *an express provision* against termination except for cause he may not be arbitrarily discharged in violation of such a provision. Moreover, we reject as outmoded and untenable the premise announced in *St. Louis Iron Mt. Ry. Co.* v. *Matthews*, 64 Ark. 398, 42 S.W. 902 (1897), that the at will rule applies even where the employment agreement contains a provision that the employee will not be discharged except for cause, unless it is for a definite term. With those two modifications we reaffirm the at will doctrine.

[redacted] We recognize that these cases bear some resemblance to *Jackson* v. *Kinark Corp., supra*, where we reversed the granting of summary judgment for a fuller development of the factual issues, noting a "possible implication" from Kinark's manual that once probation was ended, an employee could be discharged only for cause. But we have considered several employment cases since *Jackson* and we realize *Jackson* may have given the impression that an implied provision would suffice. We have come to the conclusion that an implied provision against the right to discharge is not enough. The firm rule at common law is that either party can terminate at will and while the rule has been criticized, 24 *Arkansas Law Review* 729, 93 *Harvard Law Review* 1816, we are unwilling to replace it with a rule that subjects the employer to suit for wrongful discharge whenever an employee is terminated.

[redacted] As neither manual contains an express provision that discharge will not be without cause we find no error in disposing of the cases by summary judgment and directed verdict.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. This is the appropriate time to keep our promise made in *Jackson* v. *Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984). After three years and several cases, we are again asked to soften the harshness of our prior decisions concerning the common law doctrine of "employment-at-will." If we are ever to recognize and alter the harsh and unjust results of our past decisions, it should be now.

After the abolishment of slavery in 1865 the employment relationship became known as "master-servant." As late as 1968 this Court determined that a "servant" is an employee whose physical conduct is subject to the master's right of control. *Hinson* v. *Culberson-Stowers Chevrolet, Inc.*, 244 Ark. 853, 427 S.W.2d 539 (1968). We have now elevated the relationship to one of "employer-employee." *Sandy* v. *Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976).

Our existing strict adherence to the employment-at-will doctrine is archaic and in need of revision. If an employee agrees to work and be bound by conditions and restrictions set out in a policy manual or employee handbook prepared by the employer, the employer should also be bound by the same guidelines. There is no equitable or just reason why an agreement such as this one should not be enforced. Our prior decisions have allowed the employer to do as he wishes in the employment relationship except that we have recognized that the employee has the right to quit at will. The employee's right to quit at will is an unequal exchange for all he gives up for that single right. It is time to balance the equities.

In the present case Loretta Samples seeks only to have her contract of employment construed in accordance with the written declarations of the employee handbook. This is not too much to ask. According to testimony presented at the trial both parties considered these written terms to be binding. At the very least there was a jury question presented at the trial level. In *Jackson* we remanded the case for further proceedings. *Jackson* involved a fact situation almost identical to the present case.

We have said in the past that there must be mutuality of obligation to support the existence of a contract. *J.L. McEntire and Sons, Inc.* v. *Hart Cotton Company, Inc.*, 256 Ark. 937, 511 S.W.2d 179 (1974). In the present case the pay received by the

appellant for her work is ample consideration from the appellee. The employer received the following consideration from the appellant: (1) labor needed to efficiently operate the hospital; (2) dependable performance of her duties; (3) a probationary period of six months before permanent employment to determine her competence and dependability; (4) the right to discharge her if she did not abide by the rules stated in the manual; (5) the right to counsel and reprimand her or take other disciplinary action; (6) her participation in the retirement plan after one year of employment; (7) her signature acknowledging receipt and reading of the manual; and (8) a promise of a fifteen day written notice of intention to resign. It would appear that by requiring an employee to read and sign the policy manual at the beginning of employment, that such policies became terms of the employment contract. In addition, the employees were furnished copies of all changes in the handbook.

This manual was written and printed by the employer. At page three it stated: "No rights are guaranteed under any personnel policies until the probationary period is completed." There was no reason to include this statement unless it meant that after six months the rights stated in the manual were to become enforceable. The heart of the problem before us is on pages sixty-five and sixty-six of the manual where it purports to implement an attendance policy. Step one provides that counseling will be given to any employee who has three incidents of unauthorized absences within a period of twelve weeks. Step two makes the same provisions for two or more additional incidents within the following twelve weeks. Step two makes the same provisions for two or more additional incidents within the following twelve weeks. Step three calls for a three day suspension, without pay, if there are two additional unauthorized absences. Step four provides for a five day suspension, without pay, for the next two days absence during the next twelve weeks. Step five provides for termination if there are two or more unauthorized absences following step four.

It is mandatory that employees comply with all portions of the manual. Employees read the manual at the time they are hired and sign a form stating that they have read it. The policy manual requires employees to give a written notice before resigning. The hospital administrator testified that he expected

employees to follow the terms of the manual and that employees are justified in thinking that management will also follow the same policies.

The only way for the appellee to avoid the terms of the contract is to hide behind one of the six month probation clauses. There are two such clauses contained in the manual. The first one applies to initial periods of the employment and the second one applies to periods following a transfer or promotion. The second period of probation is for the purpose of evaluating the employee's performance of new job responsibilities. The manual states: "During *this* probationary period, the employee will receive all benefits he/she was entitled to *before* the transfer or promotion [Emphasis added]." Therefore, it is reasonable and logical to interpret the second or successive period of probation as applying only to the new responsibilities of the position to which the employee has been transferred or promoted. To construe it otherwise would, in effect, deny the employee the rights acquired upon the completion of the initial six-month probation period.

The appellant did not receive the consultations as provided in the policy manual. In fact there is little, if any, proof that she violated policy. It is undisputed that she did not receive any of the benefits mandated by the five-step procedure. This five-step procedure was a part of the manual and was agreed upon before her employment began. The personnel manager for the appellee stated that after the six-month probation period the employees are guaranteed the rights stated in the manual. She also testified that employees were not told they could be fired for no reason.

The employee, the employer's administrator, and the personnel manager all testified that the manual was binding upon both parties. The hospital administrator testified that he had never told an employee that he could be fired for no reason. It is logical then to assume that an employee could not be terminated without just cause. I must, therefore, conclude that there was a jury question presented and that the trial court improperly took away the jury's right to decide the facts presented in this case. This is the appropriate case to change the harsh consequences of the common law doctrine of employment-at-will. The majority opinion is a well reasoned and well written opinion except for the disappointing conclusion and result.

Although this dissent is directed to *Samples*, it applies with equal force to *Gladden*. I would reverse and remand for a trial on the merits of the case.

Avery Nathan RICHARDSON *v.* STATE of Arkansas

CR 86-223 728 S.W.2d 189

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Mark A. Colbert, for appellant.

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

Gen., for appellee.

TOM GLAZE, Justice. Appellant raises two points in his appeal from convictions for first degree murder and arson. First, he contends the trial judge erred in denying his motion for a change of venue. Second, appellant argues the court violated A.R.E. Rules 901 and 403 in admitting certain testimony. We disagree and, therefore, affirm.

Appellant has been tried and convicted three times on charges stemming from the murder of his uncle, Lester Richardson, and the arson of his home. All of the trials took place in DeWitt, the county seat of the Southern District of Arkansas County, and appellant received the maximum term each time, forty years for murder and twenty years for arson.

Before trial, appellant moved for a change of venue under Ark. Stat. Ann. § 43-1501 (Repl. 1977), alleging "that the minds of the inhabitants of the Southern District of this county are so prejudiced against the defendant that a fair and impartial trial cannot be held in said District." Appellant offered supporting affidavits from Thaddus Parker and Krista Lynch, jurors at his previous trial. In further support of his motion, appellant's attorney submitted that a poll he took of prior jurors indicated a majority felt appellant could not get a fair trial in DeWitt but were unwilling to sign affidavits to that effect because they did not want to "help the defendant" in any manner. After reviewing the affidavits and hearing the testimony of the affiants, the trial judge denied the motion, finding there was no evidence of inflamed feelings against appellant.

A change of venue should be granted only when it is clearly shown that a fair trial is not likely to be had in the county. The burden of proof is on the defendant, and the decision of the trial court will be upheld unless it is shown there was an abuse of discretion in denying the motion. *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *see also Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986).

While appellant offered affidavits of Parker and Lynch to support his motion, their testimony at the pre-trial hearing undermined that contained in their affidavits. Parker testified that he did not read the affidavit he signed, and thought his

signing it meant only that he had no objection to having the trial in Stuttgart, the county seat of the Northern District of Arkansas County. Parker further stated that he thought twelve jurors could be found who would hear the case fairly. While Lynch testified that she thought too many people had formed an opinion on appellant's guilt or innocence and that the case should be moved to Stuttgart, she also said she had not discussed appellant's case with anyone and thought it would be possible to find twelve jurors in the Southern District who did not know anything about the case. Lynch further stated she had not encountered any prejudice or inflamed feelings against appellant anywhere in "this county." In an effort to demonstrate the difficulty of obtaining affidavits, appellant offered the testimony of August Gardner, one of the former jurors who refused to sign an affidavit. However, here again, the witness testified that he did not think the minds of the people of Arkansas County were prejudiced against appellant and thought twelve jurors could be obtained from south Arkansas County as well as from the north part of the county.

[redacted] We also have held that there can be no error in the denial of a change of venue if an examination of the jury selection shows that an impartial jury was selected and that each juror stated he or she could give the defendant a fair trial and follow the instructions of the court. *Berry, supra*, and *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982). Here, the voir dire examination of the jurors reveals that those chosen testified they had no preconceived notions about the case and could base their decision on the evidence presented and the instructions from the court. Additionally, the abstract of record shows that appellant used only seven of his eight peremptory challenges—a further indication that the judge's denial of a change in venue was proper.

In conclusion on the first point, appellant argues he could not make the required showing of prejudice because most people refused to sign affidavits. He relies on *Hildreth* v. *State*, 214 Ark. 710, 217 S.W.2d 622 (1949), but there, this court reversed the trial court because it refused to hear testimony on why no affidavits in support of the venue change could be obtained. Here, appellant presented affidavits, the court heard the testimony, participated in some of the examination, and denied the motion. The *Hildreth* case simply is inapposite to the situation here.

For his second point, appellant urges the trial court committed reversible error when it admitted testimony in which the witness could not identify one of two voices he heard. Delmar Schorstein, Lester Richardson's neighbor, testified that a few months prior to the fire, he heard a loud argument going on at Lester's house. Schorstein said one voice, the loudest one, was appellant's, and he assumed the other voice was that of the victim who, the witness presumed, was inside the house.

Appellant objected on the basis of A.R.E. Rule 901, arguing that there was an insufficient basis for authentication and identification of Lester Richardson as being the other party to the conversation. He also reasoned that the testimony should not have been admitted because its prejudicial effect outweighed its probative value. A.R.E. Rule 403.

The trial judge never ruled on appellant's objection. 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. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

Even if it could be said that appellant had done all he could to obtain a ruling so as to have preserved this issue on appeal, we would not reverse the trial court's admission of Mr. Schorstein's testimony because, if the court erred in this respect, it was harmless. The State offered Schorstein's testimony to show animosity existed between the appellant and his uncle two months before the uncle's death. Other, more compelling, testimony was given on this same point by Schorstein's wife, Irene. Mrs. Schorstein testified that, the day before the fire, appellant told her he might have to kill his uncle. Obviously, Mr. Schorstein's testimony pales in comparison with his wife's revelation concerning appellant's expressed ill will towards his uncle. Thus, even if we agreed that Mr. Schorstein's testimony should have been excluded, the admission of that testimony was non-prejudicial error which is not a predicate for reversal. *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 101 (1986).

Finding no abuse of discretion, we affirm.

Affirmed.

Steven D. HILL *v.* STATE of Arkansas

CR 85-212 728 S.W.2d 510

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Charles L. Carpenter, Jr., for appellant.

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

PER CURIAM. This matter is before us on a petition for permission to proceed under A.R.Cr.P. Rule 37. The appellant was convicted of capital murder and sentenced to death. His conviction was appealed to this Court and affirmed in *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied, ___U.S.___, 107 S. Ct. 1331 (1987). The petition seeks permission to proceed under Rule 37 on the ground of ineffective assistance of counsel, at both the guilt phase and penalty phase of the trial.

In order to be entitled to proceed pursuant to Rule 37 the petitioner must show that defense counsel was not only ineffective, but that such ineffectiveness deprived him of a fair trial and produced an outcome which cannot be relied on as just. *Strickland* v. *Washington*, 466 U.S. 688 (1984). There is a strong presumption that the conduct of defense counsel is within the range of reasonable professional assistance. Allegations of mistakes in trial tactics and strategy are not normally grounds upon which we can grant post-conviction relief. *Leasure* v. *State*, 254 Ark. 961, 497 S.W.2d 1 (1973). Mere error or unsound advice do not necessarily require a new trial. *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983).

The first allegation concerning ineffective assistance of counsel is that counsel failed to file a motion to prohibit the state from seeking the death penalty because it is disproportionately imposed when the victim is white. This type motion is based upon the theory that blacks are disproportionately sentenced to death when the victim is white. The United States Supreme Court has recently rejected this argument. See *McCleskey* v. *Kemp*, ___ U.S. ___, 107 S. Ct. 1756 (1987). Moreover, in the present case, both petitioner and the victim were white.

The second allegation of ineffective assistance of counsel is the failure to call witnesses in the penalty phase of the trial.

Petitioner states that certain named witnesses would have "presented the varying conduct and circumstances of Hills' upbringing and current age for the jury to properly weigh the mitigating factor." Included among these witnesses was Dr. Roy Ragsdill, a psychologist, who would have testified that he diagnosed Hill as having an antisocial personality disorder. The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied petitioner a fair trial. *Isom* v. *State*, 284 Ark. 427, 682 S.W.2d 755 (1985). The thrust of this argument was to emphasize the youthfulness of the petitioner. The petitioner's age was already before the jury. The petitioner has failed to state what the witnesses would have testified to if called, or explain why this testimony would have been important. Therefore, this allegation of ineffectiveness is not sufficient to cast doubt on the outcome of the trial.

The chief argument on the above assertion is that it cannot be determined whether prejudice resulted from the failure to call these witnesses unless there is a hearing to develop their testimony. Rule 37 is not an exploratory procedure nor is it a license to take depositions. For the reasons stated earlier, the petitioner has not demonstrated that prejudicial error occurred as a result of his counsel's failure to call these witnesses.

Another allegation is that the prosecutor was allowed to use the wrong gun in his argument and demonstration to the jury. This matter was disposed of on the first appeal.

[redacted] Another argument is that petitioner was not advised of his right to testify during the penalty phase. We stated in *Isom*, supra:

> Nevertheless a petitioner must do more than simply state that he was not allowed to testify. He must state specifically what the contents of his testimony would have been and demonstrate that his failure to testify resulted in actual prejudice to his defense.

The petitioner has not demonstrated that his failure to testify resulted in actual prejudice to him.

The final argument is that counsel was ineffective in failing

to open the record to include a petition for writ of error coram nobis and the "confession" of a co-defendant that he, not Hill, shot the victim. Even if the record on appeal did not include this material, the petitioner has failed to show any prejudice resulted therefrom because such a petition was filed, and considered and denied by per curiam dated December 9, 1985. See *Hill* v. *State*, 289 Ark. at 398.

The petition to proceed pursuant to A.R.Cr.P. Rule 37 fails to demonstrate that the petitioner did not receive a fair trial. Most of the matters alleged in the petition were considered, or could have been considered, on direct appeal. We have discussed all of the other allegations and find that there is no basis for granting a hearing on the petition.

Petition denied.

Lee Duane JACOBS *v.* STATE of Arkansas

728 S.W.2d 192

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Naif Samuel Khowry, for appellant.

No response.

PER CURIAM. Appellant, Lee Duane Jacobs, by his attorney, has filed for a rule on the clerk.

His attorney, Naif Samuel Khoury, 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.

Mark Allen MOCK *v.* STATE of Arkansas

CR 87-66 728 S.W.2d 513

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Robert E. Irwin, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

PER CURIAM. Mark Allen Mock was convicted of possession of a controlled substance in the Pope Circuit Court, receiving a ten year sentence. The judgment of conviction was upheld by the Court of Appeals on February 18, 1987. Pursuant to A.R.Cr.P. Rule 37.2 Mark Allen Mock brings this petition for permission to file for post conviction relief under Rule 37 based on ineffective assistance of counsel. We find no merit in his arguments.

The petition consists of two general allegations: 1) that a witness for the state was permitted to testify to prior amphetamine transactions with petitioner, but that defense counsel did

not object or move for a mistrial until prejudice had resulted; and 2) that defense counsel objected to testimony by a witness at a suppression hearing who refused to answer questions based on self-incrimination but because counsel failed to preserve the point for review the Court of Appeals rejected the argument that Mock was denied the right to confront the witnesses against him.

Counsel is presumed to be competent and to overcome that presumption the petitioner must show by clear and convincing proof that some prejudice resulted which deprived him of a fair trial. *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983). Bare allegations that counsel failed to object to certain questions, or failed to preserve some issue for review do not suffice. Id. The allegations of this petition demonstrate neither ineffective assistance of counsel nor prejudice so great as to deprive the accused of a fair trial. Accordingly, the petition is denied.

Larry Jack NATION *v.* STATE of Arkansas

CR 87-40 & CR 87-41 728 S.W.2d 513

Supreme Court of Arkansas
Opinion delivered May 4, 1987

Appellant, pro se.

No response.

PER CURIAM. Appellant Larry Jack Nation pleaded guilty in 1983 to burglary and two counts of theft of property in cases No. CR 82-6 and CR 82-170. The circuit court suspended imposition of sentence in both cases. After he violated the conditions imposed when the guilty pleas were entered, appellant was sentenced to a total of forty years imprisonment. He appealed and this court affirmed. *Nation* v. *State*, 283 Ark. 250, 674 S.W.2d 939 (1984). In 1985, appellant filed in circuit court a petition under Criminal Procedure Rule 37 to vacate the guilty pleas. He also filed a petition and amended petition pursuant to Rule 37 in this court, alleging that the guilty pleas should be vacated. We denied the petition. *Nation* v. *State*, CR 84-28 (Ark. Feb. 10, 1986) (Order denying petition).

In November 1986, Nation filed in circuit court a petition for postconviction relief which he styled a "petition for writ of error coram nobis." The petition, which covered both CR 82-6 and CR 82-170, again raised the allegations already raised in this court under Rule 37 with additional allegations which were also cognizable under Rule 37. As permitted by *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984), the trial court treated the error coram nobis petition as a Rule 37 petition since the grounds in the petition were covered by Rule 37 and were not within the purview of an error coram nobis action. *See Williams* v. *State*, 291 Ark. 255, 724 S.W.2d 158 (1987); *see also Williams* v. *State*, 289 Ark. 385, 711 S.W.2d 479 (1986). The trial court denied relief, and appellant appealed in each case. He now seeks appointment of counsel to represent him in the appeals from the denial of the petition.

The motions for appointment of counsel are denied and the appeals dismissed since it is clear that there is no merit to them. *See Baker* v. *Lockhart*, 288 Ark. 91, 702 S.W.2d 403 (1986). There are several reasons why the relief sought should be denied. The most immediately apparent is that the petition filed in circuit court was procedurally barred by Rule 37.2(b). Rule 37.2(b) provides that all grounds for relief not raised in the original or amended Rule 37 petition are waived, unless the court which denied the original petition specifically did so without prejudice to filing a subsequent petition. This court denied

appellant's Rule 37 petition with prejudice; therefore, he was not entitled to file a second petition in this court or the trial court. The fact that he chose to label the petition a petition for writ of error coram nobis did not change the fact that the grounds raised were encompassed by Rule 37. *Walker* v. *State, supra.* A petitioner may not reassert issues or raise new ones which are properly addressed under Rule 37 by simply giving the petition a new name and filing it again.

Motions denied and appeals dismissed.

CARROLL COUNTY *v.* EUREKA SPRINGS SCHOOL DIST. # 21 and The CITY OF EUREKA SPRINGS

86-284 729 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 11, 1987

David S. Clinger, Prosecuting Attorney, and *Terri L. Harris*, Deputy Prosecuting Attorney, for appellant.

Epley, Epley & Castleberry, Ltd., by: *Alan D. Epley*, for appellees.

JACK HOLT, JR., Chief Justice. Carroll County brought suit against Eureka Springs School District # 21 and the City of Eureka Springs (both appellees referred to herein as Eureka Springs) to recover overpayments mistakenly made from county tax settlements. The Carroll County Chancery Court limited Carroll County's recovery to overpayments made within the three-year statutory period for implied contracts or liabilities. On appeal, Carroll County contends the five-year catch-all statute of limitations should apply. Eureka Springs cross appeals, urging dismissal of all claims, in that the county court is the only court with jurisdiction over a "county tax" matter, and Carroll County is not the real party in interest. The judgment is affirmed on both appeal and cross appeal.

Carroll County sought reimbursement of $21,953.53 from the school district and $1,972.93 from the City of Eureka Springs in the settlements for 1978 taxes collected in 1979; 1979 taxes collected in 1980; 1980 taxes collected in 1981; and 1981 taxes collected in 1982. As an affirmative defense, Eureka Springs pled

the three-year statute of limitations in Ark. Stat. Ann. § 37-206 (Repl. 1962). Eureka Springs also contested the chancery court's jurisdiction to hear a "county tax" case and alleged that the cities and school districts that were underpaid in the tax settlements were the real parties in interest under Ark. R. Civ. P. 17(a), rather than Carroll County.

The chancery court held that it had jurisdiction over the matter, that the county was the real party in interest, and that the three-year statute of limitation restricted Carroll County's recovery to overpayments made after July 1, 1981. We agree.

1. *CHANCERY COURT JURISDICTION*

Eureka Springs maintains that the county court was the only court with jurisdiction to hear this case under Ark. Const. art. 7, § 28, which gives county courts "exclusive original jurisdiction of all matters relating to county taxes." Although this case indirectly involves county taxes, this provision of our constitution should not be so broadly read as to prevent the recovery in chancery court of money that the county has mistakenly disbursed to Eureka Springs.

Eureka Springs cites cases which have protected the exclusive jurisdiction of county courts. These cases, however, were limited to issues concerning auditing, assessing and collecting county taxes. *Jackson* v. *Elder*, 187 Ark. 1094, 63 S.W.2d 991 (1933); *C.R. Burgess* v. *Four States Memorial Hosp.*, 250 Ark. 485, 465 S.W.2d 693 (1971). The chancery court relied instead on our decisions in *Marable* v. *State*, 175 Ark. 589, 2 S.W.2d 690 (1927) and *Big Gum Drainage District* v. *Crews*, 158 Ark. 566, 250 S.W. 865 (1923), in which we held that the original jurisdiction of equity to correct mistakes gives the chancery court jurisdiction in actions to recover county money mistakenly paid or withheld. Although these cases did not address the constitutional question raised here under art. 7, § 28, they are of precedential value as to the jurisdiction of chancery courts to correct mistakes.

In scrutinizing art. 7, § 28, we agree with the chancery court that this case does not fall under the county court's exclusive jurisdiction of matters involving "county taxes." After the county had completed the collection of the tax receipts and disbursed county funds to the various cities and school districts

within the county, an action to recover funds mistakenly paid to Eureka Springs was not merely a "county tax" matter as such, but rather a matter of overpayment which addresses itself to the chancery court's jurisdiction to correct mistakes.

2. *REAL PARTY IN INTEREST*

Eureka Springs asserts that under Ark. R. Civ. P. 17(a), the cities and school districts which should have received the funds are the real parties in interest rather than Carroll County. The chancellor accurately ruled that one "who mistakenly pays money to another is the real party in interest to maintain suit against the latter for the recovery of the money paid."

Inasmuch as the county had the responsibility to disburse the money to the entitled parties, it logically follows that the county can best discharge claims of those entitled to the funds Eureka Springs was ordered to return. In *House* v. *Long*, 244 Ark. 718, 426 S.W.2d 814 (1968), we said:

> The real property in interest, therefore, is generally considered to be that person who can discharge the claim on which suit is brought and not necessarily the person ultimately entitled to the benefit of the recovery.

Carroll County is the appropriate party to discharge the claim on which this suit is brought.

3. *STATUTE OF LIMITATIONS*

The two competing statutes of limitation are:

> 37-206. Actions which must be brought in three years — Contracts not in writing — Rent — Trespass — Libel — Injury to goods. — The following actions shall be commenced within three [3] years after the passage of this act, or, when the cause of action shall not have accrued at the taking effect of this act, within three [3] years after the cause of action shall accrue: First, all actions (of debt) founded upon any contract, obligation or liability, (not under seal [and not in writing]) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other State; (second, all actions upon judgments rendered in any court

> not being a court of record;) third, all actions or arrearages of rent (not reserved by some instrument in writing, under seal;) fourth, all actions (of account, assumpsit, or on the case,) founded on any contract or liability, expressed or implied; fifth, all actions for trespass on lands, or for libels; sixth, all actions for taking or injuring any goods or chattels.
>
> 37-213. Actions not otherwise provided for — Five years. — All actions not included in the foregoing provisions shall be commenced, within five [5] years after the cause of action shall have accrued.

On ruling the three-year statute of limitation applies, the chancellor relied primarily on *Futrall* v. *City of Pine Bluff*, 87 F.2d 711 (8th Cir. 1937) and *The Fidelity & Casualty County of N.Y.* v. *State*, 197 Ark. 1027, 126 S.W.2d 293 (1939). In *Futrall*, a bank mistakenly paid too much money to the city upon liquidation of the bank. The city raised the statute of limitations as a defense to the bank's action. In comparing these two statutes, the Eighth Circuit said:

> The meaning of these sections of the statutes of Arkansas must be determined from the decisions of the Supreme Court of that state. An analysis of such decisions as throw light upon the question here involved has convinced us that an action to recover money paid or obtained through an honest mistake of fact or law, in the absence of fraud, corruption or willful diversion, is an action founded upon implied contract or liability, not in writing, and must be commenced within three years.

In *Fidelity*, this court followed the *Futrall* rationale where an action was brought by the county prosecutor on the bond of the county treasurer, alleging that the treasurer had paid money from the county funds on invalid warrants. *In Board of Educ. of Ouachita County* v. *Morgan*, 182 Ark. 1110, 34 S.W.2d 1063 (1931) and *State, Use and Benefit of Garland County* v. *Jones*, 198 Ark. 756, 131 S.W.2d 612 (1939), this court also applied a three-year limitation to suits to recover money mistakenly paid. In *Morgan*, an excessive commission was paid to the county treasurer and was then improperly credited to the general fund rather than the school funds from which the commission was

taken. In an action by the school to recover the money from the general fund, the three-year limitation was applied by the trial court and we affirmed, stating:

> The next and last question of law arising out of the pleadings and agreed statement of facts is whether any part of appellants' cause of action is barred by the statute of limitations. It is conceded in the brief of appellants that the funds sought to be transferred to the county common school fund from the several county funds into which they were diverted, are not trust funds by virtue of an express trust. The general rule of law is that, while the statute of limitations will not run against an express trust until there has been a repudiation of the trust, the statute of limitations will run against implied, resulting and constructive trusts. There are some exceptions to the rule that the statute of limitations will run against implied, resulting and constructive trusts, but we think the instant case comes within the general rule and not within any exception thereto. The three years' statute of limitations provided for in § 6950 of Crawford & Moses' Digest is applicable to the claims of appellants for excess commissions and interest. It was not alleged in the complaint nor in the stipulated agreement of facts that funds claimed were wilfuly diverted by the officer apportioning them, hence § 6960 of Crawford & Moses' Digest, providing for a five-year statute of limitations, has no application to the instant case.

Eureka Springs cites several cases in support of its position that the five-year limitation should be used in this situation, including *Sims* v. *Craig County Treasurer*, 171 Ark. 492, 286 S.W. 867 (1926); *Yates* v. *State*, 186 Ark. 749, 54 S.W.2d 981 (1932); *Marable* v. *State*, 175 Ark. 589, 2 S.W.2d 690 (1927); and *Big Gum Drainage* v. *Crews*, 158 Ark. 566, 250 S.W. 865 (1923). The chancellor declined to follow these decisions, commenting that the question of whether the three or five-year statute of limitation was appropriate was not in issue in these cases. He also noted that these cases preceded *Fidelity* and *Morgan.*

[redacted] We find the chancellor was correct in characterizing this action as one falling within the implied obligation or liability

provisions of § 37-206 and that Carroll County could recover only for overpayments made during the three years before this suit was filed.

Judgment affirmed.

Buddy TOWNSEND *v.* STATE of Arkansas

CR 87-47 728 S.W.2d 516

Supreme Court of Arkansas
Opinion delivered May 11, 1987
[Rehearing denied June 15, 1987.]

Jeff Duty, for appellant.

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

JACK HOLT, JR., Chief Justice. Appellant, Buddy Townsend, challenges the jurisdiction of the circuit court, when hearing a misdemeanor appeal from the municipal court, to grant a monetary judgment for restitution in excess of the constitutional limit for municipal courts in civil cases. We hold that the circuit court acted beyond its jurisdiction and reverse and dismiss the monetary judgment. Otherwise, Townsend's conviction and sentence for driving while intoxicated and driving left of center

are affirmed.

Townsend's other arguments for reversal are that he was denied a speedy trial, that the trial court erred in allowing a police officer to testify as to what he had written on his report of the accident, and that the court should not have allowed two witnesses to give "opinion" testimony.

Townsend was found guilty of D.W.I. and driving left of center by the Siloam Springs Municipal Court. He was sentenced to one year in county jail, fined $1,000 and ordered to pay restitution of $5,894 to the victim of the automobile accident which resulted from his driving violations. Townsend appealed to the Benton County Circuit Court, where on trial de novo he was again found guilty in all particulars. The circuit court imposed the same sentence and fine, but entered a separate "civil judgment" increasing restitution to $25,877.25.

Arkansas Constitution art. 7, § 42 provides for appeal "from the final judgment of the justices of the peace to the circuit courts under such regulations as are now, or may be, provided by law." Jurisdictional limits for justice of the peace courts carry over to the municipal courts. Ark. Const. art. 7, § 43; Ark. Stat. Ann. § 22-709 (Repl. 1962).

Arkansas Stat. Ann. § 26-1308 (Repl. 1962), provides for appeal from justice of the peace courts to circuit courts to determine the cause "anew" on the merits. However, the jurisdiction of the circuit court is derived from and is dependent upon the appeal. The circuit court can render no judgment that the justice of the peace is not authorized to render. *Whitesides* v. *Kershaw & Driggs*, 44 Ark. 377 (1884). *See also Combined Insurance* v. *Dreyfus*, 244 Ark. 1011, 428 S.W.2d 239 (1968); *Markham* v. *Evans*, 239 Ark. 1154, 397 S.W.2d 365 (1965).

Townsend claims that the circuit court had no jurisdiction to render the civil judgment against him. To resolve this question, we must decide whether the judgment of the municipal court was in fact a "civil" judgment, and if so, was the municipal court authorized under its jurisdictional limit of $100 to render a judgment for restitution in the amount of $5,894.

The municipal court ordered Townsend to pay restitution under the authority of Ark. Stat. Ann. § 43-2351 (Supp. 1985),

which provides:

> If a defendant pleads guilty or is found guilty of a criminal offense, the trial court of criminal jurisdiction shall, in addition to imposition of sentence, enter a monetary judgment against the defendant in an amount of restitution or reparations from the offender to the victim that will totally or partially compensate the victim for his personal injury or loss of or damage to his property caused by the criminal act of the offender. The court shall specify the total amount to be compensated, the rate of compensation, if periodic payments are provided, to whom it is to be paid; and, if personal service to the victim is the compensation, establish a reasonable value or rate of value for the services rendered.

Section 43-2354 addresses the effect of the restitution judgment:

> The monetary judgment, as provided herein, shall become a judgment against the offender and shall have the same force and effect as any other civil judgment recorded in this State.

The state argues that the municipal court's constitutional limit on civil judgments does not apply in this instance because the municipal court was exercising its criminal jurisdiction when it found Townsend guilty of the criminal offenses and ordered him to pay restitution. We disagree. Section 43-2351 provides for the entry of a monetary judgment against the defendant in an amount that will compensate the victim for loss of or damage to property caused by the criminal act of the offender. Section 43-2354 states that this judgment shall have the same force and effect as any *other civil* judgment recorded in this state.

Although labeled "restitution," the money judgment assessed by the municipal court was in fact a civil judgment subject to the municipal court's jurisdictional limit of $100 for loss or damages to personal property. Ark. Const. art. 7 §§ 40 and 43. This court has no authority to construe a statute that is plain and unambiguous to mean anything other than what it says. *Hinchey* v. *Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987); *Weston* v. *State*, 258 Ark. 707, 528 S.W.2d 412 (1975).

The legislature obviously designated restitution as a civil judgment. We treat it accordingly and find that the municipal court, and therefore the circuit court on appeal, exceeded its jurisdiction. That part of the judgment as to restitution is reversed and dismissed.

Townsend also argues that he was denied his right to a speedy trial in both the municipal and circuit court trials. The applicable dates are as follows:

October 26, 1984	Date of arrest
June 5, 1985	Municipal court trial
July 2, 1985	Notice of appeal filed in circuit court
March 12, 1986	Circuit court trial

The state had eighteen months from Townsend's arrest to bring him to trial in circuit court. Ark. R. Crim. P. 28.1(c). He was tried in less than seventeen months in the circuit court, thus, there was no violation of Rule 28.1. Townsend has not argued that he was prejudiced by any delay.

Townsend next contends that the trial court erred in allowing the investigating police officer to testify as to what he marked on his accident report as contributing factors to the accident. When Townsend objected to the use of the report, the trial court ruled that the report could not be introduced into evidence, but that the officer could use it to refresh his memory. Townsend argues that we held in *Hogue* v. *Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985) that this is a violation of the hearsay rule, A.R.E. Rule 803. In *Hogue*, we simply stated that the officer could not testify from his writings as to what was told to him by persons with whom he spoke during his investigation. *Hogue* did not involve an officer refreshing his memory from notes as to what he observed at the scene, which is permissible. *Black and White, Inc.* v. *Love*, 236 Ark. 529, 367 S.W.2d 427 (1963).

Finally, Townsend argues the trial court erred in allowing two witnesses to give opinion testimony. One was an eye witness who was driving in front of Townsend prior to the accident. She testified she drove into the ditch alongside the road when

Townsend attempted to pass her immediately before the accident, and estimated Townsend's speed at more than seventy miles per hour. She determined Townsend's speed by comparing her speed of fifty miles per hour to the speed of Townsend's vehicle, which she said came up behind her very quickly. The witness was a mail carrier and said she drives more than 100 miles a day. The other witness was the investigating officer who testified that the road, which was straight and flat, did not play a part in the accident.

A lay witness may give testimony in the form of opinions or inferences if they are rationally based on the perception of the witness and helpful to a clear understanding of a fact in issue. A.R.E. Rule 701; *Smith* v. *Davis*, 281 Ark. 122, 663 S.W.2d 165 (1983).

We do not accept Townsend's statement, without explanation, that the testimony did not fall within Rule 701. The first witness was an experienced driver who was in a position to observe the speed of Townsend's vehicle relative to her own. The officer investigated the accident and observed the causes of the accident and the condition of the road. Their testimony was relevant in determining the extent of Townsend's fault and whether he "constituted a clear and substantial danger to himself and other motorists," our definition of intoxicated under Ark. Stat. Ann. § 75-2502 (Supp. 1985). The testimony was properly submitted.

Reversed in part and affirmed in part.

James SMITH *v.* STATE of Arkansas

CR 86-205 729 S.W.2d 5

Supreme Court of Arkansas
Opinion delivered May 11, 1987

Law Offices of Kevin Wyrick, by: *Matt Keil*, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. James Smith was convicted of rape and sentenced to life imprisonment. He raises two arguments on appeal: his confession should have been excluded, and the evidence of his guilt was insufficient. Smith concedes that if the confession is found to be admissible, there is sufficient evidence. We find the confession admissible and affirm his conviction.

Smith was arrested and jailed for loitering on April 4, 1986. Three days later, police officers questioned him about a rape that occurred on April 1, 1986. After he was advised of his rights and stated he understood them, he signed a waiver of rights form and then confessed to the rape. Smith now argues that his confession was not voluntary. He says he confessed because of threats made to him by police officers, and also he did not knowingly and intelligently waive his rights because of his low intelligence level, his lack of education and his inability to read.

Smith's confession was detailed. He stated he walked by the victim's home in Texarkana on March 30, 1986, and asked her for an Easter egg. He then went on his way. The next evening at approximately 11 p.m. he returned to the victim's house, saw a night light on and heard a fan blowing. He checked a window, and

it was locked; he then checked the back door, found it open, and entered the house. He was scared that the victim's husband might be there, so he got a knife from the kitchen. He saw the victim and her son asleep in a bedroom. He was scared to go into the room but remembered how his "old lady was messing around on him." This made him mad, so he entered the room with the knife in hand and touched the victim. She awoke, and he told her he was not going to hurt her; he just wanted to make love to her. He tried to put the knife down, but the victim grabbed it and cut her finger. He had sexual intercourse twice with her, and then he told her he was sorry. He also told her he loved her and wanted to marry her. He then left and went home.

In reviewing the admissibility of a confession on appeal, we consider the totality of the circumstances. *Stone* v. *State*, 290 Ark. 204, 718 S.W. 2d 102 (1986). Although Smith was found to have an IQ of 62 and to be functioning three levels below the average expected for his age, and had attained only a third grade education (although he finished 10 grades), the trial judge found that there was sufficient evidence that showed Smith understood his rights and what was happening. The officers denied Smith was threatened. The taped confession in the record appears to be spontaneous and unrehearsed; there is no hint of any heavy-handed or deceptive procedures.

The trial judge determines the credibility of the witnesses, and this was essentially a question of credibility. *Williams* v. *State*, 281 Ark. 91, 663 S.W.2d 700 (1983); *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987). We cannot say the trial judge was clearly wrong in determining the confession was voluntary.

At the *Denno* hearing and during the trial, Smith contradicted his confession. He said the officers made up what he said. He said the victim initiated all of the contact, consented to have intercourse with him and asked him to come back later. He denied raping her. Also, during the trial, Smith said for the first time that the police made two tape recordings of his statement: one tape the way they wanted him to confess and another the way it actually happened. Smith said the first tape was admitted into evidence, and he did not know what happened to the other tape.

The victim's testimony closely paralleled the version in Smith's confession. The police officers denied that two tapes were

made. There was substantial evidence to support the verdict.

[redacted] Smith also raises a question about the *Miranda* rights form used to advise him of his rights. Specifically, he argues that it does not tell an indigent, accused of a crime, that a lawyer will be appointed to represent him *without cost*. He points out that an identical version of the *Miranda* warning used in this case by the Texarkana Police Department was critized by us in *Trotter* v. *State*, 290 Ark. 269, 719 S.W.2d 268 (1986). In discussing the warning we said:

> Number four on the rights form states: 'Do you understand that if you cannot afford a lawyer, one will be appointed for you by the court before any questioning if you so desire?' Appellant maintains that the form of this statement does not meet the standards of *Miranda* because it does not provide that the appointed lawyer will represent him without cost.
>
> * * * *
>
> Had the sheriff not augmented the form with his own comments that counsel would be provided at no cost to the defendant, we would have to find the advice given appellant was inadequate . . . We caution, however, against the use of this and similar forms when informing a defendant of his rights. It must be made clear to a defendant that he has access to an attorney at absolutely no cost to him before he agrees to waive his right to counsel.

We were wrong in *Trotter*. Such a warning does comply with *Miranda* v. *Arizona*, 384 U.S. 436 (1966). There are four separate references to that specific right in the *Miranda* decision. They are as follows:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. p. 444
>
> * * *
>
> In order fully to apprise a person interrogated of the extent of his rights under this sytem then, it is necessary to

> warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. p. 473
>
> * * *
>
> [I]f police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that *if he cannot afford one, a lawyer will be provided for him prior to any interrogation.* p. 474
>
> * * *
>
> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, *and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.* p. 479 (Italics supplied.)

Compare these statements with the language used in the warning in this case: ". . . If, you cannot afford a lawyer, one will be appointed for you, before any questioning, if you wish." The language is virtually word for word from *Miranda* and completely complies with *Miranda.* Our cautionary remarks in *Trotter* about such a warning and our statement about augmentation were a mistake and are overruled.

Affirmed.

Robert BLOUNT, Steve MENZIE, and Michael IVES *v.* Thomas HUGHES, City Judge for Police Court in Beebe, Arkansas

86-254 728 S.W.2d 519

Supreme Court of Arkansas
Opinion delivered May 11, 1987
[Rehearing denied June 8, 1987.*]

*Hickman, J., not participating.

Paul Petty and *Robert Meurer*, for appellant.

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

JOHN I. PURTLE, Justice. This case involves an appeal from the decision of the White County Circuit Court, rejecting the appellant's petition for mandamus. The petition sought to compel the transfer of criminal prosecutions from the Beebe Police Court to the Municipal Court of Searcy, Arkansas. The appellants objected to the jurisdiction of the Beebe Police Court, alleging that the Beebe city ordinances were invalid. They argued that since the ordinances of the city were invalid, that they were entitled to be tried in a municipal court in the same county.

The appellants assert that the Beebe ordinances are invalid because they violate the provisions of Ark. Stat. Ann. § 22-725 (Repl. 1962), in that they contain more than one subject matter. It appears that portions of each ordinance are argued in the briefs of counsel; however, the ordinances are not abstracted. Since this Court does not take judicial notice of city ordinances, we are unable to determine whether the ordinances questioned herein are, in fact, invalid. Pursuant to Arkansas Supreme Court Rule 9(e)(2), we therefore affirm the decision of the circuit court.

Hickman, J., not participating.

James Burt TAGGART *v.* W.H. MOORE and Polly MOORE

86-271 729 S.W.2d 7

Supreme Court of Arkansas
Opinion delivered May 11, 1987

Southern, Allen, James & Jones, for appellant.

Hoofman & Bingham, by: *Clifton H. Hoofman*, and *Friday, Eldredge & Clark*, by: *George Pike, Jr.*, for appellee.

JOHN I. PURTLE, Justice. The Pulaski County Circuit Court, Second Division, dismissed appellant's complaint for damages for breach of an alleged oral contract not to collect on a judgment. The trial court dismissed the complaint stating that the action was barred by the doctrines of res judicata and election of remedies and was not in compliance with the opinion of the Court of Appeals in the appeal of a previous action growing out of the

same dispute. The appellant argues four points for reversal: (1) the trial court erred in dismissing the complaint on the doctrine of res judicata; (2) the court erred in dismissing on the doctrine of election of remedies; (3) the court erred in dismissing the case because the appellee did not plead the doctrines of res judicata and election of remedies; and (4) the trial court erred in holding that the Court of Appeals' opinion precluded the present action. For reasons stated herein, we find that none of the four arguments requires reversal.

The history of this case is very complex. The dispute arises out of a judgment obtained by the Moores (appellees) in an action on a contract brought by third parties against both Taggart (appellant) and the Moores in which the Moores had cross-complained against Taggart and other codefendants. The appellant bases his complaint on the allegation that he agreed to cooperate with the Moores in the litigation in return for their promise not to collect any judgment which might be rendered against him. The suit against both Taggart and the Moores proceeded to trial and judgment was entered on September 10, 1981. Judgment was rendered against Taggart on the cross-complaint in the amount of $32,903.16.

The Moores attempted to collect the judgment from Taggart, and he filed a complaint in the Pulaski County Chancery Court on February 18, 1982, in which he sought to enjoin enforcement of the judgment based upon the alleged oral agreement not to enforce the judgment. (This judgment has subsequently been paid by the appellant.) The complaint was amended twice. The answers raised several defenses, including lack of jurisdiction, limitations, laches, estoppel, and res judicata. On May 24, 1982, the chancery court transferred the case to circuit court upon the motion of appellees. Notice of appeal from the order of transfer was filed on June 4, 1982.

The appellant stood upon his pleadings after the case had been transferred to the circuit court. The Moores moved for dismissal, and on June 25, 1982, the circuit court dismissed the complaint. The court dismissed the complaint stating that it had no jurisdiction to enjoin enforcement of the judgment and that the remedy sought "is a separate remedy independent of the action giving rise to the judgment itself; such action . . . is a chancery

matter. . . ." Notice of appeal was given on July 1, 1982.

The Court of Appeals affirmed on May 4, 1983. See *Taggart* v. *Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983). Rehearing denied at 164. The Court of Appeals stated that the appellant was entitled to be heard and concluded that the proper forum was the court which entered the original judgment, "but only upon pleadings and a prayer for relief which that court is authorized to grant pursuant to Rule 60(c)(4), Rule 60(d), Rule 60(j) and Rule 62(b), Arkansas Rules of Civil Procedure." Upon petition for rehearing, the Court of Appeals noted again that after the transfer of the case from the chancery court that "there was no amendment of the complaint seeking either modification or vacation of the order or *showing a meritorious defense.*" (Emphasis in original.) See A.R.C.P. Rule 60.

The complaint in the present appeal was filed in the circuit court on June 29, 1983. The prayer for relief sought damages for breach of contract. The contract relied upon was the alleged oral agreement by the appellees not to collect any judgment in their favor against the appellant. The case was transferred to the division of circuit court which entered the original judgment. On August 22, 1986, the original trial court granted appellees' motion to dismiss. In dismissing this second complaint the court held that the action was barred by res judicata and election of remedies and was "not in compliance with the opinion of the Court of Appeals. . . ." The present appeal is from this order of the original trial court dismissing the complaint for damages for breach of contract.

As the arguments are so interwoven that it is impractical to discuss them separately, they will be addressed together in this opinion.

The question presented is whether a post-trial motion to set aside a judgment pursuant to A.R.C.P. Rule 60 is included within the meaning of "previous litigation" in the context of whether it is an issue which was litigated, or could have been litigated, under the doctrine of res judicata. Under the facts and pleadings of this case we hold that it is.

The appellant was under a duty to present any meritorious defense to the cross-complaint in the original action. Instead of

defending on the merits, he entered into an agreement to aid the appellees in exchange for their promise not to enforce any judgment rendered against him. The alleged secret agreement was neither reduced to writing nor was it revealed to the other parties or the trial court. The agreement comes precariously close to collusion between the parties. Such an agreement is quite similar to a "Mary Carter" agreement. See *Firestone Tire & Rubber Co.* v. *Little*, 276 Ark. 511, 693 S.W.2d 726 (1982). *Firestone* required full disclosure to all parties and the court of such agreements. We do not express an opinion on this issue because it was not argued in the briefs.

Both parties agree that the doctrine of res judicata is accurately set out in *Wells* v. *Arkansas Public Service Commission*, 272 Ark. 481, 616 S.W.2d 718 (1982), where it states:

> We first consider the question of res judicata and when it is applied. Generally speaking, it applies when there has been a final adjudication on the merits of an issue, without fraud or collusion, by a court of competent jurisdiction, on the matters litigated *or which might have been litigated.* [Emphasis supplied.]

The *Wells* opinion goes on to state: "It is res judicata even though not adjudicated if the matters were necessarily within the issues and might have been litigated in the former suit." One of the main purposes of the doctrine of res judicata is to put an end to litigation by precluding a party who has had the opportunity for one fair trial from drawing the same controversy into issue a second time before the same or a different court. A plaintiff who deliberately selects the forum is bound by an adverse judgment. *Wells*, supra, *Robertson* v. *Evans*, 180 Ark. 420, 21 S.W.2d 619 (1929). Res judicata applies even if the issue was not litigated in the first trial if it should have been included in the former trial. *Timmons* v. *Brannan*, 225 Ark. 220, 280 S.W.2d 393 (1955).

The issue is clear in the present case and no exception to the res judicata doctrine is involved. The appellant had the opportunity, if not the duty, to obtain a full and fair hearing in the original suit on the basic issue of his liability to the Moores. Instead of answering the cross-complaint by denying liability or asserting an affirmative defense, he entered into a very questionable oral agreement to aid the appellees. This agreement was not revealed

until the appellee started efforts to collect on the judgment.

When appellee sought enforcement of the judgment, the appellant deliberately chose the chancery court as the forum to raise the issue of the oral agreement between the parties. Over appellant's objection the case was transferred to the division of the circuit court which granted the judgment. The circuit court was the proper forum to challenge the judgment. However, specific defenses and prayers for relief must be raised in the proper forum or be barred by res judicata. The complaint was not amended after the transfer to circuit court and the trial court dismissed the complaint. The decision was appealed to the Court of Appeals and affirmed. The opinion of the Court of Appeals specifically stated that the appellant was entitled to be heard in a proper forum. The opinion went on to spell out that the appellant was entitled to relief only upon proper pleadings and prayer in a court that "is authorized to grant [relief] pursuant to Rule 60(c)(4), Rule 60(d), Rule 60(j) and Rule 62(b), Arkansas Rules of Civil Procedure."

The appellant did not follow the suggestion of the Court of Appeals; rather, he filed a new cause of action for breach of contract. Having had new life breathed into his claim by the decision of the appellate court, the appellant selected the correct forum, but instead of trying to set aside the original judgment, he deliberately chose to seek a new remedy on the theory of damages for breach of contract. Moreover, the correct course of action was clearly available to the appellant when the case was transferred in the first instance from equity to law.

We hold that the issue presented in the complaint filed after the Court of Appeals decision contained issues which were included, or should have been included, in the original action. Certainly the prayer for relief prescribed by the appellate court could have been heard in the circuit court where the first suit was filed.

It is not necessary to discuss the other arguments because the doctrine of res judicata compels affirmance. There must be an end to litigation at some point and this case is ended now.

Affirmed.

Kenneth Ray KENDAL *v.* STATE of Arkansas

CR 86-222 729 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 11, 1987

Leon N. Jamison, for appellant.

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

ROBERT H. DUDLEY, Justice. A jury found the appellant guilty of burglary, rape, and aggravated robbery. The appellant contends that the evidence was insufficient to support the verdicts. We affirm the convictions.

The victim testified that late one night while watching television she fell asleep on a couch in her home. She was awakened by an intruder who held a knife at her throat. The intruder never allowed her to see his face. He raped her, took her car keys, money, and handgun. Police officers testified that the appellant had the victim's handgun in his possession when he was arrested. The appellant later confessed to the crime. Police officers testified that the confession was freely and voluntarily given.

Appellant argues that the victim failed to identify him as the assailant and, therefore, the proof was insufficient. There was substantial evidence even though the victim could not positively identify the appellant. The confession coupled with the proof by the victim that the crimes were actually committed was sufficient to sustain the conviction. *McQueen* v. *State*, 283 Ark. 232, 675 S.W.2d 358 (1984). Appellant next contends that the evidence was insufficient because his confession lacked credibility. It was for the trier of fact to resolve questions of credibility. *Abdullah* v. *State*, 281 Ark. 239, 663 S.W.2d 166 (1984). Here, there was substantial evidence from which the jury could find that the confession was freely, voluntarily, and truthfully given.

Affirmed.

Ray SCOTT, Director, Arkansas Department of Human Services, et al. *v.* Griffin SMITH, Jr.

86-249 728 S.W.2d 515

Supreme Court of Arkansas
Opinion delivered May 11, 1987

Debby Thetford Nye, for appellants.

John J. Watkins, for appellee; *Smith, Smith & Duke*, Of Counsel.

ROBERT H. DUDLEY, Justice. The appellee, Griffin Smith, Jr., sought to inspect and copy documents maintained by the appellant, a state agency which is subject to the Freedom of Information Act, Ark. Stat. Ann. §§ 12-2801 to -2807 (Repl. 1979 and Supp. 1985). Appellee was allowed to inspect most of the documents, but was not allowed to inspect the agency's documents which were in the files of the agency's deputy general counsel or the documents which the agency had given to an assistant attorney general. Appellee filed suit over the failure to disclose the requested records. A part of the trial court's ruling was that a letter, a memorandum, and trial notes prepared by the assistant attorney general were exempt from disclosure because they were "unpublished memorandum, working papers and correspondence of the Attorney General" within the meaning of Ark. Stat. Ann. § 12-2804. There is no appeal from that part of the order. The trial court further held that the agency's records which were in the possession of its deputy general counsel and the assistant attorney general were subject to public disclosure. In the sole assignment of error the appellant agency argues that the trial court erred in holding that the Freedom of Information Act applies to the litigation files maintained by attorneys representing a state agency. The assignment of error is without merit.

The appellant agency's argument is grounded in the contention that the attorney-client privilege, as set out in A.R.E. Rule 502 and ARCP Rule 26 (b)(3), provides an exception to the Freedom of Information Act. We first addressed the question of whether the attorney-client privilege should provide such an exception in *Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). There, we held that the Freedom of Information Act

should be broadly construed in favor of disclosure, and that under the evidence statutes then in effect, there should be no exception for the attorney-client privilege. We do not find any changes in the present rules which provide a specific exception as required by Ark. Stat. Ann. § 12-2804 (1979) and *Laman.*

Unlike the Freedom of Information Act, the attorney-client privilege has been narrowly construed since it prevents the dissemination of truthful information. *Vittitow* v. *Burnett*, 112 Ark. 277, 165 S.W. 625 (1914). A.R.E. Rule 502 is an evidentiary rule limited to court proceedings in this state. A.R.E. Rule 101. ARCP Rule 26(b)(3) is a procedural rule limited to discovery. Neither Rule 502 nor ARCP Rule 26(b)(3) specifically provides that it should have application outside of these limited areas, and we have previously held that a statute dealing with admission of evidence and discovery should not create a specific exception to the Freedom of Information Act. *Baxter County Newspapers, Inc.* v. *Medical Staff of Baxter General Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981).

The agency argues that policy considerations favor reversal, but we have already addressed that issue. "Policy decisions such as that are peculiarly within the province of the legislative branch of the government. In this instance that branch has spoken so unequivocally that its command cannot be misunderstood. Our duty is simply to give effect to its mandate." *Laman* v. *McCord*, 245 Ark. at 406, 432 S.W.2d at 756. *Laman* has stood as our interpretation of the act on this subject for nineteen years, and through those years the General Assembly has not exercised its option to amend the act to create a specific exception for the attorney-client privilege. Accordingly, we affirm the decision of the trial court.

Affirmed.

NEWBERN, J., not participating.

Millard COX, Jr. *v.* Marian E. FARRELL

87-61 728 S.W.2d 954

Supreme Court of Arkansas
Opinion delivered May 11, 1987

Butler, Hicky, Hicky & Routon, Ltd., by: *Preston G. Hicky*, for appellant.

Doddridge M. Daggett, Lee County Child Support Enforcement Unit, for appellee.

STEELE HAYS, Justice. This appeal is from a judgment in a paternity suit finding that the appellant is the father of a child born to appellee on June 3, 1983. The case is certified to us by the Court of Appeals because the interpretation of a statute is involved. Rule 29(c).

Appellee Marian Farrell filed a verified complaint in the Lee County Court alleging that she had delivered a child out of wedlock fathered by appellant Millard Cox, Jr. Cox denied the accusation and Ms. Farrell moved for an order requiring the parties to submit to blood tests. The tests were ordered but were never taken. A special referee heard the case and found Cox was

not the father of the child. An order consistent with that finding was entered by the county court.

On appeal the circuit court denied Ms. Farrell's motion for a non-jury trial, finding that Ark. Stat. Ann. § 34-701.1(b) (Supp. 1985) was unconstitutional as depriving the litigants of their right of trial by jury. However, the constitutionality of § 34-701.1(b) was recently upheld by this court in *Dunn* v. *Davis*, 291 Ark. 492, 725 S.W.2d 853 (1987). No objection to a jury trial was preserved.

Ms. Farrell testified that she became pregnant in September 1982 and carried the baby to full term, June 3, 1983. She said she and Junior Cox drank beer together at the Marianna VFW Club and then drove to his home in her truck where they had sexual relations. She was certain Cox was the father and denied having relations with any other individual during August, September or October. She admitted giving contradictory accounts to Social Services and that she did not tell Cox she was pregnant until after the child was born.

Millard Cox denied having had sexual relations with Ms. Farrell. He admitted having been with her at the VFW Club, contending it was around October 10. He said he had been drinking heavily and he left his vehicle at the club and she drove him home. He went to bed and when he awoke next morning she was gone. He testified that he had been married three times without having fathered a child, but was uncertain of his sterility.

On cross-examination and over the objection of defense counsel Cox acknowledged that the child support unit had offered to pay for a blood test, that he had been asked to take a blood test but had refused. The jury returned a unanimous verdict finding Cox to be the father.

Cox has appealed on three grounds: it was error to permit counsel to question him about a blood test, the jury was incorrectly instructed and the trial court should have granted a motion for a new trial. We find no merit in the points.

I

Ark. Stat. Ann. § 34-705.1 (Supp. 1985) includes a provision that if blood tests are ordered in paternity cases and one

party refuses to submit to the test, that fact shall be disclosed at trial unless good cause is shown. The issue is whether, in a trial de novo, one party may make reference to an event which occurred as the result of an order made by the court which conducted the first trial. Cox asserts that because counsel for Ms. Farrell was allowed to question him about his refusal to take a blood test which had been ordered by the referee prior to the first trial in the county court he was denied a trial de novo in circuit court.

[redacted] Arkansas Const. Art. 7, § 33, provides that "[a]ppeals from all judgments of county courts may be taken to the circuit court under such restrictions and regulations as may be prescribed by law." For many years, statutes have provided that the appeal from various kinds of county court proceedings would be by trial de novo in the circuit court. *See, e.g.*, Ark. Stat. Ann. § 27-2006 (Repl. 1979), and Ark. Stat. Ann. § 34-709 (Repl. 1962), the latter referring to a statute which has now been deemed superseded, Ark. Stat. Ann. § 26-1308 (Repl. 1962), which provided for appeal from justice of the peace court to circuit court "anew on its merits." Interpreting these statutes we have said that the trial in the circuit court must be as if the case had been brought in that court in the first instance. *Gocio* v. *Harkey*, 211 Ark. 410, 200 S.W.2d 977 (1947); *Carpenter* v. *Leatherman*, 117 Ark. 531, 176 S.W. 113 (1915). *See also Bigelow* v. *Union County*, 287 Ark. 486, 701 S.W.2d 125 (1985).

[redacted] In *Batesville* v. *Ball*, 100 Ark. 496, 140 S.W. 712 (1911), we said:

> When a cause is appealed from the county court to the circuit court, the latter court obtains jurisdiction over the matter to the same extent as if it had been originally brought in that court, and it must proceed to fully try and determine the cause. It does not pass upon the question as to whether or not the county court has committed error in any of its rulings, either of law or of fact, but it must try the cause upon its merits, both of law and of fact, just as if it had been originally brought in the circuit court. It does not either affirm or reverse the findings or judgment of the county court, but tries the cause alone upon its merits, and determines the same by the exercise of its own discretion and judgment. [100 Ark. at 499, 140 S.W. at 714].

In the case before us now, the referee, acting for the county court, exercised the discretion provided to him in Ark. Stat. Ann. § 34-705.1 (Supp. 1985) which says he "may" order blood tests to determine paternity or lack of it on the part of the defendant. Had Ms. Farrell asked the circuit court to enforce the referee's order, it is clear the circuit court would not have been bound by the discretionary ruling of the county court referee, and the circuit court could have made its own order, or declined to make one, as it deemed proper. However, that is not the issue with which the circuit court was presented.

Cox moved *in limine* to prohibit references to the blood test order as a result of being informed Ms. Farrell intended to introduce testimony of a physician to demonstrate the accuracy of such tests. That testimony was to be presented in response to Cox's anticipated testimony that he did not believe the tests accurate and for that reason had refused to submit to one. The circuit judge ruled that Cox could be asked about his refusal to submit to a blood test because it was a "factual" matter. That was exactly correct. No reference was to be made to the testimony taken in the county court nor was the circuit court to be bound in any manner by factual conclusions reached in the county court or any ruling made by the referee. It was simply a fact that Cox had refused to take a blood test, and that fact was made admissible in evidence by Ark. Stat. Ann. § 34-705.1 (Supp. 1985).

While it may be contended that the admissibility of the appellant's refusal to submit to the test is dependent, indirectly at least, upon the county court's order and thus a reference to the county court record must be made, we are not troubled by such a reference. Section 34-701.1(b) requires the county court record to be filed with the circuit court when an appeal is taken. Thus the general assembly was aware that some reference to the record might occur in the de novo proceeding. Without reference to the county court record the circuit court would be unable to ascertain the cause of action below to which the appeal is limited. *See Armstrong* v. *Harrell*, 279 Ark. 24, 648 S.W.2d 450 (1982). As long as the circuit court conducts a trial of the case appealed without reference to error in the county court and without being bound in any way by the county court's conclusions of fact or law, the right of an appellant to a trial de novo has not been violated.

II

Millard Cox also urges the trial court should not have given this instruction to the jury:

> "Court's Instruction No. 7. Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and that party fails to do so without satisfactory explanation, you may draw an inference that such evidence would have been unfavorable to that party."

Cox submits that the instruction shifts the burden of proof from the plaintiff to the defendant. We disagree. The jury was instructed correctly on the burden of proof and nothing in the instruction alters the burden. The instruction merely tells the jury, in essence, that where one party fails to produce relevant evidence within his control, the jury may infer that such evidence would be unfavorable.

We have said more than once the instruction is a correct statement of the law and, where the circumstances support such an inference, it is not error to give the instruction. *Harry & Acklin Ford* v. *Landreth*, 254 Ark. 483, 494 S.W.2d 114 (1973), *Jones* v. *Brown, et al., Trustees*, 242 Ark. 537, 414 S.W.2d 618 (1967); *Saliba* v. *Saliba*, 178 Ark. 250, 11 S.W.2d 774 (1928). It was for the jury to decide whether the inference was proper.

III

The final contention deals with a motion for a new trial. After entry of the judgment Cox filed a timely motion for a new trial based on newly discovered evidence. ARCP Rule 59. An affidavit of Bobby Worley accompanied the motion stating that he had been dating and having sexual relations with Marian Farrell at the time she became pregnant, that she told him the baby was his and asked for $100 in child support, and that he had been working in Texas and only recently learned of the paternity suit against Millard Cox.

Following a hearing on the motion at which Worley testified more fully as to his relations with Ms. Farrell the circuit court denied the motion upon findings that the proof was cumulative and could have, with diligence, been discovered. We find no abuse

of discretion by the trial court in denying the motion. *Sellers* v. *Harvey*, 220 Ark. 541, 249 S.W.2d 120 (1952); *Arkansas Power & Light Co.* v. *Mason*, 191 Ark. 804, 87 S.W.2d 988 (1935).

There were a number of discrepancies in Worley's testimony. While he maintained he was having sexual relations with Ms. Farrell at around the time in question, he denied that the child was his. He said he and Ms. Farrell were living together at a trailer park close to where Cox lived from before she became pregnant until some months afterwards and everyone knew it. We cannot say it was error to find that, with diligence, the evidence could have been discovered.

Affirmed.

Willie JONES, III *v.* STATE of Arkansas

CR 87-2 729 S.W.2d 10

Supreme Court of Arkansas
Opinion delivered May 11, 1987

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

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

STEELE HAYS, Justice. Appellant Willie Jones III was convicted and sentenced to 40 years for aggravated robbery and theft of property. On appeal he argues that the evidence does not support his conviction for aggravated robbery. He asks that the conviction be reduced to robbery and the judgment modified accordingly. See *Fairchild* v. *State*, 269 Ark. 273, 600 S.W.2d 16 (1980).

Appellant's argument that there was insufficient proof that a deadly weapon was used to effect the robbery is wholly without merit.

Charles Michael Downen testified that while he was removing change from coin operated car washing machines he received a "powerful blow" from behind. He turned to see the appellant wielding a five foot iron pipe like a batter. Downen took a step toward the appellant, who swung toward his head and said "come on, come on." When Downen paused, appellant told his companion to grab the money bag, which was done. Appellant held Downen at bay a moment as the other man ran with the money, then threw the pipe at Downen. The pipe struck Downen's left hand, breaking his thumb and causing him to fall to the ground. The two were later arrested with a third individual whose car was used in the escape.

Aggravated robbery occurs when a robbery is committed by an individual armed with a deadly weapon. Ark. Stat. Ann. § 41-2102 (Repl. 1977). A deadly weapon is anything that in its manner of use is capable of causing death or serious physical injury. Ark. Stat. Ann. § 41-115(4)(b) (Repl. 1977). It can hardly be doubted that a five foot length of iron pipe is capable of causing death or serious injury. One well placed blow would suffice. A number of articles less lethal than iron pipe have been held to be deadly weapons: a flashlight (*Jackson* v. *State*, 214 Ark. 194, 215 S.W.2d 148 [1948], *People* v. *Buford*, 244 N.W. 351, 69 Mich. App. 27 [1976]), a walking cane (*People* v. *Lee*, 360 N.E.2d 1173, [Ill. Ct. App. 1973]), a stone, 2x3x9 inches (*Acers* v. *United States*, 164 U.S. 388 [1896]), an unloaded pistol used as a striking object (*Else* v. *State*, 555 P.2d 1210, [Alaska 1976]), a broomstick (*People* v. *Buford, supra*), boots (*Thomas* v. *State*, 229 S.E.2d 458 [Ga. 1976]), and even fists, depending on the manner of usage. (*People* v. *Rumaner*, 357 N.Y.S. 2735

[1974] and *People* v. *Buford, supra*), and see dissenting opinion of Justice Frank G. Smith in *Wilson* v. *State*, 162 Ark. 494, 258 S.W. 972 (1924) on the issue of whether ordinary shoes constitute a dangerous weapon.

We conclude that the testimony as to the object itself and the manner of usage by the appellant fully supported the verdict with respect to aggravated robbery.

The judgment is affirmed.

Roger Stephen SHUFFIELD *v.* STATE of Arkansas

CR 87-19 729 S.W.2d 11

Supreme Court of Arkansas
Opinion delivered May 11, 1987

Wilson, Engstrom, Corum & Dudley, by: *Wm. R. Wilson, Jr.*, and *Timothy O. Dudley*, for appellant.

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

STEELE HAYS, Justice. After being convicted of aggravated robbery and kidnapping on June 19, 1984 Roger Steven Shuffield replaced his appointed counsel, Mr. Paul K. Lancaster, with retained counsel, Mr. Ron Heller. Notice of appeal was filed and on February 4, 1985 Heller tendered the record to the clerk of this court for filing. Since more than seven months had expired the clerk properly refused to file the record. See Arkansas Rules of Appellate Procedure Rule 5.

Nothing material occurred thereafter until September 12, 1985 when Heller filed a Rule 37 petition in the trial court alleging ineffective assistance of trial counsel. On October 21 a hearing was held during which Heller represented to the trial court that he had filed a motion for a rule on the clerk of the Supreme Court. On that representation the trial court set an appeal bond and Shuffield was released pending the appeal.

Some eight months later the state moved for a revocation of Shuffield's appeal bond alleging that no motion for a rule on the clerk had been filed. At a hearing on revocation Heller conceded that he had never filed a motion for a rule on the clerk. Shuffield's bond was revoked and Heller was found to be in contempt of court and fined $50.

At this point Shuffield retained new counsel and on August

20, 1986 a second Rule 37 petition was filed charging ineffective assistance by Ron Heller in the handling of Shuffield's appeal. The motion was denied on October 20 and this appeal followed. Shuffield also filed in this court a motion for a belated appeal on March 27, 1987.

Neither the motion for a belated appeal nor the Rule 37 petition are cognizable. The filing of a motion for belated appeal is limited to eighteen months from the date of commitment. A.R.Cr.P. Rule 36.9. This record does not give us the exact date of the commitment but since Shuffield was not released on an appeal bond until the October 21, 1985 hearing he was doubtless committed following his conviction. Nor may Rule 37 be used to revive an appeal that is out of time. In *Lomax* v. *State*, 285 Ark. 440, 688 S.W.2d 283 (1985) we addressed this issue squarely:

> [Lomax] was committed in February, 1982, and therefore could have filed a motion for belated appeal in this court at any time between that date and August, 1983, which was eighteen months after date of commitment. Rule 36.9. He did not file such a motion. Instead, [Lomax] raised the question of whether counsel was ineffective for failure to appeal in his Rule 37 petition, filed April 11, 1984. *Rule 37, however, is not a means of by-passing a motion for belated appeal. If it were construed to be so, an appellant could simply ignore the rule limiting the time for filing a motion for belated appeal in favor of filing a Rule 37 petition which may be filed at any time up to three years from the date of commitment.* See Rule 37.2(c). (Our italics).

It is clear that Shuffield sought to appeal his conviction and that he retained counsel in timely fashion to process the appeal. Through no fault of his own the appeal was permitted to lapse by the failure of Mr. Heller to tender the record within the seven months allowed for lodging the record on appeal. *Gibson* v. *State*, 272 Ark. 345, 614 S.W.2d 234 (1981).

There is, however, a solution available to remedy these omissions, i.e. a motion for a rule on the clerk under Rule 5, Rules of the Supreme Court and Court of Appeals, based on an admission by counsel that the failure to lodge the record after the notice of appeal was filed was due to his own neglect. That

procedure has been established and frequently followed since *Harkness* v. *State*, 264 Ark. 561, 572 S.W.2d 835 (1978), and In Re: Belated Appeals in Criminal Cases, *Per Curiam*, February 5, 1979, 265 Ark. 964. Where counsel assumes responsibility the motion for a rule on the clerk is granted routinely. Where counsel fails to accept responsibility, but it is plain from the record where the fault lies, we have granted the rule on the clerk upon a finding that counsel's neglect was the occasion for the failure to tender the record in a timely manner. In both instances the Committee on Professional Conduct is informed of the occurrence.

In this case it is evident that the failure to bring a timely appeal was the fault of Attorney Ron Heller. Under these circumstances the motion for belated appeal is treated as a motion for a rule on the clerk to lodge the record on appeal. The motion is granted and a copy of this opinion is referred to the Supreme Court Committee on Professional Conduct.

Motion granted.

Theophilus COBBS, Jr. *v.* STATE of Arkansas

CR 87-9 728 S.W.2d 957

Supreme Court of Arkansas
Opinion delivered May 11, 1987

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

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

TOM GLAZE, Justice. Appellant appeals his convictions for rape, aggravated robbery and kidnapping for which he was sentenced, as a habitual offender, to two life terms and one forty-year term, respectively, sentences to run consecutively. For reversal, he contends the trial court erred in refusing to grant a mistrial. Appellant further argues that prejudicial error was committed in the sentencing phase, and, as a result, his sentences should be reduced. We affirm.

The State's case established that appellant's victim left work and walked to her car which was parked in a lot. As she started to unlock her car, a man, carrying a gun, accosted her and demanded her money. He then forced her into her car and, after driving around awhile, put her in the trunk of the car. Later, he let

her out of the trunk, placed her in the back seat and raped her. Afterwards, appellant drove around some more and, eventually, he left his victim with her car. She drove home and called the police. Her ordeal with the assailant lasted about three hours.

The victim testified her attacker's face was concealed by a hat and scarf, and that he threatened her, telling her not to look at him. She said her assailant talked throughout the episode, which enabled her to identify appellant on the basis of a voice lineup conducted at the police station. The State also introduced expert testimony that a more forceful than normal sexual intercourse had occurred, and that fingerprints, hair, sperm and blood samples matched appellant's.

On appeal, appellant argues the court should have granted a mistrial when a detective, on direct examination by the State, made the following statement:

> Q: Briefly, what was your occasion of coming into contact with Mr. Cobbs?
>
> A: Sir, he was brought into me at the detective bureau by members of the street crime unit as a suspect in the sexual *assaults* that . . . an assault in Little Rock. (Emphasis supplied.)

Appellant's attorney objected, and the prosecutor continued:

> Q: A sexual assault?
>
> A: A sexual assault in Little Rock. Yes, sir.

At the bench, appellant urged the witness's reference to "assaults" prejudiced him because it indicated he had committed other crimes. The court denied appellant's motion for mistrial, and appellant requested no admonition to the jury.

The detective's reference was obviously inadvertent, and upon the prompt follow-up questioning by the prosecutor, the witness immediately corrected himself. In addition, the record reflects some degree of doubt concerning whether the jurors even heard the offensive word.

[redacted] We have stated on many occasions that the granting of a mistrial is an extreme and drastic remedy and must be left to

the discretion of the trial judge. A mistrial should be avoided except where fundamental fairness of the trial itself is at stake. *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986). Furthermore, as was reiterated in *Novak* v. *State*, 287 Ark. 271, 698 S.W.2d 499 (1985), we have upheld denials of mistrials where, by chance remarks, it was brought out that the defendant had had prior arrests, even prior convictions, where the comment was inadvertent. *See McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985); *Hogan* v. *State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *Sanders* v. *State*, 277 Ark. 159, 639 S.W.2d 733 (1982); *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982). Based on the record before us, we are unable to say the trial court abused its discretion in denying appellant's request for a mistrial.

For his second point, appellant contends his sentence should be reduced because of comments the prosecutor made in his closing argument during the sentencing phase. Those pertinent remarks appear as follows:

> and maybe in this case, with the defendant's background, the third concern and purpose of the criminal justice system may be more important. We have you citizens who are not violating the law, and you citizens who are going to walk from here to your car, whenever it may be. . .

At this point of the prosecutor's closing argument, appellant's counsel objected, stating, "I didn't get into this area and I don't think Mr. . . ." Before counsel could complete his objection, the trial court overruled it. As a consequence, the nature of appellant's objection below is unclear. Because appellant's objection was not sufficiently specific to apprise the trial court concerning the particular error complained of, he failed to properly preserve the right to appellate review. *Tosh* v. *State*, 278 Ark. 377, 646 S.W.2d 6 (1983).

We note that appellant's argument on appeal is that the prosecutor's closing comments were prejudicial because they appealed to the jury's fears and prejudices. Even if this point had been preserved on appeal, we would find no prejudicial error. 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. *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1986).

In *Midwest Buslines, Inc.* v. *Johnson*, 291 Ark. 304, 724 S.W.2d 453 (1987), we reiterated the standard of review in cases involving improper arguments to the jury. Quoting *Missouri Pacific Railroad Co.* v. *McDaniel*, 252 Ark. 586, 589, 483 S.W.2d 569, 571 (1972), we said

> it is the duty of the appellate court to look to the remarks, and weigh their probable effect upon the issues; then to the action of the trial court in dealing with them; and if the trial court has not properly eliminated their sinister effect, and they seem to have created prejudice, and likely produced a verdict not otherwise obtainable, then the appellate court should reverse. However, a wide range of discretion must be allowed the circuit judges in dealing with the subject, for they can best determine at the time the effect of unwarranted argument; . . .

See also Gustafson v. *State*, 267 Ark. 830, 593 S.W.2d 187 (Ark. App. 1979) (comments made during sentencing phase held not unduly prejudicial; trial court has the opportunity to observe prejudicial impact upon jury).

For the reasons stated above, we find no reversible error and, therefore, affirm.

Robert TROUTT *v.* STATE of Arkansas

CR 84-162 729 S.W.2d 139

Supreme Court of Arkansas
Opinion delivered May 11, 1987

[redacted]

Appellant, pro se.

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

PER CURIAM. Petitioner Robert Troutt was found guilty by a jury of battery in the first degree and sentenced to twelve years imprisonment and a fine of $15,000. The Court of Appeals affirmed. *Troutt* v. *State*, CA CR 83-182 (Sept. 15, 1984), reh'g denied (Oct. 3, 1984), review denied (Oct. 15, 1984). Petitioner subsequently filed a *pro se* petition for writ of error coram nobis in this court which was denied. *Troutt* v. *State*, CR 84-612 (May 12, 1986). He has now filed a petition for postconviction relief pursuant to Criminal Procedure Rule 37, alleging that errors were committed in his trial and that he was afforded ineffective assistance of counsel both at trial and on appeal. We find no basis on which to grant the petition.

Much of the instant petition is taken up with assertions that the trial court erred when it denied petitioner's motion for new trial. The issue is clearly one which could have been raised on appeal. When an issue could have been raised on appeal in accordance with the controlling rules of procedure, it is not a basis for collateral attack on the conviction under Rule 37, unless it presents a question so fundamental as to render the judgment of

conviction absolutely void. *Swindler* v. *State*, 272 Ark. 340, 617 S.W.2d 1 (1981). A ground sufficient to void a conviction is one so basic that the judgment is a complete nullity. *Travis* v. *State*, 286 Ark. 26, 688 S.W.2d 935 (1985). Here, the trial court's decision to deny appellant's motion for new trial does not present an issue sufficient to render his conviction void.

Petitioner contends that there was misconduct on the part of the prosecution in that the prosecutor did not provide the defense with an address for witness Sieburn McArthur so that counsel could interview McArthur before trial. In a related allegation, petitioner contends that counsel was ineffective for failure to locate and interview McArthur.

Petitioner alludes to no proof that the prosecution deliberately concealed McArthur's whereabouts and fails to offer any facts to demonstrate that he suffered any actual prejudice by the lack of a pretrial interview with McArthur. To establish that counsel was ineffective, a petitioner must show that counsel's performance was deficient in that counsel made an error so serious that he was not functioning as the "counsel" guaranteed by the sixth amendment. In addition, the deficient performance must have resulted in prejudice so pronounced as to have deprived petitioner of a fair trial whose outcome cannot be relied on 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. *Strickland* v. *Washington*, 466 U.S. 668 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland* v. *Washington, supra; Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985). Petitioner has not shown that the outcome of his trial was affected by counsel's failure to interview Sieburn McArthur.

Petitioner next alleges that the attorneys who represented him at trial did not appear at the hearing on his motion for new trial but rather permitted William Wharton, one of their associates, to appear in their behalf. He goes on to allege that it could have been established at the hearing that Sieburn McArthur was mentally incompetent to testify at trial. It is not clear whether petitioner is alleging that Wharton was ineffective or that the trial court should have been persuaded by the evidence to

grant a new trial. In any event, the court heard testimony at the hearing on whether McArthur was under the care of a psychiatrist and incompetent to testify. The court concluded that there was no ground to grant a new trial, and petitioner has not demonstrated that there was any evidence which could have been presented to the court which would have affected the outcome of the proceeding. If petitioner is alleging that he was somehow prejudiced by the absence of the two attorneys who represented him at trial, he has offered no factual basis for the conclusion. The purpose of Rule 37 is not to debate the possible effect of counsel's conduct but to provide a remedy when a petitioner has suffered actual prejudice. *Brents* v. *State*, 285 Ark. 199, 686 S.W.2d 395 (1985). The burden is on the petitioner to provide facts to support his claims of prejudice. *Jones* v. *State*, 283 Ark. 363, 767 S.W.2d 738 (1984).

Petitioner's final allegations concern counsel's representation of him on appeal. Initially, he states that counsel did not follow through on the appeal. Petitioner apparently has reference to the fact that counsel had to obtain permission from this court to lodge the record late. But since the record was ultimately lodged and petitioner had his appeal, he could have suffered no prejudice from counsel's action.

The sole point for reversal raised by counsel on appeal was whether the trial court erred in refusing to declare Sieburn McArthur an accomplice as a matter of law. The court found no error and cited the case of *Robinson* v. *State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984), as a case which stated the law applicable to the point raised by petitioner. Petitioner states that his attorney was ineffective because he did not inform him that the Court of Appeals in the *Robinson* case had already ruled against his only point for reversal. Of course, while the *Robinson* case stated the applicable law, that law had not been applied to the facts in petitioner's case. How petitioner could have been prejudiced by counsel's failure to inform him of the *Robinson* ruling is neither stated nor apparent.

Petitioner also contends that counsel on appeal should have argued that petitioner was denied effective assistance of counsel at trial and that the trial court erred in not granting a motion for change of venue. While the sixth amendment guaran-

tee of effective assistance of counsel extends to a first appeal, *Evitts* v. *Lucey*, 469 U.S. 387 (1985), the United States Supreme Court has not yet stated the criteria for determining the effectiveness of an attorney on appeal. The court has held, however, that counsel is not required to raise every nonfrivolous issue possible. *Jones* v. *Barnes*, 463 U.S. 745 (1983). The hallmark of effective appellate advocacy is the process of assessing arguments and focusing on those likely to prevail. *Jones* v. *Barnes*, *supra*; *see also Smith* v. *Murray*, 477 U.S. ___, 106 S. Ct. 2661 (1986). When assessing whether a particular issue should be advanced on appeal, counsel must weigh the strength of the legal basis for it and the factual support for the legal argument which was entered into evidence in the trial court. If counsel elects to omit an issue which could have been raised on appeal and the convicted defendant later claims under Rule 37 that the attorney was ineffective for failing to argue it, the petitioner must demonstrate that counsel's decision amounted to an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington, supra.* The burden is on the petitioner to state facts in the Rule 37 petition to establish that counsel's performance was deficient. In determining whether counsel was effective on appeal, we consider only what was included in the record and the prevailing legal authority at the time counsel made his decision about whether to argue the particular point on appeal. If a petitioner under Rule 37 contends that counsel should have raised an issue which turns on factual evidence, he is responsible for citing in his petition the facts contained in the record which would have supported the argument on appeal.

Petitioner here makes general claims without supporting facts. He alleges that the county sheriff had made prejudicial statements linking him to organized crime, called him vile names and said he was "criminally associated" with two supreme court justices. He also contends that publicity surrounding the proceedings against Eugene Hall and Mary Orsini created a "hostile public atmosphere." He does not state what statements made by the sheriff created ill-will towards him or when the statements were made. He also fails to allude to any evidence that the Hall or Orsini proceedings engendered hostility against him. In short, petitioner has provided no facts in the petition before us to demonstrate that the trial court abused its discretion by denying a

change of venue. This court will not go behind the petition filed and search the record for support for allegations raised in it. *Brents* v. *State, supra*; *see also Hill* v. *State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Petition denied.

BUTLER MANUFACTURING CO. *v.* Robert M. HUGHES and Patsy HUGHES, his wife

86-243 729 S.W.2d 142

Supreme Court of Arkansas
Opinion delivered May 18, 1987
[Supplemental Opinion on Denial of Rehearing June 29, 1987.]

Friday, Eldredge & Clark, by: *James M. Simpson* and *H. Charles Gschwend, Jr.*, for appellant.

Spencer, Spencer, Depper & Guthrie, for appellees.

JACK HOLT, JR., Chief Justice. The appellee, Robert M. Hughes, a construction worker, was shocked while using a piece of equipment called a "roof runner" and fell from the roof where he was working, receiving numerous injuries. Hughes and his wife sued the appellant, Butler Manufacturing Co., (Butler) from whom the machine was leased, under both products liability and negligence theories. The jury awarded the Hugheses $919,163.25 in damages. It is from a judgment based on that verdict that Butler brings this appeal. We find no merit to its arguments and affirm the judgment.

The accident occurred on September 21, 1981, while Hughes was working for Hampton & Crain Construction Co. The products liability theory asserted by Hughes was based on the contention that Butler leased the roof runner to Hampton & Crain in a defective condition, in that the restraining device, a rubber grommet, designed to relieve strain on the individual wires inside the machine, was missing when the roof runner was received. The negligence theory was that Butler was negligent in its choice of a quality control system, since their system permitted the roof runner to leave the company in this allegedly defective condition. Butler moved for directed verdicts on both theories which were denied. Butler's motion for a judgment notwithstanding the verdict was also denied.

On appeal, Butler challenges two comments made by the Hugheses' attorney during closing arguments; claims there was no substantial evidence of a product defect or of negligence; and objects to the court's jury instruction as to the measure of damages to be awarded for scars and disfigurement suffered by Hughes and to a jury instruction on concurring proximate cause.

1. *CLOSING ARGUMENT.*

The Hugheses offered the testimony of Thomas H. Collard, Jr., a consulting engineer, as an expert witness about quality control engineering. Collard's testimony was limited by the judge to a discussion of quality control in a theoretical vein. The court instructed him not to testify specifically about Butler's quality control system. After this ruling, the following colloquy occurred:

> Hugheses' Attorney: Based on your understanding of the quality control system that existed at Butler, based on your

> reading Mr. Martin's deposition, do you have an opinion as to the likelihood of a piece of equipment leaving that operation in a defective condition?
>
> Butler's Attorney: Your Honor, excuse me. There's just no way—
>
> Court: I'm going to sustain that objection. I think he's gone about as far as an expert can go with looking at those documents. He's now testifying specifically at Butler and I'll sustain that.

During the Hugheses' closing argument, their attorney made the following comments:

> Mr. Collard also tells us, very importantly, that a system of quality control, such as that Butler had, i.e., virtually nonexistent—with such a system it was very likely that a machine might get out of that plant in a defective condition. Okay?
>
> . . . .
>
> The possibility is that they have no quality control procedures at Butler Manufacturing, none of any significance, according to Mr. Collard. I've already gone over Mr. Collard's testimony as to what they should have done, should have had that checklist, should have had some sampling. If they had done that, they possibly would have prevented that device from getting out of Butler Manufacturing in a defective condition, but lacking such quality control, it's very possible, it's likely, according to Mr. Collard, that the machine might have left the factory in a defective condition.

No objection was made to these statements by Butler's attorney during the closing arguments. After closing arguments, in a proceeding out of the hearing of the jury, the court heard Butler's motion for mistrial based on these statements by the Hugheses' attorney. The court denied the motion, stating:

> Well, under the circumstances, the motion having been made at recess out of the presence of the jury, the Court considered the motion, felt that it was not prejudicial, that I had instructed them that comments of counsel not

consistent with the evidence should be disregarded and, therefore, overrule the motion for mistrial.

[redacted] A trial judge has wide discretion to control counsel's argument and to deal with a motion for mistrial, and we do not reverse either decision absent a manifest abuse of that discretion. *Wal-Mart Stores, Inc.* v. *Yarbrough*, 284 Ark. 345, 681 S.W.2d 359 (1984); *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). Likewise, it is settled law that for the trial court to have committed reversible error, timely and accurate objection must have been made, so that the trial court was given the opportunity to correct such error. *Gustafson* v. *State*, 267 Ark. 830, 593 S.W.2d 187 (1980). Here, by waiting until after closing arguments when they were out of the presence of the jury to make a motion for mistrial, Butler's attorney did not give the trial court the opportunity to correct any error committed during the closing argument. By this action, they waived the objection.

[redacted] Butler cites an Eighth Circuit Court of Appeals holding that counsel may make his objection to closing argument at the end of the argument, before the case is submitted to the jury. *Lange* v. *Schultz*, 627 F.2d 122 (8th Cir. 1980). We decline to follow the Eighth Circuit's position and instead require a timely objection, made at the time the alleged error occurs, so that the trial judge may take such action as is necessary to alleviate any prejudicial effect on the jury.

2. *SUBSTANTIAL EVIDENCE.*

Butler next contends that the trial court erred by failing to grant its motion for judgment n.o.v. or its motion for a new trial, since no substantial evidence existed from which a jury could properly find that Butler's negligence or a defect in the roof runner proximately caused the injuries or damages to the Hugheses.

[redacted] When the trial court denies a motion for a new trial, this court determines only if the verdict is supported by substantial evidence. *Ferrell* v. *Whittington*, 271 Ark. 750, 610 S.W.2d 572 (1981). Likewise, the trial court may enter a judgment n.o.v. if there is no substantial evidence to support the verdict. In testing whether there is any substantial evidence, the evidence and all reasonable inferences deducible therefrom should be viewed in

the light most favorable to the party against whom the verdict is sought. If there is any conflict in the evidence, or where the evidence is not in dispute but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict. *Westside Motors* v. *Curtis*, 256 Ark. 237, 506 S.W.2d 563 (1974); *Haseman* v. *Union Bank of Mena et al.*, 268 Ark. 318, 597 S.W.2d 67 (1980).

Where there is a conflict in the evidence, the determination by the jury of the issues is conclusive. The fact that this court would have reached a different conclusion will not warrant the setting aside of a verdict based upon conflicting evidence. *Stamper* v. *Aluminum & Zinc Die Cast Co.*, 283 Ark. 92, 671 S.W.2d 170 (1984). Furthermore, the jury is authorized to believe or disbelieve any testimony and the weight and value to be given to the testimony of expert witnesses is the exclusive province of the jury. *Id.* On appeal, this court will not disturb the jury's conclusion unless we can say there is no reasonable probability in favor of appellee's version, and then only after giving legitimate effect to the presumption in favor of the jury findings. *Love* v. *H.F. Const. Co.*, 261 Ark. 831, 552 S.W.2d 125 (1977).

Looking at the evidence in the light most favorable to the Hugheses, testimony as to the allegedly defective condition of the roof runner was as follows. James Crain, a general contractor and owner of Hampton & Crain, testified that they ordered the roof runner when they were "about ready to put the roof on" the gymnasium they were building. He stated the machine was sent by bus and arrived packed in a molded plastic box with two plastic bands around it. Caldwell Webster, Hampton & Crain's supervisor on the gymnasium project, testified that Butler representatives never told him not to use the roof runner if the restraining device was missing; that the roof runner was stored in a locked tool shed at night; and that Hughes was shocked twice by the machine. After the first time, Webster testified he noticed that the restraining device was missing. Hughes fell after he received the second shock. Webster then had an electrician check the machine and he found a loose wire. Mike Vail, an employee for Hampton & Crain at the time of the accident, testified that when he was picked up to go to the job site, he saw the roof runner box in the truck and noticed it was still banded the way it was the previous Friday in the shop. He said he noticed when Hughes was

shocked the first time that the cord on the machine was wrapped with black electrician's tape and that the bracket that holds the cord in place was missing. He also testified the wires were loose without the restraining device. Hughes testified he was present when the roof runner was uncrated and at that time he noticed the rubber grommet was missing that holds the cord coming out of the machine in place.

As to the cause of the accident, the Hugheses offered the testimony of Robert Newell, an electrical engineer, that if a restraining device is missing on a piece of equipment which is metal-enclosed, an unreasonably dangerous situation exists. Newell stated that in his opinion, the most likely cause of the accident was that the black or hot wire in the roof runner broke and contacted the metal housing of the roof runner and shocked Hughes. Newell said the hot wire apparently broke because the restraining device was missing. Collard further testified that Butler's quality control system was "a little lax."

Butler offered testimony that the circuit breaker used was too high and that if a lower amp fuse had been used, the chance of Hughes being shocked would have been greatly reduced. Newell disagreed with this conclusion, however, and said the circuit breaker did not have any direct effect on the shock Hughes received.

Although there were conflicts in testimony, these were properly resolved by the jury. The foregoing testimony offered substantial evidence so as to justify the verdict and the denial of Butler's motion for new trial.

3. *JURY INSTRUCTION ON DAMAGES.*

Butler contends that the court erred by instructing the jury as follows:

> If you decide for Robert Hughes and/or Patsy Hughes on the question of liability . . . you must then fix the amount of money which will . . . compensate [them] . . . for any of the following seven elements of damages sustained which you find were proximately caused by the fault of Butler Manufacturing Company,
>
> . . . .

> Sixth, any scars, disfigurement, and visible results of his injuries.

Butler argues there was no showing of any scars, disfigurement or visible results of the injury in the evidence which would allow the jury to be so instructed.

We disagree with Butler's contention and find that there *is* sufficient evidence of disfigurement to justify the instruction. Dr. Harold Chakales, the orthopedic surgeon who treated Hughes, testified that Hughes suffered bilateral wrist fractures, which means the "wrist is actually cracked here and knocked upwards and deformed." Dr. Chakales explained that Hughes had evidence "of healed fractures of his left and right wrist with some collapse of the fractures. And this caused his wrists to be radial deviated and to have some prominence over the distal portion of the wrist." The doctor also testified that after surgery, cosmetically the wrists looked better because the "bump that sticks out of there following this type of collapse" was gone.

The doctor's explanation that Hughes's wrists were "deformed" is sufficient proof of disfigurement and visible results of the injury. Although the wrists were evidently improved cosmetically by the surgery, the doctor did not testify that their appearance was now normal.

Butler argues that in *Welter* v. *Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976), this court found scars were not compensable where the testimony did not indicate the scars were disfiguring, discomforting, humiliating, disabling, or normally visible. Butler argues this is the standard by which to judge Hughes's injuries. In *Welter*, however, the plaintiffs alleged in their complaint that disfiguring scars had been suffered that would cause that plaintiff humiliation and embarrassment. There was no similar allegation in this complaint and accordingly Hughes did not have to prove his injuries were humiliating. The instruction did require the jury to find disfigurement and visible results of the injury. No error was committed.

4. *JURY INSTRUCTION ON CONCURRING PROXIMATE CAUSE.*

Finally, Butler contends it was error to instruct the jury on concurring proximate cause, AMI Civil 501, in conjunction with

instructing them on AMI Civil 503, because it had a tendency to confuse the jurors on the question of whether Hampton & Crain's negligence could bar the Hugheses' recovery.

AMI 502, as read to the jury, stated:

> When the negligent acts or omissions of two or more persons work together as proximate causes of damage to another, each of those persons may be found to be liable. This is true regardless of the relative degree of fault between them. If you find that negligence of the defendant proximately caused damage to the plaintiff, it is not a defense that some other person may also have been to blame.

AMI 503 read:

> If, following any act or omission of a party, an event intervened which in itself caused any damage, completely independent of the conduct of that party, then his act or omission was not a proximate cause of the damage.

These two instructions state the applicable rules of law. This court has explained that negligence of a third party is no defense unless it is the *sole* proximate cause of the injury, and a plaintiff may recover from the original defendant if that defendant's negligence was a contributing factor to the injury. *W.M. Bashlin Co.* v. *Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982); *Gatlin* v. *Cooper Tire & Rubber Co.*, 252 Ark. 839, 481 S.W.2d 338 (1972). Under these instructions, the jury could have found Butler *and* Hampton & Crain negligent, and still returned a verdict for the Hugheses against Butler; they could have found only Butler to be negligent; or they could have found Butler not negligent. AMI 502 states that it is not a defense that some other person may "also" have been to blame. The word "also" indicates that it is no defense for Butler that Hampton & Crain may have been negligent if Butler too was negligent. If the jury felt that Hampton & Crain was *solely* to blame, AMI 502 did not instruct them to find against Butler. Accordingly, the instructions did not have a tendency to confuse the jurors and there is no merit to Butler's contention.

Affirmed.

Supplemental Opinion on Denial of Rehearing
June 29, 1987

731 S.W.2d 214

1. TRIAL — FAILURE TO MAKE TIMELY OBJECTION TO CLOSING ARGUMENT. — By not objecting when the statements were made during plaintiff's closing argument and waiting until after plaintiff's closing argument to make a motion for mistrial, appellant failed to make a timely objection that would have given the trial court the opportunity to correct any error committed during the closing argument.
2. APPEAL & ERROR — REPETITION OF ARGUMENT MADE ON APPEAL IS AN INAPPROPRIATE SUBJECT FOR PETITION FOR REHEARING. — A repetition of an argument made on appeal is an inappropriate subject for a petition for rehearing. [Sup. Ct. R. 20(g).]

Petition for Rehearing; denied.

JACK HOLT, JR., Chief Justice. The appellant, Butler Manufacturing Co., has filed a petition for rehearing based on an alleged error of law and fact in this court's opinion handed down May 18, 1987. 292 Ark. 198, 729 S.W.2d 142 (1987). In that opinion we explained that Butler had waived its objection to certain statements made during closing argument because they did not make a timely objection. Specifically, we stated: "No objection was made to these statements by Butler's attorney during the closing arguments." Actually, the record reveals that an objection in the form of a motion for mistrial was apparently made after the plaintiff's closing argument and before Butler's argument, in a proceeding out of the presence of the jury. This proceeding was not part of the record, but the judge referred to its having taken place elsewhere in the transcript. This error in the opinion does not affect the outcome of Butler's appeal inasmuch as, by not objecting when the statements were made during plaintiff's closing argument, Butler still failed to make a timely objection that would have given the trial court the opportunity to correct any error committed during the closing argument.

Butler's other argument involves the law governing the granting of a new trial and is essentially a repetition of his original argument. It is therefore an inappropriate subject for a petition

for rehearing. Sup. Ct. R. 20(g).

Accordingly, the petition for rehearing is denied.

James DEMPSEY & Jan TAYLOR d/b/a J & J PLUMBING COMPANY *v.* MERCHANTS NATIONAL BANK OF FORT SMITH, ARKANSAS

86-208 729 S.W.2d 150

Supreme Court of Arkansas
Opinion delivered May 18, 1987

Phillip J. Taylor, for appellant.

Taylor & Vandergriff, by: *David B. Vandergriff*, for appellee.

DARRELL HICKMAN, Justice. This case presents a question of priority between a materialman's lien and a mortgage. The mortgage was filed before work commenced on the building site, but it was filed on the wrong property. A corrected deed and mortgage were later filed on the right property. The trial judge held the mortgage had priority. We disagree and reverse the decree.

The facts are that the landowners, Pat and Charlotte McGowan, obtained a deed to a small tract of land in Fort Smith containing .23 acres and recorded it on May 24, 1984. A construction money mortgage was filed the same day. The McGowans intended to build a duplex on the property. However, the deed and mortgage described the wrong property. The tract they intended to buy was actually located 260.2 feet west of the tract described in the deed and mortgage. Both tracts described were located on a larger parcel of land being developed called the Georgetown Park Condominium Project. Work was commenced on the tract in question on May 29, 1984. The land description error was discovered, and a new deed and mortgage were prepared and filed for record on July 16, 1984. These documents described the intended tract and the place where work had commenced. The owners went bankrupt. Suits were filed to foreclose the mortgage and foreclose the materialmen's liens. All claims were consolidated in this case.

The question is: who comes first, the materialmen or the mortgagee? The chancellor held the mortgagee, Merchants National Bank of Fort Smith, had priority over the materialmen. Only one materialman appeals, the J & J Plumbing Company. The chancellor should have held the plumbing company had

priority, and the decree is accordingly reversed. Because of our decision on priority, we do not reach the question of the language of the construction money mortgage. Other questions raised will be answered after our discussion of the priority question.

Priority is generally determined by the maxim "prior in time, prior in right." Comment, *Priority of Liens on Real Property in Arkansas: Mortgages, and Mechanics' and Materialmen's Liens*, 12 Ark. L. Rev. 170 (1958). The rights of a materialman are set by statute. Ark. Stat. Ann. §§ 51-601—51-642 (Repl. 1971). This being a case of new construction, any lien a materialman has relates back to the time when work commences. *Wiggins* v. *Searcy Fed. S&L*, 253 Ark. 407, 486 S.W.2d 900 (1972). Consequently, such a lien takes priority over any claims perfected after that time. It is settled law that a mortgage filed after work commences will be subordinate to any liens based on the commenced work. *Dempsey* v. *McGowan*, 291 Ark. 147, 722 S.W.2d 848 (1987); *Lyman Lamb Co.* v. *Union Bank of Benton*, 237 Ark. 629, 374 S.W.2d 820 (1964); *Planters Lumber Co.* v. *Jack Collier East Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962). A mortgage becomes a lien at the time it is recorded and not before. Comment, 12 Ark. L. Rev. 170 *supra.*

It was undisputed that the owners and the mortgagee made a mutual mistake in describing the property in the first instruments. The property the McGowans bought and mortgaged was correctly described in the second instruments.

It was stipulated that the appellant materialman did not know of the first mortgage for this construction. In other words the appellant materialman had no actual notice of the mortgage. In such a case, according to American Jurisprudence, the materialman's lien has priority. That treatise reads:

> Where a mortgage, by mutual mistake, is made on a different tract of land from that intended, and subsequently an improvement is made on the land intended to be mortgaged without notice of the intended mortgage thereon, a lien for the improvement takes priority. 53 Am. Jur. 2d, Mechanics' Liens, § 274.

This statement is based on the case of *Gaines* v. *Childers*, 38 Or. 200, 63 P. 487 (1901), which has similar facts to the case before

us. In *Gaines* the mortgage was filed on the wrong property. Work commenced and eventually a materialman's lien was perfected on the property intended to be mortgaged. The materialman was successful in its foreclosure suit. A year later, the mortgagee filed suit to reform the mortgage so it would apply to the land intended. Foreclosure of the mortgage was sought as well as a ruling that the mortgagee had priority over the rights acquired by the materialman. The court held the materialman's lien had priority.

Some assistance in answering the question can be gained from examining cases involving mortgages with "after acquired property" clauses; that is, mortgages which provide they will also cover any property a mortgagor later acquires. Do such mortgages on the newly acquired property relate back to the time the mortgages were executed and filed, or merely become effective against third persons on the date the new property is acquired? What about existing liens? In *U.S.* v. *Westmoreland Manganese Corp.*, 134 F. Supp. 898 (E.D. Ark. 1955), the court said:

> There can be no question that, as a general rule, in cases of mortgages containing after acquired property clauses the liens of such mortgages attach to after acquired property at the time that title thereto vests in the mortgagor; where, however, if the property at the time it comes into the possession or ownership of the mortgagor is burdened with a mechanics or miners' lien, that lien takes priority over the mortgage lien, although actually subsequent thereto in point of time.

The appellee concedes in this case that the second mortgage cannot relate back to the time the first mortgage was filed, and no effort was made to reform the mortgage.

The appellee makes two central arguments for priority of its mortgage. First, it argues that the materialman's lien could not attach when work commenced because the McGowans did not have title to the land until the correction deed and mortgage were filed on July 16, 1984. Their argument is that Donoho Properties Limited Partnership, the grantor in the two deeds, owned the land at the time work commenced. As authority for the proposition that a materialman's lien cannot attach unless the owner of the land contracts for the work, *Sebastian Bldg. & Loan Assn.* v.

Minten, 181 Ark. 700, 27 S.W.2d 1011 (1930), and *Katterjohn Concrete Products* v. *Coffman*, 264 Ark. 503, 573 S.W.2d 306 (1978), are cited. Neither case is controlling. In *Sebastian Bldg.*, the "owner" of the land simply had an unenforceable oral contract to buy it when work commenced. In *Katterjohn* the facts were undisputed. First, a mortgage was filed by the bank. Second, the work was commenced. Third, the deed was filed. We upheld the trial court's decision that the mortgage had priority for two reasons: the law of after-acquired title applied; that is, title later acquired related back to the time the mortgage was filed, and the owner had no title when work commenced. No mention is made in *Katterjohn* of what agreement the "owner" had about the land, and we only know title was not acquired until the deed was filed. The other difference in *Katterjohn* is obvious. The mortgage was filed *first* on the land in question before work commenced, and title could relate back to the date of the mortgage. The mortgage was notice to any materialman that a prior claim existed on that land. In this case there was no such notice to the materialman; there was no mortgage recorded on the land in question when work commenced. The materialman got there first according to the record. In this case ownership was in the McGowans when they filed the first deed.

In a case directly in point, *Mason* v. *Jarrett*, 218 Ark. 147, 234 S.W.2d 771 (1950), we held that a correction deed related back to the date of the first deed with an incorrect description. We quoted with approval:

> . . . '. . . the second deed, with its particular description of the land, conveyed, as between the parties thereto, related back and became effective as of the date of the first deed. A second deed can be looked to in aid of a description given in a prior deed.'
>
> So, in the case at bar, the plaintiff actually owned the lands involved—though under an incorrect description—before he filed this action; and the correction deed, when executed, related back to the plaintiff's original deed of March 13, 1943, and was not a new or after-acquired title within the rule stated in *Percifull* v. *Platt (supra)* and *Dickinson* v. *Thornton (supra)*. . . .

That is precisely the case before us regarding the

question of ownership, as between the McGowans and Donoho Properties. The owners of the property in this case were the McGowans when the first deed was filed.

The appellee's other argument rests on cases which, in our judgment, do not apply—those that involve legal descriptions which are ambiguous or defective, yet are held to be notice to third persons. For example, in *Caraway Bank* v. *U.S.A.*, 258 Ark. 858, 529 S.W.2d 351 (1975), a mortgage containing a metes and bounds description of property located in a subdivision called Hidden Valley incorrectly identified the property as being located in Township 18 North, when in fact the property was located in Township 19 North. We found the mortgage good for two reasons. The Hidden Valley subdivision, properly identified on the record, was located in Township 19. The metes and bounds description indicated the property was in Hidden Valley. Also, a plat of lots was made part of the description. The mortgage itself furnished a key to the error; therefore, the description was held good against a bona fide purchaser or a third person without notice.

In *Johnson* v. *Grissard*, 51 Ark. 410, 11 S.W. 585 (1888), we found a general description of property to be constructive notice to a third party. The description simply read "all my crop of corn, cotton, or other produce that I may raise, or in which I may have in any manner an interest, for the year 1884, in Faulkner County, Arkansas." In *U.S.* v. *Westmoreland Manganese Corp., supra*, the court analyzed our decision in *Johnson* this way:

> . . . that the record of the mortgage was constructive notice, and that all persons buying any cotton from the mortgagor in Faulkner County were bound to inquire whether it was covered by the mortgage to Grissard.

The first deed and mortgage in this case appeared to be a perfectly legitimate transaction. There were no errors in the description which would place one on notice that an error was made; there was no key to the fact that the wrong property had been described.

The appellee argues, however, that the materialman could have or should have known the description was wrong because the only construction taking place in the Georgetown

development at that time was on the intended plot of land. Essentially, that was the reason the trial judge found the description good. The trial judge simply changed the deed and mortgage to read the way it was corrected. Extrinsic or outside evidence is admissible to explain an ambiguity in a deed but not to change it. 23 Am. Jur. 2d, Deeds, § 310. According to American Jurisprudence, "[w]here the description of premises conveyed in a deed is definite, certain, and unambiguous, extrinsic evidence cannot be introduced to show that it was the intention of the grantor to convey a different tract or that he did not intend to convey all of the land described." 23 Am. Jur. 2d, Deeds, § 312.

In *Caraway Bank* v. *U.S.A., supra*, this statement is quoted from *U.S.* v. *Westmoreland Manganese Corp., supra*:

> It is a well settled principle of Arkansas law that a mortgage will not be held void for uncertainty, even as to third persons, whereby any reasonable construction it can be sustained; and where the description used furnishes a key whereby a person, aided by extrinsic evidence, can ascertain what property is covered, such description is sufficient.

Extrinsic evidence may be used in cases when the description gives a key to the mistake or there is an ambiguity. For example, in *Johnson* the key was "all my . . . cotton." That placed a third person on notice to make certain any cotton bought from the mortgagor was not mortgaged. In this case the trial court held that the materialmen could know the description was wrong by seeing that no other construction was in progress and that a mistake was made in the description. But how was the appellant to know it was the wrong property? There was no key in the first deed and mortgage; there was no ambiguity to be cured by extrinsic evidence. The extrinsic evidence—seeing the state of construction—was used to simply change a description that was definite and certain.

This Georgetown area was a development area, and from all one could gather, the owners had more than one transaction or development underway. Indeed, the owners did later build two more units on this part of the development.

A materialman should not be placed on notice by

simply looking at construction work. The materialman is bound by the record and ought to be able to rely on it. In *Jack Collier East Company* v. *Barton*, 228 Ark. 300, 307 S.W.2d 863 (1957), we said:

> . . . It would place a great burden on materialmen and, in particular, laborers not to be able to rely on public records for protection. Otherwise they would have to rely on hearsay and oral agreements, and would have to make extensive investigations for which they are ill equipped.

See also Comment, 12 Ark. L. Rev. 170, *supra*. There was no actual, legal, or constructive notice that the appellee had a mortgage on this land when work commenced.

The bank made a mistake when it filed its mortgage. It was filed on the wrong land. Whether the bank relied on the McGowans, a lawyer, a realtor, or its own officers when it prepared the mortgage is immaterial. The materialmen made no mistake and had a right to rely on the record. Between these parties, the bank must suffer the consequences of its error.

There was some dispute as to whether other work was going on in the area before the second mortgage was filed, but no one disputed that the appellant commenced its work before the second mortgage was filed. Therefore, the decree regarding priority is reversed, and the appellant's lien has priority over the mortgage.

The appellee purchased the land and improvements for $10,000 at the foreclosure sale. The appellant's lien is in the sum of $4,532; however, interest on this sum was denied by the chancellor. This was error which the appellee concedes. In *Advance Const. Co.* v. *Delta Asphalt and Concrete Company*, 263 Ark. 232, 563 S.W.2d 888 (1978), we held that materialmen were entitled to prejudgment interest at six percent, based on Ark. Const. art. 19, § 13. Therefore, the appellant is entitled to prejudgment interest at the rate of six percent from the time the complaint was filed. In this case that was November 9, 1984.

The appellant was also allowed attorney's fees. The appellee cross-appeals from this decision and is right—attorney's fees are not proper in such a case. *Millsap* v. *Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986). But that argument

is made too late. The record reflects that the appellant prayed for attorney's fees in its complaint; that the appellee failed to specifically object to that prayer; that the chancellor, at the conclusion of trial, asked for all attorneys of record to submit worksheets for fees; and that the appellee again failed to object. The appellee had the opportunity to object at trial and did not; instead, it argues this point for the first time on appeal. We have repeatedly held that objections not made at trial cannot be raised for the first time on appeal. *Merriman* v. *Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987). Therefore we affirm the chancellor's award of attorney's fees.

The appellee also argues on cross-appeal that the chancellor erred in awarding a lien for labor when only material was furnished by the appellant. *Christy* v. *Nabholz Supply Co.*, 261 Ark. 127, 546 S.W.2d 425 (1977). The amount of the lien was stipulated to by the parties, which in our judgment precludes arguing this question on appeal.

Reversed and remanded with directions to enter a consistent decree.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I could agree with the majority if J & J Plumbing Company was adversely affected by the substitution of the lot correctly described for the lot incorrectly described. But it was not. In fact the correction benefitted J & J Plumbing because it, like the other materialmen, was placing materials on the lot to which the McGowans had no legal title and, but for the correction, its lien would have been worthless. *Katterjohn Concrete Products* v. *Coffman*, 264 Ark. 503, 573 S.W.2d 306 (1978). The erroneous description, by metes and bounds, described the property as:

> Commencing at the Southeast corner of said NE/4, NW/4; thence West 603.5 feet; along the South line of said Northeast Quarter, Northwest Quarter; thence North 25 feet to the point on the Northerly Right-of-Way line of South O Street; thence North 10° 04 minutes West, 301.00 feet to the point and place of beginning; thence North 10° 04 minutes West, 109 feet; thence East 90.4 feet; thence South 10° degrees 04 minutes East 109.0 feet; thence West 90.4 feet to the point and place of beginning

containing 0.23 acres more or less. . .

In fact the description should have been *863.07* feet rather than *603.5* feet. Thus, the tract *intended* to be conveyed was identical to the property actually conveyed except that it lay 260.02 feet to the west.

I concede the parties stipulated that J & J Plumbing had no actual knowledge of the mortgage. But that is not controlling. There was no stipulation that it had no legal notice and the chancellor made a specific finding that the materialmen were on notice that the property being improved by them was subject to the mortgage to Merchants National Bank.

The important thing is whether J & J Plumbing was misled by the error in the description. There was no stipulation that J & J Plumbing thought the property was unencumbered by a construction money mortgage so that its lien for materials would be a first lien. Significantly, J & J Plumbing does not argue here or below that it was under the impression it would have a first lien. Therefore, the correction deed altered its position only for the better.

What is controlling under our cases is whether materialmen could reasonably have been alerted to the fact that the construction was not occurring on the incorrectly described property, but on adjacent property, in this case immediately to the west. The chancellor found J & J Plumbing was on notice of the discrepancy because the only construction in the pertinent subdivision, Georgetown Park, was on the lot which was later correctly described, whereas there was no construction on the lot incorrectly described, or anywhere else in the area. That finding was sustained by the proof and those factors are sufficient under our cases. In *Caraway Bank* v. *United States of America*, 258 Ark. 858, 529 S.W.2d 351 (1975), where the wrong township was used in the mortgage, we held that a third party lien claimant could have located the correct property by extrinsic evidence and by the mortgage itself. Thus a mortgage with a deficient description had priority over intervening claimants without actual notice. In *Caraway Bank* we quoted with approval language from *United States* v. *Westmoreland Manganese Corp.*, 134 F. Supp. 898 (E.D. Ark. 1955):

> It is a well settled principal of Arkansas law that a mortgage will not be held void for uncertainty, even as to third persons, whereby any reasonable construction can be sustained; and where the description used furnishes a key whereby a person, aided by extrinsic evidence can ascertain what property is covered, such description is sufficient.

The majority cites *Gaines* v. *Childers*, 38 Or. 200, 63 P. 487 (1901). But there is a material difference in the facts. In *Gaines*, the trial court found the materialman had neither knowledge *nor notice* of the year-old claim of the mortgagee, whereas here the correction occurred within days and to the detriment of no one. Moreover the chancellor in this case reached a contrary finding and that finding was supported by the proof.

The majority relies essentially on cases which follow the rule, "first in time, first in right." However, in many of those cases the interests of innocent third paties had intervened. Where those are lacking, as here, the equities of the case have governed. Thus, in *Allen* v. *McGaughey, et al.*, 31 Ark. 252 (1876), Kimberly executed a deed of trust to Allen which erroneously described one quarter-section of a 1,200 acre tract as southeast instead of southwest. It was undisputed that Kimberly intended to convey the southwest quarter to Allen but only after a foreclosure and sale to Allen did the error come to light. By that time McGaughey had acquired a judgment against Kimberly and his judgment lien was prior to Allen's claim. This court held the judgment lien was subject to Allen's right to reform his deed to make it conform to the contract. In *Ft. Smith Milling Co.* v. *Mikles*, 61 Ark. 123 (1895) the same result was reached:

> That courts of equity can correct mistakes in contracts of all descriptions by reforming them so as to carry out the intention of the parties is beyond question. In the absence of a statute, they will interfere to correct mistakes between the original parties, even against a judgment lien, or purchasers at sheriff's sales under executions with notice of the facts, notwithstanding the judgment under which the lien was acquired, or upon which the executions were issued, were rendered subsequent to the execution of the contracts, but prior to the reformation. In such cases the equities are *dehors* the contracts, and the judgment liens

attach subject to them; and parties purchasing with notice cannot defeat them.

I believe the chancellor should be affirmed.

Bob FRANCE d/b/a BOB FRANCE TRAILER PARK
v. George O. NELSON d/b/a E-Z TV

86-248 729 S.W.2d 161

Supreme Court of Arkansas
Opinion delivered May 18, 1987
[Rehearing denied June 22, 1987.]

Jeff Duty, for appellant.

Matthews, Campbell & Rhoads, P.A., by: *Craig A. Campbell*, for appellee.

DARRELL HICKMAN, Justice. This is a replevin and conversion case which was transferred to us by the court of appeals.

Bob France, the appellant, owns a trailer park in Rogers, Arkansas. The appellee, George Nelson, rents appliances, televisions, and stereos. Nelson rented a washer and dryer, a television set, and a stereo system by the week to Danny and Lena Adams. The Adamses rented a mobile home in France's mobile home park. When the Adamses failed to pay the weekly rent on the appliances, Nelson tried to recover the rented items. The Adamses had vacated the premises, and France refused to release the items until the rent due him by the Adamses was paid. Ultimately, Nelson filed a replevin suit to obtain the items. He also sued France for conversion, asking for damages.

The circuit judge signed a replevin order before trial, and the items were taken from the trailer park by court order and delivered to Nelson. All of the items were returned except the television set, which was not there. (Apparently, the Adamses took it.) Sitting as a jury, the trial judge found that France had no lawful right to keep possession of the property, and he awarded Nelson compensatory damages in the amount of $510. This amount is equal to the weekly rental Nelson charged for the items, $30 for the 17 weeks France converted the property. Punitive damages in the sum of $200 were also awarded.

France makes three arguments on appeal. First, the judgment was contrary to the law and evidence; second, punitive damages were not justified; and third, the court applied the wrong measure of damages. We do not agree and affirm.

The last argument can be easily disposed of. Both parties argue the law of damages relating to a replevin action, quoting extensively from *White* v. *Gladden*, 6 Ark. App. 299, 641

S.W.2d 738 (1982). In that case the court split three to three on this issue of damages. (See Note, *White* v. *Gladden: A Change in Law of Damages or a Change in Evidentiary Burden*?, 37 Ark. L. Rev. 718 [1983]). We declined to review that decision on a petition for writ of certiorari. An affirmance by an equally divided court is not entitled to precedential weight. *Arkansas Writers' Project, Inc.* v. *Ragland*, No. 85-1370, slip op. at 11 n.7 (U.S. April 22, 1987); *Neil* v. *Biggers*, 409 U.S. 188 (1972).

Both parties miss the point entirely. The trial judge did not award incidental damages for a *replevin* judgment pursuant to Ark. Stat. Ann. § 34-2116 (Repl. 1962). He awarded damages for the *conversion* of the property. A replevin action is to recover property. Conversion is a common law tort action for the wrongful possession or disposition of another's property. See 18 Am. Jur. 2d, Conversion, §§ 1-6 (1985). They are separate causes of action. The measure of damages in a conversion action is different from that in a replevin suit. See *First Nat'l Bank of Brinkley, Ark.* v. *Frey*, 282 Ark. 339, 668 S.W.2d 533 (1984). The complaint asking for replevin also specifically alleged conversion and sought damages for that wrong. In his order, the judge found "[t]hat the Plaintiff is hereby awarded . . . compensatory damages for the conversion . . ." and ". . . hereby awarded punitive damages . . . in the sum of Two Hundred Dollars." No objection was made below to the claim for conversion, and the argument on appeal does not address what the judge found. Since it does not deal with the finding and judgment, we do not address it. Cf. *Garst* v. *Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987).

The remaining arguments are simply disagreements over the facts. The trial judge summarized his finding from the bench:

> . . . [T]he *perception I have from hearing everybody is Mr. France made it clear Mr. France took the position he had the right to hold on to that property until his rent was paid. That position in my opinion is wrong. He didn't have the right to hold on to somebody else's property until the rent was paid.* I think he left Mr. Webb clearly with that idea that there wasn't anymore use to do anything else because he was going to hold it until the rent was paid. Mr.

> Webb didn't have any way of getting the rent paid and had no duty to pay the rent, nor did Mr. Nelson. It seems to me Mr. France got mistreated by Mr. Adams because Mr. Adams didn't pay his rent, but that's not a good reason for Mr. France to then mistreat Mr. Nelson or the rental business. I think there is a conversion here . . . (Italics supplied.)

The appellant disagrees with those findings, essentially rearguing his case to us. On appeal we view the evidence in a light most favorable to the appellee, and all inferences are resolved in favor of the appellee. *Sipes* v. *Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985). The findings of the trial judge are affirmed unless we find them clearly wrong. *Sipes* v. *Munro, supra.*

The appellant's testimony was that he had a right to hold the property until his rent was paid, and Nelson never showed him any evidence of ownership until the sheriff came out. (No legal justification was given below or argued on appeal as to why the appellant had a right to hold the property.) The trial judge did not accept the appellant's version of what happened, because he began his summary by saying "[n]ow I certainly wouldn't say Mr. France is not telling me the truth when he says he told Mr. Webb he wanted to know who owned it . . ."

The testimony offered by the appellee was in a different vein. Nelson called the trailer park two or three times about his property. He was told "you cannot have those until someone pays the rent . . ." He got a refusal each time he called. Nelson sent his employee, Lester Webb, to get the property. He made three trips on his own to the trailer court. On the first trip, he left a note for France to call him. To his knowledge, no one ever did. A week later he returned and spoke to Mrs. France. She said her husband had the keys to the trailer. He asked if she would let him know when he could come out. Again, no word from the appellant. He returned the third time and finally talked to France. France told him someone had to pay the trailer rent before he would let the items go. A replevin suit was filed. A deputy sheriff made three trips to the trailer court. Finally, France was there to reluctantly open the trailer. France took the papers and found the serial numbers of the items a few digits off and refused to deliver the items. The deputy called his sergeant and was told to arrest

France if he refused to deliver the items. Finally, France saw the items were marked "E-Z TV Rental" in ink and released them to the deputy.

Disputed facts and the credibility of witnesses are within the province of the factfinder to resolve—not ours. *Merriman* v. *Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987). We cannot say that the trial judge was clearly wrong in finding France wrongly refused to return the items to Nelson and converted them to his own use. No doubt, France's obstinance was a basis for the small award for punitive damages, as well as the repeated good faith efforts of the owner to get his goods without success. Nelson was wrongfully deprived of his property for four months. There is the fact that France changed the lock on the trailer and refused to comply with the sheriff's order, at least until threatened with arrest. The trial judge was entitled to conclude that France wrongfully and willfully deprived the owner of his property.

The appellant has failed to demonstrate any error that would warrant setting aside this judgment.

Affirmed.

PURTLE and NEWBERN, JJ., concur.

DAVID NEWBERN, Justice, concurring. The trial court, as the majority opinion notes, ordered the return of the property to the appellee and then awarded incidental damages based on the loss of use of the items replevied. However, the court stated in its order that it was awarding damages for "conversion." The majority opinion has seized on that mistaken terminology to duck the issue of whether the damages were correctly calculated.

I see nothing wrong with the trial court's calculation of damages. The appellant's argument is that no evidence of the *value* of the replevied items was presented. Therefore, he says, the court had no basis for determining whether the compensatory damages awarded for loss of use were disproportionate to the market value of the items.

In my opinion, if the appellant had wished to challenge the appellee's evidence of rental rates under the Adams contract as a basis for damages, he could have done so by presentation of

evidence of the value of the items. However, he did not.

My primary objection to the majority opinion is that it leaves the impression that this court fails to understand that conversion damages and incidental damages accompanying replevin are wholly inconsistent remedies. The distinguishing feature of an action for *conversion* is an interference with property so serious as to justify a forced judicial sale to the wrongdoer. *See* W. Prosser and W. Keeton, *Law of Torts*, § 15 (5th Ed. 1984). The property owner is compensated by an award for value of the property at the time and place of the conversion.

On the other hand, the primary object of a replevin action is the actual *recovery of possession* of the property. The owner cannot be required to accept the value of the item in lieu of return of possession. *Pettit* v. *Kilby*, 232 Ark. 993, 342 S.W.2d 93 (1961). By statute, the property owner may, in addition to return of the item, recover damages for loss of use while it was out of his possession. Ark. Stat. Ann. § 34-2116 (Repl. 1962).

It is generally recognized that the *value of the use* of the property converted is not recoverable in a conversion action. *Ford Motor Credit Co.* v. *Henry*, 267 Ark. 201, 584 S.W.2d 584 (1979) (measure of damages for conversion is the market value at the time and place of conversion, not the purchase, rental, or replacement cost); *Hardin* v. *Marshall*, 176 Ark. 977, 5 S.W.2d 325 (1928) (instruction allowing jury to assess as damages rental value of property converted in addition to value of property was error in a conversion cause of action).

Rather than emphasize the trial court's mistaken reference to conversion, I believe we can and should ignore the form of his order and look to its substance. The compensatory damage awards were so clearly the ones contemplated by Ark. Stat. Ann. § 34-2116 (Repl. 1962) that the court's ruling should be treated as such.

My second objection is that the majority opinion suggests we are somehow bound by the United States Supreme Court's estimate of the precedential value of appellate decisions which result from a tie vote. This court is not bound by the way the federal courts choose to handle this situation. The question of what weight to accord decisions from an equally divided court has

not been directly addressed in Arkansas, and the issue is far from settled. *See* R. Laurence, *A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court*, 37 Ark. L. Rev. 418 (1983).

While *White* v. *Gladden*, 6 Ark. App. 299, 641 S.W.2d 738 (1982), is in my view, no more than a tempest in a teapot in the context of this case, I do not believe we should imply that it lacks precedential value in our court of appeals.

While there is a temptation to remand this case to the trial court because of the mistaken terminology used in the judgment, I believe the judgment is clear enough in stating the damages and the means used to calculate them as incidental replevin damages that the judgment should be affirmed.

PURTLE, J., joins in this concurrence.

Robert E. LOOPER and ENTROPHY SYSTEMS, INC.
v. MADISON GUARANTY SAVINGS & LOAN ASSOCIATION, et al.

86-242 729 S.W.2d 156

Supreme Court of Arkansas
Opinion delivered May 18, 1987

Eichenbaum, Scott, Miller, Crockett, Liles & Heister, P.A., by: *Leonard L. Scott* and *C. Richard Crockett*, for appellant.

Wright, Lindsey & Jennings, for appellee.

DARRELL HICKMAN, Justice. In a foreclosure proceeding, the chancellor refused to confirm the sale of a residence. The

reasons given were because the purchase price shocked her conscience and other circumstances existed which justified the refusal. The question presented involves the law concerning the confirmation of judicial sales when an inadequate price is paid.

The appellants argue there is no Arkansas case holding that a sale can be set aside simply because the sale price is inadequate. Conceding that we have said a sale may be set aside because it "shocks the conscience of the court," the argument is that this is only dictum: the law is or should be that some other circumstances must exist, which amount to a fraud brought about by the buyer. It is further argued that since the buyers in this case, the appellants, were faultless, the sale should not have been set aside.

The appellees argue that our decisions state a sale can be set aside solely because it shocks the conscience of the court, and even if that were not so, there were other circumstances present which justified the chancellor's actions.

Both parties are right in a sense. We have not held that a sale can be set aside simply because of an inadequate sales price. But we have said on four separate occasions that a sale may be set aside if it shocks the conscience of the court. We have never had a case before in which a trial judge set aside a sale solely because it shocked the conscience of the court. Essentially, we have that in this case and affirm the chancellor's decision as being discretionary, permitted by law, and not arbitrary.

The sale price was $1,900, and the market value was found to be $42,500; that is, the property sold for 4.4% of its value according to the chancellor's finding.

A price that "shocks the conscience" of a judge can never be reduced to a mathematical formula. It depends on a variety of circumstances: the value of the property, the circumstances surrounding the sale, the price, the rights of the parties participating in the sale, and the harm that may result if the sale is confirmed, to name a few. Nevertheless, the decision is one for the chancellor to make, using sound discretion. *Summars* v. *Wilson*, 205 Ark. 923, 171 S.W.2d 944 (1943). While no fixed formula exists or can exist for what is a shocking sale price, fixed rules do exist for us to review such a case. First, we are an appellate court; we do not retry cases. We cannot sit as jurors who determine facts

in law cases, nor chancellors who do the same in chancery courts. *Merriman* v. *Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987); *Black & Black Oil Co.* v. *Guy R. Smith Drilling Co.*, 289 Ark. 487, 712 S.W.2d 901 (1986). Factual determinations of chancellors must be upheld unless clearly erroneous. ARCP Rule 52.

When we examine a discretionary decision made by a chancellor, the question is not what we would have done, but whether, as a matter of law, discretion was abused—was the judgment call arbitrary or groundless? *Keirs* v. *Mt. Comfort Enterprises et al.*, 266 Ark. 523, 587 S.W.2d 8 (1979); *Robbins* v. *Guy*, 244 Ark. 590, 426 S.W.2d 393 (1968).

Other principles also apply when we review a case, sometimes omitted from our opinions, but nonetheless applicable to all our decisions. The appellant, the party losing at the trial level, has the burden of demonstrating error. *Baldwin Co.* v. *Ceco Corp.*, 280 Ark. 519, 659 S.W.2d 941 (1983). The evidence on appeal and all reasonable inferences from that evidence, and the findings of fact by a judge must be reviewed in a light most favorable to the appellee, the party that won at the trial level. *Sipes* v. *Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985); *Wasp Oil, Inc.* v. *Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983). With these principles in mind, we review the chancellor's finding.

Nathan Graham purchased a residence, and Madison Guaranty Savings & Loan Association took a mortgage on it for $38,400. Graham made no payments, and Madison sued to foreclose the loan. Foreclosure and judgment were granted. The property was ordered sold at a judicial sale to the highest bidder on June 5, 1986. Madison's attorney, Charles Ward, intended to be there to bid in or near the amount owed Madison. That amount, which was reduced to judgment, was $46,470.61. Graham testified that he did not attend the sale because the lawyer, Ward, had told him that he, Ward, would attend the sale and bid in for Madison the amount of the judgment. Graham concluded he would not need to be there to protect his interests, because such a bid would not result in a deficiency judgment against him. Ward was late to the sale, a few minutes according to him. Two different secretaries had reminded Ward of the noon sale late that morning.

Robert Looper, acting alone, and Imran Bohra, acting on behalf of Entrophy Systems, Inc., joined forces and bid on the property. According to the testimony, the opening price bid was one dollar, and the bidding increased competitively to the sale price of $1,900.

An expert testified that the property had a market value of $42,500. Looper said he drove by the property and decided not to bid more than $10,000 or $12,000. He said its value was diminished because a youth home was across the street, and he did not know the condition of the interior of the house. Also, he knew the property was heavily mortgaged.

After a hearing the chancellor refused to confirm the sale and ordered a new sale. The chancellor made these findings of fact:

> 1. A lawfully advertised judicial sale of the subject property was held on June 5, 1986. At this sale Robert E. Looper and Entrophy Systems, Inc. were the successful bidders at the price of $1,900.00. The total amount of the judgment, interest and costs against the property was $46,470.61.
>
> 2. If this sale price is confirmed, the defendant will be personally liable for a deficiency judgment for the remaining balance of $44,570.61.
>
> 3. The fair market value of the subject property is $42,500.00. The bid price is therefore 4.4% of the fair market price.
>
> 4. As a result of a conversation between plaintiff's counsel and defendant, the defendant received the impression that plaintiff would bid in the property at the total amount of judgment, interest and costs. While the court finds no actual representation was made by plaintiff's counsel that such a bid would be made, it is clear that the defendant believed this would occur and relied upon that belief, whether this reliance was reasonable or not.
>
> 5. Through inadvertance, the plaintiff's counsel failed to attend the sale on time and therefore missed the opportunity to bid in accordance with plaintiff's instructions. This

occurred because plaintiff's counsel was scheduled to attend a hearing in Hot Springs the morning of the sale and had requested another attorney to cover the sale. He returned to the Little Rock office in time to attend the sale, but became involved in a telephone conversation, and was reminded of the sale by a secretary. After running to the courthouse, counsel arrived a few minutes late to find that the property had already been sold.

6. Plaintiff had instructed counsel to bid the property at the amount of the judgment, interest and costs, and stands ready, willing, and able to so bid in the event of a resale.

* * *

The price bid at this sale is indeed so grossly inadequate as to shock the conscience of this court. The confirmation of this sale at such a price would result in serious harm to the defendant, Graham, who would suffer a large deficiency judgment and be subject to execution, garnishment, and other post-judgment remedies. The law is such that inadequacy of price when so gross, need only be coupled with slight circumstances to justify setting aside the sale. This is a court of equity, and foreclosure is historically an equitable proceeding intended to protect the debtor. Confirmation is within the sound discretion of the chancellor. This chancellor does not believe an order of resale to be an abuse of that discretion, where the price received is only 4.4% of the fair market value, and the defendant would otherwise suffer a substantial deficiency judgment. . . .

The appellants do not directly challenge these findings but do argue about their significance. While conceding the chancellor had the right to determine the market value of the property, the appellants really disagree that the fair market value of the property is $42,500. They point to Looper's testimony that he was prepared to bid only $10,000 or $12,000 based on the nearby youth home and the lack of knowledge concerning the condition of the house. Bohra's testimony was that after the sale he discovered the house was sub-standard to neighboring houses and in need of painting and cleaning. However, the appellants concede that the court may not be clearly wrong in finding the

value of the property to be $42,500 and, therefore, the price was grossly inadequate. They do not challenge the fact that the price shocked the chancellor's conscience.

The appellants argue that they had nothing to do with the apparent representation made by Ward to Graham. If Graham's belief was reasonable, then Madison Guaranty was at fault; if Graham's belief was not reasonable, then it was Graham's fault—in neither case was it the fault of the appellants.

The appellants do not think Ward was guilty of excusable "inadvertance" when he did not arrive at the sale on time. He was negligent. Ward was in town, in time, to attend the sale; he was twice reminded of the sale by secretaries; he had attended sales before and knew they started at noon; and he conceded he was late simply because he forgot.

In four separate decisions we have said that a judicial sale cannot be set aside for an inadequate price *unless* it shocks the conscience of the court. In *Mulkey* v. *White*, 219 Ark. 441, 242 S.W.2d 836 (1951), the chancellor refused to confirm a sale of property for $975. The value of it was $2,000. Other circumstances did exist which prompted the chancellor to set aside the sale. We upheld the chancellor stating:

> At the outset, certain well established holdings may be stated as applicable:
>
> (1) *Mere inadequacy of price, unless so great as to shock the conscience or amount to evidence of fraud, will not justify the Court in refusing to approve the sale. . . .*
>
> (2) When great inadequacy of price is shown, the Courts will seize upon slight circumstances to go along with the inadequacy of price and justify a refusal to approve the sale . . . .
>
> (3) In judicial sales the Court is the vendor, and, in the exercise of a sound judicial discretion, it may confirm or refuse to confirm a sale made under its order. The Courts will not reject a sale and refuse a confirmation for captious reasons, but only in the exercise of sound discretion. The trial court is vested with sound judicial discretion in these matters; and the appellate court, in reviewing the action of

> a trial court to see if there has been an abuse of discretion, does not substitute its own decision for that of the trial court, but merely reviews the case to see whether the decision was within the latitude of decisions which a judge or court could make in a case like the one being reviewed. . . . [Italics supplied.]

In three prior cases we have recited almost the exact language regarding an inadequate price. We first stated that principle in *George* v. *Norwood*, 77 Ark. 216, 91 S.W. 557 (1905):

> It is equally well settled, here and elsewhere, that a judicial sale will not be set aside on account of mere inadequacy of price, *unless the inadequacy be so gross as to shock the conscience or raise a presumption of fraud or unfairness*. . . . [Italics supplied.]

Next, in *Stevenson* v. *Gault*, 131 Ark. 397, 199 S.W. 112 (1917), we stated:

> . . . It is the settled rule of this court that mere inadequacy of price will not justify a court in refusing to approve a sale and depriving the purchaser of the benefit of his purchase *unless the inadequacy is so great as to shock the conscience or amount to evidence of fraud*. [Italics supplied.]

Then in *Doyle* v. *Maxwell*, 155 Ark. 477, 244 S.W. 732 (1922), we said:

> . . . It is the settled rule of this court that mere inadequacy of price will not justify a court in refusing to approve a sale and in depriving the purchaser of the benefit of his purchase, *unless the inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud*. [Italics supplied.]

That principle is a well established principle of law. The two general legal encyclopedias recite it. 47 Am. Jur. 2d, Judicial Sales, § 359 states it this way:

> If the inadequacy is so glaring and grossly disproportionate to the real value of the property as to shock the understanding and conscience of an honest and just man, or, as it is sometimes expressed, the judicial conscience, it

> may be sufficient to create a presumption of fraud.

50 C.J.S. Judicial Sales § 59 states it this way:

> Although there is some authority to the contrary, ordinarily a judicial sale will not be set aside, even though the price is grossly inadequate, unless the inadequacy is so great as in itself to raise a presumption of fraud, unfairness, or mistake, or to shock the conscience of the court . . .
>
> It has also been held that it is not the purpose of the law to protect one who seeks to procure valuable property for little or no outlay.

When we have overruled a chancellor's order setting aside a sale, it has been clearly warranted by the facts.

In *Doyle* v. *Maxwell, supra*, the property was sold for $150, and its value was probably $300. We held such a price was not so grossly inadequate as to indicate fraud or shock the conscience of the court. The same was true in *George* v. *Norwood, supra*, where the price was $4,000 and its value was near that.

Conversely, we have reversed chancellors who confirmed sales that should have been set aside. In *Moore* v. *McJudkins*, 136 Ark. 292, 206 S.W. 445 (1918), the chancellor confirmed a sale he should not have confirmed. The sale price was $200, the value at least $1,000. More importantly, the appellants were not notified of the sale. We have emphasized the importance of judicial sales when we have reversed a chancellor who sets aside a sale. In *Doyle* v. *Maxwell, supra*, we said:

> This court has uniformly recognized that it is essential to the interest of those whose property is sold at a judicial sale that prospective purchasers should have full confidence in the safety of the purchase, and that they will not be disturbed for mere inadequacy of price.

We have emphasized the discretion of the chancellor when we have upheld his decision. In *Summars* v. *Wilson, supra*, we said:

> . . . [I]n reviewing the exercise of discretion, the test is whether the ordinary, reasonable, prudent judge, under all the facts and circumstances before him, would have

> reached the conclusion that was reached. Viewed in the light of the facts herein, we cannot say that the trial court abused its discretion in refusing to allow Summars to complete his purchase.

Other states and circuits have readily affirmed a trial judge who sets aside a sale because it "shocks the conscience" of the court. *First Nat. Bank* v. *M/V Lightning Power*, 776 F.2d 1258 (5th Cir. 1985); *McCartney* v. *Frost*, 386 A.2d 784 (Md. 1978); *Homecraft Corp.* v. *Fimbres*, 580 P.2d 760 (Ariz. App. 1978); *Johnson* v. *Jefferson Standard Life Insurance Co.*, 429 P.2d 474 (Ariz. App. 1967); *Capozzi* v. *Antonoplos*, 201 A.2d 420 (Pa. 1964). These cases hold a sale may be set aside if the price shocks the conscience of the court. The Arizona decision of *Johnson* v. *Jefferson Standard Life Insurance Co., supra*, is particularly persuasive since the facts and arguments are similar to those in this case. A trial court's order setting aside the sale was upheld. The court said:

> Appellant initially contends that under general equity law, the trial court was powerless to grant relief to appellee because its lawyer was unexcusably negligent in arriving late at the execution sale, and appellant, who did nothing to bring about this condition, was perfectly justified in bidding $5,000.
>
> The power of a court to set aside an execution sale arises from its inherent power to control its own process. [Citations omitted.] A motion to set aside is addressed to the sound discretion of the court. [Citations omitted.]
>
> While 'mere inadequacy' of price is generally not sufficient to set aside an execution sale, * * * when the inadequacy is so great as to '* * * shock the conscience of the court,' this is sufficient to authorize the court to set aside the sale and order a new sale. [Citations omitted.] This law has been enunciated by our Supreme Court:
>
> > '* * * inadequacy of price, when unconscionable, will justify the setting aside of a sheriff's sale on motion.' [Citations omitted.]
>
> When there is an inadequacy of price which in itself

> might not be grounds for setting aside the sale, '* * * slight additional circumstances or matters of equity * * *' justify the court in setting aside the sale.

There were other circumstances in this case which the chancellor recited as reasons for her action, e.g., the fact that Madison, a creditor, would suffer a severe loss, the lawyer that was "inadvertently late," and the owner was not there to protect his interests. While these are not substantial reasons, they, no doubt, influenced her decision. The appellants argue these are not the kind of circumstances that may be considered. They were not entirely irrelevant, and the chancellor did not abuse her discretion in using these circumstances, together with the shockingly low price, to arrive at her decision. Essentially, the appellants want us to adopt an inflexible rule regarding judicial sales, a rule more suitable to law courts than courts of equity. We decline to overrule the language in our cases and cannot say in this case the chancellor abused her discretion.

Affirmed.

B.J. McNAIR, et ux *v.* OZARK GAS TRANSMISSION SYSTEM and H.B. ZACHRY COMPANY

86-261 729 S.W.2d 165

Supreme Court of Arkansas
Opinion delivered May 18, 1987

Clark & Adkisson, for appellant.

Laws, Swain & Murdock, P.A., by: *Ike Allen Laws, Jr.* and *Timothy W. Murdock*, for appellee.

DARRELL HICKMAN, Justice. This case was referred to us by the court of appeals.

The appellants, B. J. and Kitty McNair, sued the Ozark Gas Transmission System and a pipeline construction company, H. B. Zachry Company, for damages to their land resulting from construction of a pipeline across their land. The jury returned a verdict for the McNairs for $1,000. The McNairs appeal and the appellees cross-appeal. We find no merit in either appeal, the record being void of any prejudicial error and the arguments being simply disputes over the facts.

The McNairs argue that one of the jury instructions was wrong because it allowed the jury to deduct from any damages awarded the sums already paid by Ozark. The argument is that the instruction was not supported by any evidence. We disagree. There was evidence and arguments made that the McNairs were prepaid for damages claimed and that the McNairs released fully or partially any claims against Ozark.

The McNairs argue the trial judge was wrong in ruling that a letter addressed to Ozark was inadmissible. The judge had the discretion to admit or deny the letter offered during the rebuttal testimony of an Ozark witness; there was evidence that the letter was not properly addressed and concerned a collateral matter. No error was committed.

Ozark argues on cross-appeal that the judge should have found the releases discharged it completely from liability for damages within the right-of-way. But there was a dispute whether the releases only covered damages to the land within the right-of-way or also damages outside it. This issue of fact was properly submitted to the jury. *Abbott* v. *Parker*, 103 Ark. 425, 147 S.W. 70 (1912).

Ozark also complains that the judge should not have instructed the jury on trespass because the matter was completely contractual between the parties. The jury found no trespass damages, so the appellees could not have been prejudiced. We will not reverse where no prejudice is shown. *Peoples Bank & Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1987).

Affirmed.

Jimmy L. SUMMERS *v.* STATE of Arkansas

CR 86-200 729 S.W.2d 147

Supreme Court of Arkansas
Opinion delivered May 18, 1987

Jim Petty, Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. The trial court revoked the appellant's probationary sentence. After the parties concluded their presentation of evidence at the revocation hearing, Summers orally moved to dismiss the petition for revocation because the hearing was not held within 60 days of his arrest. The trial court took that motion and another oral motion under advisement and the next day ruled the hearing was timely held. He should have ruled the motion was made too late.

Summers pleaded guilty to writing hot checks in August, 1985, and was placed on probation for five years. A petition to revoke his sentence was filed March 7, 1986, alleging several violations of his probation conditions: Summers had failed to keep monthly appointments with his probation officer, failed to pay his monthly probation fee and failed to make payments on his fine and restitution. A warrant was issued for Summers' arrest on March 7, 1986, and served on April 29, 1986.

Counsel was appointed and a pretrial hearing was held in May, 1986, and a hearing on the petition was held June 4, 1986. The state only called one witness, the probation officer. He testified about the conditions of probation and Summers' breach of those conditions. Summers testified that he was arrested in Arizona on March 24 or 25 for "probation violations." He said he was in jail in Arizona for five weeks before he was returned to Arkansas.

After the parties had concluded the presentation of evidence, the appellant moved orally to dismiss the petition because the hearing was not held within the 60 day time period as required by Ark. Stat. Ann. § 41-1209(2) (Repl. 1977), which provides:

> A suspension or probation shall not be revoked except after a revocation hearing. Such hearing shall be conducted by the court that suspended imposition of sentence on defendant or placed him on probation within a reasonable period of time, not to exceed 60 days, after the defendant's arrest.

The attorneys briefly argued the matter to the trial judge. Summers argued his arrest in Arizona began the running of the 60 day period. The state argued the arrest in Arkansas began the running of the time for the hearing because the record only reflected that arrest. The trial judge took the matter under advisement and the next day he ruled that Summers was arrested on April 29, 1987, and the hearing was held within the statutory time period.

On appeal Summers argues the 60 day limitation requires the petition be dismissed. The state argues the motion was untimely. We agree with the state because the state was never placed on notice before the hearing that this objection would be raised. There was no good reason given why the motion was not filed before the hearing. In both *Lark* v. *State*, 276 Ark. 441, 637 S.W.2d 529 (1982), and *Cheshire* v. *State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985), a motion to dismiss a revocation petition was filed before the hearing. The state was on notice the 60 day statutory period would be invoked.

In this case the state had no such notice. The state was prejudiced by this lack of notice because it did not have the opportunity to present any evidence regarding whether there was a delay in returning Summers to Arkansas and whether he was unavailable during that time period. The state had a right to assume that would not be an issue. This court has referred to the speedy trial rules to determine if a defendant received a speedy revocation hearing. *Lark* v. *State, supra; Boone* v. *State*, 270 Ark. 83, 603 S.W.2d 410 (1980); *Cheshire* v. *State, supra.* Those same rules govern when that question can be raised. A.R.Cr.P. Rule 28.1(f) provides the defendant's failure to move for the dismissal of a charge for lack of speedy trial prior to trial constitutes a waiver of his rights under these rules. See *Walker* v. *State*, 288 Ark. 52, 701 S.W.2d 372 (1986). Since Summers did not raise his motion to dismiss the revocation petition for lack of a speedy hearing before the hearing, he waived his rights. We do

not reverse a judgment because a trial judge uses the wrong reason to reach the right result. *Marchant* v. *State*, 286 Ark. 24, 688 S.W.2d 744 (1985).

Affirmed.

PURTLE and NEWBERN, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I vigorously disagree with the majority opinion. The statute, Ark. Stat. Ann. § 41-1209(2) (Repl. 1977), is set out in the majority opinion and so clearly states the law that I will set it out again at this point:

> A suspension or probation shall not be revoked except after a revocation hearing. Such hearing *shall be conducted by the court* that suspended imposition of sentence on defendant or placed him on probation *within a reasonable period of time, not to exceed 60 days*, after the defendant's arrest. [Emphasis added.]

The law clearly and unequivocally requires the court to conduct a revocation hearing not more than 60 days after the defendant's arrest on the alleged violation.

In the case now being considered by this Court the trial court accepted appellant's guilty plea in 1985. The court sentenced the appellant to five (5) years and placed him on probation. The petition to revoke probation was filed on March 7, 1986. A warrant was issued and the appellant was arrested in Arizona on March 26, 1986. He did not fight extradition nor did he delay the hearing in any manner. The appellant remained in the jail in Arizona from the day of his arrest on the violation warrant until he was returned to Arkansas, a period of about five weeks. By the date of the revocation hearing, June 4, 1986, the appellant had spent an additional five weeks in the county jail in White County, Arkansas. The way I figure it that's over seventy days in anybody's book. No person would argue that the hearing was held within 60 days of the appellant's arrest pursuant to the warrant.

This Court obviously sought some reason not to apply the plain words and obvious meaning of the statute. The majority opinion holds that the appellant waived his rights under the statute because he did not raise his motion to dismiss the revocation petition for lack of a speedy hearing before the

hearing. The majority accomplishes this result by analogy to the speedy trial rules. Other than the statement of the court on June 5, 1986, that the appellant appeared before the court on May 6 and that counsel was appointed, I find no evidence in the record that the appellant was afforded any opportunity to request any type of action until June 4, 1986. Moreover, I am unaware of any precedent for the proposition that a defendant waives his rights under the revocation statute unless he moves for dismissal of the petition *prior to the hearing*. The whole purpose of the law is to safeguard the rights of individuals. In the present case the same result could have been accomplished without damage to the law by simply filing another petition on the continuing violation of the appellant's probation, which required payments of restitution, and then acting timely upon it.

The warrant itself may not have been served until April 29th, but that is not the trigger under the statute which starts the calendar rolling. It is clearly the arrest of the appellant which triggers the running of the 60-day limitation. The majority opinion cites the cases of *Walker* v. *State*, 288 Ark. 52, 701 S.W.2d 372 (1986); *Lark* v. *State*, 276 Ark. 441, 637 S.W.2d 529 (1982); and *Boone* v. *State*, 270 Ark. 83, 603 S.W.2d 410 (1980). None of them hit the point.

Walker dealt with the speedy trial issue and is somewhat analogous to the present case. In neither case were there any excludable periods. Walker's attorney failed to move for dismissal although the speedy trial period had run prior to trial. A.R.Cr.P. Rule 28.1 provides that failure to invoke the speedy trial rule constitutes a waiver. The *Walker* case came to us by way of a Rule 37 request for relief based upon ineffective assistance of counsel. We reversed and dismissed and in doing so stated: "The appellant clearly was not holding up the trial during that time." Neither was the appellant in the present case. He merely invoked the 60-day period at the first hearing, which was held more than 70 days after his arrest.

I agree with the majority opinion that the *Lark* decision involved the very same statute as we are considering in this case. Lark had been committed to the state hospital, upon his own motion, subsequent to his arrest on a petition for revocation. Lark was arrested on February 27, 1981. He petitioned for a mental

examination, which petition was granted on March 31 and resulted in a commitment to the state hospital. On June 11, 1981 he was returned to the county jail from the state hospital. The revocation hearing was conducted on July 20, 1981, at which time Lark moved to dismiss because of failure to bring him to a hearing within 60 days. The court continued the hearing until August 25, 1981, on the grounds that the defendant had not been properly served with the petition for revocation. However, the state then refiled the same petition and at a hearing on July 22, 1981, the court revoked the suspended sentence. On appeal we reversed and dismissed because the revocation hearing was not conducted within the 60-day limit, excluding the period of delay caused by the appellant.

In *Boone* the trial court revoked a suspended sentence. However, the appellant was never arrested because he was serving a sentence on an unrelated charge when the petition to revoke was filed. Boone argued the 60 day period should run from the date of the filing of the petition to revoke. He argued that he was "constructively arrested" on the date the petition was filed. Neither the trial court nor this Court agreed with Boone's theory to establish a "constructive arrest" date. However, we modified the sentence in order to give credit for jail time served. In my opinion *Boone* is inapposite.

I believe we should continue to give this 60-day limitation provision a rational and reasonable interpretation in accordance with our past decisions. To depart from the plain and clear language used in our past decisions upholding the statute results only in confusion and uncertainty in the law relating to revocation of probation.

NEWBERN, J., joins in this dissent.

Herbert MALONE *v.* STATE of Arkansas

CR 86-206 729 S.W.2d 167

Supreme Court of Arkansas
Opinion delivered May 18, 1987

William L. Wharton, for appellant.

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

JOHN I. PURTLE, Justice. The appellant was convicted in the Pulaski County Circuit Court of aggravated robbery, aggravated assault and theft of property. The information charged appellant as an habitual offender, alleging that he had committed "four or more" previous felonies. For reversal he argues: (1) that the court erred in failing to suppress real evidence; (2) that the court erred in refusing to grant a continuance; and (3) that the court erred in allowing evidence of more than four previous convictions in the sentencing phase. The sufficiency of the evidence is not argued on appeal. We do not find reversible error.

A branch of First Federal Savings and Loan Association in Little Rock, Arkansas, was robbed on April 8, 1986. During the investigation immediately following the robbery, the officers identified the appellant as a suspect and determined that he was on a bus headed for Memphis, Tennessee. The Tennessee authorities were advised by the Arkansas police that an Arkansas arrest warrant had been issued. Shortly after appellant arrived in Memphis, the local officers took him into custody. The appellant's person was searched during the arrest. The officers found a locker key on appellant and used that key to open a locker in the Memphis bus station. The locker contained cash and travelers checks stained with red dye and a handgun.

On the day the trial began the appellant moved for a continuance in order to obtain the presence of witnesses from New Jersey. The request for a continuance was overruled on the

grounds that there had been no prior request that the out-of-state witnesses be subpoeaned. At the trial the items found in the bus station locker were introduced into evidence. Several officers gave detailed testimony that the appellant voluntarily signed a consent to search form before they opened the locker. The appellant also testified at his trial and contradicted the officers' testimony. (He had not testified at the hearing on the original motion to suppress.)

The information had alleged that the appellant had been previously convicted of "four or more felonies." However, during the penalty phase of the trial the state was allowed to introduce eight prior felony convictions.

We first consider the argument that the evidence found in the locker at the bus terminal should have been suppressed. The chief argument is that the show of force by several officers induced the appellant to agree to sign the consent to search form. For this point he relies upon *Rodriquez* v. *State*, 262 Ark. 659, 559 S.W.2d 925 (1978). *Rodriquez* held that a voluntary consent to search must be proven by clear and positive evidence. In *Rodriquez* the appellant had been surrounded by armed officers and when he questioned the authority for the search, one of the officers "patted his gun and stated that was all the search warrant he needed."

The facts of the present case are completely different. When one of the arresting officers sought permission to search the locker, the appellant initially refused and stated he wanted to contact federal authorities. A guard was then placed by the locker in order to secure the evidence while applying for a search warrant. The appellant then changed his mind and agreed to sign the consent to search form. (At trial several officers confirmed the voluntary execution of the consent to search form.)

The burden of proof on the issue of a voluntary consent to search cannot be discharged by the state by merely showing that the accused acquiesced in the search. It must also be shown that there was no actual or implied duress or coercion. *White* v. *State*, 261 Ark. 23, 545 S.W.2d 641 (1977). The evidence in this case shows that Officer Bartlett approached the appellant and asked him to step outside the station. The appellant then identified himself and was placed under arrest. Other

officers were nearby, but out of precaution they remained at a distance until after the arrest. There is no evidence in the record to indicate that the officers either coerced appellant or used any kind of improper influence whatsoever. Certainly the testimony of the five officers present at the scene satisfies the state's burden. The trial court therefore correctly concluded that there was no basis for the suppression of the evidence obtained from the bus terminal.

Appellant's second argument is that the court erred by failing to grant a continuance. Prior to trial both the appellant and his attorney sought to discontinue the attorney/client relationship. The requests were denied. On the day of the trial, the appellant sought to obtain a continuance in order to secure the testimony of out-of-state witnesses. (The appellant wanted to call his mother and his sister as witnesses, and he stated they could not be present until the following week.) No previous mention of the need to call these witnesses had been made to the state or defense counsel. The normal procedure for obtaining attendance of such witnesses is set out in Ark. Stat. Ann. § 27-1403 (Repl. 1979). Such procedure was not followed. In the present case no justifiable excuse was offered for the failure to make an effort to have the witnesses present until the day of the trial. Without citation of authority, we have no hesitancy in holding that the trial court did not abuse its discretion in denying a continuance.

The final argument is that the court erred in instructing the jury that appellant had eight prior felony convictions when the information alleged "four or more." Our prior decisions relating to the number of prior convictions that can be introduced in the penalty phase may have resulted in some confusion. We take this opportunity to clarify the correct procedure for introduction of prior convictions.

The law in effect at the time of the offense, Ark. Stat. Ann. § 41-1001 (Supp. 1985), controls the number of prior convictions which may be introduced for enhancement purposes. The statute states, in pertinent part:

> (1) A defendant who is convicted of a felony committed after June 30, 1983, and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than

> four (4) felonies, may be sentenced to an extended term of imprisonment as follows:
>
> . . .
>
> (2) A defendant who is convicted of a felony committed after June 30, 1983, and who has previously been convicted of four (4) or more felonies, or who has been found guilty of four (4) or more felonies, may be sentenced to an extended term of imprisonment as follows:
>
> . . .

Under the foregoing statute there are really only two possible enhanced punishment ranges. The first is the range of punishment for those who have been convicted of, or found guilty of, more than one, but less than four, felonies. The second punishment range is for those who have been convicted or found guilty of four or more felonies.

We considered the enhancement provisions in *Clinkscale* v. *State*, 269 Ark. 324, 602 S.W.2d 618 (1980). There we said that prior convictions are like essential elements of an offense, inasmuch as they must be specifically alleged in order to be introduced at trial. In *Clinkscale* the appellant had been charged with "two or more" prior felonies. During the sentencing procedure, the state moved to introduce five prior convictions. The defendant objected to this procedure, stating that the state was limited to the introduction of two felonies. The trial court recognized that five priors would increase the punishment range of allowable imprisonment and rejected the proof of "more than two" prior felonies. We reversed because we found that the trial court had actually considered more than two prior felonies.

The number of allowable prior felonies was again considered by this Court in the case of *Reed* v. *State*, 282 Ark. 492, 669 S.W.2d 192 (1984). The *Reed* opinion attempted to distinguish between "more than two" and "two or more" prior offenses. We take this opportunity to clarify when and why such distinctions may become important. For the purposes of the application of the enhancement statute, we hold that there is no distinction between "two or more" and "more than two" or "four or more" and "more than four."

The statute controlling the appellant's case is set out above. The *second* and *fourth* finding of prior guilt or conviction places the defendant in a higher range for the purpose of enhancement of punishment. It would be error to allow the state to prove "four or more" priors when the information charges the defendant with only "two or more" felonies because a more severe range of punishment for the offense is invoked when four or more priors are established. When the state alleges "two or more" prior felonies, the accused is justified in believing that he will not have to face the introduction of "four or more" prior convictions at trial. On the other hand, if the state alleges "four or more" there is no limit to the number which may be proven.

The accused is, however, entitled to know before trial the range of possible punishment that he faces. A.R.Cr.P. Rule 17 requires the prosecutor, if requested, to disclose the names and addresses of all witnesses to be called, and to identify any books, papers, documents, or tangible objects to be introduced. Under this rule of criminal procedure, the accused is entitled to know before trial the number of previous convictions the state will attempt to introduce. These discovery rights can be waived if the defense does not utilize them. *Plummer* v. *State*, 270 Ark. 11, 603 S.W.2d 402 (1980). The information requested must be furnished in sufficient time to permit the beneficial use of it by the defense. *Lewis* v. *State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

In the present case the appellant did not attempt to determine pursuant to Rule 17 discovery procedures the exact number of prior felonies that would be considered. The proving of eight prior convictions instead of four did not add an element to the offense or change the range of punishment. Therefore, there has been no showing of prejudice to the appellant.

Affirmed.

Kendall BOWERS *v.* STATE of Arkansas

CR 86-216 729 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered May 18, 1987

Ross & Ross, P.A., by: *Joe Ross*, for appellant.

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

TOM GLAZE, Justice. On July 11, 1984, appellant pled guilty to three counts of aggravated robbery and was sentenced to imprisonment for forty years. Two years later, he filed his petition for Rule 37 relief, claiming that his attorney misinformed him regarding the amount of time he would actually serve. He argued below, and now on appeal, that he would not have pled guilty if he had been properly informed concerning his parole eligibility. The trial court denied appellant's petition without a hearing, and we affirm.

As noted by the State, appellant's abstract of record consists only of a list of the pleadings with little or none of their contents described; and while he recites part of his rule 37 petition, the court's order denying it is not set out. When, as here, an appellant's abstract is deficient, our practice is to rely on the record if it shows that the trial court's decision should be affirmed on a particular point, but not to explore the record for prejudicial error if none is shown by the abstract. *Smith* v. *State*, 278 Ark. 462, 648 S.W.2d 792, *cert. denied*, 464 U.S. 890 (1983).

In reviewing the record, we are apprised that the

appellant entered his guilty plea, knowing he would receive a forty-year sentence. It was after he entered his plea that he claims his counsel misinformed him that he could expect to be paroled after four or five years. Clearly, under those circumstances, appellant had not relied upon counsel's advice concerning parole eligibility when entering his plea of guilty. However, even if he had been given such information before entering his plea, we have held that erroneous advice concerning parole eligibility does not automatically render a guilty plea involuntary. *Garmon* v. *State*, 290 Ark. 371, 719 S.W.2d 699 (1986).

Because appellant fails to demonstrate any prejudicial error, we affirm.

HOLT, C.J., not participating.

HICKMAN and PURTLE, JJ., concur and would affirm under Rule 9 of Rules of the Arkansas Supreme Court and Court of Appeals.

Rev. Vivan T. RHODES and Pearl RHODES *v.* WESTSIDE FREE WILL BAPTIST CHURCH, et al.

86-265 729 S.W.2d 171

Supreme Court of Arkansas
Opinion delivered May 18, 1987

R. H. "Bud" Mills, P.A., for appellants.

Larry D. Douglas, for appellees.

TOM GLAZE, Justice. The case involves a dispute over church property. Claiming ownership of the property, Reverend Vivan Rhodes and his wife, Pearl, brought this action, requesting the appellees be enjoined from entering or trespassing on it. Appellees, representatives and trustees of the Westside Free Will Baptist Church (Westside Baptist), answered and counterclaimed, and, among other things, denied the Rhodes's allegation of ownership. After the Rhodeses presented their case-in-chief at trial, appellees moved to dismiss the Rhodes's complaint, saying the Rhodeses had failed to make a prima facie case. The chancellor granted appellees' motion, and, on appeal from that decision, appellants list one point for reversal, *viz.*, that they had presented sufficient evidence to sustain their claim. We disagree, and, therefore, affirm.

The facts leading to this controversy are largely undisputed. By warranty deeds in 1959 and 1968, Reverend Rhodes and his now-deceased wife, Irma, conveyed two tracts of land to the trustees for the Peoples Mission, their successors and assigns. Both deeds contained a reverter clause that stated "should this property cease to be used for religious purposes then it should revert to the grantors, their heirs and assigns." Reverend Rhodes was pastor at Peoples Mission, a non-denominational church, and during his participation at Peoples Mission, various church buildings were constructed on the property, culminating with the completion of a fellowship hall in 1968. Rhodes remained active in the church until September 1982, when he entered the hospital. Due to health and other problems, he became inactive and was away from the church. It was during this period of Rhodes's absence from Peoples Mission that changes began to occur.

Rhodes's son, appellee Garry Rhodes, began taking a more active role in the church's affairs. Garry said that he was asked by his father to call a Reverend Donnie Villines, who was subsequently selected in December 1982 as the new pastor of Peoples

Mission. In early 1983, church members met and voted to formally organize the church, naming it the People's Mission Independent Baptist Church. The members adopted a constitution and bylaws, elected its officers, named new trustees and formally hired Reverend Villines as the pastor. Later, the newly-formed church hired another pastor, and, under his auspices, the church, in March 1985, was renamed the "Westside Free Will Baptist Church."

In August 1985, Reverend Rhodes, who had remarried, moved back into his house which is located on property near the church. On August 1, 1985, Rhodes and Arthur Sutherlan, as the two surviving trustees of Peoples Mission, held a meeting. At that meeting, the two men executed a deed, describing the property earlier deeded Peoples Mission in 1959 and 1968, to Rhodes, as grantee. In turn, Rhodes signed a deed to this property, naming him and his wife grantees. In September 1985, Rhodes and his wife filed this suit against the Westside Baptist Church, its pastor and trustees, including his son, Garry.

We should first make it clear that appellants have never contended that the newly-established church was illegally formed or that trustees were not duly elected. While Rhodes has steadfastly complained that he and Sutherlan, as trustees of the original church, were never notified that the Peoples Mission would be formally organized, he does not assert title to the disputed property as a result of the church members' failure to legally organize Peoples Mission into a different legal entity—which eventually became a denominational church named Westside Baptist Church. Appellants, instead, filed this action against Westside Baptist Church and its trustees, who, as parties in this case, are successor trustees to those previously named for Peoples Mission in the 1959 and 1968 deeds.

Under appellants' theory of the case, Rhodes asserts that the appellees violated the reverter clauses contained in the 1959 and 1968 deeds, and, as a consequence, the title to the church property reverted to him, as grantor. Our court, of course, has long held that slight circumstances will often be seized upon to prevent a forfeiture. *Jeffries* v. *State, Use of Woodruff County*, 216 Ark. 657, 226 S.W.2d 810 (1950) (wherein the court affirmed the chancellor's decision not to approve a forfeiture when the deed given Woodruff County restricted the use of the

property to "county purposes.")

When we review the record at bar, we find no evidence that appellees breached the "religious purposes" restriction contained in the 1959 and 1968 deeds. In fact, Rhodes tacitly conceded throughout his testimony that the property he had conveyed to Peoples Mission is still being used for religious purposes. Rather, his chief complaint is that he never intended the property to be used by a denominational church, and, for that reason, he had the reverter clause placed in both deeds. Although we understand Rhodes's disappointment in the changes made in Peoples Mission after he became inactive, our study of the record leaves no doubt that the property he conveyed to the church in 1959 and 1968 is still being used for religious purposes, albeit denominational and Baptist ones.

Based on the evidence presented, the chancellor clearly was correct in finding that the appellants failed to make a prima facie case to invoke the deeds' reverter clauses. Accordingly, we affirm.

The CITY COURT OF PEA RIDGE, ARKANSAS
v. Albert TINER

86-267 729 S.W.2d 399

Supreme Court of Arkansas
Opinion delivered May 26, 1987

Thurston Thompson, for appellant.

Jeff Duty, for appellee.

JACK HOLT, JR., Chief Justice. Albert Tiner was charged in the City Court of Pea Ridge under state law for driving while intoxicated. The city court refused his motion for a change of venue to Rogers Municipal Court. Tiner subsequently petitioned the Benton County Circuit Court for a writ of prohibition to prevent the city court from proceeding. The circuit court granted the writ and ordered a change of venue. The city court appeals from that order.

We agree with the trial court and affirm. In *Russell* v. *Miller*, 253 Ark. 583, 487 S.W.2d 617 (1972), we analyzed similar issues in light of Ark. Stat. Ann. § 19-1102 (Repl. 1980) and § 22-725 (Repl. 1962). Section 19-1102 invests the mayor's court (now renamed the city court) with the same jurisdiction and power of a justice of the peace over criminal cases arising under the laws of this state. Section 22-725 provides the jurisdiction of the justice of the peace may be subject to a motion for change of venue to municipal court and that, upon the filing of such a motion, the justices of the peace "shall have no further jurisdiction in the case." We concluded, and rightfully so, that when these statutes are read together, they mean that the jurisdiction of

the mayor's court (city court), like that of the justice of the peace, is subject to a motion to transfer to municipal court when a state offense is involved, and that upon the filing of a motion to take a change of venue, jurisdiction is withdrawn from the city court.

Divestment of jurisdiction from the city court is not contrary to Ark. Const. art. 7, § 43, which gives the General Assembly authority to set jurisdiction of corporation courts.

Writs of prohibition may be utilized when the trial court is entirely without jurisdiction or is attempting to act beyond its jurisdiction. *Beaumont* v. *Adkisson*, 267 Ark. 511, 593 S.W.2d 11 (1980). The granting of the writ of prohibition in this instance was proper.

Affirmed.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice dissenting. In my opinion the legislature cannot confer jurisdiction in a criminal case upon a municipal court when the act is committed beyond its corporate limits. That was the intent of the constitution in its scheme of inferior courts. Ark. Const. art. 7, §§ 40, 45. See also my dissent in *Pulaski County Municipal Court* v. *Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981).

The effect of the majority's decision is that an offense committed in one city can be tried in another. This is not a question of venue, but of jurisdiction. Furthermore, the statute does not state cases from city courts may be transferred to another court, only cases from justices of the peace courts. Whatever happened to the law that we interpret legislative acts according to the clear meaning of the words used? *City of North Little Rock* v. *Montgomery*, 261 Ark. 16, 546 S.W.2d 154 (1977); *Vault* v. *Adkisson*, 254 Ark. 75, 491 S.W.2d 609 (1973). This is yet another decision compounding the confusion that exists in the inferior court system.

Terry RICKETTS *v.* STATE of Arkansas

CR 86-210 729 S.W.2d 400

Supreme Court of Arkansas
Opinion delivered May 26, 1987

Murphy & Carlisle, by: *John Wm. Murphy*, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Terry Ricketts was convicted of first degree murder and second degree battery and was sentenced to 46 years imprisonment and fined $10,000. On appeal he argues that the evidence was insufficient to support the conviction for murder because the state failed to prove premeditation and deliberation and because he acted in self-defense. He also argues that the sentence was excessive. We affirm.

On the evening of April 18, 1986, Mickey Freeman had a private party at a building he owned called the "pool hall" located in Newton County. Roger Nichols, the murder victim, and five others were present. They put a sign on the door, which read "Private Party — Keep Out," covered the windows with curtains and parked a truck in the driveway in order to keep the party private. Around 10:00 p.m. Ricketts and two other individuals entered the building uninvited and began to play pool. Freeman told Ricketts they had three seconds to leave. He then fired a military, semi-automatic carbine three times in their direction. The shots hit a wall within five feet of them. Ricketts left the premises, and there was testimony that Ricketts said he would kill Freeman. Both groups had been drinking alcohol for much of the day and evening.

Later that evening, Freeman and Ricketts met again at a rock quarry. Ricketts drove up, stuck his head in the car Freeman was in, and tried to grab the carbine which Freeman had with him. Freeman wrestled it away and Ricketts then left. About 2:00 a.m. on April 19, Ricketts woke a friend, Johnny Hefley, in order to borrow his shotgun. Ricketts said he saw some deer along the road, and Hefley told Ricketts he had only squirrel shot. Ricketts said that was okay and took the gun. There was testimony that Ricketts told Hefley, "you ain't seen me over here." Minutes later, Freeman, Nichols, and Dennis Shatwell passed Ricketts and his friends, who were stopped on the side of the road. Freeman wanted Shatwell to drive on, but Shatwell stopped to see if they needed help. Almost instantaneously, Ricketts fired the borrowed shotgun toward Shatwell's truck, killing Nichols and injuring Freeman. Shatwell immediately drove off. Ricketts fired a second time, hitting the truck. There was testimony that Ricketts said "take that" when he fired.

Ricketts claims Freeman had his carbine pointed out the window at him when he drove up, and he feared for his life since Freeman had already fired at him once that evening. Ricketts testified that as he picked up the shotgun, it accidently fired and that he was not aiming at anyone. He also testified that someone told him to "reload and shoot again," but he did not remember who said this. However, other testimony and evidence indicated Freeman did not have the gun pointing out the window, but instead had the gun between his legs with the barrel pointing

downward, and Ricketts simply aimed and fired the shotgun at Freeman.

The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987). On appeal we view only the evidence which is most favorable to the jury's verdict and do not weigh it against other conflicting proof favorable to the accused. *Westbrook* v. *State*, 286 Ark. 192, 691 S.W.2d 123 (1985).

There is sufficient evidence of first degree murder in this case. Premeditation and deliberation need not exist for any particular length of time, and they can be inferred from the circumstances of the case, such as the character of the weapon used, the manner in which it is used, the nature, extent, and location of the wounds inflicted, the conduct of the accused, and the like. *Harris* v. *State*, 291 Ark. 504, 726 S.W.2d 267 (1987); *Parker* v. *State*, 290 Ark. 158, 717 S.W.2d 800 (1986).

One who claims self-defense must show not only that the person killed was the aggressor, but that the accused used all reasonable means within his power and consistent with his safety to avoid the killing. *Martin* v. *State*, 290 Ark. 293, 718 S.W.2d 938 (1986); *Burton* v. *State*, 254 Ark. 673, 495 S.W.2d 841 (1973); Ark. Stat. Ann. §§ 41-506, 41-507 (Repl. 1977). The jury did not accept Ricketts' defense of self-defense. Also, Ricketts' actions are not excused simply because he was under the influence of alcohol. *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The sentence imposed against Ricketts was not excessive because it was within the statutory limits. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

Affirmed.

The ARKANSAS RURAL MEDICAL PRACTICE STUDENT LOAN AND SCHOLARSHIP BOARD *v.* Dennis Wayne LUTER

86-253 729 S.W.2d 402

Supreme Court of Arkansas
Opinion delivered May 26, 1987

Fred H. Harrison, General Counsel for the University of Arkansas and *Steve Clark*, Att'y Gen., by: *C. Randy McNair*, Asst. Att'y Gen., for appellant.

Harkey, Walmsley, Belew & Blankenship, by: *John Norman Harkey*, for appellee.

JOHN I. PURTLE, Justice. In 1949 the legislature passed Act 131 creating the Arkansas Rural Medical Practice Student Loan and Scholarship Board to promote medical practice in rural areas.[1] The act provided for a five member board, established methods of funding and authorized the Board to lend money to University of Arkansas medical students in amounts not exceeding $1,625 per year nor $6,500 per student. The loans were subject to a number of conditions including a provision that if the recipient elected to practice in a community having a population of 2,000 or less (defined as a rural community), the debt was discharged on a ratio of 20 per cent for each year of practice in such rural community. By subsequent amendments a number of changes have been made in the original act, including increases in the population of a rural community and in the amounts available per student.

While attending medical school during 1974, 1975 and 1976, Dr. Dennis Luter (appellee) received loans totalling $13,900 from the Board (appellant). The notes provided that if Dr. Luter practiced medicine in a community having a population of 6,000 or less, the loans would be discharged as provided in the act. The loans became due on January 1, 1979 but payment was extended by the Board due to hardship.

In 1982 Dr. Luter located in Batesville. The Board notified him that Batesville, having a population of 8,241, did not qualify as a rural community. Dr. Luter refused payment of the notes and in October of 1985 the Board filed suit against him. Dr. Luter moved to dismiss the complaint based on Act 797 of 1985, which increased the population of a rural community from 8,000 to 8,300. The parties stipulated that Batesville had a population of 8,241. The trial court granted the motion to dismiss upon a finding that Batesville met the definition of a rural community under Act 797. The Board has appealed.

When Dr. Luter settled in Batesville in mid-1982, a rural community was defined under Act 47 of 1981 as having a

[1] Ark. Stat. Ann. § 80-2908—2919 (Repl. 1980).

population of 8,000 or less. Hence Dr. Luter was clearly not entitled to have his debt to the Board discharged. However, Act 797 of 1985 increased the figure to 8,300. The act, with an emergency clause, took effect on April 3, 1985, so the issue is whether Act 797 was intended to operate retrospectively. If so, we must affirm the trial court. If not we must reverse. We hold the act was not meant to operate retrospectively.

The general rule can be stated categorically—laws affecting substantive rights operate prospectively. The editors of Am.Jur.2d, Vol. 73, *Statutes*, § 350, state the rule in these terms:

> The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent. In determining such intent, courts observe a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. *However, a contrary determination will be made where the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicity, positively, unequivocably, unmistakably, and unambiguously shown by necessary implication or by terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof.* (Our emphasis).

The operation of a statute must be prospective only, "unless the words are so clear, strong and imperative as to have no other meaning." *United States Fidelity & Guaranty Co.* v. *Struthers Wells Co.*, 209 U.S. 306 (1908). "Any doubt is resolved against retroactivity and in favor of prospectivity only. *McQueeney* v. *Catholic Bishop of Chicago*, 159 N.E.2d 43, 80 A.L.R.2d 796 (1959). "A retrospective application will not be given to a statute which interferes with antecedent rights unless such be *the unequivocal and inflexible import of the terms and the manifest intention of the legislature.*" *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982) (our emphasis). Statutes will not be construed to have retroactive operation "unless the language is so clear it will admit of no other construction." *Sutherland Statutory Construction*, Vol. 2, §

41.04, p. 348.

Our own cases are in accord with the foregoing. In *Abrego* v. *United Peoples Federal Savings & Loan*, 281 Ark. 308, 664 S.W.2d 858 (1984) this court refused to give retroactive application to a regulation of the Federal Home Loan Bank Board affecting due-on-sale clauses in mortgages. The *Abrego* opinion quotes with approval language from *United States* v. *Security Industrial Bank, et al., supra*:

> The first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the equivocal and inflexible import of the terms, and the manifest intention of the legislature."

The court in *Abrego* concluded:

> In the absence of any *express language* requiring retroactive application of the regulation, and because of the vested property rights under state law, the regulation does not operate retroactively. (Our emphasis).

In *United States Gypsum Co.* v. *Uhlhorn*, 232 F. Supp. 994 (E.D. Ark. 1964) the federal district court considered retroactivity in connection with a dispute over the procedures for purchasing state lands. Prior to March 30, 1959 one procedure was prescribed. By Act 452 of 1959 the procedure was changed while an application to purchase was pending, but prior to completion and issuance of a deed. Judge Gordon Young held that Act 452 only applied prospectively and did not affect the application filed under prior law:

> Clearly, a statute under the laws of Arkansas will not be given a retroactive effect if it is susceptible to any other construction. (Citations omitted) *Uhlhorn* at p. 1002.

In *Chism* v. *Phillips*, 228 Ark. 936, 311 S.W.2d 297 (1958), we said:

> "It is presumed that all legislation is intended to act only prospectively, and all statutes are to be construed as

> having only a prospective operation unless the purpose and intention of the Legislature to give them a retroactive effect is expressly declared or necessarily implied from the language used."

To the same effect see *Hardin, Commissioner of Revenues* v. *Ft. Smith Couch & Bedding Co.*, 202 Ark. 814, 152 S.W.2d 1015 (1941) and *Snuggs* v. *Board of Trustees of Arkansas State Employees Retirement System*, 241 Ark. 402, 407 S.W.2d 933 (1966).

Turning to Act 797, we find no express language that the act is intended to operate retroactively.[2] In fact the only express language is to the contrary—that the act will take effect on *passage and approval* (April 3, 1985). In other cases we have considered such contradictions to weigh against retroactivity. See *Lucas* v. *Hancock*, 266 Ark. 142, p. 153, 583 S.W.2d 491 (1979). Hence, our interpretation of the act must be aimed at determining whether retroactive effect is implied so clearly and unequivocally as to eliminate any doubt.

The trial court relied on the language in Section 3 of the act:

> Emergency. It is hereby found and determined by the General Assembly that the definition of rural community as used in the Rural Medical Student Loan and Scholarship Act has been misconstrued; that it is the intention of this Act to redefine the term "rural community" for the purposes of that Act and to make it applicable to persons who have in the past or now practice medicine in such rural communities; that some doctors have been denied the cancellation of their loans due to the misinterpretation of the law; and that this Act is immediately necessary to provide an equitable remedy to such persons. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

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[2] In contrast, see Act 169 of 1913 ("provided, that this Act shall be construed as retrospective as well as prospective in operation") or Act 102 of 1935 ("This act shall be retroactive and shall take effect as of October 1, 1934").

Certainly the words "to persons who have in the past or now practice medicine in such rural communities. . ." is suggestive of retrogression. But we do not believe it meets the requirements of the law. That language would be more persuasive if it were not part of the emergency clause—the same provision that expressly declares that the act is meant to take effect on passage. In short, it is difficult to conclude that an act which expressly states it will take effect at passage can by the same provision *imply* that it takes effect at some earlier unspecified time. If that is the intent of the legislature, it must be more explicit. The implication is at least as great that it is meant to take effect at passage and apply to persons who now or in the past have practiced medicine in a rural community. We note too that in previous amendments to Act 131 the legislature has expressly provided that no provision of the amending act shall impair any loan obligation now outstanding. (See Act 62 of 1972).

Therefore, we cannot say with assurance that the ambiguous wording of the emergency section of Act 797 so clearly manifests an intent that the act have retroactive effect that we are free of doubt. On the contrary, the language itself leaves us with a distinct uncertainty as to the intent.

■ There are added reasons why we have come to this view—Act 797 is amendatory and we have held that the rules against retroactive operation apply *especially* with reference to amendatory acts. *Lucas* v. *Hancock, Adm'x., supra.*

■ Secondly, it is plain this legislation (Act 797) insofar as it changes the population ceiling of a rural community from 8,000 to 8,300 operates specially. The original act set the ceiling at 2,000. Act 69 of 1955 left that figure intact. Act 181 of 1963 increased it to 4,000, Act 533 of 1971 increased it to 6,000 and Act 47 of 1981 to 8,000. None of the seven amendments to this legislation have been made retroactive nor have the previous population changes been so clearly tailored to a specific community. While we regard such considerations as matters of legislative discretion, where the issue is retroactivity versus prospectivity, there is authority to the effect that "the policies against retroactivity weigh most heavily against retroactive laws which are also special in their application." *Sutherland Statutory Construction*, Vol. 2, § 41.04, p. 348.

Finally, also present here is the factor that retroactive application of Act 797 would impair contractual rights of the Board which had vested some six years prior to the adoption of Act 797. When that is so, it is even clearer that the language of an enactment must be express if it is to have retroactive effect. Appellee argues that a state may impair its own rights as opposed to those of a private entity without violating Article 2, Section 17 of the Arkansas Constitution. But the issue is not the *exercise* of the power but whether that was indeed the intent. We are decidedly of the view that Act 797 failed to make that intention clear.

Appellee cites *Aluminum Co. of America* v. *Neal*, 4 Ark. App. 1, 626 S.W.2d 620 (1982) wherein the Court of Appeals construed Act 215 of 1979 (allowing lump sum attorney fees in workers compensation cases) as intended to take effect retroactively. Act 215 was passed promptly after this court invalidated lump sum attorneys fees in *U.S.F. & G.* v. *Potter*, 263 Ark. 689, 567 S.W.2d 104 (1978). But in *Neal* there was no element of vested rights and no hint of special legislation. Lump sum attorney fees had been allowed before *Potter* and they were reinstated by Act 215. The Court of Appeals simply held the act was intended to continue such allowances without interruption. The remedial objectives of the legislation warranted that result.

The order appealed from is reversed and the case is remanded for further proceedings.

HICKMAN, HAYS, and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. While the language in Act 797 does not state specifically that the act shall be applied retroactively, it does contain explicit language that can have no other possible intent. Thus it is either *expressly stated* or *necessarily implied*, depending on one's point of view. Section 3 of the act reads in part:

> . . . it is the intention of this act to redefine the term "rural community" . . . and *to make it applicable to persons who have in the past or now practice medicine in such rural communities*; that some doctors have been denied the cancellation of their loans due to the misinterpretation of the law; and that *this Act is immediately necessary to*

provide an equitable remedy to such persons. (My emphasis.)

When the legislative intent to have an enactment operate retroactively is clearly stated, it is the duty of the judicial branch to construe the legislation accordingly. We did that in *Forrest City Machine Works* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981). The Court of Appeals did the same in *Aluminum Co. of America* v. *Neal*, 4 Ark. App. 1, 626 S.W.2d 620 (1982). Yet neither statute construed in those cases expressly or impliedly suggested retroactive application, we simply chose to construe the acts in that fashion.

Clearly, if Act 797 is to provide the equitable remedy to persons who have in the past practiced medicine in a rural community who are being "denied cancellation of their loans due to misinterpretation of the law," the act must be given retroactive effect. Under the majority's interpretation, the purpose and avowed intent of the act is defeated.

The very fact that earlier amendments to Act 131 of 1949 have expressly stated that no provision of the amending act shall be construed as impairing any loan "now outstanding" (See Act 62 of 1972, for example) reinforces the position that Act 797 intends that loans of persons practicing in rural communities of 8,300 and under would be affected by the 1985 amendment. The fact that Act 797 raised the rural community ceiling to 8,300 rather than 9,000 evidences, I believe, that the intent of the legislation was that anyone then practicing in Batesville (or other smaller communities) would benefit under the act.

I am not troubled by the fact that the emergency clause (which is actually part of the act) states that the legislation takes effect at passage. That is the traditional wording of emergency clauses and cannot defeat an intent otherwise stated—that the act have retroactive operation. Act 169 of 1913, for example, provides that it will be construed as having retroactive effect, at the same time stating it will take effect at passage.

As to the argument that legislation cannot impair antecedent rights under a contract it is enough to say that only the rights of the state itself are impaired by Act 797 and it is plain the state is free to impair those if it wishes. *Skelton* v. *B.C. Land Company,*

Inc., 260 Ark. 122, 539 S.W.2d 4 (1977).

I believe the trial court ruled correctly and should be affirmed.

GLAZE, J., joins in this dissent.

Edgar HARVEY *v.* STATE of Arkansas

CR 86-213 729 S.W.2d 406

Supreme Court of Arkansas
Opinion delivered May 26, 1987

Henry J. Swift, 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 two counts of first degree murder. His appeal presents three issues. First, he contends the statement he made to police officers should not have been admitted into evidence because he had once declined to make a statement. As we determine the statement to have been voluntarily made after waiver of his right to remain silent, we find no error. Second, he contends his tape recorded statement, which was made while he was in custody and which was partially inaudible, was inadmissible, and that a transcription of the tape recording should not have been admitted into evidence and given to the jury because it was inaccurate. We find no unfair prejudice resulting from admission of the recording or evidence to support the claim that the transcription was inaccurate. Third, the appellant contends it was error to permit introduction of gory pictures of the victims. We find the photographs were not so inflammatory as to prejudice the jury unfairly.

1. Voluntariness of statement

The appellant contended he killed the victims in self-defense. After having shot each of them with a shotgun, he called the police to report the killings. Upon his arrest the appellant was taken to the police station where, at 5:00 a.m. on December 25, 1985, he was warned of his rights and signed a waiver form but declined to make a statement. The following morning, at 9:10 a.m., two police officers who had not previously spoken with the

appellant interrogated him. One of the officers, Detective Sanders, testified that neither he nor the other officer at the second interrogation knew the appellant had earlier refused to make a statement. The appellant was again given the standard notification of his rights and warning that any statement he made might be used against him. He again waived his rights and signed a form to that effect. The appellant made the statement which was tape recorded and admitted into evidence.

The appellant contends his statement was not voluntary. At the trial he testified that he told the officers at the time the statement was made that he was not feeling well and that they should talk to him later. No such testimony was given by Detective Sanders who said the statement was made voluntarily by the appellant who not only signed the waiver of rights form but also said he understood his rights.

In *Hatley* v. *State*, 289 Ark. 130, 709 S.W.2d 812 (1986), we held that a resumption of police questioning of an incarcerated suspect by an officer to whom the suspect had not previously refused to speak was not necessarily a violation of the right to remain silent. We pointed out, after reviewing *Michigan* v. *Mosley*, 423 U.S. 98 (1975), and the difference between interrogation after a request for counsel and after refusing to make a statement, that as long as there is no evidence of coercion, a statement made voluntarily may be admissible against an accused who made it even though he once previously refused to make a statement.

A hearing was held by the trial court, at the request of the appellant, to determine the voluntariness of the statement. The only matter presented at the hearing by the appellant was his objection to the statement's admissibility "as a matter of law" on the ground of the previous refusal of the appellant to make a statement. When the court inquired whether he was contending he had been coerced to make the statement, the appellant's counsel responded that he could not "relate" to that as the appellant was unsure what had happened. He presented no evidence of coercion whatever at that hearing, and the judge found that the statement was voluntary.

Although we probably need not do so in this case, we will review the evidence as to the voluntariness of the confession

and come to an independent conclusion, as has been done in other cases where the voluntariness of the confession was at issue. *See Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Cage* v. *State*, 285 Ark. 343, 686 S.W.2d 439 (1985). However, we do not reverse unless the trial court's determination of voluntariness is clearly erroneous. *Fleming* v. *State*, 284 Ark. 307, 681 S.W.2d 390 (1984). The factors we consider are set out in *Cessor* v. *State*, 282 Ark. 330, 668 S.W.2d 525 (1984).

The appellant testified he was forty years old and could read and write. Although his counsel intimated the appellant had no education there was no evidence of it one way or the other. He was twice advised of his rights and twice signed waiver forms. There is no evidence that he was held incommunicado for a long time or that he was repeatedly questioned in an attempt to wear him down. Nor does the record contain any other evidence of coercion or promise. The appellant stated to Detective Sanders that he understood his rights just prior to making the statement. He had been incarcerated just a little over twenty-four hours.

[redacted] The record supports the trial court's finding that the statement was voluntary.

2. The recording and the transcript

The tape recording of the appellant's statement is inaudible in places. Detective Sanders testified that a transcript of the tape had been made, and that it reflected what was on the tape, but did not include the inaudible portions. The appellant objected to the admission into evidence of the recording on the basis of its partial inaudibility and to the transcript on the basis of its inaccuracy. The judge admitted both.

[redacted] The appellant's argument on this point states simply that the inaudibility of the recording and the fact that the transcript has left out parts of the interview violate his right to due process of law accorded by the Fifth and Fourteenth Amendments to the United States Constitution. No such constitutional argument was made to the trial court, and thus we will not consider it here. *Chapin* v. *Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985).

[redacted] Nor do we find the admission of the transcript into evidence otherwise erroneous. The judge admonished the jury

that the transcription was to be used only as an aid in understanding the recording. By comparing the recording with the transcript, the jury could ascertain the instances where the person who made the transcript omitted the inaudible portions of the statement. While we have some reservations about the fact that some of what the appellant said in the interview was not recorded, it is not a matter of great concern, as the audible portions of the recorded statement are essentially consistent with the appellant's testimony at the trial and state he killed the victims in self-defense. The transcript was an accurate representation of the audible portion of the recording. If the transcript is accurate, it is admissible if it would otherwise be necessary to play the tape several times for the jurors. *Baysinger* v. *State*, 261 Ark. 605, 550 S.W.2d 445 (1977).

3. The photographs

Even if photographs are inflammatory in the sense that they show human gore repulsive to the jurors, they are admissible within the discretion of the trial judge if they help the jury understand the testimony. In this case a police officer testified that the photographs of the two victims at the scene of the crime fairly depicted the positions in which they were found. A medical examiner testified the autopsy pictures aided his testimony as to the condition of the bodies and their positions at the times the shots were fired. The judge did not abuse his discretion in admitting these photographs. *Fairchild* v. *State*, 284 Ark. 289, 293 S.W.2d 380 (1984).

In support of his argument on this point, the appellant cites *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986), in which this court found too many photographs were introduced and thus the court's discretion had been abused. Here, the judge seemed to follow that decision to the letter by excluding pictures which were duplicative. We find no error.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The introduction of some of these photographs served absolutely no purpose other than to arouse the passion and prejudice of the jury. I do not understand how the colored photographs of the blood and of the

autopsy procedures assisted the jury in understanding the testimony of any witness or assisted any witness in presenting his testimony.

The facts of the case were not disputed, and there was never any need for much of an investigation. The appellant called the sheriff and reported that he had killed these two men. When the sheriff arrived at the scene of the crime, the appellant gave them the gun that he had used and explained how he had murdered the victims. Each was shot once in the chest by the appellant with a shotgun. The shots fired by the appellant killed the men instantaneously. If the photographs were of any assistance to the jury, which they were not, then the less gruesome photographs would have been adequate.

The majority misses the issue by stating that the trial court excluded pictures which were duplicative. I interpret this to mean that he excluded duplicate representations of the inflammatory photographs. The opinion fails to point out how the pictures aided the presentation of testimony to the jury or the jury's understanding of any relevant evidence.

In *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986), we analyzed and re-examined our position relating to the introduction of inflammatory photographs and stated:

> The analysis should firmly emphasize the need for the trial court to carefully weigh the probative value of the photographs against their prejudicial nature, rather than promoting a general rule of admissibility which essentially allows automatic acceptance of all the photographs of the victim and the crime scene the prosecution can offer.

It appears that such reasoning is limited to the *Berry* case; the majority opinion in the present case certainly does not follow the same logic.

The courts should scrupulously honor the defendant's right to a fair trial. Unusually repulsive and gruesome pictures should not be used when their relevance is slight, and the prejudice is great. If there is no significant relevance to an issue, then the primary purpose for their introduction can only be to inflame and arouse the passions and prejudices of the jury.

Often bodies are moved or repositioned for the purpose of taking photographs for presentation to the jury. Two of the photographs in question are of such inflammatory nature that I believe a stranger could have been placed in the defendant's chair and the jury would have convicted him after viewing the pictures. One picture is worth a thousand words—especially if it is gruesome and gory.

When *Berry* was decided I had hoped that we were going to take a straightforward and practical approach in matters relating to the introduction of photographs in criminal cases. However, it appears that we are now back to our old rule which is essentially that introduction of photographs is not subject to review on appeal. Each such decision invites the state to present even more gruesome photographs in the next trial.

The danger of allowing the introduction of such photographs is that such evidence will be substituted for the direct proof required to establish that the accused committed the crime. Courts and prosecutors sometimes fail to recognize that pictures frequently present a false impression.

My fears are based upon statements by this Court such as were made in *Burnett* v. *State*, 287 Ark. 158, 697 S.W.2d 95 (1985), where the court stated: "In this case the photographs were obviously a strong part of the state's direct evidence, and we find no abuse of discretion by the trial court." Indeed they probably were—and will continue to be in the future. Hopefully, photographs will not become the chief record on appeal.

The introduction of the irrelevant and prejudicial photographs in this case was as senseless as was the crime. Truthfulness and fair play demand the exclusion of these morbid pictures.

Jack L. MAY, et ux *v.* J.T.L., Inc.

86-283 729 S.W.2d 417

Supreme Court of Arkansas
Opinion delivered May 26, 1987

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

Peel, Eddy & Gibbons, for appellee.

DAVID NEWBERN, Justice. The appellee sold the appellants two tractors and a front end loader on a financing contract. The appellants did not meet their obligation, as provided in the contract, to pay for the equipment. The appellant notified the appellee they were revoking their acceptance of the items. Then the appellee replevied the items and sued the appellants for the deficiency between the price for which the appellee resold them and the price stated in the contract. The appellants counterclaimed, asserting they had properly revoked their acceptance and were entitled to recover the money they had paid the appellee under the contract. The trial court granted a directed verdict in favor of the appellee as to the appellants' counterclaim, and a jury found in favor of the appellee in the amount of the alleged deficiency.

The questions presented in this appeal are whether the directed verdict was proper, *i.e.*, whether the appellants had grounds to revoke their acceptance of the items, and whether the court properly allowed introduction of a lease agreement between the parties. We hold that it was error to direct a verdict against the counterclaim.

The appellee introduced the lease agreement, which apparently preceded and merged with the contract in question here, for the purpose of showing the duration of the contractual warranty on the equipment. The appellants objected to its introduction into evidence on the basis of the parol evidence rule. While we would not have reversed the decision on the basis of the erroneous admission of the lease as irrelevant, we note that in the event of a retrial of the case it should not be admitted unless some issue with respect to the warranty period develops.

On October 5, 1984, the appellants purchased from the predecessor of the appellee a 1983 Case model 1940 tractor, a 1983 Case model 1190 tractor, and a 1983 Case front end loader. The purchase price for all three items was $40,000. The appellants traded in equipment for which they were given credit of $14,000 against the purchase price, and they paid $3,000 cash. The balance due was to be paid in three equal, annual, installments of $10,250.54, but the first payment was not to be due until November 1, 1985. The appellant experienced difficulty with the

larger of the two new tractors. The testimony was that it would only operate for two hours before overheating. Appellant Jack May testified that he frequently called the appellee about the problem and was advised to flush the tractor's radiator and "blow it out." He did so on numerous occasions, but it did not cure the problem. He testified that he also had trouble with the air conditioner on that tractor and that it had not been successfully repaired.

In August of 1985, Jack May was complaining to his brother-in-law about the problem with the new Case tractors, and the brother-in-law told him they were not Case tractors. He protested that they were, and when the two men went out to look, the wiring harness was pulled back on one of the machines, and there, stamped on the engine, was the name "David Brown." The appellants formally revoked their acceptance of all the equipment in September, 1985. The appellee repossessed it, sold it, and then brought this action for the deficiency between the price it received upon the resale and the contract price of $18,739.02. The appellants counterclaimed for the $17,000 they had invested in the equipment, asserting that they had the right to revoke their acceptance of the equipment because it did not conform to the equipment they had the right to receive under the contract.

The testimony showed that David Brown was a company which manufactured tractors in Meltham, England, up until 1972 when the David Brown Company was purchased by the Case company. Since that time Case tractors of less than one hundred horsepower have been manufactured at that particular plant and exported to the United States. At first they were sold with decals showing both the Case and David Brown names, but for years have had exterior markings, at least, only as Case tractors. Jack May testified that David Brown tractors have a reputation which is inferior to that of Case tractors, and he did not know he was buying any David Brown equipment.

In granting the appellee's motion for directed verdict as to the appellants' counterclaim, the court and the appellants' counsel engaged in the following colloquy:

> The Court: What should it have conformed with?
>
> Mr. Stratton [appellants' counsel]: Should have conformed to the Case product.

The Court: And the Case product is exactly what your man got, but he happens to have an engine block with the name David Brown stamped on it, which they have explained.

Mr. Stratton: Mr. Dorsey testified that the entire tractor was made in England and shipped here.

The Court: That's my understanding. Rolls Royces and Jaguars are made in England.

Mr. Stratton: I understand that. When you buy a Rolls Royce you know what you're getting. You're not getting a Volkswagen.

Mr. Peel [appellee's counsel]: This is the correct jury instruction that this is what they had to prove and they did not.

Mr. Stratton: I'd like to see your jury instruction.

The Court: Phil, there isn't any question of fraud in this thing.

Mr. Stratton: Deception, your Honor, putting one label on another; that's a jury question.

The Court: No, I don't think there is. Now if David Brown were still in business — or whatever the name is — and were still producing tractors, something like that, you might have a better argument. But if they haven't produced since '72, they can't be misleading anybody. What would you be misleading them for or about, that they were getting a better deal than what they thought? They can't be getting any better deal because there ain't anything else out under the name of David Brown.

As to this aspect of the case, our holding is that the trial court got it exactly right. This is not like the cases in which General Motors put engines bearing one brand name in cars bearing another. *See In re General Motors Corporation Engine Interchange Litigation, Oswald* v. *General Motors Corporation*, 594 F.2d 1106 (7th Cir. 1979). Here, there is no longer a David Brown product. The Case organization has taken over the David Brown plant in England and is producing its smaller engine tractors there. The fact that the David Brown name is stamped on the engine of a tractor otherwise marked as a Case tractor does

not make it a product which does not conform to the contract any more than if it were made in the former David Brown plant and had the name "Case" stamped on the engine.

The problem, however, is, as the appellants contend, that in granting the directed verdict the court ignored the evidence about the fact that the larger tractor had been unsatisfactory from the inception of the purchase. Article 2 of the Uniform Commercial Code, particularly the part codified as Ark. Stat. Ann. § 85-2-608 (Add. 1961) permits a buyer to revoke his acceptance of a "lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it."

Whether goods are nonconforming and a revocation of acceptance was given within a reasonable time are questions of fact. *Frontier Mobile Home Sales* v. *Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974); *Dopieralla* v. *Ark. La. Gas Co.*, 255 Ark. 150, 499 S.W.2d 610 (1973); *O'Neal Ford, Inc.* v. *Early*, 13 Ark. App. 189, 681 S.W.2d 414 (1985). In this case there was sufficient evidence of nonconformity to go to the jury, thus it was error to direct the verdict against the appellant's counterclaim. We must also reverse the verdict in favor of the appellee, for if it is ultimately determined that the appellants' counterclaim is to prevail, the appellee would not be entitled to recover on the contract.

Reversed and remanded.

Ronnie MIDGETT, Sr. *v.* STATE of Arkansas

CR 86-215 729 S.W.2d 410

Supreme Court of Arkansas
Opinion delivered May 25, 1987
[Supplemental Opinion on Denial of Rehearing June 29, 1987.*]

* Hickman, Hays and Glaze, JJ., would grant rehearing.

Edward T. Barry, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. This child abuse case resulted in the appellant's conviction of first degree murder. The sole issue on appeal is whether the state's evidence was sufficient to sustain the conviction. We hold there was no evidence of the ". . . premeditated and deliberated purpose of causing the death of another person . . ." required for conviction of first degree murder by Ark. Stat. Ann. § 41-1502(1)(b) (Repl. 1977). However, we find the evidence was sufficient to sustain a conviction of second degree murder, described in Ark. Stat. Ann. § 41-1503(1)(c) (Repl. 1977), as the appellant was shown to have caused his son's death by delivering a blow to his abdomen or chest ". . . with the purpose of causing serious physical injury. . . ." The conviction is thus modified from one of first degree murder to one of second degree murder and affirmed.

The facts of this case are as heart-rending as any we are likely to see. The appellant is six feet two inches tall and weighs 300 pounds. His son, Ronnie Midgett, Jr., was eight years old and weighed between thirty-eight and forty-five pounds. The evidence showed that Ronnie Jr. had been abused by brutal beating over a substantial period of time. Typically, as in other child abuse cases, the bruises had been noticed by school personnel, and a school counselor as well as a SCAN worker had gone to the Midgett home to inquire. Ronnie Jr. would not say how he had obtained the bruises or why he was so lethargic at school except to blame it all, vaguely, on a rough playing little brother. He did not even complain to his siblings about the treatment he was receiving from the appellant. His mother, the wife of the appellant, was not living in the home. The other children apparently were not being physically abused by the appellant.

Ronnie Jr.'s sister, Sherry, aged ten, testified that on the Saturday preceding the Wednesday of Ronnie Jr.'s death their father, the appellant, was drinking whiskey (two to three quarts that day) and beating on Ronnie Jr. She testified that the appellant would "bundle up his fist" and hit Ronnie Jr. in the stomach and in the back. On direct examination she said that she had not previously seen the appellant beat Ronnie Jr., but she had seen the appellant choke him for no particular reason on Sunday nights after she and Ronnie Jr. returned from church. On cross-examination, Sherry testified that Ronnie Jr. had lied and her father was, on that Saturday, trying to get him to tell the truth.

She said the bruises on Ronnie Jr.'s body noticed over the preceding six months had been caused by the appellant. She said the beating administered on the Saturday in question consisted of four blows, two to the stomach and two to the back.

On the Wednesday Ronnie Jr. died, the appellant appeared at a hospital carrying the body. He told hospital personnel something was wrong with the child. An autopsy was performed, and it showed Ronnie Jr. was a very poorly nourished and underdeveloped eight-year-old. There were recently caused bruises on the lips, center of the chest plate, and forehead as well as on the back part of the lateral chest wall, the soft tissue near the spine, and the buttocks. There was discoloration of the abdominal wall and prominent bruising on the palms of the hands. Older bruises were found on the right temple, under the chin, and on the left mandible. Recent as well as older, healed, rib fractures were found.

The conclusion of the medical examiner who performed the autopsy was that Ronnie Jr. died as the result of intra-abdominal hemorrhage caused by a blunt force trauma consistent with having been delivered by a human fist. The appellant argues that in spite of all this evidence of child abuse, there is no evidence that he killed Ronnie Jr. having premeditated and deliberated causing his death. We must agree.

It is true that premeditation and deliberation may be found on the basis of circumstantial evidence. That was the holding in *House* v. *State*, 230 Ark. 622, 324 S.W.2d 112 (1959), where the evidence showed a twenty-four-year-old man killed a nineteen-year-old woman with whom he was attempting to have sexual intercourse. The evidence showed a protracted fight after which the appellant dumped the body in a water-filled ditch not knowing, according to House's testimony, whether she was dead or alive. Although it is not spelled out, presumably the rationale of the opinion was that House had time to premeditate during the fight and there was substantial evidence he intended the death of the victim when he left her in the water. Our only citation of authority on the point of showing premeditation and deliberation by circumstantial evidence in that case was *Weldon* v. *State*, 168 Ark. 534, 270 S.W. 968 (1925), where we said:

The very manner in which the deadly weapons were used

> was sufficient to justify the jury in finding that whoever killed Jones used the weapons with a deliberate purpose to kill. Jones' body was perforated three times through the center with bullets from a pistol or rifle, and was also horribly mutilated with a knife. The manner, therefore, in which these deadly weapons were used tended to show that the death of Jones was the result of premeditation and deliberation.

While a fist may be a deadly weapon, the evidence of the use of the fist in this case is not comparable to the evidence in *House* v. *State, supra*, and *Weldon* v. *State, supra*, where there was some substantial evidence consisting of other circumstances that the appellant who dumped the apparently immobile body in the water and walked away and the appellant who wielded the deadly weapons intended and premeditated that death occur. Nor do we have in this case evidence of any remark made or other demonstration that the appellant was abusing his son in the hope that he eventually would die.

The annotation at 89 A.L.R. 2d 396 (1963) deals with the subject of crimes resulting from excessive punishment of children. While some of the cases cited are ones in which a parent or step-parent flew into a one-time rage and killed the child, others are plain child abuse syndrome cases like the one before us now. None of them, with one exception, resulted in affirmance of a first degree murder conviction. Several were decisions in which first degree murder convictions were set aside for lack of evidence of premeditation and deliberation. *See, e.g.*, *People* v. *Ingraham*, 232 N.Y. 245, 133 N.E. 575 (1921); *Pannill* v. *Commonwealth*, 185 Va. 244, 38 S.W.2d 457 (1946). The case cited in the annotation in which a first degree murder conviction was affirmed is *Morris* v. *State*, 270 Ind. 245, 384 N.E.2d 1022 (1979). There the appellant was left alone for about fifteen minutes with his five-month-old baby. When the child's mother returned to their home she found the baby had been burned severely on one side. About a month later, the appellant and his wife were engaged in an argument when the baby began to whine. The appellant laid the baby on the floor, began hitting the baby in the face and then hit the baby's head on the floor, causing the baby's death. At the time of the offense, the Indiana law required malice, purpose, and premeditation to convict of first degree murder. In discussing the

premeditation requirement, the court said only:

> Premeditation which also may be inferred from the facts and circumstances surrounding the killing, need not long be deliberated upon, but may occur merely an instant before the act. [Citation omitted.] It is clear from the facts adduced at trial regarding the burning and beating of the child that the jury could well have inferred that his killing was perpetrated purposely and with premeditated malice. [384 N.E.2d at 1024]

No explanation is given for the quantum leap from "the facts," horrible as they were, to the inference of premeditation. We made the same error in *Burnett* v. *State*, 287 Ark. 158, 697 S.W.2d 95 (1985), another child abuse case in which the facts were particularly repugnant, where we said:

> Premeditation, deliberation and intent may be inferred from the circumstances of the case, such as the weapon used and the nature, extent and location of the wounds inflicted . . . . [T]he weapon used was a fist which struck the abdomen with such force as to rupture the colon. The child sustained fingernail scratches, four broken ribs, and other internal damage, as well as numerous bruises due to blows with a fist all over his body. The required mental state for first degree murder can be inferred from the evidence of abuse, which is substantial. [287 Ark. at 162-163, 697 S.W.2d at 98]

The problem with these cases is that they give no reason, like the reasons found in *House* v. *State, supra*, and *Weldon* v. *State, supra*, to make the inference of premeditation and deliberation.

In *Simmons* v. *State*, 227 Ark. 1109, 305 S.W.2d 119 (1957), the appellant was antagonized more than once by his victims. After the first time he went home and got his shotgun to use, he said, for hunting squirrels. We modified the conviction from first degree murder to second degree murder, noting that the appellant had opportunities to kill the victims after he had obtained his weapon but before he shot them. His having let those opportunities pass negated premeditation and deliberation. We said:

> There is no testimony of any witness, aside from the

> testimony of appellant in open court and his written confession, from which the jury could have found the existence of premeditation and deliberation. Neither do we find any circumstance which amounts to substantial evidence upon which a finding of premeditation and deliberation could be based. Consequently we are led to conclude that the jury must have resorted to speculation rather than substantial evidence in arriving at a verdict of murder in the first degree. [227 Ark. at 110-111, 305 S.W.2d at 120]

The appellant argues, and we must agree, that in a case of child abuse of long duration the jury could well infer that the perpetrator comes not to expect death of the child from his action, but rather that the child will live so that the abuse may be administered again and again. Had the appellant planned his son's death, he could have accomplished it in a previous beating.

In this case the evidence might possibly support the inference that the blows which proved fatal to Ronnie Jr. could have been struck with the intent to cause his death developed in a drunken, misguided, and overheated attempt at disciplining him for not having told the truth. Even if we were to conclude there was substantial evidence from which the jury could fairly have found the appellant intended to cause Ronnie Jr.'s death in a drunken disciplinary beating on that Saturday, there would still be no evidence whatever of a premeditated and deliberated killing.

In *Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3, *cert. den.* 459 U.S. 1022 (1980), we held that to show the appellant acted with a premeditated and deliberated purpose, the state must prove that he (1) had the conscious object to cause death, (2) formed that intention before acting, and (3) weighed in his mind the consequences of a course of conduct, as distinguished from acting upon sudden impulse without the exercise of reasoning power. Viewing the evidence most favorable to the appellee, the circumstances of this case are not substantial evidence the appellant did (2) and (3), as opposed to acting on impulse or with no conscious object of causing death. The jury was thus forced to resort to speculation on these important elements.

A clear exposition of the premeditation and deliberation requirement which separates first degree from second degree

murder is found in 2 W. LaFave and A. Scott, Jr., *Substantive Criminal Law* § 7.7 (1986):

> Almost all American jurisdictions which divide murder into degrees include the following two murder situations in the category of first degree murder: (1) intent-to-kill murder where there exists (in addition to the intent to kill) the elements of premeditation and deliberation, and (2) felony murder where the felony in question is one of five or six listed felonies, generally including rape, robbery, kidnapping, arson and burglary. Some states instead or in addition have other kinds of first degree murder.
>
> (a) Premeditated, Deliberate, Intentional Killing. To be guilty of this form of first degree murder the defendant must not only intend to kill but in addition he must premeditate the killing and deliberate about it. It is not easy to give a meaningful definition of the words "premeditate" and "deliberate" as they are used in connection with first degree murder. Perhaps the best that can be said of "deliberation" is that it requires a cool mind that is capable of reflection, and of "premeditation" that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.
>
> It is often said that premeditation and deliberation require only a "brief moment of thought" or a "matter of seconds," and convictions for first degree murder have frequently been affirmed where such short periods of time were involved. The better view, however, is that to "speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, . . . destroys the statutory distinction between first and second degree murder," and (in much the same fashion that the felony-murder rule is being increasingly limited) this view is growing in popularity. This is not to say, however, that premeditation and deliberation cannot exist when the act of killing follows immediately after the formation of the intent. The intention may be finally formed only as a conclusion of prior premeditation and deliberation, while in other cases the intention may be formed without prior thought so that premeditation and deliberation occurs only

> with the passage of additional time for "further thought, and a turning over in the mind." [Footnotes omitted.]

The evidence in this case supports only the conclusion that the appellant intended not to kill his son but to further abuse him or that his intent, if it was to kill the child, was developed in a drunken, heated, rage while disciplining the child. Neither of those supports a finding of premeditation or deliberation.

Perhaps because they wish to punish more severely child abusers who kill their children, other states' legislatures have created laws permitting them to go beyond second degree murder. For example, Illinois has made aggravated battery one of the felonies qualifying for "felony murder," and a child abuser can be convicted of murder if the child dies as a result of aggravated battery. *See People* v. *Ray*, 399 N.E.2d 977 (Ill. App. 1979). Georgia makes "cruelty to children" a felony, and homicide in the course of cruelty to children is "felony murder." *See Bethea* v. *State*, 304 S.E. 2d 713 (Ga. 1983). Idaho has made murder by torture a first degree offense, regardless of intent of the perpetrator to kill the victim, and the offense is punishable by the death penalty. *See State* v. *Stuart*, 715 P.2d 833 (Idaho 1985). California has also adopted a murder by torture statute making the offense murder in the first degree without regard to the intent to kill. *See People* v. *Demond*, 59 Cal. App. 3d 574, 130 Cal. Rptr. 590 (1976). *Cf. People* v. *Steger*, 128 Cal. Rptr. 161, 546 P.2d 665 (1976), in which the California Supreme Court held that the person accused of torture murder in the first degree must be shown to have had a premeditated intent to inflict extreme and prolonged pain in order to be convicted.

All of this goes to show that there remains a difference between first and second degree murder, not only under our statute, but generally. Unless our law is changed to permit conviction of first degree murder for something like child abuse or torture resulting in death, our duty is to give those accused of first degree murder the benefit of the requirement that they be shown by substantial evidence to have premeditated and deliberated the killing, no matter how heinous the facts may otherwise be. We understand and appreciate the state's citation of *Burnett* v. *State, supra*, but, to the extent it is inconsistent with this opinion, we must overrule it.

The dissenting opinion begins by stating the majority concludes that one who starves and beats a child to death cannot be convicted of murder. That is not so, as we are affirming the conviction of murder; we are, however, reducing it to second degree murder. The dissenting opinion's conclusion that the appellant starved Ronnie Jr., must be based solely on the child's underdeveloped condition which could, presumably, have been caused by any number of physical malfunctions. There is no evidence the appellant starved the child. The dissenting opinion says it is for the jury to determine the degree of murder of which the appellant is guilty. That is true so long as there is substantial evidence to support the jury's choice. The point of this opinion is to note that there was no evidence of premeditation or deliberation which are required elements of the crime of first degree murder. The dissenting opinion cites two child abuse cases in which first degree murder convictions have been affirmed. One is *Morris* v. *State, supra,* with which we dealt earlier in this opinion. The other is *Lindsey* v. *State*, 501 S.W.2d 647 (Tex. Crim. App. 1973), in which the opinion does not say the conviction was for first degree murder. In fact, the issue there was whether the killing occurred with "intent and malice" which are obviously not the same as premeditation and deliberation.

In this case we have no difficulty with reducing the sentence to the maximum for second degree murder. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977). The jury gave the appellant a sentence of forty years imprisonment which was the maximum for first degree murder, and we reduce that to twenty years which is the maximum imprisonment for second degree murder. Just as walking away from the victim in the water-filled ditch in *House* v. *State, supra*, after a protracted fight, and the "overkill" and mutilation of the body in *Weldon* v. *State, supra*, were circumstances creating substantial evidence of premeditation and deliberation, the obvious effect the beatings were having on Ronnie Jr. and his emaciated condition when the final beating occurred are circumstances constituting substantial evidence that the appellant's purpose was to cause serious physical injury, and that he caused his death in the process. That is second degree murder, § 41-1503(1)(c). Therefore, we reduce the appellant's sentence to imprisonment for twenty years.

Affirmed as modified.

HICKMAN, HAYS, and GLAZE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. Simply put, if a parent deliberately starves and beats a child to death, he cannot be convicted of the child's murder. In reaching this decision, the majority overrules a previous unanimous decision and substitutes its judgment for that of the jury. The majority has decided it cannot come to grips with the question of the battered child who dies as a result of deliberate, methodical, intentional and severe abuse. A death caused by such acts is murder by any legal standard, and that fact cannot be changed—not even by the majority. The degree of murder committed is for the jury to decide—not us.

Convictions for murder resulting from child abuse have become more common in our courts. That is probably because such cases are being reported more often and prosecutors are more apt to seek retribution.

The decision of what charge to file in a homicide case rests with the prosecuting attorney. He has the duty to prove the charge. The decision of whether the state has proved the crime rests with the jury. Our role is only to determine if substantial evidence exists to support the verdict.

Sometimes the facts may warrant a charge of second degree murder. We have affirmed convictions for second degree murder in two such cases. *Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984); *Limber* v. *State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

Whether the particular acts of child abuse amount to first degree murder depend on the particular facts and circumstances in each case. Just as in any other murder case, the state must prove each element of the crime. For a first degree murder conviction, the state must prove premeditation and deliberation.

We have never held motive relevant to murder, nor do we even try to look into the warped minds that commit murder to make their acts rational. *Parker* v. *State*, 290 Ark. 158, 717 S.W.2d 800 (1986). Consequently, circumstantial evidence usually plays a strong part in determining intent in any murder case.

In this case the majority, with clairvoyance, decides that this parent did not intend to kill his child, but rather to keep him alive

for further abuse. This is not a child neglect case. The state proved Midgett starved the boy, choked him, and struck him several times in the stomach and back. The jury could easily conclude that such repeated treatment was intended to kill the child.

In *Burnett* v. *State, supra*, the state chose to seek a first degree murder conviction. The child was killed in an extremely horrible way. He was malnourished and dehydrated, bruises on his face and upper and lower extremities, four broken ribs, a ruptured colon, and abrasions. His life was made intolerable and insufferable until at last a blow killed him. The parents, who could not have been unaware or innocent, were found guilty of killing him, which they did. We unanimously upheld that jury verdict. It was no "quantum leap" on our part (whatever that means), just a decision based on the facts and the law. The majority unanimously joined in the *Burnett* decision.

The facts in this case are substantial to support a first degree murder conviction. The defendant was in charge of three small children. The victim was eight years old and had been starved; he weighed only 38 pounds at the time of his death. He had multiple bruises and abrasions. The cause of death was an internal hemorrhage due to blunt force trauma. His body was black and blue from repeated blows. The victim's sister testified she saw the defendant, a 30 year old man, 6'2" tall, weighing 300 pounds, repeatedly strike the victim in the stomach and back with his fist. One time he choked the child.

The majority is saying that as a matter of law a parent cannot be guilty of intentionally killing a child by such deliberate acts. Why not? Is it because it is inconceivable to rational people that a parent would intend to kill his own child? Evidently, this is the majority's conclusion, because they hold the intention of Midgett was to keep him alive for further abuse, not kill him. How does the majority know that? How do we ever know the actual or subliminal intent of a defendant? "If the *act* appellant intended was criminal, then the law holds him accountable, even though such *result* was not intended." *Hankins* v. *State*, 206 Ark. 881, 178 S.W.2d 56 (1944); see also *Black* v. *State*, 215 Ark. 618, 222 S.W.2d 816 (1949). There is no difference so far as the law is concerned in this case than in any other murder case. It is simply a question of proof. This parent killed his own child, and the

majority cannot accept the fact that he intended to do just that.

Undoubtedly, the majority could accept it if the child were murdered with a bullet or a knife; but they cannot accept the fact, and it is a fact, that this defendant beat and starved his own child to death. His course of conduct could not have been negligent or unintentional.

Other states have not hesitated to uphold a conviction for first degree murder in such cases. *Morris* v. *State*, 384 N.E.2d 1022 (Ind. 1979); *Lindsey* v. *State*, 501 S.W.2d 647 (Tex. 1973). The fact that some states (California and Idaho) have passed a murder by torture statute is irrelevant. Those statutes may make it easier to prosecute child murderers, but they do not replace or intend to replace the law of murder. Whether murder exists is a question of the facts—not the method. The majority spends a good deal of effort laboring over the words "premeditation and deliberation," ignoring what the defendant did. Oliver Wendell Holmes said: "We must think things not words . . ." Holmes, "Law in Science and Science in Law," *Collected Legal Papers*, p. 238 (1921). If what Midgett did was deliberate and intentional, and that is not disputed, and he killed the child, a jury can find first degree murder.

I cannot fathom how this father could have done what he did; but it is not my place to sit in judgment of his mental state, nor allow my human feelings to color my judgment of his accountability to the law. The law has an objective standard of accountability for all who take human life. If one does certain acts and the result is murder, one must pay. The jury found Midgett guilty and, according to the law, there is substantial evidence to support that verdict. That should end the matter for us. He is guilty of first degree murder in the eyes of the law. His moral crime as a father is another matter, and it is not for us to speculate why he did it.

I would affirm the judgment.

HAYS and GLAZE, JJ., join in the dissent.

Supplemental Opinion on Denial of Rehearing
June 29, 1987

731 S.W.2d 774

1. APPEAL & ERROR — NO BASIS FOR GRANTING REHEARING. — Where appellant only reargues a question raised on appeal he presents no basis for granting rehearing. [Ark. Sup. Ct. R. 20(g).]
2. CRIMINAL LAW — FIRST DEGREE MURDER. — Ark. Stat. Ann. § 41-1502(3) (Supp. 1985) provides that first degree murder is a class Y felony, and a person convicted of a class Y felony may be sentenced to a term of not less than ten years and not more than forty years, or life.
3. APPEAL & ERROR — INSUFFICIENT PROOF TO SUPPORT JURY'S VERDICT OF A HIGHER OFFENSE — APPELLATE COURT MAY REDUCE SENTENCE. — If the evidence proves insufficient to support a jury's verdict of a higher offense, the trial court may sentence the defendant for a lesser included offense where the evidence clearly shows the commission of the latter and the appellate court, in its discretion, may reduce the sentence to that prescribed for the lesser offense.

Petition for Rehearing; denied.

DAVID NEWBERN, Justice. The appellant only reargues the question whether there was evidence of premeditation and deliberation and thus presents no basis for granting rehearing. Arkansas Supreme Court and Court of Appeals Rule 20(g). However, both parties have pointed out an error of law in our opinion. We stated that the maximum sentence for first degree murder is forty years imprisonment. We should have said the maximum term of years is forty. The statute provides first degree murder is a class Y felony, Ark. Stat. Ann. § 41-1502(3) (Supp. 1985), and a person convicted of a class Y felony may be sentenced to a term of not less than ten years and not more than forty years, or life. The jury thus sentenced the appellant to the maximum determinate sentence for first degree murder, although it was not the ultimate maximum sentence, *i.e.*, life imprisonment.

The appellant argues, in his response to the appellee's request for rehearing, that we should grant a new trial so that a jury may set the sentence for second degree murder. We decline to do so, as we regard the maximum sentence to be supported by the evidence in the record, and as we said in *Collins* v. *State*, 261

Ark. 195, 548 S.W.2d 106 (1977):

> If the evidence proves insufficient to support a jury's verdict of a higher offense, the trial court may sentence the defendant for a lesser included offense where the evidence clearly shows the commission of the latter (and this court, in its discretion, may reduce the sentence to that prescribed for the lesser offense). *Caton* v. *State*, 252 Ark. 420, 479 S.W.2d 537 [1972]. This rule applies in murder cases as well as for other felonies. *Simpson* v. *State*, 56 Ark. 8, 19 S.W. 99 [1892]. [261 Ark. at 209, 548 S.W.2d at 114.]

The sentence has been reduced to one within the range prescribed for second degree murder, and we find that sentence to be justified by the evidence in the record.

Rehearing denied.

HICKMAN, HAYS, and GLAZE, JJ., would grant.

Edward OWENS *v.* STATE of Arkansas

CR 87-29 729 S.W.2d 419

Supreme Court of Arkansas
Opinion delivered May 26, 1987

Appellant, pro se.

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

Gen., for appellee.

PER CURIAM. The petitioner Edward Eugene Owens was found guilty by a jury of rape and sentenced to twenty years imprisonment. The Court of Appeals affirmed. *Owens* v. *State*, CA CR 84-92 (November 14, 1984). Petitioner has now filed a timely petition to proceed pursuant to Criminal Procedure Rule 37. We find that some of the allegations contained in the petition present fact questions which cannot be resolved without a hearing and therefore grant permission for the petitioner to file a petition in circuit court for an evidentiary hearing limited to certain allegations raised in the instant petition. We find no reason to grant the motion to amend the instant petition since the amendment contains no allegations not included in the original petition.

Petitioner alleges that his attorney Arthur Allen, a deputy public defender, was ineffective in that he failed to interview and subpoena to testify J. C. Cash, Arthur Cash, Carl Stewart and Osie Jones. He contends that on February 22, 1984, when counsel visited him for the first time at the county jail he told counsel that the four men had been with him and the victim in the house where the rape was alleged to have occurred. He further informed counsel that the men would testify that during the two-and-one-half hours they were there the prosecutrix who is deaf wrote several notes to them offering to have sexual relations in exchange for drugs and money and that she was not held against her will as she testified. He contends that Osie Jones would have testified that he and the woman left the house for a time to buy liquor and beer and returned. Petitioner argues that since the trial began on February 29, 1984, counsel had not allowed himself enough time to contact the potential witnesses and secure their presence in court.

Petitioner also alleges that the prosecutrix and the men at the house wrote some thirty to thirty-five notes, the contents of which would have tended to prove that she was present by choice but that only five of the notes were introduced into evidence at trial because counsel did not act to secure the notes from the house. The prosecutrix testified that other notes were written but said that only petitioner and a co-defendant Robert Orilcek were present when the rape occurred. Petitioner states that while he was in custody after arrest, he arranged for Isaac Johnson to go to

the house to gather the notes and deliver them to counsel. He asserts that Johnson was able to find only a few of the notes because the house had been ransacked during his absence. Petitioner states that he would have given his house key to counsel immediately after he was arrested so that the notes could have been retrieved if counsel had not delayed in seeing him.

The State has attached to its response to petitioner's allegations, the affidavit of Arthur Allen in which he avers that petitioner gave him the name of only one witness, Leroy Porch. Counsel also states that petitioner did not tell him that there were any other notes to be retrieved from his residence.

When an allegation rests on whether witnesses should have been called at trial, it is incumbent on the petitioner to name the witnesses, provide a summary of their testimony and establish that the testimony would have been admissible into evidence. *See Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984). Petitioner here has identified the witnesses by name and provided a summary of their prospective testimony. If the witnesses were present at the time the offense was alleged to have occurred, their testimony concerning the events which transpired would have been admissible.

The testimony of the prosecutrix, which was contradictory in several instances, formed the core of the case against the petitioner. In light of her conflicting testimony, the testimony of the four men and the introduction of the other notes could have been of great importance to the defense.

When there is a fact question to resolve, the only appropriate means of resolving it is an evidentiary hearing in circuit court. Petitioner is granted permission to proceed in circuit court for an evidentiary hearing limited to the allegation that counsel's failure to investigate denied petitioner the opportunity to call the four men as witnesses and introduce the other notes into evidence.

This court will not accept the affidavit provided by the State to refute the factual allegations made by the petitioner. To do so would place the court in a position of being the finder of fact and would permit the state to refute an allegation without giving the petitioner an opportunity to question the affiant.

As in all postconviction proceedings, the burden at the hearing will be on the petitioner to overcome the strong presumption that counsel's assistance was effective. *Strickland* v. *Washington*, 466 U.S. 668 (1984). If it is reasonable to conclude that the information about the potential witnesses and the notes should have been furnished to counsel by the petitioner, the petitioner is responsible for demonstrating that he supplied to counsel the information necessary to make an adequate investigation or was unable to do so through some fault of counsel. The petitioner must also establish not only that counsel made some error but that the error resulted in actual prejudice so serious as to deny him a fair trial, whose result is unreliable. In other words, the petitioner must show that the evidence omitted from trial through counsel's errors was important enough to affect the judgment. *See Strickland* v. *Washington, supra; see also United States* v. *Morrison*, 449 U.S. 361 (1981). It is not enough for petitioner to prove merely that there were other witnesses who could have testified or that the notes existed.

Petitioner has raised a number of other allegations in the instant petition which do not justify postconviction relief. Chief among them is the claim that he learned after trial that the victim had a history of accusing men of rape. He states at one point in the petition that the prosecutor knew about the victim's history before trial and withheld the information from the defense. At another point, he alleges that the information was in the prosecutor's file and thus available to the defense but counsel failed to use it. Since it is unclear whether petitioner is alleging prosecutorial misconduct, ineffective assistance of counsel or that new evidence exists, the issue will not be addressed further. This court will not speculate on a petitioner's meaning.

Petition granted; motion to amend denied.

Don VENHAUS, Pulaski County Judge, Pulaski County, Arkansas *v.* PULASKI COUNTY QUORUM COURT, and Gary ADAMS, et al.

86-182 729 S.W.2d 13

Supreme Court of Arkansas
Opinion delivered May 26, 1987

Ivester, Henry, Skinner & Camp, by: *Stephen L. Curry*, for appellant.

No response by appellee.

PER CURIAM. Petitioners, Don Venhaus, Pulaski County Judge, and Pulaski County filed this motion seeking clarification of the time schedule they are to follow for lodging the transcript.

A claim was rendered against Pulaski County to award that county's deputy sheriffs overtime pay. Venhaus filed a notice of appeal from that judgment and the trial court entered an order on July 24, 1986, dismissing his appeal on the basis that the quorum court was the only proper party to appeal. In an opinion handed down March 30, 1987, this court reversed the trial court's

order and reinstated the appeal. *Venhaus* v. *Pulaski Quorum Court*, 291 Ark. 558, 726 S.W.2d 668 (1987). In that opinion, however, we did not address the question of the allowable time for purposes of preparing a transcript. Rule 5 of the Rules of Appellate Procedure provides that the record shall be filed within 90 days from the filing of the first notice of appeal, unless an extension of time is granted. Such an extension is not to exceed seven months from the date of the entry of the judgment. Venhaus asks that his notice of appeal be considered as first filed on March 30, 1987, the date of this court's opinion reinstating the appeal, giving him a maximum of seven months from that date to file the record. We agree with this approach.

Venhaus's appeal to this court of the trial court's dismissal of his original appeal is the type of postjudgment motion contemplated by Rules 4 and 5 of the Rules of Appellate Procedure. In *Pentron Corp. et al* v. *Delta Steel & Const. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985) this court stated:

> Rule 4 and Rule 5 are meant to operate successively. That is, a final disposition of the case in the trial court is reached before the notice of appeal must be filed under Rule 4. Rule 5 must then be observed in the preparation of the record and its filing with the clerk of the appellate court. That process should logically date from the notice of appeal, not from the entry of a judgment perhaps some months earlier. Even more importantly, until a motion for a new trial is acted upon, it cannot be known which party will be the appellant, for by Rule 2(a)(3) an order either granting or denying a new trial is appealable. It is manifestly impractical to put the burden of acting within seven months upon a party whose identity may not yet have been determined.

Applying this language to the case at bar, when the trial court dismissed the original appeal and Venhaus succeeded in having that appeal reinstated, that was a final disposition of the case in the trial court. The record can now be ordered, with time calculated from the date of the reinstatement, not the entry of the original judgment. To do otherwise would be "manifestly impractical," since it would place the burden of acting within seven months upon a party whose right to appeal the judgment had not been established.

Therefore, Venhaus has 90 days from this court's decision on March 30, 1987, to file the record on appeal.

Motion granted.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. This is but another dilatory tactic on the part of the individual appellant. All of the other defendants in the original action have accepted the decree of the trial court and do not want to incur the additional costs of appeal which will ultimately be paid by the taxpayers of Pulaski County. Apparently the appellant feels that his pride is at stake. If it is, I am sorry, but the taxpayers are under no obligation to pay whatever it takes to soothe his feelings.

Judgment in favor of the deputy sheriffs, the plaintiffs in the original action, was entered by the trial court on April 15, 1986. The appellant called a special meeting of the quorum court for May 13, 1986; at this meeting the quorum court voted unanimously not to appeal the judgment. Nevertheless, the appellant filed a notice of appeal on May 15, 1986, the last day possible to file a timely appeal. The designation of the record on appeal included "all pleadings, proceedings, exhibits, evidence and documents introduced in evidence at trial or hearing before this Court. . . ." The appellant filed a motion for a stay pending the appeal on the same day that the notice of appeal was filed.

At the next regular meeting of the quorum court, on June 24, 1986, the court appropriated money to pay the judgment and enacted an ordinance which prohibited the county judge (the present lone appellant) from spending county funds on the prosecution of an appeal. (The underlying judgment was in favor of the deputy sheriffs who had been required to work overtime.) The appellant vetoed the ordinance and this veto was overridden on June 22, 1986.

The trial court entered another order on July 24, 1986, wherein it dismissed the petition for a stay, held that Pulaski County was the real party in interest, and dismissed the appeal. A second notice of appeal was filed by the appellant on August 6, 1986, in which he claimed to be acting in behalf of all of the defendants in the original action, even though he was fully aware that he was the only one who desired to appeal. This second notice

of appeal was from the interlocutory order dated August 13, 1985, in which the chancellor found that the county was obligated to pay the overtime wages, and from the final order and judgment dated April 15, 1986. The court entered yet another order on August 6, 1986, staying the order of July 24, 1986, and ordering the appellant to process the payment of the judgment.

On August 13, 1986, the trial court denied the appellant's motion for an extension of time to file the record on appeal. The court found that he had not deposited any funds for the payment of the transcript and that it would cost the county $8,000 to $10,000 to prepare the transcript which would never be used. The motion to extend time was made on the last allowable day. There was no proof that the appellant had ordered the transcript or that the reporter had started to prepare the testimony of the trial.

A petition for certiorari was filed in this Court on August 4, 1986. We denied the petition for certiorari on August 18, 1986, but we stated that we would allow time to prepare the transcript if appeal of the order of April 15, 1986, were allowed. Briefing schedules on the interlocutory appeal were assigned. On March 30, 1987, we reversed the trial court's order denying appellant's appeal (Purtle, J., dissenting). See *Venhaus* v. *Pulaski County Quorum Court*, 291 Ark. 558 (1987). Technically this opinion reinstated appellant's appeal from the order of April 15, 1986. The preparation of the transcript for that appeal apparently has not begun. There is no need for an all-inclusive transcript of all of the testimony even if we allow the appeal to be pursued because the sufficiency of the evidence will most certainly not be an issue on appeal.

Before the ink was dry on our decision allowing the appellant to continue with the appeal, he filed the present motion seeking to have a full seven months to file the transcript. The appellant is using this motion simply as a delay tactic. His petition for certiorari was filed on the eighty-ninth day following the notice of appeal. He apparently had not ordered the record at that time although it was due to be filed in this Court the next day. By the date of filing his petition for certiorari he had used up four months time and now he wants seven more. The appellant is using this Court to evade the established rules and to delay the collection of the judgment in favor of the deputy sheriffs.

We ought to grant appellant's present motion for clarification and do so by dismissing the appeal itself for lack of merit. Also, the record has not been timely filed with the clerk of this Court. As of this date, a year after the trial court's decision, the transcript has apparently not yet been ordered.

The Constitution of Arkansas, Amendment 55, established the various county quorum courts as the legislative branch for the counties. Section 3, addressing the duties of the county judge, states that the judge is to "administer ordinances enacted by the quorum courts." The powers of the quorum court are defined in Section 4 of the Amendment, which in part provides: "[T]he quorum court shall have the power to override the veto of the county judge . . . [and] fix the number and compensation of deputies and county employees. . . ." It is clear throughout the amendment and the enabling statutes that the quorum court is vested with the legislative power of the county. At no place in Amendment 55 does it provide that the county judge has the power to refuse to comply with ordinances duly enacted by the quorum court.

The ordinance is the absolute controlling law of the county, provided it does not violate state law or the constitution. In the case before us the quorum court has enacted an ordinance appropriating funds to pay the deputies in the sheriff's department. The quorum court has overridden the county judge's veto. Furthermore, the quorum court has enacted an ordinance to prohibit funds from being spent by the appellant on this appeal.

I believe the appeal is moot since the quorum court has already appropriated the funds to pay the judgment the quorum court has positively declined to appeal from the judgment of the trial court. However, it appears the appellant is trying to force the quorum court to appeal. Even if this appeal were to be successful, the quorum court could still vote again to appropriate funds for the payment of the judgment. In fact, there is no reason for the quorum court not to proceed with payment of these claims at the present time.

There is no argument by the lone appellant that the quorum court has appropriated funds in an unlawful manner. The only possible purpose of the appeal is to assert the appellant's power as per this Court's decision of March 30, 1987, that the appellant

has the right to appeal the judgment of the trial court. Our decision did not attempt to rule or even imply that the appellant would be successful on an appeal on the merits.

The majority per curiam gives no reason why the first four months used by the appellant should not be counted against him or why the trial court abused her discretion in denying the appellant an extension of time to file the record. Rule 5 of the Rules of Appellate Procedure provides that the record shall be filed within 90 days from the filing of the first notice of appeal, unless an extension of time is granted by the trial court. I do not understand what makes this appellant different from the others or why he should not follow the court rules. Neither do I understand why he wants to spend attorney's fees, court costs and other expense in his vain attempt to exercise control over the quorum court.

Pride goeth before destruction and a haughty spirit before a fall. The appeal should be dismissed now.

Brian Judah MICHALEK *v.* A. L. LOCKHART, Director, Arkansas Department of Correction

86-234 730 S.W.2d 210

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Appellant, pro se.

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

JACK HOLT, JR., Chief Justice. At issue in this appeal is the classification for parole eligibility purposes of an inmate at the Arkansas Department of Correction. The trial court upheld the action of the Department. We affirm.

Brian Judah Michalek, the appellant, entered a negotiated plea of guilty on May 28, 1981, to breaking and entering and to arson. He received a fifteen-year sentence for the arson conviction and five years for breaking and entering, with the sentences to be served concurrently. While he was incarcerated, Michalek escaped and was charged with escape and theft of property. He entered a negotiated plea of guilty to those charges on July 11, 1983, and received a two-year sentence for the escape, and four years for theft of property, to be served concurrently. This four-year sentence, however, was to be served consecutively to the fifteen-year sentence imposed in 1981.

After his second set of convictions, Michalek was reclassified by the Department of Correction, for parole eligibility purposes, from a first offender to a second offender. It is that reclassification that is the subject of this appeal. Michalek contends the Department improperly computed his sentence after his second conviction. Michalek also contends the Department violated his state and federal constitutional rights. Neither allegation has any merit.

In his first assignment of error, Michalek relies on this court's decision in *Bosnick* v. *Lockhart*, 283 Ark. 206, 672 S.W.2d 52 (1984), *supplemental opinion on denial of rehearing*, 283 Ark. 209, 677 S.W.2d 292 (1984). In that case, Bosnick was sentenced to life in prison for murder committed on December 31, 1968. In 1977, Act 93 was passed by the General Assembly which changed the parole eligibility laws. On October 30, 1978, Bosnick escaped from prison, for which he was subsequently convicted and sentenced to an additional three-year term, to be served consecutively. Although Act 93 was in effect at the time of Bosnick's escape from prison, a different parole eligibility law applied when Bosnick committed murder in 1968. Under the prior law, Bosnick was eligible for parole after serving fifteen years of the life sentence. Under Act 93, he was not eligible for parole until and unless the life sentence was commuted to a term of years by the governor. The Department applied the 1977 Act and refused to consider Bosnick for parole. This court reversed, holding that "parole status is governed by the parole statute in effect at the time the crime was committed."

Our holding in *Bosnick* is not applicable to the facts of this case. The same parole statute, Act 93 of 1977, was in effect when both of Michalek's crimes were committed. The Act, codified at Ark. Stat. Ann. §§ 43-2828 — 43-2830 (Repl. 1977 & Supp. 1985), makes provision for "first offenders": "inmates convicted of one or more felonies but who have not been incarcerated . . . for a crime which was a felony", and for "second offenders": "inmates convicted of two or more felonies and who have been once incarcerated . . . for a crime which was a felony." § 43-2828(1) & (2). First offenders are not eligible for parole until a minimum of one-third of their sentence is served, while second offenders are not eligible until a minimum of one-half of their sentence is served. § 43-2829(B)(2) & (3).

Although Michalek was classified as a first offender and only required to serve one-third of his sentence after his first conviction, he was properly reclassified as a second offender after his second conviction, and ordered to serve one-half of his sentence to be eligible for parole. The parole eligibility laws did not change while Michalek was incarcerated; his status did as a result of his commission of a second crime. We have previously explained that everyone is charged with knowledge of the

criminal law and that the purpose of Act 93 "was to lengthen the period of confinement before parole eligibility as the number of prior convictions increases." *Tisdale* v. *Lockhart*, 288 Ark. 203, 703 S.W.2d 849 (1986), *Woods* v. *Lockhart*, 292 Ark. 37, 727 S.W.2d 849 (1987).

As to Michalek's second argument, it is not clear what constitutional rights he is claiming were violated and he does not cite any authority in his argument. Assignments of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that they are well taken. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Nevertheless, the classification scheme contained in § 43-2828 violates no constitutional due process right since there is no constitutional right or entitlement to parole. *Stuart* v. *Lockhart*, 587 F. Supp. 1 (E.D. Ark. 1983). The United States Supreme Court has also explained that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979).

Accordingly, Michalek's claim that his constitutional rights were violated is without merit.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent. The appellant was sentenced by the trial court to fifteen years in the Arkansas Department of Correction. Under the current parole statutes, Ark. Stat. Ann. §§ 43-2828—2833 (Repl. 1977 & Supp. 1985), he was to serve five years of the sentence as he was unquestionably a "first offender" as defined in the statute. While serving this sentence he committed crimes for which he was sentenced to serve an additional four years, consecutive to the sentence of fifteen years which he had been serving. The Arkansas Department of Correction subsequently reclassified him as a second offender and related it back to the first sentence. Under the Department of Correction's application of the statute and this Court's interpretation of it in the present case, the appellant is now required to serve at least one-half of the original sentence.

The effect of the Arkansas Department of Correction's action is to resentence him on the first offense and require him to serve a longer sentence than imposed by the trial court. This action is clearly ex post facto as applied to the original sentence. He now must serve time on the first offense which was not required at the time of the first sentencing.

Act 93 of 1977 undoubtedly was intended to lengthen the period of confinement imposed for *subsequent* offenses committed by persons who had been previously incarcerated for a felony. The majority opinion cites the applicable statute, but fails to quote the determinative section thereof. Ark. Stat. Ann. § 43-2828(1) (Repl. 1977) defines "first offenders" as "inmates convicted of one or more felonies but who have not been incarcerated . . . for a crime which was a felony . . . *prior to being sentenced to a correctional institution in this state for the offense or offenses for which they are being classified.* [Emphasis added.]" For the purposes of the application of this statute to the original sentence, the appellant clearly remained a "first offender"; he was re-classified as a "second offender" for an offense prior to which he had never been incarcerated.

The legislature is supposed to enact laws and the courts are supposed to interpret and apply the laws. The Arkansas Department of Correction is required to operate pursuant to the laws of the state. However, it now appears the Arkansas Department of Correction may interpret the law as it sees fit in spite of the plain words of the statute.

Certainly appellant could correctly and legally be compelled to serve one-half of the second sentence because that is what the law states. However, to increase a sentence already being served is most certainly ex post facto and fundamentally unfair.

S. Wayne EVERETT and PENROSE, INC. *v.* CITY OF WYNNE, ARKANSAS; AIRPORT COMMISSION FOR WYNNE, ARKANSAS; and Norman BURNETTE

87-109 730 S.W.2d 212

Supreme Court of Arkansas
Opinion delivered June 1, 1987

[redacted]

Everett & Whitlock, by: *Robert J. Gladwin*, for appellants.

Killough & Ford, by: *Robert M. Ford* and *S. Kyle Hunter*, for appellees.

DARRELL HICKMAN, Justice. Wayne Everett, a crop duster pilot, sued the City of Wynne because it prevented him from operating his agricultural spraying business from the Wynne Municipal Airport. His main argument was that the airport's manager, Norman Burnette, was allowed to operate his crop-dusting business from the airport and denied others the same privilege and that this constituted a violation of the United States Constitution. The airport commission asked for a declaratory judgment of the rights under a lease with Burnette.

The chancellor upheld the lease agreement between the Wynne Airport Commission and Burnette and denied Everett any relief. On appeal Everett makes three arguments: (1) the grant to Burnette of the exclusive privilege of operating a crop-dusting business violates the Equal Protection Clause of the United States Constitution; (2) the exclusion of Everett from using the airport is not a valid exercise of the police powers; and (3) the agreement between the airport commission and Burnette is not a valid franchise agreement. We find no merit to these arguments and affirm the decree.

The facts are virtually undisputed. The airport commission signed a ten year contract with Burnette in 1979 as airport manager. Because the city and the commission could not afford to pay Burnette, he was granted the exclusive right to provide the usual airport services: gas, maintenance and repairs of aircraft,

parking spaces, taxi services, etc. He was given a lease of land 1,000 feet north and 1,000 feet south of the main entrance to use in connection with these services. He was also granted the right to operate his crop-dusting business from the airport. All of this was a part of the consideration which Burnette received in return for managing the airport without cost to the city and commission. The commission considered it a fair exchange.

According to the testimony, the airport commission would not allow other crop dusters to operate from the airport for reasons of safety, health and welfare. Such operations entail loading chemicals which can run off to nearby residential areas, increased noise pollution, and increased air traffic. Burnette testified that he located his business at the airport so that the runoff of chemicals would not be toward the city, and this runoff plan was approved by the Environmental Protection Agency.

On March 24, 1986, Everett landed his plane at the airport in order that his trucks could load his plane with chemicals; however, Burnette would not allow Everett to so use the airport because of his exclusive privilege agreement with the airport commission. The gate to the airport is normally locked to keep vehicles off the runway. Everett cut the lock to let his trucks come onto the airport property, loaded his plane, and used the airport in his spraying business. Everett then sought injunctive relief. The City of Wynne sought to prevent Everett from operating his business at the airport.

The Equal Protection Clause of the United States Constitution protects fundamental personal rights. In this case Everett concedes he has no right to operate his business from the municipal airport. He was not denied the right the public has to use the airport—only the privilege of setting up his business and operating it from the municipal airport. He could land, take off, and service his planes; he could not load chemicals and fertilizer. His argument is, "If Burnette can, why can't I?" The answer is because the city, in the use of its police power and its legislative power, decided that in the interest of economy, it would be best for the city to have an airport manager at no charge and in return, the manager would be allowed to operate his private business from the airport to the exclusion of other private businesses.

In the case of *City of New Orleans* v. *Dukes*, 427 U.S.

297 (1976), two street vendors were allowed to continue to operate their businesses in the French Quarter while others were prohibited. Without elaboration, there were economic reasons for the city's action. The court said:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. (Citations omitted.) Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

Everett does not deny that the City of Wynne and the airport commission can prohibit all crop dusters from operating from the airport in the exercise of its police power. He argues, however, that the city's action is arbitrary. It has allowed one operator to base his operations there and has made no effort to set standards regarding flights or safety.

The evidence did reflect that there are 13 crop duster operators in Cross County. The city did not want any other crop dusters using the strip for safety reasons and for the health and welfare of the residents of the city. In addition the city needed a good manager, and the grant was made to obtain Burnette at no cost to the city.

The argument that the city granted an illegal franchise must also fail. Everett has not cited any authority to support his argument. The case of *City of Daytona Beach* v. *Dygert*, 1 So. 170 (Fla. 1941), is cited by Everett in his equal protection argument as law in his favor. We will consider it under this franchise agreement argument. In that case the city granted an individual the exclusive right to operate an airport. In effect, it became a private airport. In this case the commission ran the airport for the city, and Burnette managed it for the commission. This did not

involve a franchise agreement but instead a lease. Neither the public nor Everett has been denied any fundamental right.

Affirmed.

James Daniel MUCK *v.* STATE of Arkansas

CR 87-10 730 S.W.2d 214

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Mark E. Ford, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. The trial court denied the appellant's petition for relief pursuant to Rule 37 which alleged that there was no factual basis upon which the guilty plea could be supported. On appeal the appellant argues: (1) the court erred in failing to establish a factual basis to support the guilty plea; and (2) the court erred in finding that defense counsel was not ineffective and in finding that the appellant's guilty plea was voluntarily and intelligently entered. For the reasons stated below we do not agree with either contention of the appellant.

On November 17, 1983, the appellant was charged by information with the offense of murder in the first degree in violation of Ark. Stat. Ann. § 41-1502 and attempted murder in the first degree in violation of Ark. Stat. Ann. §§ 41-1502 and 41-701. The appellant subsequently entered pleas of not guilty to both charges. On April 27, 1984, the appellant changed his pleas and entered a plea of guilty to each charge. The trial court found the appellant guilty on both charges. On March 17, 1986, the appellant filed a petition for post-conviction relief pursuant to A.R.Cr.P. Rule 37. The petition alleged that there was no factual basis for the conviction upon the charge of attempted murder in

the first degree, and that defense counsel was ineffective and deficient and that such deficiency rendered the appellant's guilty plea to said charge unintelligent and involuntary. After an evidentiary hearing on the Rule 37 petition, the trial court entered its order denying any relief.

The first argument is that the trial court erred in accepting his guilty plea without first making a factual determination of the basis of such plea as required by A.R.Cr.P. Rule 24.6. We recently stated in *Grover* v. *State*, 291 Ark. 508, 726 S.W.2d 269 (1987), that the trial court's failure to make such a factual determination when the plea is taken may be remedied at the Rule 37 hearing where the factual basis is determined to have existed at the time of the guilty plea. We have a similar situation in the case before us. A.R.Cr.P. Rule 24.6 provides that the trial court shall not enter a judgment upon a plea of guilty without making such an inquiry as will establish that there is a factual basis for the plea. Although this rule is mandatory, substantial compliance with the rule is all that is required. *Jones* v. *State*, 288 Ark. 375, 705 S.W.2d 874 (1986). The court must ask the defendant if he did the things of which he stands accused and is pleading guilty because he is guilty. *Smith* v. *State*, 291 Ark. 496, 725 S.W.2d 849 (1987); *McDaniel* v. *State*, 288 Ark. 629, 708 S.W.2d 613 (1986).

At the plea hearing, the trial court essentially read the information stating the charges and asked appellant if he understood them. The appellant replied, "Yes." When asked how he pleaded to the charge of attempted murder in the first degree, the appellant replied, "Guilty." The appellee concedes that the question of whether there was substantial compliance with Rule 24.6 at the plea hearing is a close one in the present case. However, at the Rule 37 hearing the appellant introduced a statement by one of the witnesses to the murder, who was also the victim of the attempted murder charge. In the statement the witness, Teresa Buckman, stated that the appellant "pointed a gun at me which looked like a small handgun and fired directly at me. . . ." The foregoing statement alone is sufficient to establish a factual basis for the entry of the guilty plea.

With regard to the claim of ineffective assistance of counsel, the appellant has the burden of showing that the advice

he received from his attorney was not within the range of competence demanded from attorneys in criminal cases. *Thomas* v. *State*, 277 Ark. 74, 639 S.W.2d 353 (1982). Counsel is presumed to be effective. *Rightmire* v. *State*, 275 Ark. 24, 627 S.W.2d 10 (1982). At the Rule 37 hearing, testimony indicated that counsel had visited the appellant in the jail five or six times. Counsel also inspected the prosecutor's file, made notes from the file, and discussed his notes with the appellant. The appellant has simply not met his burden of demonstrating that defense counsel was ineffective.

The United States Supreme Court has adopted a two-part test for reviewing claims of ineffective assistance. *Strickland* v. *Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. In *Hill* v. *Lockhart*, 106 S.Ct. 366 (1985), the Supreme Court held that the two-part *Strickland* standard applied to guilty pleas. Under *Hill*, in order to satisfy the second prong of the *Strickland* test, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted upon going to trial.

On this point appellant argues that his counsel failed to obtain another psychiatrist to examine him. The trial court had previously ordered that the appellant be admitted to the State Hospital for psychiatric evaluation. The report from the State Hospital was that the appellant was competent both at the time the offense was committed and at the time of the guilty plea. At the Rule 37 hearing, the testimony demonstrated that the attorney did discuss the case with a psychiatrist but that the appellant could not afford to pay for the examination. Certainly there is no demonstration of fact which would indicate ineffective assistance of counsel on this point. We have dealt with this situation several times in the past and have reached the same conclusion each time. See *Henry* v. *State*, 288 Ark. 592, 708 S.W.2d 88 (1986), and *Glick* v. *State*, 286 Ark. 133, 689 S.W.2d 559 (1985). At the hearing on the Rule 37 petition the appellant did not tender testimony or evidence that another psychiatrist

would have testified that he was mentally incompetent at any time.

Another argument on the allegation of ineffective assistance is that counsel failed to obtain a ruling on a motion to suppress, which had been filed prior to the change of plea. This allegation can hardly be taken seriously in view of the fact that the appellant admitted at the Rule 37 hearing that the statement he had given was true and voluntary. He further acknowledged he received his Miranda warnings prior to giving the statement. Moreover, the statement sought to be suppressed did not even mention the attempt to kill Teresa Buckman. It was her statement, partially quoted earlier in this opinion, that was introduced by appellant.

Even though the court may originally have erred in not obtaining a sufficient factual basis to accept the guilty plea, such error was cured by the trial court at appellant's Rule 37 hearing. Further, the appellant has failed to demonstrate that counsel's representation fell below an objective standard of reasonableness or that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted upon going to trial. Evidence presented at the hearing clearly supports the trial court's denial of Rule 37 relief.

Affirmed.

HICKMAN, J., concurs.

ARKANSAS GAME & FISH COMMISSION *v.* Thomas E. LINDSEY, Alfred PEITZ, and C.W. ELROD

86-19 730 S.W.2d 474*

Supreme Court of Arkansas
Opinion delivered June 1, 1987
[Rehearing denied July 6, 1987.]

* Justice Purtle's and Justice Glaze's opinions can be found at 733 S.W.2d 723.

Howell, Price, Trice, Basham & Hope, P.A., by: *Carey E. Basham* and *Dale Price*; and *P. Douglas Mays*, Arkansas Game & Fish Commission, for appellant.

Richard B. Adkisson, for appellee.

ROBERT H. DUDLEY, Justice. The appellees purchased two tracts of land on the shore of Lake Conway. They subdivided one of the tracts and started promoting the sale of lots. The most direct route to the subdivision is by use of a road which crosses part of the Camp Robinson Wildlife Demonstration Area which is owned by the appellant, Arkansas Game and Fish Commission. *See* Ark. Const. amend. 35, § 8. The appellant Commission claims the road as a private road and placed a barricade across it. Appellees filed suit in the Chancery Court of Faulkner County to enjoin the Commission from barricading the road. The Commission responded with an ARCP Rule 12(b)(3) motion alleging that Faulkner County was not the county of proper venue, filed an answer, filed a compulsory counterclaim seeking affirmative relief, and filed a third party complaint also seeking affirmative relief. The third party answered and issues were joined.

The applicable venue statute, Ark. Stat. Ann. § 27-602 (Repl. 1979), provides that all actions against State Boards or Commissions must be filed in Pulaski County. The trial court relied on cases which we decided before the current Rules of Civil Procedure were adopted, and held that the Commission waived the issue of improper venue when it asked affirmative relief against the appellees and against the third party defendant. *See Foster* v. *Arkansas State Highway Comm'n*, 258 Ark. 176, 527 S.W.2d 601 (1975); *Arkansas State Racing Comm'n* v. *Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956). The

appellant Commission argues that the trial court erred in refusing to dismiss appellees' complaint because of improper venue. We affirm the result reached by the trial court on this issue.

Prior to our adoption of the Rules of Civil Procedure, it was necessary for a party to make a special appearance in order to object to venue. If that party proceeded further and made a general appearance by some act, such as the filing of a permissive counterclaim, he waived the issue of venue and entered his appearance in a county other than the one designated by the venue statute. *Thompson* v. *Dunlap*, 244 Ark. 178, 424 S.W.2d 360 (1968). ARCP Rule 12(b) has abolished the distinction between special and general appearances. A defendant need no longer appear specially to attack venue. *Bituminous, Inc.* v. *Uerling*, 270 Ark. 904, 607 S.W.2d 331 (1980) and *see* Reporter's Notes to Rule 12, Note 7. Thus, the Commission did not waive venue simply by making a general appearance.

Our cases, before the current Rules of Civil Procedure, held that one who came into court and sought affirmative relief against a plaintiff by a permissive counterclaim invoked the court's jurisdiction in the case so that he could not later question the court's authority to pass on all questions between himself and his adversary. *Thompson* v. *Dunlap*, 244 Ark. 178, 424 S.W.2d 360 (1968). In *Federal Land Bank of St. Louis* v. *Gladish*, 176 Ark. 267, 2 S.W.2d 696 (1928), we explained why a demand for permissive affirmative relief enters one's appearance: "But one cannot come into court, assert a claim, ask the court for affirmative relief, and then, when there is an adverse judgment, claim that the court had no jurisdiction over his person. If this could be done, the appellant would have the opportunity and advantage of prosecuting its claim, and, in case it recovered judgment, it could collect, and at the same time take no chances of a judgment against itself."

The above cases dealt with permissive counterclaims but the case at bar deals with a compulsory counterclaim. In dealing with the doctrine of waiver, there is a significant distinction between the two types of counterclaim. Wright and Miller, in *Federal Practice and Procedure: Civil* § 1397 (1969) explain:

> Although waiver is a reasonable result when the counterclaim asserted is permissive under Rule 13(b) [the

> permissive counterclaim rule], it seems improper to apply waiver when the counterclaim is compulsory under Rule 13(a) [the compulsory counterclaim rule]. By interposing a permissive counterclaim, a party voluntarily asks the court for affirmative relief and thus should not be allowed objections based on personal inconvenience. In addition, application of the waiver principle reinforces the policy against piecemeal litigation of claims that is reflected in all of the joinder of claims and multiparty litigation procedures in the rules. But waiver in the case of a compulsory counterclaim does not seem appropriate inasmuch as defendant is obliged by Rule 13(a) to assert his claim and does not have the option afforded by Rule 13(b).

Justice Newbern, in his book *Arkansas Civil Practice and Procedure* § 11-4, (1985), discusses our cases and the defendant's dilemma with a compulsory counterclaim as follows:

> In deciding that a request for affirmative relief waived an objection, previously made, to improper venue, the supreme court recognized but did not answer the problem which might arise when an objection to venue is overruled and the objecting party has a claim which could be characterized as a compulsory counterclaim. *The question whether the objecting party must waive either the objection or the counterclaim under those circumstances has not been addressed.*

(Emphasis added.)

The language of the Rules of Civil Procedure is of no help on the issues. Rule 12(b), the pertinent part, provides:

> (b) *How Presented.* Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: . . . (3) improper venue, ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a

responsive pleading or motion.

As can be seen, the rule allows a defendant to answer to the merits in the same pleading in which he raises the issue of venue, but it does not authorize a defendant to couple a counterclaim with a venue motion. The provision "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion" is of no assistance since it is reasonably clear that a counterclaim or third party complaint is not a "defense" within the purview of the quoted passage. D. Newbern, *Arkansas Civil Practice and Procedure* § 11-1 (1985); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1397 (1967).

Similarly, Rule 12(h)(1) does not answer the question. It only provides that the defense of improper venue is waived if not made either by motion or in the original responsive pleading. The rule does not provide that it is exclusive of other waiver situations.

Since the rules do not govern the issue before us, we must look to our common law. As previously stated, we do not find any prior cases involving a compulsory counterclaim, and so, we must choose what we regard as the sounder approach. We hold that the assertion of a compulsory counterclaim does not constitute a waiver of objection to venue because of the non-voluntary character of the compulsory counterclaim. As stated in *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 378 F.2d 241 (9th Cir. 1967):

> Under Rule 13(a) a party who fails to plead a compulsory claim against an opposing party is held to have waived such claim and is precluded by res judicata from bringing suit upon it again. . . . However, since such a party has no alternative but to submit his compulsory claim against an opposing party, or lose it, his act in asserting it does not constitute a waiver of any jurisdictional defense he previously or concurrently asserts.

Accordingly, the appellant Commission did not waive its objection to venue by filing the compulsory counterclaim.

However, the same reasoning does not apply to a defendant who pleads improper venue and who also files a third party complaint. By filing the third party complaint he invokes

the jurisdiction of the court, and by invoking it submits to it. *Globig* v. *Greene & Gust Co.*, 193 F. Supp. 544 (E.D. Wis. 1961); *Merz* v. *Hemmerle*, 90 F.R.D. 566 (D.C.N.Y. 1981). Clearly, one should not be allowed to assert voluntarily a claim against a third party defendant, and then, if there is an adverse judgment, claim the court was not the proper venue. Therefore, the appellant Commission waived improper venue by asserting a third party complaint. The trial court reached the correct result on this point.

The Commission next contends that the trial court erred in refusing to dismiss the case because it is a suit against the State and is prohibited by article 5, section 20 of the Constitution of Arkansas. The trial court was also correct on this ruling.

An exception to the prohibition against a suit against the State exists where the act sought to be enjoined is illegal or is causing irreparable injury. *Cammack* v. *Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984); *Arkansas Game and Fish Comm'n* v. *Eubanks*, 256 Ark. 930, 512 S.W.2d 540 (1974). The application of the constitutional prohibition is determined by the pleadings. Here, the allegations of the complaint were that the road had been open as a public road for more than 50 years, was designated as a county road, and that the Commission was obstructing a public road which was causing appellees irreparable injury. In addition, the obstruction of a public road is illegal. Ark. Stat. Ann. § 41-2915 (Repl. 1977). The trial court correctly ruled that this case fell within the exception.

The merits of this case involve the claim by the appellant Commission that the eastern segment of the Webster's Ridge Road to Lake Conway is its private road while the appellees claim that it is a public road. It is undisputed that an old road was located near the present road, but the old road was clearly in a different location. Around the turn of the century, the old road served as the access to homes, a church, and a cemetery. It was later used as a mail route, a school bus route, and as access to a lake by hunters and fishermen. In 1940, the United States of America acquired title to all the land in the area by condemnation, but that title was subject to existing easements. In 1949, the United States quitclaimed its interest in the 4,205.8 acres to the State of Arkansas for the Commission's Camp Robinson Wildlife

Demonstration Area. In the mid-1950's, the Commission built the new segment of the road across its own land. By that time, there were no homes or churches in the area, but some hunters and fishermen began to use the new road. The Chancellor found that the old road was a "county road by operation of law" and that the new road was a "part of the county road system of Faulkner County." The ruling is in error.

County roads, as distinguished from public roads by prescriptive right, may be created in either of three ways. First, the landowners can dedicate the right-of-way to the county. *See* Ark. Stat. Ann. §§ 76-108 and 76-109 (Repl. 1981 and Supp. 1985). There was no dedication of either the old or the new rights-of-way in this case. Second, a county may condemn and pay for the right-of-way. *See* Ark. Stat. Ann. §§ 76-901 to -928 (Repl. 1981). There was no condemnation action in this case. Third, the County Judge may enter an order, after notice, declaring a mail route or a school bus route a county road. Ark. Stat. Ann. §§ 76-105 and 76-106; *Johnson* v. *Wylie*, 284 Ark. 76, 679 S.W.2d 198 (1984). No such order was ever entered, and no such proceeding can now be had because the roads no longer serve as either a school bus route or a mail route.

A former County Judge testified that he thought the county owned the road because someone, in 1975, wrote a county road number on a Faulkner County road map which was kept at the county garage. Of course, such non-judicial action by someone without statutory or common law authority, was not sufficient to transfer title to Faulkner County of either the corporeal or incorporeal hereditaments. Of course, the hunters and fishermen could not acquire a prescriptive right to the new road across state land because the limitations period for prescription does not run against the State. *Bengel* v. *City of Cotton Plant*, 219 Ark. 510, 243 S.W.2d 370 (1951). *See also* Annot. 55 A.L.R. 2d 554, 578 (1957). Therefore, neither the old road nor the new road was a county road.

The appellant next argues that "the trial court erred in finding that 'by acquiescence between Arkansas Game and Fish Commission and Faulkner County, the road in question was moved and continued as a county road.' " The argument is meritorious for three reasons. First, Faulkner County had no road

to exchange with the state; second, no state authority to convey state lands is shown; and third, there simply is no evidence of an exchange agreement. The first two reasons are self-explanatory. The only substantial evidence going to the third reason was given by Robert Pierce, a witness for the Commission, and Robert Adney, a witness for the appellee. Mr. Adney, a former employee of the Commission, testified that the new roadway evolved from a firebreak which the Commission had cut through its land. Mr. Pierce, testified that at the time he was manager of the Wildlife Area for the Commission, he caused the new road to be built with the use of a bulldozer and a roadgrader owned and operated by Commission personnel. He testified that the new road was built for recreational purposes to let hunters and fishermen use the Wildlife Management Area. There simply is no substantial evidence of Faulkner County's participation in the construction of the road or of the county's involvement in any type of exchange agreement. The only evidence involving the county is that sometime in the 1960's it began to occasionally blade the road.

Reversed.

HICKMAN, PURTLE, and GLAZE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. I dissent because I find only one road in issue.

JOHN I. PURTLE, Justice, concurring in part and dissenting in part. I dissent from that part of the opinion which addresses the portion of the road known as "Webster's Ridge Road." There is only one road between the Saltillo Road and Green's Lake, the road in question. There is no other road that reaches the landing on Lake Conway which is known as Green's Lake. If the appellees are prevented from traveling along this road, they have in actuality lost the use of their property. It is well established that property cannot be taken without just compensation and without due process of law.

The land owned by the appellant was received through a quitclaim deed from the United States. Ownership of the land had been acquired by the United States subject to existing easements. Obviously the appellant took only such title as the United States had. Faulkner County was not a party to the condemnation suit wherein the United States gained title to the

lands in question. The United States did not receive, nor could it convey, title to the road easements through this property.

The evidence produced at trial supported the chancellor's findings that the public had acquired a prescriptive right to use the road from the Saltillo Road to Green's Lake. It is undisputed that the appellant established that part of the road which the majority designates as "Webster's Ridge Road." This newly prepared section was primarily for the benefit of the appellant and was an exchange for existing roads over the property. There was an agreement between the appellant and Faulkner County to exchange the old roads for the new one. Faulkner County thereafter treated the new route as a part of its county road system, keeping it open to the public, grading and maintaining it.

The decree in part states:

> . . . Plaintiffs are owners of the following described lands . . . access to which property is provided by means of a roadway commonly known as "Green's Lake Road", which runs from . . . the "Saltillo Road", to . . . the shoreline of Lake Conway on plaintiff's lands.
>
> . . .
>
> Prior to 1940, two roads led into the area known as the saddle, which, in fact, became and were county roads by operation of law through their usage as mail routes and school routes; service to the residents, the church, and the cemetary; and by the use of county personnel and equipment in establishing and maintaining said roads.
>
> . . .
>
> Between 1955 and 1960, Arkansas Game and Fish Commission and Faulkner County, Arkansas, relocated said prior roads into the road now known as the Ridge Road . . . Said road has thereafter been used by the general public. Faulkner County and Arkansas Game and Fish Commission have maintained said road, and said road is a public road, part of the county road system of Faulkner County, Arkansas.
>
> . . .

> Wherefore, . . . that roadway known as the "Green's Lake Road", as now located, running from its eastern terminus at its intersection with the county road known as the "Saltillo Road", . . . be and the same is hereby found and decreed to be a public road, and a part of the county road system. . . .

This Court held in *Chaney* v. *Martin*, 205 Ark. 962, 171 S.W.2d 961 (1943), that:

> We do not deem it necessary to decide whether the proof in this case justified the finding that appellee had acquired by prescription an easement along the old route used by him in crossing appellant's land. Regardless of whether appellee had acquired such right, it is shown by the evidence that appellant recognized this right to the extent that he provided for appellee a new right-of-way across his land, and the evidence further shows that appellee accepted this new route and used it for several months. Appellee thereby surrendered any prescriptive right to use the old route that he might have possessed. This exchange of routes, accompanied by surrender of the old route and acceptance and continued use of the new route by the appellee, as was shown by the evidence in this case, was effective, even in the absence of any writing to evidence the agreement.

In the more recent case of *Higgins* v. *Blankenship*, 270 Ark. 370, 605 S.W.2d 493 (1980), the Court of Appeals upheld and reaffirmed the rule in *Chaney*. The Court of Appeals in a factually similar situation held that there was an easement by agreement, rather than by prescription, and such easement could be lost only by abandonment. This Court reached the same result in *Warren* v. *Cudd*, 261 Ark. 690, 550 S.W.2d 773 (1977), and went on to hold that an oral agreement was sufficient to establish the right of a roadway. We further held that such easement, even though the result of oral agreement, was transferred by deed as an appurtenance to the land.

It does not matter whether the appellees had established an easement by use or prescription because the appellant agreed to allow the use of the new road in exchange for whatever right the appellees had in the existing roadways. The appellant had the right to grant the easement by agreement.

It is impossible to get to the appellee's property by land without going across some of the lands owned by the appellant. The majority finds that an easement along the Green's Lake portion of this road has been established by adverse use and prescriptive right because the public has traveled the road for more than seventy-five years. Since it is not possible to reach the lower end of the road without traveling across the lands in the upper part of the road, it is hard for me to understand how a right can be obtained across part of the road but not all of it.

Apparently the majority holds that the appellees have, in fact, acquired a prescriptive right across the Webster's Ridge portion of the road but not exactly in the same location as the new road. I think the exchange of location extinguished the old easement and established a new one. In any event, it appears from the record that it would be to the benefit of the appellant to maintain the new route rather than to force the appellees to re-establish the old route down Webster's Ridge. I think the exchange agreement between the appellant and Faulkner County had the effect of transferring the old prescriptive or adverse use roadway to the new location. The acceptance and use of the new route is sufficient consideration to establish the new easement.

The chancellor found that sometime between 1955 and 1958 the county and the appellant agreed to the relocation of the road to its present site. He also found that the road had thereafter been used by the general public. These findings of the trial court force me to conclude that the new location was established by agreement and that this agreement had the same effect as establishing a prescriptive easement. Therefore, the majority's reliance upon the doctrine that the statute of limitations does not run against property owned by the state is misplaced. This doctrine is simply not relevant where, as in the present case, the facts establish an easement by agreement.

The majority opinion is unique in that it grants the public the use of the distal portion of the road but denies use of the portion of the road which provides access to the "Green's Lake Road." There is no other access to this portion of the road except by the "Webster's Ridge Road." Apparently the majority means to provide access over the old routes, which were found to have been used by the public for more than seventy-five years, or perhaps the

majority intends for the appellees to resort to acquisition of a road across the Arkansas Game and Fish Commission lands pursuant to Ark. Stat. Ann. § 76-110 (Repl. 1981). In any event, it seems to me that granting the use of one section of the road and denying use of the other section is not only contrary to the facts and the law but lacks any reasonable basis.

The majority opinion fails to mention the standard of review on appeal. There is no reason revealed in the record for this Court to find that the chancellor was clearly wrong in its findings and the failure to mention the standard of review does not render the standard inapplicable. I believe that the chancellor's decision is in accordance with the overwhelming evidence presented at the trial and is not clearly erroneous.

In my opinion the chancellor should be affirmed in all respects.

TOM GLAZE, Justice, dissenting. The majority court is clearly wrong in two respects. First, it concludes erroneously that the trial judge found adverse users acquired a prescriptive right against the State to the relocated road known as Webster's Ridge Road. Second, it then applies the wrong rule of law, *viz.*, that the statute of limitations does not run against property owned by the State.

Obviously, a person cannot hold adversely to the State, and the trial court did not, and doubtless would not, make such a holding. What the trial judge did find is as follows:

> *Prior to 1930 two roads led into the area known as the Saddle which, in fact became county roads by operation of law through their usage as mail routes school routes service to the residents, church and cemetery in the area and by the use of county personnel and equipment in establishing and maintaining such roads.* The United States of America acquired title to the land served by such roads in 1940 but, Faulkner County was not made a party to such condemnation action and the rights of the county and of the public in and to such roads were not affected. *Between 1955 and 1958 Arkansas Game and Fish Commission and Faulkner County relocated such prior roads into the road now known as the Ridge Road. Such roads*

> *have thereafter been used by the general public. Faulkner County and Arkansas Game and Fish Commission have maintained said road, said road is a public road, part of the county road system of Faulkner County, Arkansas.* (Emphasis supplied.)

Consistent with the trial judge's findings above, the majority concedes that, since the early 1900's, the public traveled the entire roadway — the Green's Lake Road (western segment) and Webster's Ridge Road (eastern segment)—and had established that right-of-way by prescription. Because, however, Ridge Road, the eastern segment, was relocated sometime between 1955-1960, the majority somehow concludes the public use to that part of the public right-of-way ended. That simply is not the law. In *Chaney* v. *Martin*, 205 Ark. 962, 171 S.W.2d 961 (1943), a dispute arose concerning whether Martin had a right to use a road that crossed Chaney's property and accessed to a public highway. Martin claimed the road was an easement by prescription but the court determined whether Martin had acquired such a right to cross Chaney's land was of no moment because the evidence showed Chaney recognized this right to the extent that he provided Martin a new right-of-way across his land and that Martin accepted and used the new route. The court held the exchange of the old road or route for the new one was effective, even in absence of any writing to evidence the agreement. The situation at bar is no different except here the appellees and the public had firmly established their right-of-way by prescription. Contrary to the majority's holding, all the trial judge found here was that both roads by prescription became public easements and, while the eastern segment (Ridge Road) was relocated between 1955-1960, both the State and Faulkner County continued to maintain that eastern segment as a public road the same as it had previously been treated.

The record is abundant with evidence to support the trial judge's finding. The evidence reflects that, when the property over which these public roads ran was condemned, the government took the property, specifically subject to existing easements for public roads and highways. Appellees presented proof that this entire route to their property was used continuously, and it was recognized and maintained by the government as a public easement. For this court to hold otherwise dehors the record and

improvidently invades the province of the trial judge.

The majority became side-tracked by its discussion on county roads which juxtaposed it into position to conclude that the road in question is not a county road because the road was never dedicated or condemned as such. Thus, the majority concludes, the road was not a road which the county had authority to maintain, exchange and to hold open to the public. That issue is but a red herring since the real point in issue is whether the road was a "public easement," not a county road. As mentioned earlier, the record is replete with evidence that both the State and Faulkner County maintained and treated the entire road or easement as a public one, and both were responsible for changing, at times, the eastern portion of the road to ensure safe passage by the public.

I must also say that the majority decision leads to a rather silly holding, *viz.*, it permits appellees the use of the western half of the public easement that leads to their property, but the *only* access to it is the eastern half which the majority now limits access to, holding it no longer is a public road or easement.[1] Thus, the appellees, from their present property, have access to one-half a public road that leads east to nowhere, except the middle of a wildlife area.

Unfortunately, our court got detoured, and instead of meeting the real issue in this case, we have only complicated matters. The State's main concern is appellees' possible residential development of their private property, which is located on Green's Lake and is immediately west of and adjacent to the State's wildlife property. Except by way of the lake, the only ingress and egress to appellees' property is over the State's wildlife property. On this point, I agree with the State that any use of the public road may be that use which is compatible and consistent with the use authorized by the easement. *Massee* v. *Schiller*, 243 Ark. 572, 420 S.W.2d 839 (1967). For over seventy-five years, the roads in question provided the general public access to Green's Lake for recreation purposes. Any expanded purpose

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[1] The trial court specifically ordered the entire road—from its eastern terminus commencing at the Saltillo Road thence northwesterly to the appellees' property—a public road.

or use of the easement simply would not be permissible.

I would affirm.

Kenny HALFACRE *v.* STATE of Arkansas

CR 86-183 731 S.W.2d 182

Supreme Court of Arkansas
Opinion delivered June 1, 1987
[Rehearing denied June 29, 1987.]

Phillip A. McGough, appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant was charged and convicted of the March 5, 1985 aggravated robbery of the Asher News and Video store in Little Rock. He does not question the sufficiency of the evidence, and there is no need to recite the facts of the aggravated robbery. We affirm the conviction.

[redacted] On March 6, 1985, appellant robbed the Red Roof Inn and later told his wife and Jerry Sutherland what he had done. *See* companion case, *Halfacre* v. *State*, CR-86-184, handed down this date. His wife, in turn, told a Pine Bluff police officer, and that officer contacted the Little Rock Police Department. The lead in that case subsequently led to appellant's arrest in the instant case. He contends that his arrest was illegal because of the evidentiary spousal privilege and that the conviction should be reversed and dismissed. The argument is without merit. The spousal privilege, A.R.E. Rule 504, is a *testimonial* privilege, and was not violated. Further, even if the arrest were illegal, it would not void the conviction. *O'Riordan* v. *State*, 281 Ark. 424, 665 S.W.2d 255 (1984).

Appellant next argues that due to the combination of the delay in bringing this matter to trial, and the lack of investigation by the public defender who was originally appointed to represent him, his sixth amendment right to a speedy trial was denied. The argument has no merit.

[redacted] Appellant admits that he was tried within the time limits set out in A.R.Cr.P. Rule 28, but still argues that he was denied a speedy trial because he lost the exculpatory testimony of witnesses due to the ineffectiveness of the public defender. In *Matthews* v. *State*, 268 Ark. 484, 598 S.W.2d 58 (1980), we explained:

> The rules set out in Article VIII of the Rules of Criminal Procedure were an effort to more precisely define what constitutes a "speedy trial" in the interest of persons accused of crime and the public and in clear recognition of *Barker* v. *Wingo*, supra. We perceive that there may be a denial of one's constitutional right to a speedy trial after a

period of delay shorter than those permitted under Rules 28 and 30, but a much stronger showing of prejudice would be necessary than that made here to overcome the presumption that a time within the prescribed limits of these rules meets constitutional requirements.

Appellant has not overcome the presumption that a trial occurring within the time limits set out in Rule 28 meets constitutional requirements because he has not shown any prejudice. He claims that due to the delay he lost the exculpatory testimony of witnesses. However, at the hearing on the claim of denial of a speedy trial, the appellant did not give any specific information concerning who the witnesses were, what efforts were made to locate them, or what their testimony would have been had they been located. Such vague claims do not establish prejudice.

The appellant received a life sentence in this case. Under the provisions of Rule 11(f) of the Rules of the Supreme Court, we have reviewed all objections decided adversely to appellant and find no errors prejudicial to appellant.

Affirmed.

Kenny HALFACRE *v.* STATE of Arkansas

CR 86-184 731 S.W.2d 179

Supreme Court of Arkansas
Opinion delivered June 1, 1987
[Rehearing denied June 29, 1987.]

Phillip A. McGough, appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. On March 6, 1985, Betty Bryant was working as a desk clerk at the Red Roof Inn in Little Rock. She saw the appellant linger in the lobby of the Inn for about thirty minutes, and then, after all of the other people in the lobby had left, she closely observed him when he came up and asked about room rates. She told him the rates, and he immediately walked over to the window, looked out, came back, walked behind the desk, and pulled a handgun. He took the money, pointed the gun in Ms. Bryant's face, and told her to lie down. She did so, heard the door open and close, and heard the sound of a motorcycle leaving. The police were summoned, and when they arrived, Officer Ralph Simon took a physical description of the robber from Ms. Bryant. He subsequently got a description of the robber from Roy Moore, the last person to leave the lobby before the robbery. That night appellant drove his motorcycle to a school to pick up his wife. From the school they rode to the River Port Inn in Pine Bluff where appellant showed his wife some money. She knew that he was unemployed and had just gotten out of prison, and asked where he got the money. He told her that he had robbed the Red Roof Inn. His wife reported this to a Pine Bluff policeman, who contacted the Little Rock Police Department, which ultimately arrested appellant. This led to the identification of appellant by Ms. Bryant, the charge of aggravated robbery, and the conviction. We affirm.

Appellant first contends that his arrest was the result of his wife's breach of a confidential communication, and he is privileged to prevent her from breaching that confidence under A.R.E.

Rule 504, and therefore, he argues, his arrest was illegal and his conviction should be reversed and dismissed. The argument is without merit.

[redacted] Rule 504 is a rule of evidence providing a *testimonial* privilege to an *accused* in a *criminal proceeding.* Rule 504(b) provides: "(b) General Rule of Privilege. An *accused* in a *criminal proceeding* has a privilege to prevent his spouse from *testifying* as to any confidential communication between the accused and the spouse." (Emphasis added.) Here, the criminal proceedings had not begun when the wife reported the statement, and she did not testify at trial.

[redacted] Even if Rule 504 were applicable to the facts of this case, appellant waived it by communicating the same information to a third person, Jerry Sutherland. A.R.E. Rule 510. Finally, even if appellant's arrest had been illegally made, we would not reverse. We will not set aside a conviction because of an illegal arrest. *O'Riordan* v. *State*, 281 Ark. 424, 665 S.W.2d 255 (1984).

[redacted] At trial, appellant's attorney asked Officer Simon to read from his police report the description which Roy Moore gave of appellant. The trial court excluded the evidence as hearsay. The appellant contends the report was admissible under either A.R.E. Rule 803(1) or 804(b)(5). Neither rule is applicable. Rule 803(1) is the rule providing that a present sense impression may be admitted as a hearsay exception. The rule was not applicable in this case because Mr. Moore's description of the robber was given some time after the robbery, and not while he was perceiving the event, or immediately thereafter.

[redacted] Rule 804(b)(5) provides another hearsay exception for statements "having equivalent circumstantial guarantees of trustworthiness." This exception is not applicable for two reasons: (1) The statement did not have equivalent guarantees of trustworthiness, and (2) appellant did not bring himself under the provisions of the rule because he did not prove that Mr. Moore was unavailable as a witness as required by 804(a)(5).

Appellant's next argument is two-fold: (1) Generally, he argues that the trial court erred in allowing the jury to consider two of his prior convictions which were on appeal, and (2) more

specifically, he argues that since one of these two convictions was later reversed and dismissed, there has been a miscarriage of justice. The trial court did not commit error.

The two prior convictions were properly admitted into evidence for purposes of sentence enhancement even though they were on appeal. *Birchett* v. *State*, 291 Ark. 379, 724 S.W.2d 492 (1987). It was not until after appellant was convicted in the case at bar that one of his other convictions was reversed. Therefore, the trial court did not commit error, and we will not reverse.

After affirmance of this direct appeal, the appellant can petition for post conviction relief and ask that his original sentence be modified if, in fact, it is in excess of the maximum authorized by law. A.R.Cr.P. Rule 37.1; *Birchett* v. *State, supra.*

Finally, appellant argues that due to the combination of the delay in bringing this matter to trial, and the lack of investigation by the public defender who was originally appointed to represent him, his sixth amendment right to a speedy trial was denied. The argument has no merit.

Appellant admits that he was tried within the time limits set out in A.R.Cr.P. Rule 28, but still argues that he was denied a speedy trial because he lost the exculpatory testimony of two witnesses due to the ineffectiveness of the public defender. In *Matthews* v. *State*, 268 Ark. 484, 598 S.W.2d 58 (1980), we explained:

> The rules set out in Article VIII of the Rules of Criminal Procedure were an effort to more precisely define what constitutes a "speedy trial" in the interest of persons accused of crime and the public and in clear recognition of *Barker* v. *Wingo*, supra. We perceive that there may be a denial of one's constitutional right to a speedy trial after a period of delay shorter than those permitted under Rules 28 and 30, but a much stronger showing of prejudice would be necessary than that made here to overcome the presumption that a time within the prescribed limits of these rules meets constitutional requirements.

Appellant has not overcome the presumption that a trial occurring within the time limits set out in Rule 28 meets constitutional requirements because he has not shown any

prejudice. The two witnesses from whom he claims to have lost exculpatory testimony are Roy Moore and a lady with whom he claims to have been conversing in a coffee shop at the time of the robbery. Roy Moore is the identification witness discussed previously under appellant's second point of appeal. As discussed under that point, appellant did not show what efforts, if any, were made to procure this witness. We do not know whether his testimony was lost due to ineffective counsel or lack of a speedy trial, or other reasons. The appellant located the lady in the coffee shop, but she did not remember him. There is absolutely no basis for finding that she would have remembered him even if she had been contacted earlier. In order to establish ineffectiveness of counsel, appellant has the burden of showing that counsel's conduct fell below an objective standard of reasonableness, and that but for counsel's conduct, he would not have been convicted. *Strickland* v. *Washington*, 466 U.S. 668 (1984). Appellant has fallen far short of meeting that burden under the facts of this case.

Affirmed.

Dale KING and Marcel KING *v.* D.J. KING and Emilene KING and Ronnie TUGGLE and Dale KING and Marcel KING *v.* Ronnie TUGGLE

86-293 730 S.W.2d 224

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Paul Petty & Robert Meurer, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., for appellee D.J. and Emilene King.

Matthews & Sanders, by: *Marci L. Talbot*, for appellee Ronnie Tuggle.

ROBERT H. DUDLEY, Justice. The appellants, plaintiffs below, Dale King and her minor son Marcel King, filed suit for recovery of medical expenses paid by the mother, Dale King, on behalf of her son, Marcel, and for injuries suffered by Marcel when he wrecked a three-wheeled motor vehicle. They sued Marcel's grandfather and grandmother, D.J. King and Emilene King, for failing to properly supervise Marcel, and for allowing

him to operate the three-wheeled vehicle. In a separate suit they sued the owner of the vehicle, Ronnie Tuggle, for negligence in allowing Marcel to operate the vehicle. The separate cases were consolidated for trial. At the conclusion of the plaintiffs' case-in-chief, the trial court directed a verdict against both plaintiffs. We affirm.

The appellants failed to abstract the pleadings, the findings of fact, the argument and the detailed ruling on the motion for a directed verdict, and submitted only a cryptic two and one-half page abridgement of all of the testimony. We find the appellants' abstract to be wholly deficient, but, as we have explained, if the appellee considers the appellants' abstract to be deficient, he has the option of supplying the deficiency or leaving it unsupplied. Ark. Sup. Ct. R. 9(e), and *Brace* v. *Busboon*, 261 Ark. 556, 549 S.W.2d 802 (1977). Here, the grandparent-appellees elected to submit a proper abstract on the claim of Marcel, thereby waiving any objection to the defect in his appeal. Pursuant to Rule 9(e) and the certificates of costs and attorneys' fees submitted by the grandparents' attorneys, we allow $92.90 as printer's costs and $552.00 as attorneys' fees to be taxed as extra costs against the appellants. The grandparent-appellees did not remedy the deficiencies in the abstract on the claim of the appellant-mother, Dale King, and therefore, on her appeal against the grandparents, we affirm the directed verdict under Rule 9(e). The appellee-owner of the three-wheeled vehicle, an entirely separate defendant in a consolidated case, elected not to cure the deficiency, which is best demonstrated by the fact that there is no mention whatsoever of the appellee-owner in the abstract of testimony. The consolidated case against the appellee-owner is therefore affirmed for failure to comply with Rule 9(d). In summary, all of the claims are affirmed for failure to comply with Rule 9(d), except the claim of Marcel King against his grandparents, D.J. King and Emilene King, which we consider on the merits because the appellee-grandparents supplied the deficiency under Rule 9(e).

The appellee-grandparents did not file an ARCP Rule 12(b)(6) motion for failure to state facts upon which relief can be granted, nor a Rule 12(c) motion for judgment on the pleadings on the basis of the family immunity doctrine. *See Rambo* v. *Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Brown* v. *Cole*,

198 Ark. 417, 129 S.W.2d 245, 122 A.L.R. 1348 (1939); *Thomas* v. *Inmon*, 268 Ark. 221, 594 S.W.2d 853 (1980); and *Attwood* v. *Estate of Attwood*, 276 Ark. 230, 633 S.W.2d 366 (1982). Accordingly, we need not decide if the family immunity doctrine is applicable to the facts of this case.

The only issue before us is whether the trial court erred in directing a verdict against Marcel in his claim against his grandparents.

In an appeal from a directed verdict for a defendant, we are bound to give the evidence its highest probative value in favor of the plaintiff, together with every inference reasonably deducible from that evidence. *Ikani* v. *Bennett*, 284 Ark. 409, 682 S.W.2d 747 (1985). From that viewpoint, the facts are as follows: Marcel, aged 13, was a hyperactive child with a short attention span; he was developmentally younger than his chronological age; he presented problems in discipline and control; and his grandparents were familiar with his problems.

At his parents' request, Marcel was visiting his grandparents for the weekend. Some of Marcel's older cousins were also there. One of them owned a motorcycle and another borrowed the three-wheeler. Marcel's parents had instructed him not to ride on any motorcycle or three-wheeler. His parents also instructed the grandparents not to allow him to ride on either type of machine.

On the day of the accident, the grandfather, who was to watch the children, had been around his house, out in the yard, and, at the time of the accident, was nearby checking his cattle. He never left the immediate vicinity of the home. Marcel knew he was not to ride on either machine, much less drive one of them. Still, unknown to either grandparent, he drove the three-wheeler and wrecked it.

The appellant argues:

> In the case at bar, the minor plaintiff's father had repeatedly warned the defendants not to allow the minor plaintiff to ride the three-wheeler. Obviously, the defendants should have foreseen an appreciable risk of harm to the minor plaintiff in *allowing* him to ride the three-wheeler.

[Emphasis added.]

The short answer to that argument is that the grandparents did not *allow* Marcel to ride on the vehicle. Neither grandparent saw him on a machine nor had any knowledge that he was on the machine. He simply slipped away from them.

The appellant next argues that the grandparents were negligent in not "securing" the vehicle so that Marcel could not drive it. We do not think the argument is valid. The three-wheeled vehicle had been borrowed from a neighbor by Marcel's seventeen-year-old cousin. The cousin was an experienced driver. The grandfather was not under a duty to padlock a three-wheeled vehicle owned by a third person and being operated by a seventeen-year-old who was an experienced driver. There simply was no evidence of negligence. The trial court correctly granted the verdict for the appellee-grandparents.

Affirmed.

NEWBERN, J., not participating.

PULASKI COUNTY CIVIL SERVICE COMMISSION
v. Rhonda DAVIS, et al.

86-268 730 S.W.2d 220

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Ivester, Henry, Skinner & Camp, by: *Stephen L. Curry*, for appellant.

Robert A. Newcomb, for appellee.

ROBERT H. DUDLEY, Justice. The appellant Pulaski County Civil Service Commission promulgated rules which set educational standards as a prerequisite for the promotional testing of employees of the Pulaski County Sheriff's Department. Under those rules any employee seeking testing for promotion in the Corrections Division of the Sheriff's Department in 1984 and 1985 must have had a high school degree or general education degree; in 1986 and 1987, must have six college semester hours; in 1988 and 1989, must have fifteen college semester hours; in 1990 and 1991, must have thirty college semester hours; in 1992, and afterwards, must have sixty college semester hours. Similar, but higher, educational standards were set for employees seeking testing for promotion in the Enforcement Division. The appellees, all employees of the Sheriff's Department, sought promotional testing but did not meet the educational standards. They filed suit and argued that the rules setting the educational standards were contrary to the state statute and, therefore, invalid. The trial court ruled that the governing statute does not permit the consideration of education as a standard for promotion. We affirm.

The parties agree that Ark. Stat. Ann. § 12-1124 (Repl. 1979) is the statute which governs a civil service commission's promotion of employees within a county sheriff's office. We have never interpreted that statute, but have interpreted an almost identical one, Ark. Stat. Ann. § 19-1603 (Repl. 1980), which governs the criterion for a civil service commission's promotion of officers within a city police department. Both statutes provide that a commission shall adopt rules "for promotion based upon open competitive examinations of efficiency, character or conduct." In interpreting this language, as it applied to police departments, under Ark. Stat. Ann. § 19-1603, we said

the statute provides that promotion shall be made solely on the basis of competitive examination. "There is no provision authorizing any other criterion. . . ." *Bradley* v. *Bruce*, 288 Ark. 342 at 343, 705 S.W.2d 431 at 432 (1986). In this case, the Commission's use of college hours as a prerequisite for promotion eligibility was the use of a criterion other than the competitive examination and, therefore, fails to comply with the statute.

The Commission's argument that college education of employees of the Sheriff's Department is desirable is an appealing argument, and it could be that the insertion of this criterion would not alter the objectivity of the results. However, once the General Assembly has expressed its will, as it has done in this case, this Court has bound itself to adhere to it. *Hatcher* v. *Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (1979).

Affirmed.

HAYS, J., not participating.

HOLT, C.J., and PURTLE,. J., dissent.

JACK HOLT, JR., Chief Justice, dissenting. The majority interprets Ark. Stat. Ann. §§ 12-1124 and 19-1603 as providing that promotions shall be made solely on the basis of competitive examinations. I disagree with that interpretation and with this court's prior holding to that effect in *Bradley* v. *Bruce*, 288 Ark. 342, 705 S.W.2d 431 (1986).

Section 12-1124 provides in pertinent part:

The commission shall adopt rules as follows:

> (a) For the qualifications of each applicant for appointment to any position in the sheriff's department; . . .
>
> (i) For promotion based upon open competitive examinations of efficiency, character and conduct, lists shall be created for each rank of service and promotions made therefrom as provided herein, and advancement in rank or increase in salary beyond the limits fixed for the grade by the rules of said commission shall constitute a promotion.

The wording of § 19-1603 is almost identical.

In *Bradley*, this court discussed § 19-1603, stating, "[t]he

statute specifically provides that promotion shall be made on the basis of the examination. There is no provision authorizing any other criterion, including seniority. Any other reading of the law would negate its purpose which is to promote those eligible who score highest on the test."

I think the majority in both decisions misinterprets the intention of the legislature. Both statutes vest the civil service commission with the authority to adopt rules on certain subjects. Through rules the commission can establish "the qualifications of each applicant for appointment to *any* position" (emphasis added) and "promotion based upon open competitive examinations." The commission has done just that. They have set out educational qualifications for anybody desiring to fill any position in the sheriff's department, whether they are newly hired, transferred from another department, or seeking a promotion. Considering the variety of jobs available within the sheriff's department, obviously all of the positions are not filled by identically qualified people. The qualifications established by the commission are for the job. Accordingly, the applicant for the promotion must first be qualified for the job that he or she seeks. If the job being sought entails a promotion, the commission has provided for a competitive examination.

The court in *Bradley* stated that the purpose of the law "is to promote those *eligible* who score highest on the test." (Emphasis added). To be eligible, a person must meet the other qualifications established by the commission pursuant to the statute. Here, those other qualifications were educational requirements.

I would reverse the trial court.

PURTLE, J., joins in this dissent.

Donna SCHLEMMER *v.* FIREMAN'S FUND INSURANCE COMPANY

86-256 730 S.W.2d 217

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Hale, Fogleman & Rogers, for appellant.

Rieves & Mayton, by: *Elton A. Rieves, IV*, for appellee.

ROBERT H. DUDLEY, Justice. This case involves a choice-of-law question. On the night of May 9, 1981, when the substantive law of Arkansas still contained a guest statute, the plaintiff, Donna Schlemmer, drove her car from Memphis, Tennessee, to the home of Rochelle Smith in West Memphis, Arkansas. There, plaintiff and Rochelle got into an uninsured vehicle, which was owned by Rochelle's sister, and drove to a party at another location in West Memphis. They drank some beer and, at about 10 p.m., plaintiff told Rochelle that she wanted to go home. Rochelle did not want to leave the party, but ultimately consented to drive the plaintiff back to her car. Rochelle drove 55 to 60 miles per hour on the service road to the Interstate Highway in West Memphis, where the speed limit is 45 miles per hour. It started raining, and the windshield wipers would not operate. Plaintiff asked Rochelle to slow down, but Rochelle replied that plaintiff wanted to go to her car and that's where they were going. Shortly afterwards, Rochelle lost control of the car, wrecked it, and injured plaintiff. Plaintiff and her stepfather were both residents of Memphis. Plaintiff's stepfather had purchased automobile insurance on his car, which was registered in Tennessee, from a Memphis insurance agent. The policy was issued by the defendant, Fireman's Fund Insurance Company. Tennessee did not have a guest statute at the time of the accident. Plaintiff filed suit against the defendant insurance company, contending that it was liable under her stepfather's uninsured motor vehicle coverage provision. The defendant insurance company filed a motion for summary judgment in which it contended that the plaintiff was not a covered person under her stepfather's policy, and, alternatively, that the Arkansas guest statute barred recovery by the plaintiff. The trial court held Arkansas law was applicable to the tort phase of the case and that, as a matter of law, the guest statute barred recovery because the driver of the car was not driving in willful and wanton disregard of the rights of others. Because of the holding on the guest statute, it was not necessary for the trial court to decide whether plaintiff was a covered person under the terms of the insurance policy. The Court of Appeals certified the case to this Court under Rule 29(1)(o). We reverse and remand.

Appellant's first argument is that the trial court erred in

applying the substantive Arkansas law, and concomitantly the guest statute, to the tort phase of the case. The argument is meritorious.

For many years this Court, like others, used mechanical rules, such as the rule of lex loci delicti, to answer conflict questions. However, in 1966 Dr. Robert A. Leflar began to write about the more flexible "choice-influencing considerations." *See* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584 (1966); R. Leflar, *American Conflicts Law*, Chapter 11, (1968); Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 Ark. L. Rev. 199 (1974). Other states quickly adopted Dr. Leflar's concept of the choice-influencing considerations. *Clark* v. *Clark*, 107 N.H. 351, 222 A.2d 205 (1966), noted in 20 Ark. L. Rev. 359 (1967); *Health* v. *Zillmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); *Mitchell* v. *Craft*, 211 So. 2d 509 (Miss. 1968). We adopted the approach in *Wallis* v. *Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977), and have continued to use the approach. *Williams* v. *Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978).

The five choice-influencing considerations are:

(1) Predictability of results,

(2) Maintenance of interstate and international order,

(3) Simplification of the judicial task,

(4) Advancement of the forum's governmental interests, and

(5) Application of the better rule of law.

In applying the considerations to the facts of the tort phase of this case, we reach the following conclusions:

(1) Predictability of results: As with other accident cases, the predictability consideration had no bearing on the unplanned injury. *See* Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 Ark. L. Rev. 199 (1974). However, the plaintiff was a resident of Tennessee and the defendant insurance company issued its policy in Tennessee, and the

premium calculation was probably made upon casualty experience under the automobile liability laws of Tennessee. To that limited extent, Tennessee law is the most relevant under this consideration. *See* Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations, id.*

(2) Maintenance of interstate and international order: Free highway traffic between the states will not be lessened, nor will either states' concern with its sovereignty be affected by the choice of either state's law. Neither of the states' laws is favored under this consideration.

(3) Simplification of the judicial task: The trial court's task will not be unduly complicated by the application of the law of either state. Tennessee does not have a guest statute. Arkansas had a guest statute until it was repealed by Act 13 of 1983. Arkansas courts regularly try car accident cases and either apply the guest statute, or do not apply it, depending solely on whether the accident occurred before or after repeal of the guest statute. There will be no difficulty encountered by the forum court in trying the case without using a guest statute. Neither of the states' laws are favored under this consideration.

(4) Advancement of the forum's governmental interest: As previously set out, the General Assembly expressly repealed the guest statute after this accident occurred and, therefore, the state's policy is now against the application of the guest statute. To that extent, Tennessee law is the most relevant.

(5) Application of the better rule of law: There is no doubt about which law we regard as the better law. The Arkansas guest statute in effect at the time of this accident was archaic and unfair. We find a thirteen year old paragraph by Dr. Leflar is still timely and appropriate for this case.

> It must not be automatically assumed that every court will regard its own law as better than that of other states. Courts sometimes realize that certain of their own laws, especially statutory ones, are archaic, anachronistic, out of keeping with the times. Specifically, that may be their attitude toward their automobile guest laws. Despite nationwide lobbying efforts in the 1920's and 1930's, half of the state legislatures did not enact them, and no state has

> enacted one since the 1930's. Some states have recently repealed them, though it is not as easy to repeal an archaic statute as it would be to prevent its current enactment if it were not already law. Four states have recently held their guest statutes to be unconstitutional on the ground that they deny the equal protection of the laws to injured persons in discriminatory fashion. [Footnotes omitted.]

Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 Ark. L. Rev. 199, 215 (1974).

Under this consideration, Tennessee's law is the better law.

After considering and weighing all five choice-influencing considerations, it is clear that the Tennessee law should be applied to the tort phase of this case.

Reversed and remanded.

HICKMAN and HAYS, JJ., dissent.

GLAZE, J., concurs.

DARRELL HICKMAN, Justice, dissenting. I cannot say that Tennessee law is the better law simply because we had the guest statute. We upheld the statute repeatedly until it was repealed by the legislature. It prevented innumerable civil cases between friends whose friendships ceased when money was at stake.

The insurance policy was issued in Memphis, Tennessee. The suit was filed in Arkansas by the Tennessee resident. She could have sued in Tennessee. The accident occurred in Arkansas in an Arkansas vehicle driven by an Arkansas resident. Arkansas law should be applied to this case.

I would affirm the trial court's decision.

STEELE HAYS, Justice, dissenting: I have no disagreement with applying Tennessee law to a dispute between a Tennessee resident and a Tennessee insurer over the coverage of an insurance policy issued in Tennessee, assuming Arkansas has jurisdiction to decide the issue. But with respect to the liability of Rochelle Smith to Donna Schlemmer, the majority opinion concludes that Tennessee law applies and with that I disagree.

I burn no candles for the guest statute, but it was the law of

this state when the accident occurred and it governs any claim of Donna Schlemmer against Rochelle Smith, or any claim dependent thereon. When a resident of another state comes to Arkansas, enters an Arkansas based vehicle, owned and operated by an Arkansas resident, for a trip wholly local in character and never intended to be otherwise, I have no doubt but that Arkansas law governs issues of tort liability.

George WEBB, J. Bill BECKER, Jimmy CLARK, Individually, and on Behalf of All Others Similarly Situated, and ARKANSAS STATE AFL-CIO *v.* WORKERS' COMPENSATION COMMISSION

86-270 730 S.W.2d 222*

Supreme Court of Arkansas
Opinion delivered June 1, 1987
[Rehearing denied July 6, 1987.]

* Justice Newbern's opinion can be found at 733 S.W.2d 726.

Youngdahl & Youngdahl, P.A., by: *James E. Youngdahl* and *Thomas H. McGowan*, for appellant.

Steve Clark, Att'y Gen., by: *Frank J. Wills*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The Workers' Compensation Act, Ark. Stat. Ann. §§ 81-1301 to -1367 (Repl. 1976 and Supp. 1985), provides benefits to employees killed or injured in the course of their employment. The Workers' Compensation Commission is charged with administration of the Act and with reviewing decisions of Administrative Law Judges concerning disputed claims. Ark. Stat. Ann. §§ 81-1325 to -1342. The Commission acts in a quasi-judicial capacity and its awards are in the nature of judgments. The Act provides a symmetry for the composition of the tripartite commission. The Governor appoints all three Commissioners. Ark. Stat. Ann. § 81-1342(a). One member is to represent employers' interests, one member is to represent employees' interests, and the third, the neutral chairman is to be an attorney with at least five years experience in the practice of law. Former Governor White appointed Melvin Farrar, an employer for 25 years, to serve as the employees' representative on the Commission. Appellants sought to challenge the qualifications of Commissioner Farrar. The trial court dismissed the action. We reversed, reinstated the action, and remanded for trial. *Webb* v. *Workers' Compensation Commission*, 286 Ark. 399, 692 S.W.2d 233 (1985). Both parties then filed motions for summary judgment. The trial court held that the governor had the authority to determine who is qualified to serve

as the representative of employees and that Commissioner Farrar was not disqualified from serving even though he was an employer. We reverse.

In order to insure the balance between employers and employees, the Act plainly requires that the employee representative on the Commission satisfy two requirements: (1) five years of past union membership and (2) classification as a representative of employees. Ark. Stat. Ann. § 81-1342(a). These two requirements must be viewed in light of the members' "previous vocation, employment or affiliation." Ark. Stat. Ann. § 81-1342(a).

It is undisputed that Commissioner Farrar met the first requirement, five years of past union membership, as he was a member of a union from the early 1950's until 1978. It is the second requirement which Commissioner Farrar fails to satisfy. In a supporting document to the motion for summary judgment, Commissioner Farrar admitted that the last time he was an employee was in 1957 and from that time until his appointment he was a small businessman who hired and fired his own employees.

The Commission does not dispute the fact that Commissioner Farrar was an employer for the 25 years preceding his appointment, but instead argues that the courts should not interfere with gubernatorial appointments unless the governor has abused his discretion. Admittedly, the gubernatorial power of appointment is vested with a reasonable latitude of discretion in classifying the persons to be appointed to the Commission, but that discretion is not without limit or restraint. The classification of appointees to the Commission must measure up to minimal legal standards in order to comply with the requirements of the Act. Whether such requirements have been met is subject to judicial review, and if they have not been met appropriate relief may be granted. *Hogan* v. *Davis*, 243 Ark. 763, 422 S.W.2d 412 (1967).

In light of his "previous vocation, employment, or affiliation," Commissioner Farrar does not minimally meet the requirement of being "classed as a representative of employees" and, solely on that basis, is not qualified to hold that office.

Reversed.

NEWBERN, J., concurs.

DAVID NEWBERN, Justice, concurring. The majority opinion is correct in holding that Commissioner Farrar's appointment to the Workers' Compensation Commission was not in compliance with Ark. Stat. Ann. § 81-1342(a) (Repl. 1976). The Arkansas Court of Appeals reviews the decisions of the commission. Ark. Stat. Ann. § 81-1325(b) (Supp. 1985). As a member of that court in 1979 and 1980, I began to question the wisdom of composing a quasi-judicial body, such as the commission, of advocates for the points of view always at odds in the cases before it. My skepticism has since grown, and I must take this opportunity to discuss a law that requires us to hold, as we do today, that a commissioner is disqualified because his background is not of the sort that will assure he is sufficiently partial.

The creation of an entity such as the commission, which is recognized to be an administrative body but which has one function which is purely adjudicative, brings on problems associated with courts. *See* C. Koch, *Administrative Law and Practice*, § 6.7 (1985). Although it is not a court per se, the commission has replaced the courts' adjudicative function with respect to the claims of injured workers, at least at the first hearing and review levels.

The commission has the responsibility of adjudicating an enormous number of claims involving huge sums of money. In its Annual Report for 1984, entitled "Costs and Characteristics of Occupational Injuries and Illnesses in Arkansas" the commission reported that it had, in that year, closed 8,972 cases with $30.1 million in indemnity compensation and $25.2 million in adjudicated medical and other costs for a total of $55.2 million. In its Biennial Report for 1984-1986, the commission reported for the period from July 1, 1984 to June 30, 1985, total compensation expenditures of $91,751,878. For the period from July 1, 1985 to June 30, 1986, the total was $89,582,074.

The adjudication of these claims begins with a hearing before an administrative law judge (ALJ). It is an adversary proceeding, but designed to be informal. The ALJ's decision is then reviewed by the commission if one party or the other is

dissatisfied with the result reached by the ALJ. There may have been a time when the commission actually heard witnesses give live testimony when its members wished to redo the work of the ALJ. Given the numbers of claims today, however, that would be impractical if not impossible. The commission has the power to, and presumably does, permit argument before it either orally or in the form of briefs and it may admit additional evidence in its de novo review of the decision of the ALJ. It would surely be wasteful, however, to hold the hearing with the live witnesses a second time, so the decision of the commission is much like that of an appellate court; it operates from a cold, or at best, warmed-over, record.

Thus the ALJ position has been upgraded. The ALJ is no longer just an aide to the commission or a referee. The title, "Administrative Law Judge" appears in the commission's official publications. *See* the Biennial Report referred to above. Although Ark. Stat. Ann. § 81-1344 (Repl. 1976) refers to "referee," the duty of that officer is "to hear and determine claims for compensation, and to conduct such hearings and investigations and to make such orders, decisions, and determinations as may be required by any rule or order of the Commission." The evolution of the position is best described in *Civil Service Commission* v. *Department of Labor*, 424 Mich. 571, 384 N.W.2d 728, *amended*, 425 Mich. 201, 387 N.W.2d 384 (1986). Michigan has undertaken a formal restructuring of its commission similar to that which has taken place informally elsewhere. The Michigan Supreme Court noted the existence of a condition in that state like that which exists here specifically as a result of our § 81-1345, that is, that our ALJs do not just render "findings" on behalf of the commission but render "decisions" to be reviewed by the commission.

Despite the fact that it is the ALJ who hears the witnesses and has the opportunity to see them face to face, we persist in holding that his or her decision is meaningless when a decision of the commission is on appeal. *See Dedmon* v. *Dillard Department Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981). That is the view of the majority of the courts. *See* 3 Larson, *The Law of Workmen's Compensation*, § 80.12(c) (1983). However, there is a growing minority view perhaps led by the Federal Longshoremen's and Harbor Worker's Compensation Act, P.L. 92-576, §

21(b) (3). It is now held in Florida, for example, that the commission cannot reverse the findings of fact made by a hearing officer unless the findings are not sustained by competent, substantial evidence, and on appeal from the commission the court must determine whether the commission observed the substantial evidence rule when it reviewed the officer's findings and order. *See United States Casualty Company* v. *Maryland Casualty Company*, 55 S.W.2d 741 (Fla. 1951). *See also Powell* v. *Industrial Commission*, 4 Ariz. App. 172, 418 P.2d 602 (1966); *Universal Cyclops Steel Corporation* v. *Workmen's Compensation Appeals Board*, 9 Pa. 176, 305 A.2d 757 (1973); *R & R Well Service Company* v. *Industrial Commission*, 658 P.2d 1389 (Colo. App. 1983); *A.D. Braun* v. *Industrial Commission*, 36 Wisc. 2d 48, 153 N.W.2d 81 (1967); *Delesky* v. *Tasty Baking Company*, N.J. Super. A.D. 420 A.2d 1022 (1980); *Davol, Inc.* v. *Aguiar*, 463 A.2d 170 (R.I. 1983).

In Florida it has been recognized that the Industrial Relations Commission, similar to our commission, exercises the functions of a court. *Scholastic Systems* v. *LeLoup*, 307 So.2d 166 (Fla. 1975). It has been held in Georgia and in California that the Code of Judicial Conduct applies to the officers who adjudicate these important claims. *Delta Air Lines, Inc.* v. *McDaniel*, 176 Ga. App. 523, 336 S.E.2d 610 (1985). *Fremont Indemnity Co.* v. *Workers' Compensation Appeal Board*, 153 Cal. App. 3d 965, 200 Cal. Rptr. 762 (1984). We have yet to consider that issue.

Given the changes going on around us, and given the changes which have come about by necessity in our own workers' compensation scheme since our commission was created by Initiated Act 4 of 1948, it occurs to me that we should be thinking of creating a system in which the decisions of the ALJs are like those of juries, to the extent that the factual determinations should be reviewed only to determine if they are supported by substantial evidence. An alternative would be to review them as the factual decisions of trial judges are reviewed in other civil cases, i.e., to determine if they are clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a).

No matter what standard of review is chosen, however, the reviewing body need not be poised to recreate the adversarial

arguments and adversarial positions taken and protected at the hearing level. Requiring management and labor representatives on such a reviewing body, so analogous to a court, is like assuring that our court of appeals or this court be composed of equal numbers of plaintiffs' advocates and defendants' advocates in tort cases. In any body exercising the function of legal review, the public is entitled to, and should, demand the putting aside of social philosophies which are the stuff of legislation. That may not be entirely possible, but at the very least, we should not encourage the advocacy of such points of view when we are empowering a tribunal to interpret the law and apply it to facts rather than to make the law to be applied.

Earl S. BRANHAM *v.* STATE of Arkansas

CR 87-12 730 S.W.2d 226

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Pruitt & Hodnett, by: *Roger T. Jeremiah*, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. In 1985 Earl Branham was charged with nineteen counts of possession of a controlled substance, dilaudid, with intent to deliver. A plea bargain was accepted by the trial court and in accordance with its terms one of the charges was dropped and Branham pled guilty to the remaining eighteen counts, receiving a sentence of twenty years in the Department of Correction with five years suspended.

Six months later Branham filed a petition for post-conviction relief under A.R.Cr.P. Rule 37. He alleged that Ark. Stat. Ann. § 82-2617 (Schedule II) under which he was charged had been repealed, that a search warrant served on him was illegal, that defense counsel's ineffectiveness deprived him of a fair trial, including the failure to notify him of certain rights as a first offender, and failing to subpoena a physician who had prescribed the drugs.

The trial court ordered an evidentiary hearing on the Rule 37 petition at which several witnesses testified, including Branham and the public defender who had defended him on the charges. Following the hearing the trial court made detailed findings of fact and conclusions of law. He found that Ark. Stat. Ann. § 82-2617 had not been repealed, that the allegation concerning the search warrant pertained only to the charge that was dropped, that Branham was not a first offender, that evidence adduced at

the hearing established that acts by Branham while in California in shipping drugs from California to be delivered in Arkansas constituted a violation of Arkansas law, that the evidence established "overwhelmingly" that Branham received effective representation in that counsel was prepared to defend the charges and was prevented from doing so because Branham elected to plead guilty for a twenty year sentence with five years suspended. The trial court found there was a factual basis for the guilty pleas and that Branham's pleas were made voluntarily and with a full understanding of the charges and of the consequences.

Earl Branham has appealed from the denial of his Rule 37 petition. He assigns two points of error: 1) the trial court erred in accepting his guilty plea by failing to have Branham state whether there was a factual basis for the plea; and 2) defense counsel was ineffective in failing to demand sentencing as a first offender, failing to communicate with defendant's physician, failing to move to suppress tape recorded conversations and failing to move for a continuance. We find no merit in the arguments.

It must be remembered that on appeal from the denial of a Rule 37 petition following pleas of guilty there are only two issues for review— one, whether the plea of guilty was intelligently and voluntarily entered, two, were the pleas made on the advice of competent counsel. *Huff* v. *State*, 269 Ark. 404, 711 S.W.2d 801 (1986); *Thomas* v. *State*, 277 Ark. 74, 639 S.W.2d 353 (1982); *Williams* v. *State*, 273 Ark. 371, 620 S.W.2d 277 (1981). We are satisfied on both counts.

The burden is on the petitioner to prove his allegations for post-conviction relief, *Porter* v. *State*, 264 Ark. 272, 570 S.W.2d 615 (1978) and we do not reverse the trial court's findings unless they are clearly against the preponderance of the evidence. *Irons* v. *State*, 267 Ark. 469, 591 S.W.2d 650 (1980).

It must be conceded that at the hearing on the guilty pleas the trial court asked defense counsel if there was a factual basis for the pleas rather than addressing the defendant directly as the rule requires. A.R.Cr.P. Rule 24.6. With that exception the trial court spoke directly to the defendant; he carefully went through each charge, asking the defendant if he understood the charge, if he had any questions about it and how he pled to it. To

the extent that the original hearing was deficient, the testimony at the post-conviction hearing established the factual basis for the pleas and that is sufficient. *Snelgrove* v. *State*, 292 Ark. 116, 728 S.W.2d 497 (1987); *Thomas* v. *State, supra.* Sergeant Dale Best of the Arkansas State Police testified that he arranged for two individuals to place calls to the defendant in California to purchase drugs to be shipped to addresses in Arkansas in exchange for money wired to the defendant by Western Union. The packages arrived as expected and in some instances Branham's fingerprints were identifiable. The findings of the trial court that Branham's pleas of guilty were based on fact and were voluntarily and intelligently made were fully supported by the evidence.

Turning to the remaining issue—ineffective assistance—we note that counsel is presumed to be competent, *Rightmire* v. *State*, 275 Ark. 24, 627 S.W.2d 10 (1982), and a defendant assumes a heavy burden in asserting that counsel's advice was lacking in competence. *United States* v. *Cronic*, 466 U.S. 648 (1984). Branham argues that because he has never been convicted of a felony he was eligible for first offender treatment under Ark. Stat. Ann. § 82-2623 (Repl. 1976), and the state contends Branham is ineligible for the alternative sentencing procedures provided under the act because he is 58 years old and the act is limited to those 26 and under at time of the offense, and because he pled guilty to numerous counts of possession with intent to deliver, whereas the act is limited to mere possession. We decline to reach the issue because, as in the case of parole procedures, defense counsel is not required to advise about post-sentencing alternatives in order to render effective assistance to a defendant facing criminal charges. *Brown* v. *State*, 291 Ark. 393, 725 S.W.2d 544 (1987); *Haywood* v. *State*, 288 Ark. 266, 704 S.W.2d 168 (1986).

Branham contends the public defender should have subpoenaed his California physician to testify that he prescribed dilaudid for his back pain, thereby explaining that the dilaudid found in his briefcase and suitcase were for his own use. But the proof was that the charges arising from these particular drugs were dropped and so Branham could not have been prejudiced by the absence of Dr. Siggers.

Branham's two final points are that counsel should have moved to suppress recorded telephone conversations between Branham and persons in California discussing the sale and transportation of drugs from California to Arkansas. Branham contends the taping of the conversations is a violation of Arkansas law. Ark. Stat. Ann. § 41-4501 (Supp. 1985). While there is passing reference to the tapes at the post-conviction hearing, there is nothing in the record concerning the nature of the evidence so obtained, nor what the state intended to prove, nor even whether it was subject to suppression. We will not speculate over possible issues which might have arisen had the case been tried. As to the contention defense counsel should have moved for a continuance Settle testified he was ready for trial and Branham has failed to show how a continuance would have improved his situation.

In order for an appellant to prevail on an ineffective assistance argument, he must show that counsel's performance was so deficient as to deprive him of the opportunity for a fair trial. *Strickland* v. *Washington*, 466 U.S. 668 (1984). Appellant has failed to meet that burden.

The order is affirmed.

HCA MEDICAL SERVICES OF MIDWEST, INC., d/b/a DOCTOR'S HOSPITAL *v.* Darrell W. RODGERS and Sally RODGERS

86-307 730 S.W.2d 229

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Gayle Windsor, Jr., for appellant.

No brief filed for appellees.

DAVID NEWBERN, Justice. The sole issue in this case is whether Act 638 of 1983 violates the constitutional equal protection of the laws requirement. The act provides that claims for charges for medical services performed or provided prior to April 1, 1985, must be brought within eighteen months. In 1985, the general assembly added a provision, not applicable here, that the limitation would be two years for such claims arising after March 31, 1985. Act 894 of 1985. These acts are codified as subsections (a) and (b) of Ark. Stat. Ann. § 37-245 (Supp. 1985).

The stipulation and testimony before the court left no doubt that the claim was brought after the applicable eighteen-month limitation period. The appellant argues that the legislation created an inferior class of medical services creditors by imposing upon them a shorter limitation than had been imposed upon other creditors similarly situated. Thus, it contends, Ark. Const. art. 2, § 18, and the Fourteenth Amendment to the United States Constitution have been violated by this deprivation of equal protection of the laws.

We upheld Act 638 of 1983 against the same constitutional argument in *Ballheimer* v. *Service Finance Corporation*, 292 Ark. 92, 728 S.W.2d 178 (1987), citing *Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976), and *Carter* v. *Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970). While the *Owen* case did not involve a reference to the equal protection provisions of the constitutions, the *Carter* case did, and there, in a thorough opinion by Special Chief Justice Roy Penix, this court noted that "[a]lmost every statute or law serves to work for some and against others," but that if the law is neither unreasonable nor arbitrary, it will not be struck down as unconstitutional.

The appellant argues that the *Carter* case is distinguishable because there the opinion noted differences between the classes of persons affected by different limitation periods at issue. The contention here is that there are no such differences. The appellant has, however, not convinced us of that proposition. The appellant's evidence and the stipulation before the trial court were insufficient to prove that there were no differences between medical service providers and others which would make the limitations distinction reasonable. Rather, the appellant provided only evidence tending to show that the short period had caused problems for patients and for medical service providers working with insurance claims. No evidence was presented to show that the general assembly did not have or could not have had a reasonable basis for finding, in the words of the trial judge, "that medical services are traditionally provided under special circumstances deemed . . . sufficient for medical providers to be in a different category from other creditors who perform services and sell goods to the public." Before we will declare an act of the general assembly unconstitutional, there must be clear and strong evidence that it is incompatible with the Constitution, and we will resolve all doubts in favor of the constitutionality of the act in question. *Phillips* v. *Giddings*, 278 Ark. 368, 646 S.W. 2d 1 (1983). *See also Eason* v. *State*, 11 Ark. 851 (1851).

Affirmed.

Edward Charles PICKENS *v.* STATE of Arkansas

CR 86-42 730 S.W.2d 230

Supreme Court of Arkansas
Opinion delivered June 1, 1987
[Rehearing denied June 29, 1987.*]

[redacted]

* Hickman, J., would grant rehearing.

Achor & Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

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

TOM GLAZE, Justice. On October 20, 1975, several people

were shot in a robbery of a grocery store in Arkansas County. Three people were charged in the case, one being appellant. Venue for appellant was changed to Prairie County, where appellant subsequently was convicted of the capital felony murder of Wesley Noble, one of the customers in the store. Appellant was sentenced to death. The conviction and sentence were upheld in *Pickens* v. *State*, 261 Ark. 756, 551 S.W.2d 212 (1977). In *Pickens* v. *Lockhart*, 714 F.2d 1455 (8th Cir. 1983), appellant's death sentence was vacated because of ineffective assistance of counsel, and remanded to state court to permit it to reduce appellant's sentence to life without parole or to conduct a new sentencing procedure. A resentencing trial took place in Prairie County Circuit Court in September 1985, and appellant was again sentenced to death. He appeals this new sentence, listing ten points for reversal. Some of these ten points include an additional number of sub-issues or reasons why appellant claims this cause should be reversed. Because we agree with appellant's first argument, we decide and discuss only those points which are required for the remand and retrial of this case.

Appellant's first argument centers on his having been found guilty of capital murder, after which, the jury, during the penalty phase, unanimously imposed the death sentence. In doing so, the jury was required to find that the aggravating circumstances of the murder outweighed all mitigating circumstances found to exist and the aggravating circumstances justified a sentence of death beyond a reasonable doubt. Ark. Stat. Ann. §§ 41-1301(3)(4) and -1302(1) (Repl. 1977). Appellant argues that the trial court erred in limiting appellant's proof concerning mitigating circumstances to those circumstances that existed in October 1975, the time of the murder. In this respect, appellant contends that the trial judge should have allowed him to introduce the testimony of various witnesses regarding character, rehabilitation, adjustment to prison and good works he had undergone or performed since the murder occurred.

In support of this argument, appellant relies upon the Supreme Court's recent holding in *Skipper* v. *South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986). In *Skipper*, the trial court excluded the testimony of two jailers and a "regular visitor" regarding the defendant's good behavior while he was in jail for seven months awaiting trial. The Supreme Court held the trial

court's exclusion of such testimony denied Skipper his right to place before the sentencer relevant evidence in mitigation of punishment. The Court said: "Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, [cite omitted], there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' " 106 S.Ct. at 1671.

The State argues the *Skipper* decision should be limited to its facts and suggests a temporal limit exists that precludes a defendant from offering mitigating circumstances which arise after the jury decides the defendant is guilty of capital murder. The State submits to construe the *Skipper* holding otherwise would permit defendants, who are able to extend their appeals and post-conviction relief processes the longest, an opportunity to collect evidence in mitigation that, in time, is far removed from the circumstances of the crime, as well as from what their characters were when they committed the offense. Such an open-ended procedure, the State suggests, bestows on some death-row inmates the opportunity to accumulate mitigating evidence while others may not be so fortunate. In sum, the State concludes that to permit such erratic opportunities to present additional, post-sentence mitigation would produce capricious, arbitrary and freakish results in the application of the death penalty in Arkansas for years.

[redacted] While the State's argument seems based on sound logic and reason, its position is not unlike the one argued to and rejected by the Court in the *Skipper* case. The *Skipper* majority Court's holding, and its effect on the mitigating evidence issue before us now, can best be understood by first reading Justice Powell's concurring opinion, joined in by then-Chief Justice Burger and Justice Rehnquist. Those concurring Justices clearly stated that they joined in reversing the South Carolina trial court not because it excluded "relevant mitigating evidence" but only because the petitioner was not allowed to rebut evidence and argument used against him. Otherwise, the concurring Justices strongly disagreed with the majority Court holding that a defendant's conduct after the crime should be considered "mitigating evidence" and that the sentencer must consider such conduct under the Constitution. Justice Powell concluded:

> I see no reason why a State could not, consistent with these principles, exclude evidence of a defendant's good behavior in jail following his arrest, as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution here. *Such evidence has no bearing at all on the "circumstances of the offense," since it concerns the defendant's behavior after the crime has been committed.* (Emphasis supplied.)

Again, the majority Court in *Skipper* rejected Justice Powell's expressed views that a state should have the right to exclude evidence of a defendant's conduct while awaiting trial or sentencing. In doing so, the majority placed emphasis not on the defendant's culpability for the crime he committed, but instead it held the sentencer should be able to consider *any aspect of a defendant's character or record* or any of the circumstances of the offense that the defendant proffers "as a basis for a sentence less than death." It said further that evidence that the defendant would not pose a danger if spared (but incarcerated) must be potentially mitigating.

[redacted] We believe the *Skipper* decision mandates, in clear terms, that any relevant mitigating evidence concerning a defendant's character should not be excluded. That evidence may include, as the situation here, the defendant's behavior and conduct that existed not only before and at the time of the crime, but also that which occurred before sentencing and during the period of post-conviction relief, should a later resentencing occur. Accordingly, we reverse and remand this cause for resentencing to be conducted consistent with the *Skipper* holding and this court's opinion.

Appellant raises one other meritorious argument. In this respect, appellant argues the trial court erred in refusing to excuse certain jurors for cause, two of them because they indicated they would automatically impose the death penalty if appellant were convicted of murder. The State made every effort to rehabilitate one of those two jurors by leading him to say, "No, sir," when asked, "Now, we have to be fair, so in the other vein, life without parole is also a possible penalty, so you haven't got your mind made up at all that all capital murder deserves [the] death penalty?" Even after such efforts by the prosecutor, this

witness repeatedly said that if appellant (or anyone) was guilty of murder (or rape), "I would burn them" or "be for the death penalty." As we pointed out in *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980), a prospective juror's candid answers cannot be overcome merely by routine responses, and there is a point beyond which such a juror cannot be rehabilitated. We believe that situation occurred here and, accordingly, presents another reason why this cause must be reversed.[1]

[redacted] The Supreme Court has said that a venireman should not be excluded unless he is irrevocably committed to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. *See Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 68 (1983) (quoting from *Davis* v. *Georgia*, 429 U.S. 122 (1976)). By the same token, a venireman who is automatically committed to imposing the death penalty is, for the defense, good cause for that juror's exclusion from service. Clearly, proper inquiry on voir dire in the matter would be to ask the veniremen if they would first consider and weigh the aggravating and mitigating circumstances involved when determining whether death or life imprisonment without parole should be imposed.

Before turning to appellant's other points, we mention briefly those we do not reach. Appellant argues that the jurors, in rendering appellant's sentence, erroneously found the appellant had presented no evidence of mitigating circumstances. If error occurred in this instance, such error may readily be avoided at the retrial and we need not discuss it.

Similarly, we need not reach appellant's contention that the trial court erred in permitting the jury to consider the aggravating circumstance that appellant committed capital murder for pecuniary gain. Appellant presents a two-pronged argument: (1) the jury, which determined appellant's guilt at the original trial, also found that the murder the appellant committed was not for pecuniary gain, and appellant urges that to allow another jury,

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[1] We note the appellant peremptorily excused the veniremen discussed here, but appellant preserved his record on this point by showing an objectionable juror was later forced upon him because he had exhausted all his peremptory challenges. *Cf. Stephens* v. *State*, 277 Ark. 113, 640 S.W.2d 94 (1982).

upon resentencing, to consider pecuniary gain as an aggravating circumstance violates the principle of double jeopardy; and (2) citing *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S.Ct. 546 (1985), appellant argues his conviction was for robbery-murder, a crime that included pecuniary gain as an element, and he suggests that if the court permits the State to prove the aggravating circumstance of murder for pecuniary gain for sentencing purposes, the court improperly permits the double counting of one aspect of the evidence. Because this cause is reversed on other grounds and three other aggravating circumstances remain available to the State, we need not presume or anticipate that this issue will arise at the resentencing trial.

Appellant does attack one of the other remaining three aggravating circumstances, and we do dispose of that argument since we conclude it is wholly without merit. The jury found the appellant committed capital murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody—an aggravating circumstance under Ark. Stat. Ann. § 41-1303(5). Appellant contends this circumstance is vague and overbroad as applied to the facts of this case. We consider this contention spurious in view of the overwhelming evidence that the appellant and his accomplices repeatedly shot their victims during the robbery while they laid helplessly on the floor of the store. One victim, Harold Goacher, testified the appellant and his accomplices asked if there was a room in which they could lock up their victims and when they were told no, Goacher said, "they turned around and said well, hell, we were (sic) just going to have to do away with them because if they get loose they will burn us." Unquestionably, the record supports the conclusion the appellant and his cohorts intended to kill their victims in order to avoid identification, apprehension, arrest and conviction for the robbery.[2]

Appellant next argues the unconstitutionality of Ark. Stat. Ann. § 41-1358 (Supp. 1985), contending that its retroactive

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[2] Appellant also contends on appeal that it was error to permit the State to prove this aggravating circumstance because it was not found by the jury in his co-defendant's sentencing trial. Although he raised this issue below, we find nothing in the record, nor does he offer any citation of authority, to support his argument.

application here violates (1) the *ex post facto* clause, (2) the equal protection clause and (3) the double jeopardy prohibition. He argues further that the provision is a special law forbidden by Ark. Const. art. 5, § 24.

Section 41-1358 provides that a capital case is remanded to the court where the defendant was originally sentenced when a death sentence is vacated, and the prosecutor may move the trial court to impose a life sentence without parole or to impanel a new sentencing jury. Appellant claims that, prior to § 41-1358 (enacted as Act 546 of 1983), he would have been allowed by law, when a penalty phase error occurred, to a reduction in sentence to life without parole or a retrial as to both the guilt and any resulting sentencing phase. On this point, appellant primarily relies upon *Miller* v. *State*, 280 Ark. 551, 660 S.W.2d 163 (1983). The State, in its argument, correctly distinguishes *Miller* from the instant case but the significant distinction is that this cause involves a remand by the federal court to the state trial court for resentencing, not a retrial on the guilt issue. Aside from such differences, the Supreme Court, in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), held that a procedural change in a state's death-sentencing law is not an *ex post facto* violation, nor does such a change deny a defendant the equal protection of the laws. In *Dobbert*, the Court concluded that the newly-enacted law there simply altered the methods employed in determining whether the death penalty was to be imposed and no change occurred regarding the quantum of punishment attached to the crime. The same can be said for the situation here. The crime for which appellant was charged, the punishment prescribed for it, and the quantity or degree of proof necessary to establish his guilt, all remain unaffected by § 41-1358. In sum, the State's position is in no way enhanced by § 41-1358, since it may not, under that new law, seek any greater penalty or punishment against the appellant for the crime he committed than that which was available under the prior law.

Appellant further urges § 41-1358 permitted the State at the resentencing trial to present additional evidence not presented at the original trial; this, he suggests, violates the double jeopardy prohibition under the fifth amendment. In this connection, Jerry Lockridge, one of the robbery victims, testified at the resentencing trial, but had not testified at appellant's first

trial because Lockridge was in Europe at the time. A similar question of double jeopardy to the one presented here was considered in *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957). The Court, in language that is particularly instructive here, said:

> It is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence.

355 U.S. at 243.

We are unaware of any reason why the State should be precluded from introducing additional relevant evidence on remand at a resentencing trial, especially when appellant's guilt already has been established and when appellant has in no manner shown or demonstrated prejudice that would result from the admission of such evidence.

Finally, appellant asserts Ark. Const. art. 5, § 24 prohibits the General Assembly from passing any local or special law changing the venue in criminal cases, and the General Assembly, appellant says, did just that here since § 41-1358 effectively requires this case to be remanded to Prairie County and not Arkansas County, where the crime was committed in 1975. Appellant's argument is far afield since the parties, themselves, agreed to a venue change to Prairie County when this cause was originally tried. Thus, § 41-1358 had nothing to do with fixing venue in this matter; instead, it merely reinvests venue for resentencing purposes in the county the parties agreed on in the first instance.

Next, appellant's counsel argues the trial court erred in the application of Ark. Stat. Ann. § 43-2419 (Repl. 1977) which provides for fees for attorneys representing indigents in criminal matters. Counsel, without offering sufficient reason or argument, requests that this court strike the $1,000.00 limitation provided under § 43-2419 as being a violation of due process and of appellant's right to the effective assistance of counsel. We reject appellant's request to reach the question concerning the constitutionality of § 43-2419, but we do recognize counsel's entitlement

to the maximum award under that provision. Thus, because the trial court allowed only $650.00 for the actual trial on resentencing, we direct the trial court to award an additional amount in the sum of $350.00.

Appellant raises two additional points we recently addressed and decided in *Duncan* v. *State*, 291 Ark. 521, 721 S.W.2d 653 (1987), *viz.*, that Arkansas's sentencing laws for capital murder are death-mandatory provisions prohibited by *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), and that the prosecutor is not entitled to a second closing argument under such sentencing laws. In *Duncan, supra*, we rejected the contention that Arkansas's statutory scheme provides for a mandatory death penalty when the jury finds the aggravating circumstances outweigh mitigating circumstances. *See* Ark. Stat. Ann. §§ 41-1301 to 41-1304. As we pointed out there, the jury, irrespective of its findings under these provisions, can still return a life verdict without parole simply by rejecting the death penalty. *See also Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1986). We also held in *Duncan, supra*, that the prosecutor had the right to close the argument in the penalty phase because the State had the burden of proof. Because we have already disposed of these points in *Duncan, supra*, no further discussion is required.

Appellant concludes his argument for reversal of this cause by listing a mixture of issues captioned "other claims." None of these claims have merit.

Appellant first argues that he was prejudiced because he was led into the courthouse in handcuffs. To note the obvious, appellant's case was one of resentencing, only, and the jury was quite aware that appellant was guilty of capital murder since that was the very crime for which the jury was convened to impose a penalty. We fail to see how prejudice would result from a juror's view of appellant in handcuffs when that juror already knows the appellant had been convicted of murder nearly nine years earlier. As was said by the court in *United States ex rel. Stahl* v. *Henderson*, 472 F.2d 556 (5th Cir.) *cert. denied*, 411 U.S. 971 (1973), "No prejudice can result from seeing what is already known." *See also Glick* v. *State*, 286 Ark. 133, 689 S.W.2d 559 (1985).

Next, appellant contends the prosecutor erred in

referring to himself as representing "the people" and arguing to the jury that the death penalty is a deterrence and making other remarks appellant considers were designed to prejudice his case. Appellant submits no case authority and little argument to convince us these matters were errors, requiring the reversal of this cause. Neither do we find merit in appellant's expressed attempt to preserve his argument that death-qualified juries are unconstitutional since that issue has been decided against him. *Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986). The same can be said for his contention that the death penalty is cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Fairchild* v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984).

As previously mentioned, we reverse and remand for resentencing consistent with the directions and holdings set out herein.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree with the majority decision; we have no alternative but to reverse this case. However, I would go further and address the question raised by *Collins* v. *Lockhart*, 754 Fed. 258 (8th Cir.) cert. denied ___ U.S. ___, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). I would not follow the rationale of that decision which has been rejected by other federal and state courts. *Glass* v. *Blackburn*, 791 F.2d 1165 (5th Cir. 1986); *Wingo* v. *Blackburn*, 783 F.2d 1046 (5th Cir. 1986); *Evans* v. *Thigpen*, 631 F. Supp. 275 (S.D. Miss. 1986); *State* v. *Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). The Eighth Amendment to the United States Constitution simply says "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Circuit Court of Appeals has indeed strayed a long way from that principle by finding that simply because an element of capital felony murder will be an aggravating circumstance, such a circumstance makes the death penalty unconstitutional.

If a state decides to limit the death penalty, as Arkansas has done to those who commit murder during the commission of certain felonies, in this case robbery, that is not such an arbitrary, broad category of criminal misconduct that fails or should fail the guidelines laid down by the United States Supreme Court. *Furman* v. *Georgia*, 408 U.S. 238 (1972); *Gregg* v. *Georgia*, 428

U.S. 153 (1976); *Lockett* v. *Ohio*, 438 U.S. 586 (1978). A jury may still decide not to impose the death penalty.

It is ironical that the few death penalty cases which will slip through the interminable appeal process will mean that those defendants are simply unlucky. The reason for their fate will not be because they deserve the death penalty more than the great majority who are spared that penalty, but because there are no technical reasons left to throw out the death penalty in their case. Is this a fair way to decide who will get the death penalty? It seems a far more freakish way to impose the death penalty than to leave that decision to juries within reasonable guidelines.

Ruth BAERLOCKER and Bernadine DEAN *v.* Sam HIGHSMITH, Executor of the Estate of Luella M. TURNER, & the Estate of Luella M. TURNER

86-298 730 S.W.2d 237

Supreme Court of Arkansas
Opinion delivered June 8, 1987

David M. Clark, for appellants.

Highsmith, Gregg, Hart, Farris & Rutledge, by: *John C. Gregg*, for appellees.

JACK HOLT, JR., Chief Justice. Luella Turner's will divided her estate equally between the Arkansas Chapter of the American Cancer Society and Ouachita Baptist University. Appellants Ruth Baerlocker and Bernadine Dean, Mrs. Turner's sisters, contested the will in probate court, alleging Mrs. Turner was incompetent to execute a will and that she was under the undue influence of persons unknown. After the appellants presented their proof, the probate judge ruled in favor of appellee Sam Highsmith, executor of Mrs. Turner's estate. We agree that the appellants failed to meet their burden of proof and affirm.

Mrs. Turner executed her will at Highsmith's office on April 18, 1978. Highsmith, whom Mrs. Turner knew through her friendship with his mother, drafted her will which nominated him as executor. Mrs. Turner died on January 15, 1986, leaving four sisters and one brother as survivors.

The appellants contested the will on the basis that Mrs. Turner was not competent to execute a will because of the trauma and continuing grief caused by the death of her husband, who died of cancer in October of 1977. They also contended that Mrs. Turner had a strong personal objection to giving money to institutions and would not have executed a will leaving her estate to the cancer society and to the university absent the undue influence of persons unknown.

Probate and chancery cases are tried de novo on appeal. This court does not reverse unless the findings of the probate judge are clearly erroneous, giving due deference to the

superior position of the judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Reddoch* v. *Blair*, 285 Ark. 446, 688 S.W.2d 286 (1985). The party contesting the validity of a will has the burden of proving by a preponderance of the evidence that the testator lacked mental capacity or was unduly influenced at the time the will was executed. *Rose* v. *Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). "If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without promptings, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument." *Id.* Influence by a person over the maker of a will "becomes 'undue,' so as to invalidate the will, only when it is extended to such a degree as to override the discretion and destroy the free agency of the testator." *Edwards* v. *Vaught*, 284 Ark. 262, 681 S.W.2d 322 (1984).

The appellants offered very little evidence in support of their allegations. John Davies, who drove Mrs. Turner to Highsmith's office to execute the will, testified that she was still grieving over the death of her husband. He also said she was just like any other widow who had lost her husband. Appellant Baerlocker, who lived in California and had not seen her sister in 27 years, testified that Mrs. Turner spoke of her husband often in her letters. Baerlocker also said that she did not notice any change in Mrs. Turner in their correspondence after the death of Mrs. Turner's husband.

Highsmith testified that Mrs. Turner did not specifically discuss with him how much money she had, nor did she tell him she had a box with $31,000 in cash hidden in her home. Highsmith said, however, that Mrs. Turner was emphatic about leaving her estate as specified. She told him she wanted the cancer society to get half because her husband had died of cancer, and wanted the university to get half because she had some affiliation with the Baptist church and wanted to help young people with their education. Mrs. Turner also told him she had a brother and sisters, but that she did not want to leave them anything. Highsmith stated that he did not notice any change in Mrs. Turner after her husband's death. In going through Mrs. Turner's home after her death, Highsmith said he found business

records dating back to the 1960's, recent bills she had paid and the cancelled checks that went with them, tax returns for the previous six or seven years, a list of her certificates of deposit, bank statements and other records. Highsmith said this indicated to him that she was a meticulous person.

The only other proof regarding Mrs. Turner's competence was a neighbor's testimony that she became eccentric after her husband died. The fact that a testator is peculiar or eccentric does not establish the lack of capacity to make a will. *See Harwell* v. *Garrett*, 239 Ark. 551, 393 S.W.2d 256 (1965).

The appellants produced no evidence to show that Mrs. Turner was unduly influenced in the making of her will, other than testimony that she did not believe in giving to institutions, that she did not like children, and that she had no contact with the cancer society or the university.

The evidence clearly failed to prove that Mrs. Turner lacked the capacity to make a will or was unduly influenced in any manner.

Affirmed.

Jerrie L. WILLIAMS *v.* SMART CHEVROLET CO. AND GENERAL MOTORS CORP.

86-304 730 S.W.2d 479

Supreme Court of Arkansas
Opinion delivered June 8, 1987

[redacted]

James L. Hall, Jr., for appellant.

Wright, Lindsey & Jennings, for appellee Smart Chevrolet Co.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellee General Motors Corporation.

JACK HOLT, JR., Chief Justice. The appellant, Jerrie L. Williams, was driving her new car when the door swung open and she fell out, injuring herself. She filed a lawsuit against appellee Smart Chevrolet Co., from whom she bought the car, and against appellee General Motors Corp., the manufacturer of the car, on product liability and tort theories. The trial court granted both appellees' motions for directed verdicts at the close of Williams' proof. It is from that order that this appeal is brought. We affirm.

William argues on appeal that there was sufficient evidence to submit to the jury the questions of negligence, breach of express and implied warranties, and strict liability for the manufacture, design, material, assembly and repair of the automobile door, door latch mechanism and component parts.

When a directed verdict has been granted, on appeal we take that view of the evidence that is most favorable to the party against whom the verdict was granted and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Dan Cowling & Assoc.* v. *Clinton Bd. of Educ.*, 273 Ark. 214, 618 S.W.2d 158 (1981). The granting of the motion is upheld only if the evidence viewed in that light would be so insubstantial as to require that a jury verdict for the party be set aside. *Id.* Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or

another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Id.* Bare conclusions without supporting facts, are not substantial evidence. Substantiality is a question of law. *Pickens-Bond Const. Co. et al.* v. *Case*, 266 Ark. 323, 584 S.W.2d 21 (1979).

Looking at the evidence in the light most favorable to Williams, there was testimony by Williams that she purchased her new Chevrolet Camaro Z-28 from Smart on September 12, 1984, and noticed after a few days that the driver's side door was difficult to close and would work loose after being shut and locked. She returned the car to Smart for repairs and told them about the problem with the door. Smart returned the car to her and, according to Williams, told her the car was fixed. The door continued to work loose. On October 4, 1984, Williams was driving about 10 miles per hour down a straight, level, gravel road when her door, which she testified she specifically remembered shutting and locking with the power locks, suddenly came open. Williams said she fell out of the car, injuring herself. The car went into a ditch but was not damaged. Immediately after the accident, Williams noticed that the driver's door latch mechanism had one of the three securing screws hanging partially out. She returned the car to Smart to be fixed. The door, however, continued to work loose, but it never came open again. She sold the car some fourteen months later.

Williams also offered the testimony of her mother, her sister, and a friend that they rode in the car before and after the accident and noticed that the door would work loose.

Mike Keller, assistant technical director of American Interplex Corp., was Williams' expert witness. He testified that he worked on the car for two or three days in July, 1985, and test drove it on all types of roads and was never able to get the door to come all the way open, including when he tried to force it open. He testified he found no defective parts which would cause the door to fail and come open. He explained that the word "defective" excludes parts which had been abraded or otherwise damaged by external factors. Keller stated that the driver's side striker bolt, as compared to the striker bolt on the passenger door, had one or two additional shims and had two separate wear patterns, as opposed to one on the passenger side. Keller said this indicated to him that

the latch mechanism had engaged at different places on the striker bolt. In addition, the driver's side door latch was abraded and the jaws of the rotor were flared wider, which he believed was caused by uneven contact of the striker bolt with the rotor jaws. Keller testified that this all resulted in an alignment problem with the door. He explained, however, that his examination of the vehicle did not indicate anything that would have allowed the door to come open and he could not document that it had ever previously been in a condition that would cause that to occur.

Williams argues the foregoing was sufficient proof of negligence to submit that question to the jury. "In an action for negligence, the evidence is sufficient to show proximate cause if the 'facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred.' " *Cockman* v. *Welder's Supply Co.*, 265 Ark. 612, 580 S.W.2d 455 (1979), *quoting St. Louis-San Fran. Ry. Co.* v. *Bishop*, 182 Ark. 763, 33 S.W.2d 383 (1931). In *Cockman*, the distributor of a grinding disc was sued when the disc exploded while being used. Cockman was dependent on his expert testimony to demonstrate a fact issue and that witness admitted there was nothing in his examination of the disc fragment which would lead him to a conclusion that the disc was defective when it was sold by the distributor to Cockman's employer. He could not say why the disc exploded. This court held:

> Viewing appellant's evidence most favorably, we cannot say that it negates all possibilities sufficiently to remove the asserted issue of liability from the realm of speculation and conjecture so as to entitle him to have the question presented to the jury.
>
> . . . .
>
> Here, although there was evidence that the explosion of the disc caused appellant's injuries, there was no evidence from which it could be fairly inferred that any action by appellee. . . was the proximate cause of the exploding disc and appellant's resulting injuries. Appellant's evidence as to proximate cause is not sufficient to remove it from the realm of conjecture or speculation.

Here, too, viewing Williams' evidence most favorably,

it does not negate all possibilities so as to remove the question of negligence from the realm of speculation and conjecture. There was evidence that the door came open and that Williams fell out of the car and injured herself, but there was no evidence from which it could be fairly inferred that any action by Smart or General Motors was the proximate cause of the accident. The trial court correctly granted the directed verdicts as to this issue.

Williams also objects to the granting of directed verdicts on the question of a breach of an express warranty. In support of this allegation, she testified she purchased her car and received a 12,000 mile warranty and that she also purchased an extended warranty for 36,000 miles. She admits on appeal that she produced no further evidence as to the details of the warranty and that she did not offer the warranty itself into evidence. Without any evidence of an express warranty covering the parts of the car in issue, Williams' argument on this point must fail because of her failure to meet her burden of proof.

The final argument offered by Williams is that it was error to direct verdicts on the issues of strict liability and implied warranty. We reject both theories. Inasmuch as they require similar proof, we will discuss this argument in terms of strict liability. *Higgins* v. *General Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741 (1985).

Arkansas has adopted the strict liability doctrine in torts in products liability cases. Arkansas Stat. Ann. § 85-2-318.2 (Supp. 1985) provides:

> A supplier of a product is subject to liability in damages for harm to a person or to property if:
>
> (a) the supplier is engaged in the business of manufacturing, assembling, selling, leasing or otherwise distributing such product;
>
> (b) the product was supplied by him in a defective condition which rendered it unreasonably dangerous; and
>
> (c) the defective condition was a proximate cause of the harm to person or to property.

The doctrine of strict liability does not change the burden of proof as to the existence of a flaw or defect in a product,

but it does do away with the necessity of proving negligence in order to recover for injuries resulting from a defective product. *Southern Co.* v. *Graham Drive-In*, 271 Ark. 223, 607 S.W.2d 677 (1980). The plaintiff still has the burden of proving that a particular defendant has sold a product which he should not have sold and that it caused his injury. *Id.* "The mere possibility that this may have occurred is not enough, and there must be evidence from which the jury may reasonably conclude that it is more probable than not." *Id., quoting* Prosser, The Fall of the Citadel, 32 ATL L.J., p. 21 (1968). We further explained in *Southern Co., quoting* Prosser, Torts, § 102, p. 672 (4th Ed. 1971):

> The difficult problems are those of proof by circumstantial evidence. Strictly speaking, since proof of negligence is not in issue, res ipsa loquitur has no application to strict liability; but the inferences which are the core of the doctrine remain, and are not less applicable. The plaintiff is not required to eliminate all other possibilities, and so prove his case beyond a reasonable doubt . . . [I]t is enough that he makes out a preponderance of probability. . . .
>
> [I]n the absence of direct proof of a specific defect, it is sufficient if a plaintiff negates other possible causes of failure of the product, not attributable to the defendant, and thus raises a reasonable inference that the defendant as argued here, is responsible for the defect.

The plaintiff is not required to prove a specific defect when common experience tells us that the accident would not have occurred in the absence of a defect. *Harrell Motors, Inc. et al.* v. *Flanery*, 272 Ark. 105, 612 S.W.2d 727 (1981). The mere fact of an accident, standing alone, does not make out a case that the product was defective, nor does the fact that it was found in a defective condition after the event. But the addition of other facts tending to show that the defect existed before the accident may make out a sufficient case. *Id., quoting* Prosser, Torts § 102 pp. 672, 673.

This court affirmed a directed verdict for the same appellees, General Motors and Smart, in an analogous case, *Higgins* v. *General Motors Corp, supra.* In *Higgins*, the appellant stepped on the accelerator after a traffic light changed, and

the car shot across the intersection and onto the median. He blamed the accident on a malfunction in the transmission, but presented no direct proof of a defect or of the cause of the accident. Instead he relied on circumstantial evidence, primarily his own testimony, as did Williams in the case before us now. This court stated:

> Initially, we could not say that when a car moves suddenly, even swiftly, into an intersection common experience tells us that it would not have happened absent a defect. Therefore, we examine the evidence to see to what extent appellant negated other causes of the accident.
>
> Appellant offered proof to negate several possible causes, testifying he was in excellent health prior to the accident, that the weather was good on that day and there had been no misuse or abuse of the car. Our difficulty comes in finding appellant adequately negated any cause of the accident due to driver error or control.
>
> . . . .
>
> As to the proof of the defect itself appellant testified the car had had transmission problems intermittently from the time he bought it. The trouble was manifested in the car's hesitation before going into gear. He had taken it to the dealer on several occasions but he continued to have the same problem. The car was about four months old and had approximately 6,000 miles on it.
>
> After the accident appellant had a mechanic completely disassemble the transmission to look for any defect. The mechanic testified as an expert for appellant. . . . However, he could not say whether these defects would cause the car to behave as appellant described. . . . The expert's testimony was inconclusive as to the existence of any defect and even tended to support the theory that the accident was due to driver error.

Here, too, we cannot say that when a car door suddenly flies open while the car is travelling on a gravel road at 10 miles per hour common experience tells us that it could not have happened absent a defect. Therefore, we examine the evidence to see to what extent Williams negated other causes of the accident.

Williams stated that she is positive she shut and locked the door and that she was driving slowly and the road was straight. She testified she was not wearing her seat belt and that, when she saw the door open, she turned to her left and hit the brakes and her left hand came off of the steering wheel. She then fell to the ground, landing on her left hip and the left side of her face. The foregoing does not adequately negate any cause of the accident due to driver error or control. Furthermore, she had an expert examine the car, but he could not say that any of the problems he found were defects or that they would cause the door to come open. The expert's testimony was inconclusive as to the existence of any defect and tended to support the theory that the accident was due to driver error.

This court in *Higgins* concluded by finding that appellant's proof does not go beyond suspicion or conjecture nor raise a reasonable inference that the defect was the cause of the accident. We reach the same conclusion in this case and accordingly affirm the trial court's action in granting the motions for directed verdict.

Carl WIDMER *v.* Raymond WIDMER, Executor of the Estate of Walter WIDMER, Deceased

86-302 729 S.W.2d 422

Supreme Court of Arkansas
Opinion delivered June 8, 1987
[Rehearing denied July 13, 1987.]

Appellant, pro se.

Hardin, Jesson & Dawson, by: *Bradley D. Jesson*, for appellee.

DARRELL HICKMAN, Justice. This is the third appeal in this case. *Widmer* v. *Widmer*, No. 85-217 (Ark. App. February 26, 1986); *Widmer* v. *Widmer*, 288 Ark. 381, 705 S.W.2d 878 (1986). In the last appeal, we held that the fees received by the attorney for the estate could not be retained for services which he performed while his license was suspended for failure to pay his license fee. On remand, appellant argued the attorney knew that his license was suspended at the time of the hearing admitting the will into probate. Therefore, the attorney practiced deceit and fraud upon the probate court. A motion was filed to vacate the order admitting the will to probate. After a hearing the probate judge found that the motion was barred by the doctrine of law of the case and *res judicata.*

The appellant, Carl Widmer, argues that he had no proof or knowledge that the lawyer Tuohey acted with deceit and fraud until the matter was last remanded. Therefore, his motion to dismiss should not be barred by *res judicata.* The judge found otherwise; he correctly found that the motion could have been filed.

Affirmed.

Larry G. THURSTON *v.* Ada Thurston PINKSTAFF

86-264 730 S.W.2d 239

Supreme Court of Arkansas
Opinion delivered June 8, 1987
[Rehearing denied July 13, 1987.]

Patten & Brown, for appellant.

Rowland & Templeton, by: *Randell Templeton*, for appellee.

JOHN I. PURTLE, Justice. The chancellor modified an earlier child support order which had modified an agreement between the parties relating to child custody and support. In the new order the trial court based his decision on support payments upon the family support chart found in the Domestic Relations Handbook of the Arkansas Bar Association. The appellant argues the chancellor used the support chart improperly and also erroneously changed the agreement between the parties relating to the disposition of a part of the child support. The record does not disclose that the chancellor's finding of a "sufficient change in circumstances" was clearly erroneous. The decree must therefore be affirmed.

The appellee petitioned for an increase in child support and appellant petitioned for a reduction in support payments due to the fact that one of the two children had reached majority. The order here in question was entered based upon the petition, other pleadings, the agreement between the parties and financial affidavits filed by the parties. No testimony or other evidence was presented to the court.

The original decree of divorce was entered on May 7, 1976. It incorporated by reference the agreement between the parties relating to child custody and support. The terms of the agreement provided, among other things, that the appellant would pay the sum of $250 per month to the appellee for the support of their two minor children. The agreement also provided that, upon appellee's remarriage, forty percent of the support payments were to be deposited in a separate fund. Several subsequent orders were entered changing the terms of visitation and arrangements for support payments prior to entry of the order here in dispute. The child support under the parties' agreement had reached $290 per month for the two children when the appellee remarried and the

support was frozen.

The order from which this appeal arises was entered on April 10, 1986. The notice of appeal attempts to have the prior orders and the separate agreement reviewed and modified or reinstated. The main argument is that the court used the child support chart in an arbitrary and discriminatory manner. The court followed the chart precisely to the top income figure and when the appellant's income went beyond the chart the chancellor started all over again. The result was that instead of the current payments of $290 per month for two children, the appellant was ordered to pay $338 per month for one. The chancellor also eliminated the provision which provided for forty percent of the support to be deposited in a separate fund.

Apparently the parties agreed that the chancellor would decide the case without benefit of testimony or other additional evidence. Since the appellant contends the chancellor erred, it was his duty and responsibility to present to this Court sufficient evidence, argument, and citation of authority to prove his argument. He has not done so. Neither has he shown that there was no evidence to support the chancellor's decree.

We first discuss the proper use of the family support chart found in the Domestic Relations Handbook published by the Arkansas Bar Association. It is referred to in Ark. Stat. Ann. § 34-1211(a) (Supp. 1985), which states:

> In determining a reasonable amount of support to be paid by the non-custodial parent, the court shall refer to the most recent revision of the family support chart found in the Domestic Relations Handbook . . . and may use such in determining the amount of support to be ordered.

Although we have not previously discussed the extent to which the support chart should be considered by the trial courts, we have no hesitancy whatsoever in holding that the courts are required to refer to the chart but are not bound to set support payments in accordance with the exact terms thereof. The statute clearly states the courts "may" use the chart in determining the amount of support. This is simply another manner of stating that the degree of dependence upon the chart is left to the sound discretion of the chancellor. There are numerous other matters which have a

strong bearing in determining the amount of support. It is error to change the amount of support where there is no evidence submitted to show a change in circumstances. *Meeks* v. *Meeks*, 290 Ark. 563, 721 S.W.2d 653 (1986).

By statute the chancery courts are required to make such orders touching upon the care and support of children as from the circumstances of the case shall be reasonable. Ark. Stat. Ann. § 34-1211(a). This Court stated the basic considerations for establishing child support in *Barnhard* v. *Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972). There we stated:

> In considering the amount to be contributed for child support, the court should consider the needs of the children, the assets of each parent, their respective ages, earning capacities, incomes and indebtedness, state of health, future prospects and any other factors which will aid the court in reaching a just and equitable result.

The law has not substantially changed since *Barnhard*. This Court and the Court of Appeals have continued to apply the standard criteria used in *Barnhard*. See *Perkins* v. *Perkins*, 15 Ark. App. 82, 690 S.W.2d 356 (1985), and concurring opinion of Glaze, J.

■ There is an argument by the appellant that certain remaining conditions of the agreement between the parties should have not been changed by the chancellor. However, he admits that *Williams* v. *Williams*, 253 Ark. 842, 489 S.W.2d 774 (1973), among others, holds that such separate agreements, even if incorporated into the decree, cannot diminish the power of the court to modify support upon a determination of a change of circumstances. *Williams* is still sound law.

■ What change of condition is required before the amount of child support should be changed? In *Glover* v. *Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980), we affirmed the chancellor's refusal to find a change of conditions and in doing so stated:

> The decree recited that the "defendant is paying considerably less than the support chart recognizes as equitable based on his net earning capacity." However, [the chancellor] found that the appellant was not entitled to an increase in child support. Obviously, the chancellor recognized that

any reference to "a chart" is only one factor in making his decision.

Clifford v. *Danner*, 241 Ark. 440, 409 S.W.2d 314 (1966), holds that no order for child support is ever res judicata or so final that the obligations of a parent to the child are not subject to modification. The decisions of this Court have for many years adopted the rule that a trial court always has the right to review and modify child support payments in accordance with changing circumstances and may increase or reduce the payments as warranted in each case. *Johnston* v. *Johnston*, 241 Ark. 551, 408 S.W.2d 885 (1966) and *Lively* v. *Lively*, 222 Ark. 501, 261 S.W.2d 409 (1953).

Without attempting to enumerate all of the various matters which should be considered in determining whether there has been a change in circumstances warranting adjustment in child support, we have considered such things as: remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change of custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child support chart.

We cannot say on the record whether the court felt bound by the amounts listed in the child support chart or whether he merely used it as a guide. The support chart *is* to be considered by the trial court along with other relevant factors. However, the chart is only a guide and the amount of support is a matter within the reasonable discretion of the chancellor after consideration of all relevant information. The decree in the present case stated that all of the necessary considerations were taken into account by the chancellor. The record does not reflect the considerations relied upon by the chancellor. The case apparently was submitted to him based upon the pleadings, affidavits, and the file. Therefore, we cannot say the chancellor was clearly wrong.

Affirmed.

Vernon Ray COPE *v.* STATE of Arkansas

CR 87-13 730 S.W.2d 242

Supreme Court of Arkansas
Opinion delivered June 8, 1987

Val P. Price, for appellant.

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

STEELE HAYS, Justice. Vernon Ray Cope was convicted of two counts of raping his daughters, Jennifer and Debra, between December 1, 1984 and August 12, 1985. Cope was convicted and received two consecutive life sentences in the Arkansas Department of Correction. On appeal, four assignments of error are presented. We affirm the judgment.

Sufficiency of the evidence as to Jennifer Cope

Cope contends there was insufficient evidence to support his conviction of raping Jennifer. He points out the state must prove the sexual intercourse was the result of forcible compulsion, or that it occurred after the effective date of Act 281 of 1985, neither of which, he urges, the state proved.

On March 7, 1985 Act 281 became effective.[1] The act provides that one commits rape by engaging in sexual intercourse with another person either by forcible compulsion or, regardless of compulsion, if the other person is less than fourteen years of age. Previous to Act 281, the specified age was eleven. Since Jennifer was born on May 6, 1973 the state must prove that sexual intercourse occurred after March 7 or was accomplished by forcible compulsion. Cope insists that there was no proof of either.

We need not decide whether Jennifer's testimony that her father would remove her clothes, have sexual intercourse with her, which was painful, and warn her not to tell anyone, meets the statutory requirement of forcible compulsion. Jennifer testified that her mother attended classes on Tuesday and Thursday nights and that these episodes regularly occurred during her mother's absences. The classes ended in May 1985. Jennifer also testified the acts continued until she was removed to a foster home in mid-August 1985. We believe the evidence was sufficient that the offenses occurred after the effective date of Act 281 while Jennifer was less than fourteen years of age.

Sufficiency of the evidence as to Debra Cope

Cope submits the proof was insufficient to support his conviction of the rape of Debra. The child's testimony contained a number of inconsistencies— she said her father had not touched

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[1] Ark. Stat. Ann. § 41-1803 (1985 Supp.)

her private parts but answered "yes" when the question was repeated. Nor was there any corroboration of her testimony, including any physiological evidence of intercourse.

We concede the inconsistencies in Debra's testimony, but these flaws are relevant to credibility rather than substantiality. *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980). When asked what would happen after her father "threw her on the bed," Debra answered, "He would put his private in my private." The uncorroborated testimony of a rape victim is sufficient to support the verdict. *Smith* v. *State*, 277 Ark. 64, 638 S.W.2d 692 (1982). Debra's testimony was corroborated to a degree by the statement of the appellant himself to the police. He admitted having sex with Jennifer "a lot more than 2 times" and said he might have "played with Debra's [vagina], I don't know. I am a sick man."

Admission of Cope's Third Statement

The third point concerns the admission of Cope's third statement, given after he had taken a polygraph examination. Miranda warnings had been given twice previously, once just prior to the polygraph. However, the warnings were not repeated immediately following the test and Cope maintains this omission fatally taints the statement. We disagree. There is no requirement that the Miranda warnings, when properly given, must be repeated in each instance. Cope had twice been given the warnings, professed his understanding of them and gave his third statement shortly after the second warnings. *Wyrick* v. *Fields*, 459 U.S. 42 (1982).

The argument that the language of the statement is "dubious" was not made to the trial court and the argument that Cope did not understand his rights is refuted by the record, which we have reviewed independently on appeal. *Williamson* v. *State*, 277 Ark. 52, 639 S.W.2d 55 (1982).

Bill of Particulars

The final contention is that the court should have granted a motion by the defense for a bill of particulars specifying the date, time and place the acts occurred. Cope relies on *Bliss and Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984), where

we reversed and remanded on several grounds, including the failure of the state to furnish a requested bill of particulars. In *Bliss* the defendants were charged with rape and deviate sexual activity and by their motion for a bill of particulars they sought to determine which of the two offenses they were alleged to have committed. Unlike *Bliss*, in this case the prosecutor informed defense counsel that the state's case would consist of sexual intercourse with each child, accompanied by penetration and fondling. We have recognized that the trial court has some discretion under Ark. Stat. Ann. § 43-1006 (Repl. 1977) in granting motions for a bill of particulars and we are not shown that the denial of the motion worked to the prejudice of Vernon Cope. *Limber* v. *State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

The judgment is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent from that part of the opinion which affirms the conviction for the rape of Debra Cope, the younger daughter. Not only was there no substantial evidence that Debra had been raped, there was positive evidence that sometime later she was still a virgin — her hymen was still intact. The examining physician found no evidence of sexual abuse or intercourse. The only evidence was Debra's testimony.

The rape of both girls is alleged to have occurred between December 1984 and August 12, 1985. When the girls were first interviewed, Jennifer said she had been raped and Debra stated she had not been raped or molested. However, after the video-taped statement of her sister was taken, Debra then stated she had been raped in exactly the same manner as her sister testified she had been raped.

In June of 1986 the video depositions of the girls were taken. Debra did not remember telling the investigators that the appellant had not raped her. She testified positively that the appellant would get on top of her and "put his private in my private." Her testimony was clearly that the appellant had vaginal intercourse with her. There was never any other evidence offered to substantiate her statement. The examining physician found absolutely no evidence to support her story. Since she at first denied that appellant had even touched her private parts and

only changed her story after Jennifer described how she had been raped, I believe that she was simply following the leader.

I have no disagreement with our cases which have upheld rape convictions on the testimony of the victim. In all those cases, however, there was also physical evidence that a rape had actually occurred. In this case no such evidence was presented. The appellant admitted that he had indeed had vaginal intercourse with Jennifer; however, he steadfastly denied any misconduct with Debra.

There is no question that child molesters and those who commit rape should and must be dealt with rather harshly. There is presently a hue and cry for vengeance in such cases. That is fine unless it goes so far as to automatically condemn anyone charged with such an offense. Young children are learning from the news media and other sources that accusing an adult with such a crime is one way of getting even with them for any grievance the child might have. An accused should still be considered innocent until reliable and positive proof of guilt is established. However, I fear society and the law is rapidly reaching the point where the mere accusation by a child that an adult has molested him or her is sufficient to send the accused to prison for life.

There is a substantial difference in the situation where a child reports being molested at the first opportunity and where the child reports such an offense many months later after a great deal of coaching. In the present case, other than the alleged victim's testimony, there was no evidence that Debra had been raped. In fact, the doctor's finding that her hymen was still intact indicates lack of sexual intercourse.

The appellant received a life sentence for raping Jennifer. Unless clemency is granted he will spend the rest of his life in prison. I do not feel that the second life sentence for raping Debra is founded upon substantial evidence.

Mary Katherine BASINGER *v.* Dixon BRIDGES, Executor of the Estate of Edna Greig, Deceased

86-287 730 S.W.2d 486

Supreme Court of Arkansas
Opinion delivered June 8, 1987

Walters Law Firm, P.A., for appellant.

Michael J. Medlock, for appellee.

DAVID NEWBERN, Justice. The appellant, Mary Katherine Basinger, is a niece and beneficiary named in the will of Edna Greig, deceased. The will provided, in part:

> I give, devise and bequeath to my niece, Mary Katherine Basinger of Route 1 Box 185, Huntinton, Arkansas, my savings at First Federal Savings and Loan Association in Van Buren, Arkansas. Her name has been placed on this account.

Upon the death of Edna Greig there were three savings accounts at First Federal in Van Buren, but only one of them had the appellant's name on it as a pay-on-death beneficiary. The appellant contended she was entitled to all three accounts. The probate judge held she was entitled only to the one with her name on it because the will was unambiguous in saying so. The appellant put on evidence tending to show that the decedent intended her to have all three of the accounts. We agree with the judge that the use of the term "this account" was unambiguously

singular. Thus we affirm the probate judge's decision.

There is no factual dispute. The appellant testified that the decedent told her on many occasions that she was leaving her enough money to build a house, the implication being that all three accounts would contain enough money to build a house, but that the one account did not. The other evidence the appellant produced included testimony by the lawyer who prepared the will. He did so from notes which had been prepared by the decedent. Those notes, in pertinent part, said:

> I give & bequeath to my niece Mary Katherine Basinger Huntington, Ark. Rt 1 Box 185 Savings at 1st. Federal & loan co. Van Buren, Ark her name on my book.

The lawyer testified that the testatrix told him that the appellant would get a little more than the testatrix's sister who was being given a $10,000 bequest, but "she [the sister] will understand." The appellant argued that the evidence that she was to get more than the sister meant that the testatrix intended to give her more than the one account which was only $9,000 at the time the will was made. Considering the testatrix's remark that the appellant would get a little more than the sister as a prediction, it turned out to be accurate. The testatrix lived long enough for the account with the appellant's name on it, which was $9,000 at the time the will was made, to grow to over $12,000, while the bequest to the sister remained static.

The lawyer's testimony was that when the will was made he did not know there was more than one account at First Federal of Van Buren. It is clear, however, that all three accounts were in existence when the will was prepared. Although he did not know of the other accounts, he did ascertain that there would be assets not disposed of if he followed the notes the testatrix had given him, so he suggested a residuary clause. Such a clause was added, and the residuary beneficiaries were named by the testatrix for inclusion.

The precedent signed by the probate judge said that the words, "her name on my book," were and were meant to be singular, and thus applied only to one account. The order signed by the judge said the will was unambiguous and showed the testatrix's intent to be that only one account was to pass to the

appellant. The appellant argues that, had the testatrix merely said she was leaving her savings at First Federal of Van Buren to the appellant, there could be no question but that all three accounts were intended to go to her. However, the added words, "her name has been placed on this account," negate the intention to bequeath more than one account to the appellant.

The probate judge recognized the unambiguity of the reference to a single account, and stated in the precedent for the order that the words of the decedent, "her name on my book" supported the appellees' contention that the decedent intended that only one account pass to the appellant. That was the judge's conclusion, and we cannot disagree. When the language of the testatrix is unambiguous and leaves no doubt as to her intent, we need not look beyond that language in construing the will. *Mills' Heirs* v. *Wylie*, 250 Ark. 703, 466 S.W.2d 937 (1971); *Quattlebaum* v. *Simmons National Bank of Pine Bluff*, 208 Ark. 66, 184 S.W.2d 911 (1945).

Affirmed.

PURTLE and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. I believe the will was ambiguous and hence, the trial court should have taken proof of the intent of the testatrix. Her will makes an unqualified bequest of "my savings at First Federal Savings and Loan Association in Van Buren, Arkansas." Whether those savings are in one account or in several accounts, the language is all inclusive. The following sentence— "Her name has been placed on this account"— creates the problem, as it cannot be squared with the fact there were three accounts as opposed to one. The two sentences cannot be reconciled and appellant was entitled to offer proof as to what the testatrix intended. In *Martin* v. *Simmons First National Bank*, 250 Ark. 774, 467 S.W.2d 165 (1971) we summarized the law:

> "Whenever there is uncertainty as to the intention of a testator, which cannot be clearly ascertained when the words of his Will are considered in their ordinary sense, the court must read the language employed by the testator in the light of the circumstances existing when the Will was written and in order to put itself in the place of the testator,

as nearly as possible, may consider all surrounding facts and circumstances known to him, including the condition, nature and extent of the testator's property, his relations with his family and other beneficiaries named, the motives which may reasonably be supposed to influence him, the subject matter of the gift, the financial condition of the beneficiary and other such matters." *Murphy* v. *Morris, Executor*, 200 Ark. 932, 141 S.W.2d 518, *Rufty* v. *Brantley*, 204 Ark. 32, 161 S.W.2d 11; *Thompson* v. *Arkansas National Bank of Hot Springs, Trustee*, 220 Ark. 802, 249 S.W.2d 958; *Eagle* v. *Oldham*, 116 Ark. 565, 174 S.W. 1176."

I would reverse and remand.

PURTLE, J., joins.

Mahlon A. MARTIN, Director, Department of Finance and Administration, et al. *v.* RIVERSIDE FURNITURE CORPORATION

86-273 730 S.W.2d 483

Supreme Court of Arkansas
Opinion delivered June 8, 1987
[Rehearing denied July 13, 1987.*]

* Hickman, J., would grant rehearing.

Timothy J. Leathers, Joseph V. Svoboda, Wayne Zakrzewski, Kelly S. Jennings, Ann Kell, Joe Morphew, Philip Raia, and *Robert Jones*, by: *John Theis*, for appellant.

Don A. Smith and *Thomas Harper*, for appellee.

DAVID NEWBERN, Justice. This appeal challenges a use tax imposed on advertising materials. Riverside Furniture Corporation is an Arkansas corporation, located in Fort Smith, which manufactures furniture for sale throughout the United States. An audit was conducted of Riverside's records and books by the Department of Finance and Administration for the period of 1979-1982. The auditor found invoices for advertising materials, catalog inserts, photographs, and ad slicks. These materials were purchased from out-of-state companies for Riverside to distribute to its sales representatives and dealers outside Arkansas.

The materials were delivered to the Fort Smith office where they were collated, packaged, and mailed to the sales representatives and dealers located outside Arkansas.

On July 7, 1982, Riverside received a notice of assessment of use tax, penalty, and interest. After exhausting its administrative remedies, Riverside filed suit alleging the advertising materials were exempt from taxation. The parties stipulated that some of the advertising materials were incorrectly included in the assessment. The tax paid on those items would be refunded. The chancellor determined that the remaining items were exempted because they had not "finally come to rest" in Arkansas. We disagree.

The standard of review for tax exemption cases is trial *de novo* upon the record, and we will not reverse the chancellor's findings of fact unless they are clearly erroneous. *Western Paper Co.* v. *Qualls*, 272 Ark. 466, 615 S.W.2d 369 (1981); *S.H. & J. Drilling Corp.* v. *Qualls*, 268 Ark. 71, 593 S.W.2d 178 (1980). The party claiming the exemption has the burden of proving that he is entitled to the exemption beyond a reasonable doubt. *Ragland* v. *K-Mart Corp.* 274 Ark. 297, 624 S.W.2d 430 (1981); *Western Paper Co.* v. *Qualls, supra.* Tax exemption provisions must be strictly construed against exemption with any doubt justifying taxation. *Arkansas Beverage Co.* v. *Heath*, 257 Ark. 991, 521 S.W.2d 835 (1975).

Ark. Stat. Ann. § 84-3105(a) (Repl. 1980) provides for the imposition of a use tax. That statute reads:

> There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property . . . purchased for storage, use or consumption in this State. . . . This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. . . .

The last sentence of the statute recognizes the constitu-

tional limitation of a state's imposition of a tax on goods in interstate transit. If the goods have not "come to rest" within the state, they are still in the stream of interstate commerce, and a tax may not be levied. The question we are presented with here is whether the advertising materials came to rest within this state. If so, a tax on the materials does not impermissibly burden interstate commerce.

We have considered this exemption on two previous occasions. First, in *American Television Co.* v. *Hervey*, 253 Ark. 1010, 490 S.W.2d 796 (1973), a television station contracted with an out-of-state firm to furnish movies for broadcasting on the station. After the movie was shown, it was returned. A use tax was imposed on the video tapes. We determined the tapes had come to rest within the state for the intended use — to be broadcast.

In *Skelton* v. *Federal Express Corp.*, 259 Ark. 127, 531 S.W.2d 941 (1976), Federal Express purchased eighteen Falcon Jet airplanes. These planes were delivered to Federal Express offices in other states, but the planes were transported to the Little Rock office for modifications before they could be used for delivery service. It took about fifty days for each plane to be modified, then the planes were sent to Memphis. A use tax was imposed on the planes. We upheld the imposition of the use tax because the modifications were not incidental to the transportation of the aircraft.

[redacted] The advertising materials did "finally come to rest" in Arkansas within the meaning of the statute. The materials were purchased by Riverside for mailing to its sales representatives and dealers who are all outside the state.

The materials were shipped to Fort Smith where they were, albeit for a short period, removed from interstate commerce for the purpose of packaging, addressing, mailing, and, in the case of the catalog inserts, collating, before being sent on to the sales representatives. The evidence also showed that Riverside retained a number of the items in Fort Smith to meet increased demand or emergencies.

We hold therefore that the advertising materials are not exempted from the use tax. The materials came to rest within the state and, during the time they were processed for dispersal from

Fort Smith, were not a part of interstate commerce. The use tax may properly be imposed. *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939); *Inter-State Nurseries, Inc.* v. *Iowa Dept. of Revenue*, 164 N.W.2d 858 (Iowa 1969).

The citation to the *Gallagher* case leads us to consider a point that was not addressed by either party. The case of *Burlington Northern Railroad Company* v. *Ragland*, 280 Ark. 182, 655 S.W.2d 437 (1983), implies that *Gallagher* is no longer good authority for determining whether an item is within the stream of interstate commerce. That implication is based on the United States Supreme Court decision of *Complete Auto Transit Inc.* v. *Brady*, 430 U.S. 274 (1977), which we said set out a new test for determining such matters.

We take this opportunity to recognize that *Brady* does not address that question of whether an item's transit through interstate commerce is continuous or sufficiently interrupted so as to come to rest. *Brady* involves the question of whether a foreign entity has a sufficient connection with the state to allow the state to impose a tax on the entity's activities. Any language in *Burlington* that extends the *Brady* holding beyond this point is incorrect.

The dissenting opinion cites no authority for its stark and incorrect proposition that this decision encroaches on the legislative function. The error of the dissent becomes apparent when one asks how it would be any more "interpretive" and less "legislative" if we were to reach the opposite result. If the suggestion is meant to be that the result we reach is an unreasonable interpretation, we simply must disagree. Advertising materials are "used" when they "come to rest" long enough to be sent to those sought to be influenced by them. We are interpreting § 84-3105(a) in the manner we think intended by the general assembly.

Reversed.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. I would affirm the chancellor because the advertising material was not used in Arkansas and it did not finally come to rest within the state for taxation purposes.

Goods and merchandise purchased in Arkansas are generally subject to a sales tax. Goods and merchandise purchased outside Arkansas and brought into the state for use in the state are subject to the use tax. The legislature has recognized, and rightly so, that goods merely passing through the state, not used here, should not be taxed. In fact Ark. Stat. Ann. § 84-3105(a) (Repl. 1980) says:

> This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. . . .

The advertising materials here did not finally come to rest in Arkansas. The only "use" was the packaging and mailing of the material out-of-state.

In *Burlington Northern Railroad Co., et al* v. *Ragland*, 280 Ark. 182, 655 S.W.2d 437 (1983), we denied the application of the use tax to railway cars loaded for the first time in Arkansas. In *American Television Co.* v. *Hervey*, 253 Ark. 1010, 490 S.W.2d 796 (1973), we upheld the use tax on video tapes used by a television station. Both of these decisions were right in my judgment. The case of *Skelton* v. *Federal Express Corp.*, 259 Ark. 127, 531 S.W.2d 941 (1976), is wrong in my opinion. A use tax was applied to airplanes transported to Arkansas, not for use, but for modifications. The airplanes were never used in Arkansas, nor intended for use here, and to tax them at their market value was, in my judgment simply to rewrite the use tax law. Courts are often accused of "legislating." There is, of course, a difference between interpreting legislative acts and simply changing them. The former is permissible — the latter is an abuse of power for which there is no direct remedy. The majority decision in this case is a clear encroachment by this court on the power of the legislature.

Jerry Wayne PEMBERTON *v.* STATE of Arkansas

CR 86-178 730 S.W.2d 889

Supreme Court of Arkansas
Opinion delivered June 8, 1987

Bill E. Ross, for appellant.

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

DAVID NEWBERN, Justice. The appellant was accused of capital murder for having killed Charles E. Brown. He was convicted of first degree murder and sentenced to forty years imprisonment. Three points of appeal are raised, the first of which

is that the state was allowed to ask one of its own witnesses about a prior inconsistent statement the witness had made. Secondly, the appellant contends that the evidence was insufficient to support the jury's verdict. His third point is that the trial court erred in failing to instruct the jury on the lesser included offense of manslaughter. We hold it was not error for the state to be allowed to elicit testimony from its own witness that she had made a prior inconsistent statement and that there was no error in failing to instruct on manslaughter. There was ample evidence to support the conviction.

On Sunday, March 3, 1985, the appellant was found asleep and intoxicated by the side of the road in a truck belonging to the decedent, Charles E. Brown, with the motor running. Police officers arrested him for public intoxication. When they asked the appellant whose truck he was driving, he answered that it belonged to Brown. The appellant was released on bond, and the truck was released to the appellant's brother who had come to the place where the appellant was being held. During the next few days, the appellant drove around in the decedent's truck.

The decedent's son, Danny Brown, an Arkansas State Trooper, lived in Piggott. The decedent's home was in or near Leachville. They stayed in pretty close touch. Danny Brown testified that after a day of being unable to reach his father by telephone, he called another state trooper, Sergeant Bill Corwell, whom he asked to check on his father. Sergeant Corwell went to the elder Brown's home and found him there dead on the evening of March 5, 1985. The state medical examiner testified that the death was caused by a gunshot wound just below the ear. A ballistics expert testified that the wound was caused by a Marlin, Model 60, .22 caliber rifle. Although some $1,000 was found concealed in the decedent's home, no money was found in his pockets.

There was undisputed testimony that it was known that the decedent carried large sums of money in his pocket because of his business as a "trader" who commonly bought and sold items to earn his living. There was also testimony that the appellant was out of a job and had no other source of income and that he had had access to a Marlin .22 rifle which belonged to his brother. The appellant testified that he and Wilma had been out shooting the

rifle near the time the crime occurred, but that he had sold the rifle to a person at a bar for $25, and that this sum, plus others he had obtained by gambling had enabled him to have the money to post the bond when he was arrested for public intoxication, and was the source of the money observed on his person by Wilma, between March 3 and March 5, and by another woman, Madonna McElhaney, with whom he had consorted for a time on March 3.

Wilma Honeycutt's brother, Jeffery Chadwick, testified that on a day early in March the appellant and Wilma came to the apartment occupied by Jeffery and his wife, Tammy, and asked if they could stay the night. He noticed a pickup truck near his apartment when the appellant and Wilma arrived, and he asked the appellant if they had arrived in the truck. The appellant denied it. On March 5 or 6, Jeffery returned home from work, and he, Tammy, the appellant, and Wilma were watching the evening news which reported the homicide and indicated the authorities were searching for a thirty-five-year-old Leachville man. At that point, the appellant and Wilma went outside, and when they returned, the appellant spoke with Jeffery privately. He told Jeffery he "was the one that done it" and asked Jeffery to trade him his tennis shoes for the appellant's boots and to let the appellant use a sleeping bag. The appellant became the subject of a manhunt lasting several days. He gave himself up as officers were closing in on him near a levee on Eight Mile Creek.

At the commencement of the trial, counsel for the appellant made a motion in limine to prohibit the prosecution from asking Wilma about a statement she had made to the police to the effect that the appellant had told her at Jeffery's house that he, the appellant, had committed the crime. Wilma's testimony, as presented by the state, was that the appellant had said only that he was the one they were looking for, the inference being that he was being sought because he had been driving about in the decedent's truck. When the prosecutor began to ask Wilma about her previous statement, the appellant's counsel objected, and the court initially ruled that the prosecution could not ask about her prior inconsistent statement. However, in cross-examination of Wilma, the appellant's counsel asked: "Did you ever hear him, Jerry, make any statement, 'I'm the one that done it,' or 'the one they're lookin' for?' " Wilma responded: "I did not."

At that point, the prosecutor objected, saying that that had been the question he had been denied permission to ask, and the court ruled that the appellant's counsel had "opened the door" to allowing the prosecution to inquire. He then permitted the prosecutor to ask Wilma whether she had ever made a contradictory statement, and she replied that she had.

1. Impeachment

The appellant argues that *Roberts* v. *State*, 278 Ark. 550, 648 S.W.2d 44 (1983), is precedent for disallowing any reference whatever to Wilma's previous inconsistent statement. In that case, the son of the appellant told police he saw his father kill his mother with a pistol. In subsequent statements, and in his testimony, he said only that he was in another room and heard the shot. The first statement was introduced through the testimony of a deputy sheriff who read it to the jury. We held that was improper, but went on to say:

> We still must decide whether the trial court erred in allowing the State to impeach Richard, its own witness, with his . . . hearsay statement by asking him if he had in fact made the prior inconsistent statements. Under the circumstances of this case we believe the probative value of such testimony was far outweighed by the danger of unfair prejudice. Therefore, this evidence should have been excluded under Rule 403 . . . .

Thus, without saying why it was unfairly prejudicial, we held that "in the circumstances of [that] case," upon retrial, the state could not inquire whether the witness had made a prior inconsistent statement.

Whatever the unfair prejudice may have been in that case, we do not find it here. The ruling in the *Roberts* case that the prior statement itself could not be quoted into evidence as part of the impeachment process was consistent with prior Arkansas cases, and indicated that the adoption of A.R.E. 613 had not presaged any change in that respect. Note, 37 Ark. L. Rev. 688 (1983). However, if we meant to say there that the fact that a reference to, rather than a quotation of, a prior inconsistent statement was unfairly prejudicial because it came in the form of the state's impeachment of its own witness, we failed to take

account of A.R.E. 607. That rule makes it clear that there no longer is a general prohibition against such impeachment. S. Perroni, *Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence*, 1 UALR L.J. 1277 (1978).

In the case before us now, when the appellant's counsel, during cross-examination, asked Wilma whether she had heard the appellant say "he was the one that done it," the prosecutor's objection was that that had been the question he had been denied the privilege of asking. That was incorrect, as he had wanted to ask whether Wilma had previously made an inconsistent statement, not what Wilma had heard the appellant say. The trial judge found that the appellant's counsel had "opened the door" to allowing the prosecutor to ask, on redirect examination, whether Wilma had made a prior inconsistent statement. That ruling was correct because a party may inquire of a witness on redirect examination with respect to testimony given on cross-examination, and the scope of redirect examination is largely within the discretion of the trial judge. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Stovall* v. *State*, 233 Ark. 597, 346 S.W.2d 212 (1961). While the *Parker* and *Stovall* cases are not cases in which impeaching testimony was taken on redirect examination, in view of Rule 607, discussed above, we do not find that distinction to be significant.

The state's argument on this point is that no error was committed because the appellant's statement to Wilma was an admission and thus qualifies for the exception to the hearsay rule found in A.R.E. 801(d)(2). That argument misses entirely the point that the question and answer complained of by the appellant went to Wilma's prior inconsistent statement, that is, what she had said, rather than asking her what the appellant had said. However, given our conclusion that the trial court did not abuse its discretion in permitting the question and the answer, we can disregard the state's argument and still affirm on this point.

2. Sufficiency of the evidence

There was no eyewitness to the killing of the decedent. However, circumstantial evidence which is consistent with guilt of the appellant and inconsistent with other reasonable conclusions may form the basis of a verdict of guilty, and the role

of this court is only to determine whether the evidence was substantial. *Ward* v. *State*, 280 Ark. 353, 658 S.W.2d 379 (1983); *Blaney* v. *State*, 280 Ark. 253, 657 S.W.2d 531 (1983). In reviewing the evidence, we need only look to that which is favorable to the appellee to determine its sufficiency. *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987).

The appellant's argument on this point is that he gave a plausible explanation for his having been in possession of the decedent's truck, *i.e.*, he stole it, and of his having recently been in possession of a rifle such as the one which killed the decedent, *i.e.*, he and Wilma were shooting it for fun, and of his being in possession of money despite lack of a job, *i.e.*, he won it and sold the rifle. (He does not, however, explain Jeffery Chadwick's testimony that the appellant admitted to him having killed the decedent.) He argues that the jury may not be allowed to disregard the testimony he presented, citing *Barnes* v. *State*, 258 Ark. 565, 528 S.W.2d 370 (1975). However, the appellant gives no reason for us to conclude that the jury ignored his testimony as opposed to merely not believing it which, of course, is the jury's prerogative.

3. Lesser included offense

[redacted] The jury was instructed as to capital murder, first degree murder, and second degree murder. The appellant was found guilty of first degree murder. He argues it was error for the court to have refused his proffered instruction on manslaughter. There is no error in failing to give an instruction on one lesser offense if other lesser offenses were covered by the instructions given and the jury returned a verdict of conviction on an offense greater than the least offense instructed upon. *See Sherron* v. *State*, 285 Ark. 8, 684 S.W.2d 247 (1985); *Jones* v. *State*, 282 Ark. 56, 665 S.W.2d 876 (1984). There is no prejudice to the accused when that occurs.

Affirmed.

William C. HEDRICK, Jr. *v.* STATE of Arkansas

CR 87-1 730 S.W.2d 488

Supreme Court of Arkansas
Opinion delivered June 8, 1987

Thomas M. Carpenter, for appellant.

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

TOM GLAZE, Justice. This Rule 37 appeal ensues from a murder to which appellant pled guilty on March 17, 1975, over twelve years ago. Appellant committed the murder of Louis G. Boyd during the perpetration of a robbery. He was charged with murder in the first degree pursuant to Ark. Stat. Ann. § 41-2205 (Repl. 1964), but he later pled guilty to capital felony murder under Ark. Stat. Ann. § 41-4701 (Supp. 1973), and was sentenced to life without parole. Appellant now seeks post-conviction relief based upon the argument that he pled guilty to capital felony murder, a crime with which he was never charged. Thus, he claims the sentence given him was illegal, and, instead, he is entitled to have it set aside or reduced to life imprisonment — the sentence for first degree murder, the crime with which he was charged. We reject appellant's argument, as did the trial court.

Rule 37.2(c) of the Arkansas Rules of Criminal Procedure provides that an attack on a conviction pursuant to Rule 37 must be made within three years from the date of commitment, unless the ground for relief would, if proven, render the conviction absolutely void. *Travis* v. *State*, 286 Ark. 26, 688 S.W.2d 935 (1985). Of course, the conviction at hand was not

challenged within the three-year period, so appellant is left only with the argument that his conviction was absolutely void under the provisions of Rule 37.2(c) or was illegal under Ark. Stat. Ann. § 43-2314 (Supp. 1985) — a statutory provision that authorizes a circuit court to correct an illegal sentence at any time. We hold that appellant has demonstrated no entitlement to relief under either of these provisions.[1]

We first should point out that we agree with appellant's underlying contention that a person cannot, under due process, be convicted of a crime for which he was not charged. In support of this fundamental proposition, we note *Bosnick* v. *State*, 248 Ark. 846, 454 S.W.2d 311 (1970), wherein we stated that the State's law in effect then was not intended to enable the State to charge one "class of murder" (premeditated murder) and then prove a different class (murder in perpetration of a robbery). Stated in other terms, a conviction upon a charge not made would be sheer denial of due process. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

The *Bosnick* case, of course, involved a conviction that resulted from a jury trial, and the case here involves a conviction that resulted from appellant's plea of guilty to a charge of felony murder. Such a distinction, however, in no way relieves the State's burden to gain a conviction to the crime with which it charges a defendant. In *Switzer* v. *Golden, Judge*, 224 Ark. 543, 274 S.W.2d 769 (1955), the petitioner was charged with one specific instance of selling liquor in a dry territory, a misdemeanor. He pled guilty, however, to a third offense of selling intoxicating liquor in a dry territory, a felony. Our court held the trial court exceeded its jurisdiction in sentencing the defendant to prison on a plea of guilty to a felony when he was charged only with a misdemeanor. 224 Ark. at 545.

While, then, acknowledging the validity of appellant's argument that he could not legally plead guilty to a crime for which he was not charged, we cannot agree that he demonstrated such an error occurred. The record, as presented to us, is

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[1] While appellant advocates the applicability of § 43-2314, his sentence was imposed in 1975, and we have held that § 43-2314 is not available to correct a sentence if the sentence was imposed before the statute became law in 1983. *Williams* v. *State*, 291 Ark. 255, 724 S.W.2d 158 (1987).

incomplete and confusing. Unquestionably, appellant committed a murder during a robbery for which the State, at that time, had the option of charging him with either capital felony murder or first degree murder. The facts underlying either of these crimes were the same, and those facts were recited in the information filed against appellant; the information was titled "capital felony information," but, in the body of the information, he was charged with committing the crime of "murder in the first degree," in violation of Ark. Stat. Ann. § 41-2205 (Repl. 1964). The State later filed an amended information bearing the same caption and criminal charge but changing only the date the robbery-murder occurred. No conviction judgment appears in the record, nor is there a transcript of the hearings at which appellant entered his plea and was sentenced. The record does reflect appellant's plea statement wherein he and his attorney acknowledged he was charged with capital felony murder and that he could, upon entering a plea, receive a sentence of from life without parole to death. Appellant signed that statement, admitting his guilt to capital felony murder. Too, his attorney signed the statement, indicating that he had discussed the plea statement with appellant, that appellant understood the statement and its contents and appellant's guilty plea was consistent with the facts as appellant related them to the attorney. The only other matter of record of what occurred when and after appellant was sentenced is a penitentiary commitment order remanding appellant to the Department of Correction for life without parole. That order reflects March 17, 1975, as the date of the "Proceedings" and the style contained the words, "Indictment for Murder In First Degree."

As we have already noted, appellant, in his claim for post-conviction relief, must show his conviction judgment is absolutely void or illegal. In other words, the burden is on appellant, as the petitioner, to demonstrate that the judgment entered was a nullity, and the presumption that a criminal judgment is final is at its strongest in collateral attacks on the judgment. *Travis* v. *State, supra.* Here, as we mentioned earlier, the record is incomplete, and in examining what is in the record, we are left with the impression that something may well have happened at the sentencing hearing that could reconcile the ambiguity caused by the filed documents reflecting the dual use of

the terms (crimes), first degree murder and capital felony murder.

In oral argument, appellant's counsel conceded the sentencing record of what occurred in open court in 1975 no longer exists. Nonetheless, we have held that the appellant has the burden of supplying a transcript of the proceedings below and that burden includes the responsibility of obtaining a transcript or its reconstruction. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In sum, we hold that appellant has not met his burden of showing his conviction is illegal or absolutely void.

In conclusion, we add that one matter is certain from our study of the record before us. Appellant knew the underlying facts of the murder he committed, and both crimes of first degree murder and capital felony murder were mentioned either in the information filed against him or at the time he pled guilty. Also, we know he faced the prospects of a death sentence. He obviously desired to avoid the death penalty by entering his guilty plea, thereby availing himself of a sentence of life without parole. Under these circumstances, we decline to speculate that the appellant, at the time of sentencing, did not knowingly enter a guilty plea to the charge of capital felony murder. Therefore, we affirm.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The appellant was charged by information with first degree murder pursuant to Ark. Stat. Ann. § 41-2205. Before the scheduled trial he decided to plead guilty. The court accepted the guilty plea; however, it sentenced him for capital felony murder pursuant to § 41-4701, a crime for which appellant had never been charged.

This Court has reached the pinnacle of affirmance in this case by upholding the finding of guilt for a crime which was never charged. So far as I am concerned, the sentence of life without parole is as void as a death sentence issued by a municipal judge. Good-bye due process and equal protection.

Jimmie WILBURN *v.* STATE of Arkansas

CR 86-7 730 S.W.2d 491

Supreme Court of Arkansas
Opinion delivered June 8, 1987

Appellant, pro se.

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

PER CURIAM. Petitioner Jimmie Wilburn was found guilty by a jury of first degree murder and sentenced to life imprisonment. We affirmed. *Wilburn* v. *State*, 289 Ark. 224, 711 S.W.2d 760 (1986). Petitioner now seeks permission to proceed in circuit court pursuant to Criminal Procedure Rule 37.

Petitioner first requests a copy of the transcript of his trial to enable him to "further prepare and amend" his petition. He does not explain specifically why a copy of the record is necessary to amend the petition and he has not filed a motion to amend in this court. Before a request for transcript will be granted, the petitioner must show that he has some reasonably compelling need for specific documentary evidence to support a particular ground for postconviction relief in the amended petition. *See Chavez* v. *Sigler*, 438 F.2d 890 (8th Cir. 1971). Petitioner does not contend that he has any specific need for documentary evidence.

Petitioner next alleges that he was not afforded the effective assistance of counsel guaranteed by the sixth amendment to the

United States Constitution. He contends that counsel failed to argue that his confession should be suppressed as the fruit of an illegal arrest. As support for the allegation, petitioner argues that there was no probable cause to arrest him, that the arrest warrant was based on uncorroborated information and that the police entered his home without his consent.

[redacted] There is a strong presumption that counsel was effective. *Strickland* v. *Washington*, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that counsel made an error so serious that he was not functioning as the "counsel" guaranteed by the sixth amendment to the Constitution. Second, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial whose outcome cannot be relied on as just. Even if counsel could have made a meritorious motion to suppress, the judgment must stand, unless the petitioner demonstrates that the failure to file the motion had a prejudicial effect on the outcome of the trial. *Strickland* v. *Washington, supra.* A reasonable probability that but for counsel's conduct the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

[redacted] We find no basis to conclude that counsel was ineffective for failing to move to suppress petitioner's confession on the grounds that it was obtained as a result of an illegal arrest. Petitioner himself cites information provided to the police by several persons on which the authorities based their arrest warrant. It was not necessary for the police to have proof beyond a reasonable doubt that petitioner was guilty before arresting him.

With regard to petitioner's allegation that there was no consent to enter his residence, the record indicates that his stepson opened the door for the police. Petitioner does not contend that the stepson was not a resident and capable of giving consent to enter.

[redacted] Petitioner next alleges that counsel erred in failing to object to the introduction into evidence of a handgun which was similar to the murder weapon. Petitioner further alleges that counsel should have objected to testimony by a firearms expert on

the damage a .44 magnum handgun can do. As petitioner does not state where in the record the firearms expert testified about the damage such a gun could inflict or how he was prejudiced by the testimony, the allegation does not warrant consideration. This court will not search the record in an attempt to find factual support for an allegation. *Troutt* v. *State*, 292 Ark. 192, 729 S.W.2d 139 (1987).

We find no basis on which to conclude that counsel was ineffective since petitioner has not shown that he was prejudiced by the display in court of a gun similar to the murder weapon. While it is true that the murder weapon was never found, petitioner said in his confession that the weapon was a .44 magnum Ruger, single-action pistol. The State showed a similar gun to witnesses, but it was made clear that the gun exhibited in court was not the murder weapon. Contrary to petitioner's claim, the gun shown to the witnesses was not introduced into evidence or displayed to the jury in closing argument.

Petitioner alleges that his attorney was ineffective in failing to object to his wife's testifying against him. He bases the allegation on our decision in *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986), which held that the Uniform Rules of Evidence were not validly adopted by the legislature in 1976. Petitioner is correct that the Uniform Rules of Evidence were adopted in an invalid session, thus invalidating Rule 504 which permitted one spouse to testify against the other. Act 14 in 1943 which was in effect at the time of petitioner's trial prohibited one spouse from being called by the opposite party as a witness against the other spouse. This is not to say, however, that counsel was ineffective under the standards of Rule 37 for not objecting to the wife's testimony. The objection raised in *Ricarte* turned on an unusual set of circumstances with respect to which counsel advanced a novel, albeit successful, argument in an obscure area of the law. There can be no doubt that before *Ricarte* other highly competent attorneys faced with the decision of whether to object to testimony by a spouse had failed to recognize the merit in the argument raised in *Ricarte*. This court is not willing to conclude that an attorney is ineffective for failing to ferret out such an issue. As a result, we hold that the failure of an attorney to raise the issue decided in the *Ricarte* case does not constitute ineffective assistance of counsel.

Petitioner next asserts that counsel did not object to the unconstitutional process by which the jury was selected. He contends specifically that the number of black jurors was not in keeping with the percentage of black persons in the community and that the prosecution used its peremptory challenges to exclude black jurors. Counsel filed a motion to quash the jury panel on the grounds that the jury selection process unfairly discriminated against young people and blacks. Since counsel *did* object to the jury's selection process, there is no basis for the allegation that he should have done so. Petitioner has further failed to state facts to establish that the State misused its peremptory challenges. Allegations without factual support do not justify an evidentiary hearing. *Smith* v. *State*, 283 Ark. 264, 675 S.W.2d 627 (1984).

Petitioner finds fault with counsel for not investigating evidence of juror bias. As substantiation for the allegation, he has attached the affidavits of his two sisters and a brother-in-law that they overheard two female jurors making the comments, "We can't let that guy go; that's that man's son." and a male juror saying to a female juror "I know he's guilty." In one of the affidavits, the affiant states that counsel for the petitioner was informed of the jurors' comments and that counsel in turn informed the trial judge. According to the affiant, the judge then told the jury not to discuss the trial outside of the courtroom. The petitioner does not name the jurors or state where in the record the judge's admonition to the jury can be found.

Jurors are presumed unbiased. *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984). Petitioner is responsible for demonstrating actual bias on the part of a juror. *Jeffers* v. *State*, 280 Ark. 458, 658 S.W.2d 869 (1983). The bare allegation that members of petitioner's family overheard unnamed jurors discussing the case is not enough to prove that any particular juror at petitioner's trial was biased.

Finally, petitioner contends that counsel should have objected and requested a mistrial when the prosecutor said in his closing argument that the victim was not there to tell what happened because petitioner had shot him to keep him from telling what he knew. The prosecution is permitted to draw whatever inferences are reasonable from the evidence. *Long* v.

State, 260 Ark. 417, 542 S.W.2d 742 (1976). It was not unreasonable to conclude that the victim was not present to tell his story because he had been killed. Petitioner was tried for aggravated robbery of the victim as well as murder. The mere suggestion in closing argument that petitioner had been motivated to kill the victim by his desire to leave no witness to the robbery was not in itself sufficient to deny petitioner a fair trial. Clearly, the failure to object to the prosecutor's comment was not ineffective assistance of counsel under the criteria of *Strickland* v. *Washington, supra.*

Petition denied.

William Frank PARKER *v.* STATE of Arkansas

CR 86-91 731 S.W.2d 756

Supreme Court of Arkansas
Opinion delivered June 15, 1987

W.H. Taylor and *James G. Lingle*, for appellant.

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

JACK HOLT, JR., Chief Justice. William Frank Parker was convicted of two counts of capital felony murder for which he was sentenced to death; two counts of attempted first degree murder (thirty years imprisonment and $15,000 fine for each); two counts of burglary (twenty years imprisonment and $15,000 fine for each); kidnapping (life imprisonment and $15,000); and attempted capital murder (thirty years imprisonment and $15,000). Parker's capital felony murder convictions were for causing the deaths of James and Sandra Warren in the course of and in furtherance of a burglary. The burglary, as proved by the state, was the entry of the Warrens' home for the purpose of committing therein the murders of the Warrens. The capital felony murder convictions must be reversed because the Warrens' deaths were not caused "in the course of and in furtherance of" a burglary as required by Ark. Stat. Ann. § 41-1501(1)(a) (Repl. 1977), and because the trial court erred in submitting evidence under Ark. Stat. Ann. § 41-1303(3) (Repl. 1977) regarding previously committed felonies as an aggravating circumstance at the penalty phase of the appellant's trial. Parker's remaining arguments contain no reversible error, thus we affirm each of his other convictions.

The relevant facts are basically undisputed as Parker's primary defenses at trial related to his mental capacity at the time of the events. Parker was divorced from Pam Warren. Pam's father, James Warren, and her sister, Cindy Warren, were getting into Mr. Warren's truck in front of their house on November 5, 1984, when they saw Parker approaching the truck with a gun. Cindy got on the floor of the truck, from where she heard shots being fired. Cindy then got out of the truck and attempted to spray mace into Parker's face. Parker fired one or two shots at Cindy, not hitting her, and then chased Mr. Warren into the house. Mr. Warren and his wife Sandra were later found in the house where they had been shot to death by Parker. In the events that followed that same day, Parker kidnapped and shot his ex-wife, Pam Warren, and shot a police officer three times in a shootout at the Rogers Police Department.

1. CAPITAL FELONY MURDER

Parker maintains the trial court erred in not directing a verdict in his favor on the capital murder charges for killing the Warrens. Parker was charged under Ark. Stat. Ann. § 41-1501(1)(a), which provides:

> A person commits capital murder if: . . .he attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and *in the course of and in furtherance of the felony*, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; . . . (emphasis added)

An analysis of this statute leads us to the conclusion that it cannot be read to encompass the facts of this case. The state's proof showed that Parker followed Mr. Warren into the house for only one purpose—to commit the murders of the Warrens. The entry was a burglary because Parker unlawfully entered an occupiable structure with the intent to commit those punishable offenses. Ark. Stat. Ann. § 41-2002 (Repl. 1977). The killings were obviously a form of criminal homicide of some degree, but they were not "in the course of and in furtherance of" the burglary as required to be capital felony murder. Parker could have been charged under subsection (1)(c) of § 41-1501 for

causing the death of two or more persons in the course of the same criminal episode. Instead, the prosecutor elected to proceed under subsection (1)(a), which was wrong. We must reverse.

[redacted] Relying on *Blango* v. *United States*, 373 A.2d 885 (D.C. 1977), the state argues that the societal interests served by the burglary statute justify its use to support capital felony murder. In that case, *Blango* committed burglary by entering an "occupied dwelling" with the intent to commit assault on the victim. The court reasoned that the burglary violated the "societal interest in protecting occupied dwellings due not only to the inherent danger to occupants during the commission of such an offense, but also to the value society places on the home." The D.C. court stated that the crime was complete upon entry, "and is a separate and distinct act from the succeeding killing, yet may be deemed to be a continuing offense for purposes of the felony murder statute." *Blango* reasoned that the felony murder statute has the distinct societal interest of protecting the security of the person and the value of human life by punishing nonpurposeful killings by implying premeditation and deliberation from the commission of the burglary. *Blango* quoted *People* v. *Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973) in support of its rationale:

> It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street. Where, as here, the the criminal act underlying the burglary is an assault with a dangerous weapon, the likelihood that the assault will culminate in a homicide is significantly increased by the situs of the assault.

Unlike the case before us, in *Miller* the defendant was convicted of murdering a person who came to the aid of the first victim, whose home the defendant had entered to commit the assault. *Blango* and *Miller's* distinction between whether a murder is

committed in an occupied dwelling as opposed to outdoors may or may not be a valid reason for making it unnecessary to prove the intent ordinarily required for a capital or first degree murder conviction under the applicable statutes in those cases. However, when viewing the language of our own statutes such a distinction does not exist. For the phrase "in the course of and in furtherance of the felony" to have any meaning, the burglary must have an independent objective which the murder facilitates. In this instance, the burglary and murder have the same objective. That objective, the intent to kill, is what makes the underlying act of entry into the home a burglary. The burglary was actually no more than one step toward the commission of the murder and was not to facilitate the murder.

Simply put, the state has not advanced any convincing argument as to how the murder committed after the burglary could be in the course of and in furtherance of the burglary, both of which are elements required by our statutes. "If we can, we give legislation a construction to affect legislative intent. . .However, this is a criminal statute which must be strictly construed with doubt being resolved in favor of the accused." *Knapp* v. *State*, 283 Ark. 346, 676 S.W.2d 729 (1984). In strictly construing our statutes, as we must do, it is apparent that in order to constitute capital felony murder, the murder must be in the *course of*, and in *furtherance* of the burglary, which is not the case before us.

2. PREVIOUSLY COMMITTED FELONIES

Appellant argues that the trial court erred in submitting an instruction on previously committed felonies under § 41-1303(3) as an aggravating circumstance at the penalty phase of his trial. His argument is that there was no evidence that Parker "previously" committed another felony, other than shooting at Cindy Warren, which was contemporaneous with the killings of James and Sandra Warren. We must agree.

Section 41-1303(3) provides as follows:

> Aggravating Circumstances—Aggravating circumstances shall be limited to the following:
>
> . . .
>
> (3) the person previously committed another felony, an

element of which was the use or threat of violence to another person or created a substantial risk of death or serious physical injury to another person.

In *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1986), this court addressed the question of what is meant by a previously committed offense under this statute. In *Hill* we explained that the reason for section (3) is to allow the state to show that the defendant has a character for violent crimes or a history of committing such crimes. Since there are other avenues by which the state can prove crimes immediately connected with the principal crime, our conclusion was that this section applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. In this instance, the shooting at Cindy Warren was so closely connected in both time and place that it did not present a portrait of the defendant as having previously demonstrated a character for violent crimes or a history for committing such crimes.

Because the trial court erred in submitting this case under our felony murder statute, and in instructing the jury on previously committed felonies, we reverse.

We find no merit in the issues raised by Parker for reversal of the other convictions. In addition to those issues, we will address the questions which may arise on retrial of the capital murder charges.

3. CONTINUANCE FOR RECOMMITMENT TO STATE HOSPITAL

Parker argues that the trial court should have granted his motion for a continuance so that he could be reevaluated by the state hospital in support of his insanity defense. The trial court granted Parker's first request for a thirty-day commitment to the state hospital for a mental examination on November 15, 1984. The report from the state hospital, dated January 31, 1985, concluded that Parker was capable of assisting in his defense and that at the time of the commission of the offenses he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

On July 19, 1985, Parker filed a motion to be recommitted to the state hospital for an additional evaluation. An amended

motion was filed on August 1, 1985, with a letter from Dr. David Pritchard, the forensic psychologist for the Arkansas Department of Human Services who conducted Parker's first examination. Dr. Pritchard said in the letter that he felt it was "professionally advisable to return the defendant to the Arkansas State Hospital for additional neurological and neuropsychological evaluations." The reason for the suggestion was that Dr. Pritchard had been made aware of a statement by Parker found in the Veterans' Administration Hospital records from 1982 in which he gave a history of severe head trauma. Dr. Pritchard stated in the letter that Parker should be returned to the hospital only after the hospital had received the army records which document the head trauma. Parker's counsel had been unable to obtain the records from the St. Louis Army Records Section.

On September 20, 1985, Parker filed a motion for a continuance stating that the medical records pertaining to his head injury could not be obtained, that additional efforts to obtain the records were being made, and that the continuance was necessary to permit him to obtain the records. The trial court denied the motion and the trial began on October 28, 1985.

Parker contends that he was unable to adequately and completely present defenses and mitigating factors based on his mental condition without the neuropsychological evaluation to determine the effect of the head injury. He argues that a defendant should not be forced to go to trial in such a serious case as this without the opportunity to present evaluations from medical personnel who have the benefit of his complete medical history, including prior injuries. Parker states that his statement concerning the prior injury is given credibility because it was found in hospital records from more than two years before the murder. It was corroborated by testimony of Pam Warren, who testified at trial that Parker had told her how he received an injury when he was hit on the head with a pipe while working as a disc jockey at an army base.

Arkansas R. Crim. P. 27.3 states:

> The court shall grant a continuance only upon the showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public

interest in prompt disposition of the case.

Parker was tried just one week short of a year from the date of the crimes.

Whether to grant a continuance is addressed to the sound discretion of the trial court and this court does not reverse unless that discretion has been abused. *Pruett* v. *State*, 282 Ark. 304, 669 S.W.2d 186 (1984). The burden is on the appellant to show that there has been an abuse of the court's discretion in denying the continuance. *Cotton* v. *State*, 265 Ark. 375, 578 S.W.2d 235 (1979). There is no error in the denial of a motion for a continuance to obtain evidence that is not material and not relevant. *Worley* v. *State*, 259 Ark. 433, 533 S.W.2d 502 (1976). In *Worley*, we said the trial court was justified in denying a continuance requested by the appellant in order to secure documentary evidence, where he only verbally assured the court the documents would be forthcoming and it appeared the records might not be material or relevant.

The only evidence of Parker's head trauma was his own statements concerning the injury that were contained in the Veterans' Administration Hospital records and his statements to Pam Warren. Warren also testified that Parker never claimed to have any lasting effects from the injury. Parker's attorneys were never able to produce any documentation of his injury, even though they knew about it as early as July, 1985, when the additional evaluation was requested. The record does not establish whether any documentation could have ever been obtained, and Dr. Pritchard's letter stated that the reevaluation should occur only after the records were received. There is also no evidence of any mental problems suffered as a result of the head injury. For these reasons, the trial court did not abuse its discretion in denying the motion for a continuance.

4. DISCOVERY

Parker's next two arguments for reversal are that the trial court erred by not compelling discovery of statements taken by the prosecutor pursuant to his subpoena power, and that the trial court erred in not granting his motion to compel the circuit clerk to issue discovery subpoenas so that he would have the same subpoena power as the prosecutor. We rejected these same

arguments in *Alford* v. *State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

In regard to the first of these issues, Parker contends, as did Alford, that Ark. R. Crim. P. 17.1(b)(i), which requires the prosecutor to disclose to the defendant the "substance of any relevant grand jury testimony," should be extended to compel the prosecutor to furnish statements acquired by subpoena. Parker bases this contention on *Taylor* v. *State*, 220 Ark. 953, 251 S.W.2d 588 (1952), which said that prosecuting attorneys have in a sense replaced grand juries and are subject to the same rules. In *Alford*, we said that the prosecuting attorney did not have to furnish the defendant with statements taken pursuant to a subpoena, but only must disclose to defense counsel any material information within the prosecutor's knowledge, possession or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce any resulting punishment. Ark. R. Crim. P. 17.1(d). The statement sought by Parker was made by Parker's expert witness, Dr. Phillip Barling. Dr. Barling was called to testify by Parker, rather than by the state, and Parker has not shown how any information acquired by the state prejudiced his defense. Thus, there was no error.

We also held in *Alford* that the appellant was not denied due process when he was not allowed equal discovery rights to those given the state in Ark. Stat. Ann. § 43-801 (Repl. 1977). That statute authorizes prosecutors to issue subpoenas and administer oaths in all criminal matters they are investigating. Like Alford, Parker contends the trial court's denial of his motion to subpoena witnesses is violative of the United States Supreme Court's statement on the issue of equal discovery rights in *Wardius* v. *Oregon*, 412 U.S. 470 (1973). In *Alford*, we said:

> The *Wardius* decision does not suggest that the due process clause requires states to adopt discovery procedures in criminal case, but rather it held that, where a state imposes discovery against a defendant, equivalent rights must be given to a defendant. *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982). The record before us fails to reflect that the State, by use of its statutory authority to subpoena witnesses, in any way abused that power in an effort to obtain witnesses against the appellant or to secrete

their testimony from him before trial. Thus, we see no merit in appellant's argument.

As in *Alford*, the only witness subpoenaed by the state was called by the defense to testify, rather than by the prosecution, and there is no indication of abuse by the prosecutor of the subpoena power or that any testimony was hidden from Parker. Accordingly, there was no prejudicial error.

Parker next argues that the trial court should have either granted his motion for a continuance or suppressed certain testimony because the state failed to timely disclose certain witnesses' statements to the defense. Parker argues that in response to pretrial motions for discovery, the prosecutor had assured him and the court that he was disclosing all of Parker's previous statements the state had in compliance with Ark. R. Crim. P. 17.1(a)(ii). October 17, 1985, however, eleven days before trial, the state provided Parker with certain statements by witnesses relating what Parker had told them. Seven days before trial, the prosecutor gave the defense affidavits containing more statements Parker had allegedly made to third parties. Parker moved that all the statements be suppressed because they were provided too late for Parker to adequately defend against them or to have them analyzed by his expert witness. Only the testimony of Leta Lloyd, however, is urged as prejudicial by Parker. That testimony concerned statements by Parker about his marital difficulties that show how upset he was over his separation from Pam Warren. Parker argues he could have used these statements to support his contention that his divorce had affected his emotional state before the crimes were committed.

The state argues that Parker's attorneys were able to interview Lloyd before the trial, the statements were provided before trial to the defense's expert witness who said it did not affect his opinion, and the same testimony Lloyd provided about Parker being distraught over the failure of his marriage was provided by other witnesses. The state's position is correct. Accordingly, the trial court did not abuse its discretion in denying the continuance and refusing to suppress the testimony, and Parker has shown no prejudice as a result of the ruling. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984).

5. SEVERANCE

Parker also contends that the trial court should have granted his motion for a severance of the capital murder charges from the other offenses. Two or more offenses may be joined when they (a) are of the same or similar character or (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ark. R. Crim. P. 21.1. If offenses are joined solely on the ground that they are of the same or similar character and are not part of a single scheme or plan, a defendant has the right to a severance. Ark. R. Crim. P. 22.2(a). The court shall also grant a severance if it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. Ark. R. Crim. P. 22.3(b)(i).

It is clear that the crimes charged constituted a single criminal episode and "when a series of acts are connected that is enough to give the state a right to join them in a single information." *Ruiz* v. *State*, 273 Ark. 94, 617 S.W.2d 6 (1981). Parker maintains that the cumulative effect of the offenses was prejudicial and that the severance should have been granted in order to promote a fair determination of his guilt or innocence. Parker has offered no convincing argument that the trial court abused its discretion in determining that a severance was not appropriate to promote a fair determination of Parker's guilt or innocence, and we find no error.

6. FUNDS FOR PRIVATE PSYCHIATRIC EXAMINATION

Parker next contends that the trial court should have granted his motion for funds for a private psychiatrist. In *Dunn* v. *State*, 291 Ark. 131, 722 S.W.2d 595 (1987), we held that the defendant's right to an examination under *Ake* v. *Oklahoma*, 470 U.S. 68 (1985) was adequately protected by the examination at the state hospital, an institution which has no part in the prosecution of criminals. In addition, Parker was able to afford the services of Dr. Barling, a clinical psychologist.

7. INFLAMMATORY PHOTOGRAPHS

Parker argues also that the trial court erred in admitting several photographs showing the Warrens' bodies at the scene and at the coroner's. Pictures of the blood-stained floor and a picture of the Warrens together while alive were also shown to the jury over Parker's objections.

Parker maintains that the probative value of these photographs was substantially outweighed by the danger of unfair prejudice because of their inflammatory nature and that the photographs were needlessly cumulative. A.R.E. Rule 403. The fact that photographs are inflammatory is not alone sufficient reason to exclude them. *Smith* v. *State*, 282 Ark. 535, 669 S.W.2d 201 (1984). Inflammatory pictures are "admissible in the discretion of the trial judge, if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony." *Perry* v. *State*, 255 Ark. 378, 500 S.W.2d 387 (1973). We have often held that a photograph is not inadmissible merely because it is cumulative, and that the defendant cannot admit the facts portrayed and thereby prevent the state from putting on its proof. *Rodgers* v. *State*, 261 Ark. 293, 547 S.W.2d 419 (1977). Even the most gruesome photographs have been held admissible when they related to proof of an element of the offense charged. *Perry, supra; Robinson* v. *State*, 269 Ark. 90, 598 S.W.2d 421 (1980); *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979).

In *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986), we reversed the trial court when it needlessly allowed seven photographs of the victim's face and dislodged teeth, some of which showed the victim in a more inflammatory state because of the coroner's work on the victim. In *Berry*, the photographs had little relevance to the issues at the trial; depicted injuries inflicted by the appellant's accomplice; were needlessly repetitive; and were unusually inflammatory.

The state argues that the photographs in this case were necessary to show the repeated and accurate shooting of the victims by Parker from close range and while the victims were defenseless. Parker's "extreme indifference to the value of human life" was an element of the capital murder charges. None of the

photographs were unnecessarily gruesome, and the autopsy pictures merely showed the corpses with the blood cleaned away from the bullet wounds. Any prejudicial nature the photographs had did not so substantially outweigh the probative value as would mandate a reversal. We trust, however, that the trial court on retrial will carefully weigh the probative value of each photograph against its prejudicial nature, and not automatically accept every photograph the state has to offer, as we directed in *Berry*.

The photograph of the victims while alive had little, if any, prejudicial effect, but Parker is correct in asserting that it also had no probative value, and it should not be admitted on retrial. *See Parker* v. *State*, 290 Ark. 158, 717 S.W.2d 800 (1986).

8. PREVIOUS STATEMENTS OF WITNESS

Parker maintains that the trial court erred in not requiring the prosecutor to provide him with previous statements made by a police officer who testified for the state. Ark. Stat. Ann. § 43-2011.3 (Repl. 1977). We are unable to determine what Parker is alleging as error, because after the request for the statements was made, the trial court agreed that Parker was entitled to whatever the officer had used to refresh his memory, and to any other statements he had previously given or signed, but that he thought Parker already had those statements. Parker's counsel responded that he did. There is nothing in Parker's argument indicating what statements the officer had previously made to which Parker was not given access. Therefore, he has not shown any prejudicial error.

9. PROSECUTOR'S ARGUMENT

Parker also contends that the trial court erred in allowing the prosecutor to address the jury in response to a juror's question. After Parker's attorney requested a recess to review a witness's previous statements provided by the prosecutor after the witness had testified, the juror asked why the statements were not provided earlier in order to save time. The prosecutor was allowed to tell the jury that the statements had been supplied to the defense on April 3, 1985, that the witness had testified in a pretrial hearing, that a transcript of the hearing was available to

the defense, and that other notes had been made available while the witness was testifying.

Parker argues that this, in effect, made the prosecutor an unsworn witness, who was not subject to cross-examination. The prosecutor, however, did not address the jury on an issue pertaining to Parker's guilt or innocence, but only sought to correct the impression that the state had not given the defense adequate time to review the statements the prosecution had in its possession. The trial court was wrong in permitting the prosecutor to address the jury, however, Parker has not shown any prejudice as a result of the prosecutor's response to the juror's question, and we need not reverse. *Berna, supra.*

10. DISCRETION IN SENTENCING

Parker alleges that the trial court failed to exercise its discretion in imposing the sentences recommended by the jury. The responsibility for sentencing was placed with the jury by Ark. Stat. Ann. § 41-802 (Repl. 1977). Parker has apparently confused this situation with the rule that the judge must exercise discretion in determining whether sentences should run consecutively or concurrently. Ark. Stat. Ann. § 41-903 (Repl. 1977); *Wing* v. *State*, 286 Ark. 494, 696 S.W.2d 311 (1985). No error was committed.

11. CONSTITUTIONALITY OF CAPITAL FELONY MURDER STATUTE

Finally, Parker argues that our capital murder statute is unconstitutional in its application, because it has been applied almost exclusively to males. This argument was not raised at trial, and thus we are not required to address it on appeal. *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986). For purposes of the retrial, however, we note that we see no merit in the argument that our facially neutral statute, held constitutional in *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), was passed with any discriminatory intent towards men.

12. SEVERANCE OF JUDGMENT

In *Martin* v. *State*, 290 Ark. 293, 718 S.W.2d 983 (1986), we held that "[w]hen a judgment in a criminal case is correct as to one count, but erroneous as to another, as in this case,

we have the power to sever the judgment, affirm the count on which the appellant was properly convicted, and reverse and grant a new trial as to the other." Accordingly, the capital murder convictions are reversed. Parker's other convictions are affirmed.

HICKMAN, J., concurs.

HAYS and GLAZE, JJ., dissent.

DARRELL HICKMAN, Justice, concurring. I concur and write merely to maintain my opposition to the decision in *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

TOM GLAZE, Justice, dissenting. I respectfully but vigorously disagree with the majority decision concerning its disposition and reversal of the capital felony murder conviction regarding appellant's killing of Sandra Warren. Although it can be said that the appellant entered the Warren's house to kill James Warren, the proof at the same time precludes that he entered the house with the intention to murder Sandra. Cindy Warren testified that the appellant saw her and her father, James, when they were departing James' truck in front of the Warren house. Appellant shot at Cindy and then his "attention automatically went to my father," as her father was running to the house.

I fail to see any logic in the majority's attempt to distinguish the instant case from either the holding in *People* v. *Miller*, 32 N.Y.2d 157, 297 N.E.2d 85, 344 N.Y.S.2d 342 (1973), or *Blango* v. *United States*, 373 A.2d 885 (D.C. 1977). As was true with the defendants in those cases, the appellant here entered an occupiable structure to commit a crime other than the one with which he was convicted. In this respect, appellant entered the Warren house with the ostensible purpose of killing James Warren—which the majority concedes was a burglary because appellant entered an occupiable structure with the intent to commit an offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977). Again, as were the situations in *Miller* and *Blango*, appellant, while in the course and furtherance of committing this burglary (felony), murdered James' wife, Sandra—a second and distinct crime.

The rationale underlying the *Miller* and *Blango* decisions is that the legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons

within domiciles are in greater peril from those entering the domicile with criminal intent than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street.

In the instant case, appellant's entry into the secluded and confined homestead of the Warrens in his pursuit and effort to kill James also enhanced greatly the prospects that he would kill anyone else trapped within those confines. I believe the rationale underlying our State's felony murder statute is sound, and the facts of this case implore its application, at least as to Sandra Warren.

I also disagree with our court's holding in *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1986), insofar as that decision interpreted Ark. Stat. Ann. § 41-1303(3) (Repl. 1977). In my view, this court placed a much too restrictive interpretation on the words "previously committed" when deciding what prior violent crimes can be used in establishing aggravating circumstances for sentencing purposes in capital felony murder cases.

In *Hill*, we explained that the reason for section (3) is to allow the state to show that the defendant has a character for violent crimes *or a history of committing such crimes*. This court then parlayed that reasoning to arrive at the conclusion that section (3) applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. Such reasoning and logic engrafts a restriction on the employment of section (3) that simply is not there.

Here, I have no problem reaching the conclusion that appellant's acts warranted the jury's consideration of the plain language used in section (3)—that he previously committed another felony, an element of which was the use or threat of violence to another person or created a substantial risk of death or serious physical injury to another person. Undisputably, appellant attempted to murder Cindy Warren outside the Warren house just moments before he entered the home where he killed both James and Sandra Warren. The majority holdings here and in *Hill* raise more questions than they answer. For example, if appellant had attempted to shoot Cindy an hour ear-

lier—somewhere on the grounds but outside the house—could section (3) be employed? What would be the result if appellant's prior acts had happened the day before he entered the Warren house to kill James? In short, at what point in time and place may a defendant's prior violent acts be used to justify the usage of section (3)?

We become entrapped in our own web, so-to-speak, when we add language to section (3) that is not there. The purpose, I submit, of section (3), is merely to permit a jury to consider a defendant's violent nature, as he had previously applied it towards others, regardless of when and where such violence occurred.

For the reasons stated, I would affirm William Parker's conviction and find no error in giving the instruction on previously committed felonies.

HAYS, J., joins in this dissent.

Bruce CONSTANT et ux *v.* Sam HODGES et ux, et al.

86-312 730 S.W.2d 892

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Ivester, Henry, Skinner & Camp, by: *David P. Henry*, for appellant.

House, Wallace & Jewell, P.A., by: *Don F. Hamilton* and *Janice W. Vaughn*, for appellee.

DARRELL HICKMAN, Justice. This is a suit to enforce a restrictive covenant in several instruments applicable to the Robinwood Subdivision of Little Rock. The appellants owned one of the large lots in Robinwood on the corner of Cantrell Road and Misty Lane, consisting of 1.73 acres. Their house burned in 1983, and the lot remains vacant. The appellants applied to the Little Rock Planning Commission to divide their lot into four smaller lots. Permission was denied. A request was then made to divide the lot into two lots. That request was granted. A request for another split was filed but deferred when this lawsuit was filed. The appellees, several residents of Robinwood, sued to prevent breaking up the lot and to enforce restrictive covenants applicable to Robinwood. The chancellor held the restrictive covenants limited the use of the lot to a single family residence, and it could not be divided.

The appellants make two arguments on appeal. First, their land was not subject to such a restriction, and second, the chancellor was wrong in finding the existence of a general plan of development which would permit enforcement of the restrictive covenants in question. The chancellor was unquestionably right and we affirm the decree.

It is agreed that there are three relevant instruments. First, a bill of assurance was filed in 1949 which provides in part: "The

lands hereinbefore described shall be restricted to detached single-family residences; garages, servants' quarters, and other outbuildings must be clearly incidental to residential use of said land." The bill of assurance said its purpose was to carry out . . . "a general plan to develop said lands as a high-class suburban residential property." The parties agree a deed to a predecessor in title of the appellants is applicable and contains this language: "This conveyance is subject to the reservations, covenants, and restrictions set forth in the Bill of Assurance dated November 15, 1949, . . . Only one detached single-family residence with only one story at or above ground level . . . shall be erected. . ." The same date the deed was executed, a memorandum of agreement was executed and later filed. It provided in part:

> In addition to the provision contained in said deeds that only one detached single-family residence with only one story at or above ground level shall be erected, it is hereby expressly agreed that no residence shall be erected . . . if the main floor area of such residence . . . is less than two thousand five hundred (2,500) square feet . . . It is agreed that the provisions of this agreement shall run with the said land.

Nathaniel Griffin, who was director of city planning in Little Rock in 1977 and has a masters degree in city planning, testified at length about the Robinwood Subdivision. Some of his testimony is especially relevant:

> The area is virtually the same as it was in 1977, with the possible exception of the house with the white wall around it and the Constant house which burned in 1983. The area has been remarkably stable over the years in terms of its livability. The Gibsons' [original owners of the land] original objective as set forth in the Bill of Assurance has been achieved over time and the area remains an attractive, residential environment, certainly one of the best in the City.
>
> * * * *
>
> The Cantrell Place West proposal [the appellants' plan] would have an adverse effect on the property values in the area, but the effect would depend on what future

> changes occurred as a result of the development and I could not be specific as to the magnitude of change. It is not the thing you qualify in dollars.
>
> * * * *
>
> . . . I am quite familiar with all the residential development patterns of the City and would say that the Robinwood area has among the largest lots of any residential district. These large lots on a major arterial represent the only way that you can have an established residential character that can be preserved.
>
> * * * *
>
> . . . [T]he division of the Constant property into two or four lots would be a negative factor because it would communicate to everyone in the area that it is not going to be a sacrosanct, single-family area. That the community will consider alternate uses, and that is a destabilizing factor.
>
> * * * *
>
> . . . There is absolutely no reason why they could not build a new home on that 1.73 acre lot if they chose to do so.

W. P. Hamilton, a Little Rock lawyer, testified he was personally familiar with the development of Robinwood. He said: "It is my opinion that the Constants' proposals are inconsistent with the development pattern in the neighborhood and would adversely effect property values."

Sam Hodges, one of the appellees, testified that he had lived in Robinwood for 20 years. He said:

> In my opinion, a subdivision of the Constant property into two or four lots would have a deleterious effect, reducing the value of the property, destroying what we've got and the visual effect of the Robinwood neighborhood. The pattern of development has been maintained since 1967, except for landscaping changes. The lot split would torpedo our development. There is nothing that can be done with the Constant lot except to build a nice single-family dwelling.

> I think the homes in the area would average $250,000 with some below, and then some much more than that, over $500,000.

After hearing the testimony and examining the documents, the chancellor made these findings:

> The character and nature of the Robinwood Subdivision referred to in the Bill of Assurance signed by Cecil Gibson and Vera Gibson has been and is single-family residences consisting of very valuable, large homes on large lots. The nature of the neighborhood and this pattern of development have not changed since the lands described in the Bill of Assurance were developed beginning in 1949, and this pattern has continued through the present time. Although there may have been some violations (as alleged by defendants) of some of the provisions of the Bill of Assurance or some of the restrictions contained in deeds subsequently conveying lands subject to the Bill of Assurance, those violations have been minor and they have not destroyed the purpose of the Bill of Assurance or deed restrictions and these violations have not adversely affected the adjoining property owners.

On appeal we consider the evidence in a light most favorable to the appellee. *Sipes* v. *Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985). We do not reverse a finding of fact by a chancellor unless it is clearly wrong. ARCP 52; *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). Using this criteria, the evidence overwhelmingly supports the chancellor's finding that a general plan of development existed for Robinwood. That is important because if no general plan of development exists, the general rule is that restrictive covenants cannot be enforced. *Jones* v. *Cook*, 271 Ark. 870, 611 S.W.2d 506 (1981). The test of whether such a plan exists is "whether substantial common restrictions apply to all lots of like character or similarly situated." *Jones* v. *Cook, supra.*

In this case the existence of large lots with single family residences has remained unbreached since its inception. The appellants attack the three instruments in detail, arguing that they do not apply for several reasons: The bill of assurance does not prohibit dividing a lot; the trial court did not specify

which of the three instruments was binding or a basis for his decision; the deed contained no restrictions in the granting clause, and the only restriction contained therein appears after the habendum clause with none in the granting clause; and the covenant did not "run with the land." On appeal our only duty is to decide if the chancellor was wrong. Indeed, if he reaches the right result but for wrong reasons, he will be upheld. At one point the court remarked:

> . . . But, as they sold the property, further restrictions were put on it, and it does run with the land, as it says in those others, but you have to read all of the instruments together to reach a conclusion as we do in many cases in the law to reach whatever result that we're going to try to reach.

This is apparently what the chancellor did, considered all the instruments, in deciding that the restrictive covenant did exist which prohibited dividing this lot. In reviewing instruments, our first duty is to "give effect to every word, sentence and provision of a deed where possible to do so and give effect to the intention of the parties." *Gibson* v. *Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974). That intent in this case is gathered from all the instruments.

We agree with the appellees that there is little room for doubt that these instruments contain a restrictive covenant that prohibits the action the appellants seek to take.

Affirmed.

GLAZE, J., not participating.

FIRST AMERICAN BANK OF NORTH LITTLE ROCK, N.A., et al. *v.* ASSOCIATED HOSTS, INC., d/b/a WRANGLER, et al.

87-6 730 S.W.2d 496

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Jim O'Hara and *Zachary D. Wilson*, for appellant.

Wright, Lindsey & Jennings, for appellees.

JOHN I. PURTLE, Justice. This appeal represents yet another attack on the lack of a Dramshop Act in Arkansas, and as such, it too must fail.

On December 7, 1982, the appellant attended the "happy hour" at a local bar and dance hall where he consumed more than a dozen drinks in about three hours. The appellant left the bar in an intoxicated condition and fell backwards on the sidewalk. The appellant's head struck the pavement, and he sustained injuries which rendered him partially paralyzed, blind in one eye, and mildly retarded.

The question presented is whether a dramshop owner or operator is liable for damages to a patron who becomes intoxicated and by reason thereof sustains injury. Our prior decisions hold that an owner of a tavern is not responsible for injuries caused to third parties by a drunk patron. See *Yancey* v. *The Beverage House of Little Rock, Inc.*, 291 Ark. 217, 723 S.W.2d 826 (1987). We hold that there is no reason to favor an intoxicated patron over an innocent third party. At the common law, a tavern owner had no liability for injury to a patron or a third party. See *Bolen* v. *Still*, 123 Ark. 308, 185 S.W. 811 (1916).

We continue to defer to the General Assembly on this subject. *Yancey*, supra. We therefore affirm the decision of the trial court in dismissing the complaint.

Affirmed.

Naomi Johnson HENRY *v.* Leonard JOHNSON, Administrator

86-279 730 S.W.2d 495

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Wayne R. Foster, for appellant.

Marquis E. Jones, for appellee.

JOHN I. PURTLE, Justice. After the decedent's death, his brother petitioned the probate court for appointment as personal representative of the estate. Letters of administration were issued. The appellant then filed a petition in the probate court for determination of heirship, claiming to be the illegitimate child of the decedent. The probate court decided that the appellant's petition was a matter relating to bastardy and transferred it to the county court. The county court then transferred the case back to probate on the theory that a proper petition to establish paternity had not been filed and that the county court was without jurisdiction. The probate court then dismissed the petition on the ground that Article 7, Section 28, of the Arkansas Constitution grants exclusive jurisdiction to the county court in all matters relating to bastardy. We agree with the appellant's argument that determination of heirship is not a bastardy proceeding within the meaning of Article 7, Section 28, and therefore reverse the decision and remand the case to the probate court.

Alonzo Johnson died intestate in Pulaski County, Arkansas, on January 9, 1985. The petitioner was born in Chicot County, Arkansas, on September 23, 1935. During the decedent's lifetime there had been no legal proceeding to determine if the decedent was the father of the appellant. We considered a somewhat factually similar case in *Lewis* v. *Petty,* 272 Ark. 250, 613 S.W.2d 585 (1981). Although *Lewis* fell within the period of time between the decision of *Trimble* v. *Gordon,* 340 U.S. 762 (1979), which declared statutes similar to Ark. Stat. Ann. § 61-141(d) to be unconstitutional, and the reenactment of the revised 61-141(d) (Act 1015 of 1979), the decision is persuasive. There the illegitimate daughter of Lewis was born in 1927, and Lewis died in 1978 without a legal determination of paternity during his lifetime. In *Lewis* the petition for a determination of heirship was filed in the probate court and was never considered by the county court.

[redacted] We also considered the matter of an illegitimate child in the case of *McFadden* v. *Griffith,* 278 Ark. 460, 647 S.W.2d 432 (1983). There we were concerned with the claim of child support by the mother of a teenaged child against the putative father. The action was initiated in the county court as a bastardy proceeding. The county court found that McFadden was the father of the child and ordered support. This order was then affirmed by the circuit court and we affirmed that decision. For reversal the appellant cited the case of *Lewis* v. *Petty,* supra. However, we distinguished the type bastardy proceeding presented in *McFadden* from one to determine heirship as in *Lewis.* We stated that the standard of proof in determining heirship by a child of a deceased person is by clear and convincing evidence; whereas, the quantum of proof required against a living putative father is by a preponderance of the evidence.

[redacted] Clearly this Court has recognized that an illegitimate child may bring a petition for the determination of heirship in the probate court where the decedent's estate is being administered. Equally certain is our adherence to the requirement that matters relating to bastardy must be brought in the county courts pursuant to Article 7, Section 28, Constitution of Arkansas. The possible confusion of these two positions arises from the language used in some of our decisions, such as *Higgs* v. *Higgs,* 227 Ark. 572, 229 S.W.2d 837 (1957); *Rapp* v. *Kizer,* 260 Ark. 656, 543 S.W.2d 458 (1976); *Stain* v. *Stain,* 286 Ark. 140, 689 S.W.2d 256 (1985); and *Jarmon* v. *Brown,* 286 Ark. 455, 692 S.W.2d 618 (1985). All four of these cases held that chancery courts do not have jurisdiction to determine paternity and establish support payments and visitation rights in cases involving an illegitimate child. None of these cases dealt with probate proceedings for the determination of heirship of an illegitimate. Admittedly the language of *Rapp* and *Jarmon* was not expressly limited to proceedings to establish paternity, support and visitation, but these decisions are obviously limited to the issues presented. The issues presented in all of these decisions are all limited to true bastardy proceedings.

In *Stain* we questioned the current relevance of the constitutional provision found in Article 7, Section 28. There we quoted from *Higgs,* supra, as follows:

> The common law affords no remedy to compel a putative father to contribute to the support of his illegitimate offspring. Statutes now exist in most jurisdictions, however, providing for judicial proceedings, usually called filiation or bastardy proceedings, to establish the paternity of a bastard child and to compel the father to contribute to its support. . . . Perhaps the reason for placing jurisdiction in bastardy matters in the county court no longer exists, but nevertheless, the Constitution has not been changed, and the court still has exclusive, original jurisdiction in such matters.

This concern was also reflected in the concurring opinion of two justices in *Jarmon* v. *Brown,* supra. This concurrence also specifically objected to the broad language in *Rapp* v. *Kizer,* supra.

In the present case the appellant sought only to establish heirship in a probate court, and we hold that she should have been allowed to present her case in that forum. She did not attempt to establish liability for expenses, support payments or visitation rights of an unmarried parent. To the extent, if any, that our prior decisions have implied that county courts have jurisdiction to determine heirship, they are overruled.

Reversed.

STATE of Arkansas, CHILD SUPPORT ENFORCEMENT UNIT *v.* Herschel MARKHAM

87-11 730 S.W.2d 497

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Mark Woodville, Asst. General Counsel for Arkansas Department of Human Services, for appellant.

David B. Switzer, for appellee.

JOHN I. PURTLE, Justice. The state filed an action in the County Court of Polk County to determine if appellee was the father of an illegitimate child. The referee eventually ruled in favor of the putative father and the state appealed to the circuit court where the appeal was dismissed as untimely.

The bastardy action was commenced on April 4, 1984, and a hearing on the merits was held on May 31, 1985. The case was taken under advisement by the bastardy referee. On July 29, 1985, the referee wrote a letter to the attorneys in which he announced his decision that the appellee was not the father of the child. The letter requested the counsel for appellant or the counsel for the appellee to prepare the order. However, the order was not signed and filed with the county clerk until March 3, 1986. An appeal was filed in the circuit court on March 14, 1986. A motion to dismiss for untimeliness was filed by the appellee on March 26, 1986, and granted by the circuit court on July 29, 1986. An order of dismissal was entered of record on August 15, 1986. Notice of appeal was filed on September 10, 1986.

The question presented for our decision is when does the time for appeal commence to run from an order in the county court deciding the issue in a bastardy action? The statutes, rules and our prior decisions on this subject are somewhat less than clear. We take this opportunity to clarify the matter to the extent possible.

In *Thomas* v. *Easley,* 277 Ark. 222, 640 S.W.2d 797 (1982), we held that an appeal in bastardy cases must be made within 30 days from the entry of the judgment. The issue in *Thomas* was whether the apellant had 30 days or 6 months in which to file an appeal. The issue in the present case is what triggers the running of the 30 days within which to appeal from the decision in a bastardy proceeding. We must decide if time starts when the

opinion is "rendered" or on the date of "entry of the judgment."

After the decision in *Thomas* the legislature apparently attempted to comply with this decision and the concurring opinion of Justice Frank Holt by enacting what is now Ark. Stat. Ann. § 34-701.1(b) (Supp. 1985). This statute obviously was an effort to clarify the time limit within which appeals to circuit court in bastardy proceedings must be perfected. The statute states in part that an appeal in a bastardy case may be taken as a matter of right "within 30 days *after the decision* of the bastardy referee *is rendered.*" (Emphasis added). However, Ark. Stat. Ann. § 34-709 (Repl. 1962) allows an appeal from such decisions "as in cases of appeal from judgments of justice of the peace to circuit courts." Appeals from judgments of justices of the peace are governed by Rule 9 of our Inferior Court Rules. This rule requires appeals to be filed "within 30 days from the date of the entry of the judgment." However, Inferior Court Rule 1 states: "These rules shall govern the procedure in all civil actions in the inferior courts of this state, *except county courts.*" (Emphasis added).

Although Rule 9 does require appeals in civil cases of inferior courts to be filed within 30 days from the date of "the entry of the judgment," the Inferior Court Rules expressly do not apply to decisions of the county courts. We held the 30 day rule applied in *Thomas.* Even though we held that the 30 day rule applied, we did not intend to hold that the Inferior Court Rules apply to bastardy actions in county court. The *Thomas* holding was correct, however, where it stated: "Therefore, we conclude that appeals from the county court to the circuit court in bastardy proceedings must be perfected within 30 days."

In the earlier case of *Donley* v. *State Ex. Rel. Lewis,* 226 Ark. 49, 287 S.W.2d 886 (1956), this Court held that an appeal in such matters must be made within 30 days from the date the written order was filed in the county court. The *Donley* case was factually similar to the present one insofar as the county court had announced the decision, but the decision had not been filed in the county court. The announcement of the decision by the county court was on January 7, 1955, but the written order was not entered until January 20, 1955, and stated it was *nunc pro tunc* for January 7, 1955. Notice of appeal was filed and the record was

filed in the circuit court on February 8, 1955. The circuit court dismissed the appeal as untimely. In *Donley* this Court reversed the circuit court and held the time for the 30 days within which to appeal started *when the written order was filed in the record.*

It was the obvious intent of the General Assembly by enacting Act 559 of 1983 (A.S.A. 34-701.1(b)) to make the law on this subject conform to the decision of this Court in *Thomas.* This statute also served the additional purpose of making the time within which to appeal an order of the county court in a bastardy action conform to the time limit for appeals in other courts. We therefore hold that by statute, the period for filing an appeal from the county court in a bastardy proceeding is 30 days, and the time within which to give notice of appeal begins to run when the judgment or order is filed in the county court.

In this case the appeal was filed within 30 days after the judgment was filed and entered of record. Therefore, the appeal to circuit court was timely.

Reversed and remanded.

AMERICAN AUTOMOBILE AUCTION, INC. *v.* Ralph TITSWORTH and Joe McPEEK

87-14 730 S.W.2d 499

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Tatum & Sullivan, P.A., by: *Tom Tatum*, for appellant.

Laws, Swain & Murdock, P.A., by: *Timothy W. Murdock*, for appellee.

ROBERT H. DUDLEY, Justice. The appellees, Ralph Titsworth and Joe McPeek, filed a tort suit under a negligent supervision theory, seeking to hold the employer, appellant American Automobile Auction, Inc., liable for the intentional acts of its employees. The jury returned verdicts of $50,000.00 for appellee Titsworth and $1,000.00 for McPeek. We affirm the judgment on the verdicts.

The appellant's first point of appeal is that there is no proof of negligence because, it argues, the employees committed intentional torts against the appellees. The proof was undisputed that the employees committed intentional torts, but such proof does not exclude the theory of negligent supervision of the employees who committed the intentional torts. The appellees' theory of the case was not based upon imputed liability, and they did not seek an instruction on vicarious liability for the intentional torts, but rather, they sought recovery on the theory of direct liability for the negligent failure to supervise employees.

In determining the sufficiency of the evidence an appellate court reviews the evidence, and all reasonable infer-

ences from it, in the light most favorable to appellee. *Taylor* v. *Terry,* 279 Ark. 97, 649 S.W.2d 392 (1983). In so reviewing the evidence we find that the appellant corporation conducted automobile auctions. It hired David Doster and Don Ball, both ex-convicts. Doster was hired as a sales director and repossessor of vehicles while Ball was hired as an auction ring man and bouncer. At the time of the intentional torts, an auction was being conducted, and employee Ball, who normally drank while at work, had a bottle of beer in his hand.

The president of the appellant corporation, Don Moak, had barred appellee McPeek from attending a different automobile auction which he owned because Moak had previously had trouble collecting a debt from McPeek and his partner. In fact, Moak and employee Doster had repossessed a truck from McPeek's partner. Even so, appellant corporation mailed a written invitation to McPeek to attend the auction.

On the night of the auction, McPeek went to Moak's office and asked if he was invited to or barred from the auction. Moak asked him to leave and come back some other time and discuss it. Moak then watched appellee McPeek go into the auction. McPeek caused a disturbance. The appellant's employees, Doster and Ball, commenced to forcibly eject appellee McPeek. Appellee Titsworth, a large man, attempted, without fighting, to protect McPeek and, at the same time, get him out of the auction area. Employee Doster told appellee Titsworth: "Turn him loose, we're going to teach him a lesson. This is the reason I pay this boy [Ball] $100.00 a week is to take care of punks like him." Employees Doster and Ball then viciously attacked appellee McPeek in the auction area. McPeek drew a knife and started to fight back. Appellee Titsworth pleaded with them to stop before someone was killed. Appellee Titsworth then got appellee McPeek away from the auction and led him across the street to Titsworth's truck. The employees, Doster and Ball, got a shovel and a bumper jack, went across the street to appellee Titsworth's truck, and severely beat both appellees.

The beatings were so tumultuously administered that a crowd of 50 people gathered before it ended. Even so, the president of the appellant corporation remained in his office.

These facts and the reasonable inferences therefrom estab-

lish that appellant corporation hired Ball, an ex-convict, for the purpose of forcefully ejecting people from the auction and teaching "punks" "a lesson." Ball was paid $100.00 per week but only worked one day a week. Ball normally drank at work and had a bottle of beer in his hand when the intentional torts occurred. Doster, another ex-convict, knew that appellee McPeek and his partner owed the appellant's president, Moak, a debt and he had repossessed a truck from the partner. On the night at issue, Don Moak told appellee to leave the premises, but saw him walk into the auction area. At this point, the president of appellant corporation knew, or by the exercise of reasonable diligence should have known, that appellee McPeek might be forcibly ejected by the corporation's employees, Doster and Ball. Still he did not exercise any supervisory care on behalf of the appellant corporation.

Clearly, an employer who hires two ex-convicts, one of whom is normally drinking, and entrusts to them the job of forcibly ejecting patrons, has a duty to exercise reasonable care to avoid harm to those patrons by exercising supervisory care when the employer knows, or by the exercising of reasonable diligence ought to know, that such employees are about to forcibly eject a patron.

Appellant next argues that the evidence is insufficient to support the amount of the awards. The argument is without merit. McPeek, who received the $1,000.00 verdict, suffered a permanent scar, plus pain, suffering, and anguish. Titsworth, who received the $50,000.00 verdict, had medical expenses in excess of $3,700.00, is still under medical care, has suffered loss of income, has suffered pain, and according to his medical witness, will continue to do so.

Affirmed.

HOLT, C.J., not participating.

Velma M. DIEBOLD and FIRST NATIONAL BANK OF WYNNE, ARKANSAS *v.* MYERS GENERAL AGENCY, INC.

86-313 731 S.W.2d 183

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Proctor & McCauley, by: *Richard L. Proctor*, for appellant Velma M. Diebold.

Shaver, Shaver & Smith, by: *Tom B. Smith*, for appellant First National Bank of Wynne.

Daggett, Van Dover, Donovan & Cahoon, by: *Jesse B. Daggett*, for appellee.

DAVID NEWBERN, Justice. A judgment was rendered against appellant Velma Diebold in the amount of $156,905.51 for her failure to pay a promissory note in favor of the appellee, Myers General Agency, Inc. Mrs. Diebold asked the trial court to set the judgment aside pursuant to Ark. R. Civ. P. 60(b) or 60(c). She claimed, and contends on this appeal, that the judgment entered against her was a default judgment and that she had not had the benefit of the three-day notice period prescribed in Ark. R. Civ. P. 55. She also contends that because her attorney was allowed to withdraw from the case in violation of Ark. R. Civ. P. 64, she has been denied a fair trial in violation of her right to due process of law. We hold that the judgment against Mrs. Diebold was not a default judgment, as it was one taken on the basis of evidence presented by the appellee. Mrs. Diebold moved to set the judgment aside pursuant to Ark. R. Civ. P. 60. We hold that she was not entitled to relief under Rule 60(b) because the court did not act within the ninety-day limit prescribed in that rule, and that she was not entitled to relief under Rule 60(c) because she was negligent in failing to check on or show any interest whatever in the suit against her of which she had been given notice. For the same reason, we hold that Mrs. Diebold has not been denied due process of law.

Lloyd Diebold, Jr., Mrs. Diebold's son, was charged with theft resulting, apparently, from his failure to remit insurance premiums which had been paid to him and were owed to the appellee. He owed some $44,000 on his "account" with the appellee, plus other money he had borrowed from the appellee's president. The trial court accepted a plea of guilty and suspended imposition of sentence on Lloyd Diebold, Jr., for a five-year period. One of the conditions of the suspension was restitution to the appellee in a total amount of $162,932.55. Mrs. Diebold signed the note in that amount when she was visited by her son and Johnny Myers, an officer of the appellee corporation. Although Lloyd and Myers did not threaten Mrs. Diebold, Myers explained to her that he did not want to see Lloyd go to prison, and that would be the result if the "restitution" were not achieved.

Mrs. Diebold was not the only maker of the note. She had

cosigned it with Lloyd and a number of other family members. She made one $10,000 payment on the note and thereafter no payments were made. The appellee brought this action on the note, and Mrs. Diebold was served with a summons. She called Lloyd and then did nothing further. Lloyd hired the law firm of Croxton and Boyer, of Rogers, Arkansas, to answer the suit. An answer was filed by Charles F. Hickman, an associate of that law firm. Mr. Hickman took no further action in the suit except to respond to a motion for summary judgment which was filed by the appellee and to respond to telephone calls from counsel for the appellee about the setting of the action for trial. He did not communicate with Mrs. Diebold at all.

On March 14, 1986, the case was set by the trial court to be heard in Cross County on April 1, 1986. Mr. Hickman was notified of the trial date. The appellee and its witnesses and counsel appeared for the trial, but Mr. Hickman did not appear. Rather, he called an attorney in Cross County and prevailed on him to present two motions to the court. The first motion was that the case be continued, and the other was that Mr. Hickman be allowed to withdraw from the case. The continuance motion was denied, and the motion to withdraw was granted. Mrs. Diebold was not present and had no idea the trial was being held. The court took evidence from the appellee's witnesses and entered a judgment in favor of the appellee. Mrs. Diebold first learned that "something was wrong" when her bank account was garnished to satisfy part of the judgment.

1. Default judgment

Mrs. Diebold contends that the judgment taken against her was a default judgment governed by Ark. R. Civ. P. 55, and that it was error not to have set it aside because she had appeared in the action through the answer filed by Mr. Hickman but was not given the three-day advance notice required by the rule to be given to a party who has appeared. The problem with this argument is its basic premise. No default judgment was taken in this case. We have not addressed the definition of default judgment as discussed in Rule 55; however, our court of appeals has. In *Dawson* v. *Picken,* 1 Ark. App. 168, 613 S.W.2d 846 (1981), it was held that where no motion for default was made upon the failure of a party to appear but a judgment was taken on

the basis of the evidence adduced, Rule 55 was inapplicable. That is also the rule in some other jurisdictions. *Coulas* v. *Smith,* 96 Ariz. 325, 395 P.2d 527 (1964); *Davis* v. *Klaes,* 141 Colo. 19, 346 P. 2d 1018 (1959); *Biddy* v. *Preston,* 555 S.W.2d 898 (Tex. Civ. App. 1977).

The only case cited by Mrs. Diebold dealing with Rule 55 is *Magness* v. *Masonite Corporation,* 12 Ark. App. 117, 671 S.W.2d 230 (1984), in which our court of appeals held it was error not to have set aside a default judgment where the defendant had appeared but had not been given the requisite three-day notice. In that case, however, no question was raised as to whether the judgment was taken by default. The judgment was entered against the defendant apparently because he had failed to respond to an amendment to the original complaint. The court of appeals consistently characterized the judgement as a default judgment in its opinion, and there seems to be little doubt that it was not a judgment based upon evidence presented before the court as in this case.

Our holding is that when a judgment is based upon evidence presented to the court at a trial, as opposed to being based on the failure of a party to appear or attend, the judgment is not a default judgment, and Rule 55 does not apply.

2. Ark. R. Civ. P. 60(b)

Rule 60(b) provides:

> (b) Ninety-Day Limitation. To correct any error or mistake or to prevent the miscarriage of justice, a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.

The judgment in favor of the appellee against Mrs. Diebold on the note was filed April 10, 1986. The motion to set the judgment aside pursuant to Rule 60(b) was filed July 8, 1986, which was the eighty-ninth day after the judgment. No action was taken by the court, but a hearing was held September 8, 1986, at which the motion was denied. No explanation of Mrs. Diebold's delay in seeking relief under Rule 60(b) appears in the

record. After the ninety days specified in Rule 60(b) had passed, the court lost the authority to set aside the judgment on the basis that there had been a miscarriage of justice. *See Mullen* v. *Couch,* 288 Ark. 231, 703 S.W.2d 866 (1986), where we said, in the context of ruling on a motion for new trial, that "a court must act within 90 days of the filing of the judgment with the clerk if it is to modify or set aside its judgment . . . unless certain conditions . . . exist." The "certain conditions" referred to are those found in Rule 60(c).

While Mrs. Diebold's original motion to set aside the judgment invoked only the provisions of Rule 60(b), at one point she amended her motion to include reference to all of Rule 60, so we will address whether she was entitled to have the judgment set aside pursuant to subsection (c).

3. Ark. R. Civ. P. 60(c)

Rule 60(c), in pertinent part, provides:

> (c) Grounds for Setting Aside Judgment After Ninety Days. The court in which a judgment has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> . . .
>
> (7) For unavoidable casualty or misfortune preventing the party from appearing or defending. . . .

Mrs. Diebold contends that there was in this case an unavoidable casualty or misfortune which prevented her from appearing or defending.

While this court has held that a misunderstanding of counsel resulting in the entry of a default judgment may constitute an unavoidable casualty or misfortune sufficient to permit setting aside the judgment pursuant to Rule 60(c)(7), *Foote* v. *Jitney Jungle, Inc.,* 283 Ark. 103, 671 S.W.2d 186 (1984), we have not so held when the party against whom the judgment was rendered ignored the lawsuit altogether. *Meisch* v. *Brady,* 270 Ark. 652, 606 S.W.2d 112 (1980). The words, "unavoidable casualty or misfortune," found in Rule 60(c)(7) were taken from

a statute which was similar to the rule and which has now been superseded. Ark. Stat. Ann. § 29-506. In applying that language we consistently held that a party cannot invoke the aid of the court in setting aside a judgment where she failed to keep herself informed. In *Merchants & Planters Bank & Trust Co.* v. *Ussery,* 183 Ark. 838, 38 S.W.2d 1087 (1931), we held that a woman who received a summons, as did Mrs. Diebold, and then turned the matter over to her son was not entitled to relief from a judgment entered against her without her knowledge. The knowledge of the son was imputed to his mother who had made him her agent, and we said her failure to appear was the result of her failure to keep herself informed. *See also Midwest Timber Products Co.* v. *Self,* 230 Ark. 872, 327 S.W.2d 730 (1959); *Parker* v. *Sims,* 185 Ark. 1111, 51 S.W.2d 517 (1932).

The record shows that Mrs. Diebold made no efforts whatever to keep herself informed. She simply trusted her son to handle the matter. Given his record to that point, we cannot say she was other than negligent. While there was evidence that Mrs. Diebold was taking strong drugs which had been prescribed for her during the time she should have been keeping up with her case, there was also evidence that she was continuing to act as trustee of a trust established in her late husband's estate and handling other business matters. To the extent the trial court's ruling may have considered that she had no excuse for failure to keep herself informed about the proceedings, we can hardly say any such factual determination was clearly erroneous.

4. Ark. R. Civ. P. 64

The most troublesome aspect of this case is that the trial court allowed Mr. Hickman to withdraw as counsel for Mrs. Diebold without complying with Rule 64. That rule provides:

Withdrawal of Counsel

> A lawyer may not withdraw from any proceeding or from representation of any party to a proceeding without permission of the court in which the proceeding is pending. Permission to withdraw may be granted for good cause shown if counsel seeking permission presents a motion therefor to the court showing he (1) has taken reasonable steps to avoid foreseeable prejudice to the rights of his

> client, including giving due notice to his client, allowing time for employment of other counsel; (2) has delivered or stands ready to tender to the client all papers and property to which the client is entitled; and (3) has refunded any unearned fee or part of a fee paid in advance, or stands ready to tender such a refund upon being permitted to withdraw. . . .

In a deposition Mr. Hickman testified that after he filed the answer he sought on numerous occasions to discuss the case and obtain assistance from Lloyd Diebold who would not even respond to letters in which he was warned of the seriousness of the situation. Mr. Hickman also testified to numerous unsuccessful attempts to telephone Mrs. Diebold and to reach her through other attorneys. Mr. Hickman testified that Lloyd's "disappearance" was making him very nervous, and he discussed his need to withdraw with the judge prior to the trial date.

As the reporter's note to Rule 64 indicates, it has its basis in what is now called the Code of Professional Responsibility. It thus is a rule which deals with attorney discipline. However, the rule is aimed at protecting the client's interest. Permission to withdraw should not have been granted summarily. We cannot say that such a violation will not be a basis for setting aside a judgment pursuant to Rule 60(b) or (c) when the party whose interests have been thus prejudiced has been diligent in protecting those interests. Here, however, Mrs. Diebold's failure to keep tabs on her case was in large measure the reason she did not present the defenses she now claims to the action on the note. Even if the judge had overruled Mr. Hickman's motion to withdraw, Mrs. Diebold would have been no better off, as she was unaware of the proceedings and Mr. Hickman was unavailable.

Had Mrs. Diebold inquired of her attorney or perhaps of her son, she could have avoided the situation that resulted. The violation of Rule 64 would not have occurred had she fulfilled her duty to keep up with the case, thus we find no deprivation of due process.

5. Motion for costs

The appellee's counsel has moved to recover costs incurred in supplementing the abstract provided by the appellants. While the

supplemental abstract prepared by the appellee was of some use, we do not find that there was the sort of clear-cut and demonstrable failure by the appellants to abstract so that a full and fair consideration of the matters in issue could be had. *Arkota Industries, Inc.* v. *Naekel,* 274 Ark. 173, 623 S.W.2d 194 (1981).

Affirmed.

Vernon Dale TRAVIS *v.* STATE of Arkansas

CR 86-204 730 S.W.2d 501

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Gregory E. Bryant, for appellant.

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

TOM GLAZE, Justice. While serving a life sentence for a homicide in the Arkansas Department of Correction, appellant killed a fellow inmate and was charged with capital murder in August 1981. Twelve months later, he pled guilty to a reduced charge of first degree murder and was sentenced to a twenty-year term to run consecutively to his existing life sentence. In September 1986, appellant brought this action, requesting the trial court to amend his commitment order to reflect the penitentiary time he was already serving on the prior homicide but which caused him,

also, to be incarcerated for the twelve-month period between his arrest and his eventual conviction for this second homicide. The trial court treated appellant's letter-request as a petition for mandamus and denied it. We affirm.

Appellant's argument, while unique, is wholly without merit. He simply was not entitled to credit for his time in jail or the pentitentiary because the time he was serving was on an unrelated charge. *See McGirt* v. *State,* 289 Ark. 7, 708 S.W.2d 620 (1986). He cites Ark. Stat. Ann. § 41-904 (Repl. 1977), which deals with credit for time spent in custody, but that law clearly does not apply when, as here, the defendant's incarceration exists because of charges or criminal conduct other than the one on which the defendant seeks credit and for which he is convicted and sentenced.

The trial court correctly denied appellant's petition, and we affirm.

Steven D. HILL *v.* STATE of Arkansas

CR 85-212 730 S.W.2d 245

Supreme Court of Arkansas
Opinion delivered June 15, 1987

Charles L. Carpenter, Jr., for appellant.

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

PER CURIAM. The stay of execution is granted to expire June 30, 1987. In the future no stay of execution will

ordinarily be granted when certiorari is sought from a denial of Rule 37 relief.

HICKMAN, DUDLEY and GLAZE, JJ., would deny.

Billy Joe EDGEMON *v.* STATE of Arkansas

CR 87-26 730 S.W.2d 898

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Hurst Law Offices, by: *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. Billy Joe Edgemon was

convicted in 1981 of first degree murder for causing the death of Jimmy McCormick and was sentenced to life imprisonment. This court affirmed his conviction in 1982. *Edgemon* v. *State*, 275 Ark. 313, 630 S.W.2d 26 (1982). Edgemon's application for post conviction relief was denied by this court on December 5, 1983, in an unpublished opinion. On January 25, 1985, Edgemon filed a *pro se* petition in the trial court seeking a writ of error *coram nobis* because of newly discovered evidence. After a hearing on the petition, at which Edgemon was represented by counsel, the trial court denied relief. It is from that decision that this appeal is brought. We affirm.

We first explained in *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984) that writs of error *coram nobis* will be permitted based on newly discovered evidence if the evidence is such that it might have resulted in a different verdict, provided the writ is filed between the trial and an appeal. In *Williams* v. *Langston*, 285 Ark. 444, 688 S.W.2d 285 (1985) we clearly stated:

> Once a conviction has been affirmed on appeal, error coram nobis is not available to secure a new trial on the basis of newly discovered evidence or to raise issues which are properly raised in a petition pursuant to Criminal Procedure Rule 37. . . . If a petitioner discovers some ground for relief . . . . after a judgment is affirmed, he may present that ground in a clemency proceeding. . . We expanded the writ of error coram nobis in *Penn* to fill a gap in the legal system. Petition for writ of error coram nobis is not available after we review a case.

See also, Pickens v. *State*, 284 Ark. 506, 683 S.W.2d 614 (1985); *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986).

Inasmuch as Edgemon filed his writ of error *coram nobis* after this court had affirmed his conviction, it was properly denied by the trial court. Although the trial court based its denial of relief on the fact that the newly discovered evidence would not have changed the outcome of the original verdict, we uphold the decision denying the writ even though it was done for the wrong reason. *Marchant* v. *State*, 286 Ark. 24, 688 S.W.2d 744 (1985). Once this court affirmed the conviction, the trial court lost jurisdiction in the matter. *McDaniel* v. *State*, 286 Ark. 246, 691

S.W.2d 153 (1985).

Affirmed.

Robert Harold MUNNERLYN *v.* STATE of Arkansas

CR 86-193 730 S.W.2d 895

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Gregory E. Bryant, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Robert Munnerlyn, appellant, was found guilty of three counts of aggravated robbery, for which he was sentenced to three consecutive sixty-year sentences; and two counts of theft of property, for which he received two one-year sentences. A statement given by Munnerlyn shortly after his arrest on December 5, 1985, in which he gave a detailed account of his involvement in the robberies, was admitted into evidence at the trial. Munnerlyn contends that the trial court erred in overruling his motions to suppress the confession because it was not intelligently and voluntarily given and was the result of an illegal arrest. We affirm his convictions.

Munnerlyn first argues that his statement was not knowingly and voluntarily given because he was under the influence of drugs at the time the statement was made. Munnerlyn was arrested at his home at 8:30 p.m. and gave the police his statement at 9:44 p.m. Munnerlyn, in his recorded statement, openly and coherently recounted details of the robberies.

At the hearing on his motion to suppress, police officers testified that he was read his rights twice and indicated he understood them. One officer stated that, when told he did not have to talk to the police, Munnerlyn said "I know. You've got me." One police officer, who was present during the taking of the statement, testified that Munnerlyn appeared cognizant and knew what was going on. Another officer stated that he did not ask him if he was on drugs because he appeared to be normal. The deputy prosecutor who was in attendance specifically asked Munnerlyn whether or not he was under the influence of any drugs or alcohol to which Munnerlyn responded, "I don't think so. . . . Yes, I'm in full control." There were no allegations by Munnerlyn that police officers used coercion in obtaining the confession.

Munnerlyn testified that he had injected himself with crystal methamphetamine between 2 and 4 p.m. the day of the confession. He said he was still feeling the effect of the drug when he

gave the statement. The only other evidence in support of the motion was testimony by two witnesses, who examined Munnerlyn, that he had sores and marks consistent with repeated needle injections, and expert testimony that crystal methamphetamine creates a lack of fear in an acute situation and that a person is open to suggestions while under the influence of the drug.

When reviewing the admissibility of a confession on appeal, we make an independent determination of the voluntariness of the confession based on the totality of the circumstances, and the trial court's decision will be reversed only if it is clearly against the preponderance of the evidence. *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986). The state bears the burden of proving by a preponderance of the evidence that the confession was knowingly and voluntarily given, and any conflict in the testimony is for the trial court to resolve. *Brown* v. *State*, 277 Ark. 294, 641 S.W.2d 7 (1982). The United States Supreme Court recently held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'." *Colorado* v. *Connelly*, ___U.S.___, 107 S. Ct. 515 (1986).

In *Brown, supra*, the appellant testified that he was drunk when he gave a statement to the police, and did not remember signing a waiver form or being interrogated. Other defense witnesses agreed that the appellant had been drinking that day, but were in conflict as to what extent it affected his behavior. The police officers who took the statement testified that the appellant understood the waiver, did not appear intoxicated, had control of his faculties, and spoke without slurring his words. We held that the trial court did not err in admitting the confession.

In *Harvey* v. *State*, 272 Ark. 19, 611 S.W.2d 762 (1981), we upheld the admission of a confession where the appellant maintained that he had been drinking heavily the night before, was still drunk while in custody, and did not remember his rights being read to him. The appellant's testimony that he was intoxicated was uncorroborated. His testimony conflicted with that of the officers, who stated they smelled alcohol on his breath but that he was not drunk.

Munnerlyn's testimony was the only evidence that he was under the influence of drugs when he gave his statement. His testimony was contradicted by the testimony of the deputy

prosecuting attorney and the officers, and by his own statements made at the conclusion of his confession. Munnerlyn, in his recorded statement, clearly related details of the robbery, such as how much money was taken; how it was divided with his accomplice; the weapons used in each robbery; and who was in the liquor stores when the robberies were committed. In addition, there was no indication of "coercive police activity" in the taking of the confession. For these reasons, we find no error in the trial court's ruling that the confession was knowingly and voluntarily given.

Munnerlyn claims, as his remaining ground for reversal "that the failure of the state to provide evidence or testimony that there was probable cause to support the issuance of an arrest warrant constitutes grounds for automatic reversal." In making this statement, it appears that Munnerlyn is arguing that the state has the burden of proving that his initial arrest was based on a valid warrant issued pursuant to Ark. R. Crim. P. 7.1(c), and that the rule itself is constitutional. It is impossible for us to consider this issue as it is not developed beyond Munnerlyn's pleading. The record is barren of proof as to the circumstances of his initial arrest, other than the fact he was arrested prior to the charges being filed in circuit court.

The record reveals that on January 2, 1986, Munnerlyn was charged by felony information (which was later amended) in circuit court with several counts of armed robbery. He was arrested on these charges by bench warrant the next day. Later, Munnerlyn was tried and convicted. Prior to trial, Munnerlyn filed several motions, including one labeled "Motion to Suppress Derivative Evidence Obtained Pursuant to Invalid Arrest." This motion stated that on or about November 1, 1985, a warrant of arrest was issued by the Municipal Court of Little Rock charging defendant with the crime of aggravated robbery, and that the warrant of arrest was invalid. It further claimed that Rule 7.1(c) was unconstitutional.

The trial court denied this motion after an omnibus hearing. There was no testimony or proof presented at the hearing as to the existence of an arrest warrant other than the bench warrant issued pursuant to the information filed in circuit court. The officers who participated in the investigation of this case testified

about the arrest on December 5, 1985. However, the record does not reflect testimony indicating whether this arrest was with or without a warrant.

In *Gaylor* v. *State*, 284 Ark. 215, 681 S.W.2d 348 (1984), we held that all presumptions are favorable to the trial court's ruling on the legality of an arrest and the burden of demonstrating error rests on the appellant. It is not clear from the record whether the trial court, in denying the motion to quash, directed his ruling to the bench warrant issued by the circuit court, or to Munnerlyn's unsupported assertion that his arrest was the result of an illegal warrant issued by a municipal court. In either event, the trial court was correct, for the presumption is that the bench warrant issued by the circuit court is legal, and it is obvious that Munnerlyn has failed to demonstrate or present proof supporting his assertion.

Although the trial court did not make any specific findings as to the constitutionality of Rule 7.1(c), it is assumed that the trial court, in denying the motion to quash or invalidate the arrest, also rejected Munnerlyn's challenge to the constitutionality of the rule. We are unable to address Munnerlyn's argument in this regard since there is no evidence of record as to the issuance of a warrant of arrest other than the circuit court bench warrant. We do not make findings based on unsupported pleadings in criminal cases, as allegations in a motion do not amount to any proof of facts stated therein. *Harvey* v. *State*, 218 So. 2d 9 (Miss. 1969).

Affirmed.

The ELECTORS OF ETOWAH SCHOOL DISTRICT *v.* MISSISSIPPI COUNTY BOARD OF EDUCATION, et al.

86-294 731 S.W.2d 187

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Michael Everett, for appellants.

Fendler, Gibson & Bearden, by: *Michael L. Gibson*, for

appellees.

DARRELL HICKMAN, Justice. This is a school consolidation case. The appellants, patrons and electors of the Etowah School District, which is in Mississippi County, sought consolidation with the Lepanto School District, which is an adjacent school district but located in Poinsett County. The Poinsett County Board of Education granted the petition, which called for an election. The petition was not acted upon by the Mississippi County Board of Education. Instead the Mississippi County Board honored a resolution of the Etowah School Board which sought annexation to the Manila School District. The circuit court upheld that action and refused appellants' request for a writ of mandamus ordering consolidation of Etowah with Lepanto.

On appeal the argument is that the trial court was wrong in denying mandamus because the appellants complied with the new law on annexation, and the county board was required to grant appellants' petition to consolidate Etowah with Lepanto. The circuit court made the correct decision.

School consolidation has always been a volatile issue. Massive consolidation occurred in Arkansas during the 1930's and 1940's, but many small school districts remained. In 1983, we decided financing for public schools should be equal or nearly so. *DuPree* v. *Alma School District No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983). One consequence of this decision was the Quality Education Act of 1983. Act 445 of 1983. Since some school districts would probably be unable to comply with the new education standards, this new act gave those districts the choice of seeking voluntary annexation with an adjoining school district. Ark. Stat. Ann. § 80-4609(c) (Supp. 1985). Under this law the electors of the district or the school board could decide which adjacent school district to join. The statute provides:

> Between June 1, 1984, and June 1, 1987, any school district may be annexed to one or more adjoining school districts by petitioning the county board of education of the county in which such district is administered to order the annexation. The annexation request may be by resolution of the board of directors of the district or by a petition signed by majority of the qualified electors in the district. Upon receipt of a request for annexation, the county board

> of education shall hold a hearing on the request and shall then order the annexation of the district to one or more adjoining school districts. If the county board of education fails to act within sixty (60) days of receipt of a request for annexation, the petitioning district may request the circuit court to issue a writ of mandamus to said county board.

The history of Etowah's efforts to face its problems is extensive. Etowah is located entirely in Mississippi County. It is adjacent to three school districts: South Mississippi County School District (Rivercrest), Manila School District, and the Lepanto School District in Poinsett County. Evidently, Etowah could not comply with the new standards.

The first action taken was a petition by the Etowah School Board for an election to decide whether to consolidate with Rivercrest. The Mississippi County Board of Education approved the election. But the voters rejected this proposal in June, 1985. Immediately, the Etowah School Board adopted a resolution to petition the county board to combine the top four grades with an adjoining district and the lower grades and kindergarten were to remain a separate district. In July, 1985, this resolution was amended to provide that the top four grades be annexed to Rivercrest.

A suit was filed in chancery court to have the Etowah School Board's resolution declared void and to enjoin the county board from acting on the resolution. The chancellor dismissed the complaint and no appeal was taken.

During this time, on June 24, 1985, some electors of the Etowah District and the Lepanto School District petitioned the Poinsett County Board of Education and the Mississippi County Board of Education for a special election on whether to consolidate Etowah with Lepanto. The Poinsett County Board approved the petition; the Mississippi County Board did not act on the petition. This is the petition which the appellants contend the county board was required to honor pursuant to Ark. Stat. Ann. § 80-4609(c) (Supp. 1985). The Mississippi County Board never acted.

On January 23, 1986, the appellants, representing the electors of the Etowah and Lepanto Districts, filed a suit in circuit

court seeking mandamus against the board. On April 25, 1986, in a special meeting, the Etowah School Board, by resolution, revoked the previous resolution and petitioned the Mississippi County Board of Education to order annexation of Etowah with Manila. On May 19, 1986, the circuit court, in agreement with the parties, ordered the county board to meet and consider the two petitions—the one filed by the patrons for consolidation with Lepanto and the Etowah School Board's petition to annex to Manila. A lengthy hearing was held and the county board decided that the Etowah School Board's petition should be granted. Annexation was ordered effective July 1, 1986. An appeal was promptly filed in circuit court with a pleading titled "Second Amended and Substituted Complaint." After a hearing, the circuit court upheld the board's action and this appeal was filed.

The legal issue is simple. If the appellants' original petition complied with Ark. Stat. Ann. § 80-4609(c), the county board of education had to grant it. Appellants' petition states:

> We, the undersigned electors of Etowah School District No. 36 and of Lepanto School District No. 14, do hereby petition the County Boards of Education in Poinsett and Mississippi Counties to call a special election to submit to the electors of these two school districts the question of the consolidation of Etowah School District No. 36 with Lepanto School District No. 14 and the creation of a new school district for the consolidated area to be governed by a board with three members from the area of Etowah School District No. 36 and three members from the area of Lepanto School District No. 14. In the event this petition is signed by more than 50% of the electors of these two areas, then we petition the two County Boards of Education to direct the consolidation and creation of a new district.

This petition does not comply with the new law, and it is not, in our judgment, an effort to comply with the requirements of Ark. Stat. Ann. § 80-4609(c). This law provides an easy way for a school district to dissolve itself and simply join an adjacent school district. The only requirement is that either a majority of the electors of the district, or the school board petition for the annexation. The choice of which adjacent district to join is given

to the petitioners. The rest is automatic; the county board must honor the request and the circuit court is to issue a mandamus if the board refuses.

[redacted] The appellants sought to condition this request by retaining some elements of power in the electors of the Etowah District and some remnants of the Etowah District. The appellants asked for a special election to create a *new district* which would be governed by three board members from the Etowah District and three from the Lepanto District. This was obviously not the type of annexation the legislature contemplated by Ark. Stat. Ann. § 80-4609(c). The electors' petition followed the consolidation procedure of Ark. Stat. Ann. § 80-414 (Repl. 1980). Under that statute, the county board is not required to approve the petition but has some discretion in the matter. The statute reads in part: . . . "[I]f in the judgment of said boards such a district should be formed, shall issue an order transferring the territory affected in their respective counties, to the proposed district."

[redacted] The Mississippi County Board of Education was not required to grant the petition filed by the appellants, because it was not in compliance with Ark. Stat. Ann. § 80-4609(c); it was required to adopt the petition filed by the school board because it did comply with the statute; therefore, the trial court's order denying a request for mandamus is affirmed.

It is not necessary for us to discuss several collateral matters, such as whether the appellants actually represented a majority of the electors, or the fact Lepanto has since merged with Tyronza, or the form of the school board's request.

Affirmed.

HORNE BROTHERS, INC., A. A. HORNE AND Don HORNE *v.* RAY LEWIS CORPORATION

87-65 731 S.W.2d 190

Supreme Court of Arkansas
Opinion delivered June 22, 1987
[Rehearing denied July 20, 1987.]

John B. Hainen; John H. Jackson; and *Dailey, West, Core,*

Coffman & Canfield, by: *Ben Core*, for appellants.

Steel & Steel, by: *George Steel, Jr.*, for appellee.

DARRELL HICKMAN, Justice. This case has been referred to us by the Court of Appeals.

This was an action in chancery court by a creditor of a corporation to require its two sole stockholders and directors to repay the corporation money acquired in violation of the fiduciary duty to creditors. The chancellor held that the money should be repaid. On appeal two of appellants' three arguments were not properly raised below and will not be considered. The third argument is that the chancellor erred in not upholding a valid assignment to the stockholders of a debt due the corporation. We find the issue to be one of fact and the chancellor's decision not clearly wrong.

Appellants A. A. Horne and Don Horne, brothers, formed a corporation, Horne Brothers, Inc., to open and operate an Otasco store in DeQueen, Arkansas. The appellee, Ray Lewis Corporation, constructed a building to be occupied by the Otasco store. A ten year lease of the building was signed in the fall of 1977. For the first five years of the lease, the Horne brothers were individually liable together with their corporation for the rent. The brothers were its sole stockholders and directors. For the second five year period, only the corporation was liable for rent.

About two years later, Horne Brothers, Inc., sold the store to Galen P. Sullins, R. Kendal Harvey, and Ralph C. Harvey, and their corporation, Harvey and Sullins, Inc. The building was subleased by Horne Brothers, Inc., to Harvey and Sullins, Inc., and additional rent over and above that due the appellee was charged to Harvey and Sullins, Inc. The extra charge amounted to a little over $1,000 per year. No permission was sought for the sublease, but appellee was aware of the sale and did not object to it.

In September 1982, Harvey and Sullins, Inc., closed the store, and Horne Brothers, Inc., notified appellee of the closing and abandonment of the building. A dispute arose between Harvey and Sullins, Inc., and Horne Brothers, Inc., regarding the former's liability under the sublease—whether the five year term commenced when Harvey and Sullins, Inc., signed the sublease in

1979, or whether Harvey and Sullins, Inc., merely assumed the first five years of the lease signed by Horne Brothers, Inc., and the appellee. There was also a dispute between these parties whether any liability remained under the original ten year lease. After Harvey and Sullins, Inc., abandoned the building, the appellee would send potential renters of the building to Horne Brothers, Inc., who would, in turn, refer them back to the appellee. One of the Horne brothers, A. A. Horne, was a director of the Clark County Bank, and several loans were made by the bank to the brothers in connection with their Otasco store. The total sum loaned by the bank for the operation was at least $150,000. In October 1982 there were no corporate assets left. The corporation determined that it still owed the bank $23,705.51 on a note signed by one of the Horne brothers. (According to A. A. Horne's testimony, this debt was due on a $150,000 note dated May 2, 1978. It appears Don Horne signed this note.) The corporation assigned to the two Horne brothers any claim it had against Harvey and Sullins, Inc., in consideration of them paying the corporation's debt to the bank. The Horne brothers were already individually liable on the notes to the bank. (The note in question was not signed by the corporation officers but by one of the brothers "d/b/a Otasco of DeQueen.")

Horne Brothers, Inc., sued Harvey and Sullins, Inc., under the sublease and invited appellee to join. The appellee declined on advice of counsel. Eventually, a judgment against Harvey and Sullins, Inc., was obtained for $32,340 which was substantially affirmed by the Court of Appeals.

In the meantime, the appellee sued Horne Brothers, Inc., for rent due under the lease. A default judgment for $30,655.55 was obtained on January 17, 1985. At that time half of the money due Horne Brothers, Inc., by Harvey and Sullins, Inc., had been collected. The total amount collected from Harvey and Sullins, Inc., was $30,940. Of that amount $4,859.30 was paid by the corporation for attorneys' fees in collecting the judgment, and the balance of the money collected was placed in the individual account of A. A. Horne even though one-half of this amount belonged to Don Horne. This suit was filed to require that money be paid the corporation so appellee could collect on its default judgment.

A. A. Horne, Don Horne and Lawrence Lewis testified. Summarizing, the chancellor found: (1) the only two stockholders in Horne Brothers, Inc., were A. A. Horne and Don Horne; (2) Horne Brothers, Inc., is now insolvent and has been inactive for a number of years; (3) the transfer of the money received from Harvey and Sullins, Inc., was an unauthorized and unfair transfer of the corporate assets solely for the purpose of defeating the judgment lienholder, Ray Lewis Corporation, and a receiver should be appointed to take control of the corporation assets and to dissolve the corporation according to the law; and (4) A. A. Horne and Don Horne are ordered to return the money received from Harvey and Sullins, Inc., less attorneys' fees, to the receiver for division among the creditors.

On appeal Horne Brothers, Inc., first argues that the appellee did not comply with Act 189 of 1893. The suit was filed pursuant to Ark. Stat. Ann. § 64-1103 (Repl. 1980), which is § 2 of Act 189. No argument was made to the chancery court that the appellee's suit failed to comply with the act. Therefore, we will not consider it on appeal. *First Commercial Bank* v. *Meyer*, 289 Ark. 345, 711 S.W.2d 791 (1986).

The second argument is that the trial court failed to recognize a valid assignment to the brothers. The assignment is not in the record. A. A. Horne read into the record what it apparently said and testified about its date and circumstances. The trial court made a specific finding that the assignment was made to defeat their creditor's claim. There is no doubt that the brothers knew of the appellee's claim, and the corporation did not contest it, allowing judgment by default. The court noted that the corporation had only two stockholders. Detailed testimony was given regarding the notes signed by the brothers to the Clark County Bank and the financing of the store.

Also considerable testimony was given about the relationship of A. A. Horne to the Clark County Bank, which financed most, if not all, of the Otasco endeavor. The appellee, of course, had no notice of the assignment in 1982. The parties disputed their rights and duties under the original lease. Undoubtedly, the court considered whom to believe. Whether the assignment was made to defeat the appellee's claim was one of fact, and we will not set aside such a finding unless clearly wrong.

ARCP 52; *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). We view all evidence on appeal in a light most favorable to the appellee. *Sipes* v. *Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985). The Horne brothers did give themselves preference. The appellants argue the assignment was valid on its face and the appellee declined to join them in suing Harvey and Sullins, Inc., and should not reap the fruits of their labor. But the appellee did not have a lease with Harvey and Sullins, Inc., and could rightly stand on its claim against Horne Brothers, Inc., which it did, without having to join in the lawsuit. The appellants have been unable to demonstrate the chancellor was clearly wrong in his findings.

The general rule is that the capital stock and assets of a corporation constitute a trust fund for the benefit of creditors, which neither the officers nor the stockholders can divert or waste. *Wilson* v. *Lucas*, 185 Ark. 183, 47 S.W.2d 8 (1932). Contracts between corporations and their directors dealing with corporate assets are not void but voidable, and the fact that a corporation deals with its shareholders or directors is a circumstance to be considered along with other facts and circumstances in a case as tending to show fraud when the transaction is challenged by a creditor. *Oliver* v. *Henry Quellmalz Lbr. & Mfg. Co.*, 170 Ark. 1029, 282 S.W. 355 (1926). While such contracts are voidable, they are more closely scrutinized than ordinary contracts, and the burden is upon those claiming under them to prove that they are made in good faith and fair to the corporation. *Walker-Lucas-Hudson Oil Co.* v. *Hudson*, 168 Ark. 1098, 272 S.W. 836 (1925).

We cannot say the chancellor was clearly wrong in finding the assignment in consideration of payment to a bank, of which one of the Horne brothers was a director, was unfair and made to avoid the appellee's claim against the corporation.

The final argument is: "Chancery Court has no jurisdiction to supervise the entire liquidation of a corporation. Section 88, Act 576 of 1965 (Ark. Stat. § 64-906), is unconstitutional to the extent that it provides otherwise." First, the argument was not made below. Second, no motion to transfer to circuit court was made. *Stolz* v. *Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975); *Harris* v. *Umsted*, 79 Ark. 499, 96 S.W.146 (1906). Certainly, the chancery court was not wholly without jurisdiction. Chancery courts have jurisdiction to hear com-

plaints by creditors against corporations and stockholders to set aside transfers made to defeat creditors' claims. See *Taylor* v. *Bank of Mulberry*, 177 Ark. 1091, 9 S.W.2d 578 (1928). In *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), we said 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." See also *Towell* v. *Shepherd*, 286 Ark. 143, 689 S.W.2d 564 (1985).

There was no motion to transfer in *Liles*, nor was there a question raised regarding the propriety of chancery court to hear the case. That is essentially the posture of this case. Therefore, we need not address the question of whether Ark. Stat. Ann. § 64-906 (Repl. 1980) is constitutional in giving chancery court jurisdiction over liquidation of a corporation.

Affirmed.

GLAZE, J., dissents.

ARKANSAS APPLIANCE DISTRIBUTING COMPANY, Robert WHITEHEAD and Van BUNCH *v.* TANDY ELECTRONICS, INC., d/b/a TANDY COMPUTER LEASING

86-274 730 S.W.2d 899

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Meredith Wineland, for appellants.

House, Wallace & Jewell, P.A., by: *W. Michael Reif*, for appellee.

JOHN I. PURTLE, Justice. On April 18, 1984, the appellants entered into a contract with the appellee for a computer and software equipment. The contract called for total payments of $10,138.00. Subsequently, the appellants defaulted on the contract and appellee demanded the return of the equipment. Appellee then sold the equipment to Radio Shack, a wholly owned subsidiary of the Tandy Corporation, for the amount of $3,325.95. Suit was filed in Pulaski County, Arkansas, for the deficiency.

The trial court decided that Texas law was to be applied. The court also found that the sale to Radio Shack was commercially reasonable. A deficiency judgment in the amount of $5,544.43

was entered in favor of the appellee. On appeal it is argued that the trial court erred in applying Texas law and in finding that the sale was commercially reasonable.

The contract in question was initiated in Pulaski County, Arkansas. It was accepted in Forth Worth, Texas. The contract provided that Texas law would apply. The record does not reveal where the equipment was shipped from. The monthly payments on the contract were mailed from Arkansas to Texas.

When appellee filed its complaint, it attached a copy of the original contract which stated that the laws of Texas governed the transaction. Admittedly, this copy of the contract was almost illegible. This defect was subsequently cured by appellee separately furnishing a legible copy. It was stipulated by the parties that if Texas law applied, then there would be no usury challenge; however, if Arkansas law applied, the contract would be usurious.

The first issue is whether the court properly applied Texas law. Before this issue can be considered, it must be determined whether the appellee gave notice of its intention to rely upon Texas law. Arkansas Rules of Civil Procedure, Rule 44.1 (a) provides:

> A party who intends to raise an issue concerning the law in a jurisdiction or governmental unit thereof outside this state shall give notice in his pleadings or other reasonable written notice.

The same issue was addressed in *Yarbrough* v. *Prentice Lee Tractor Co.*, 252 Ark. 349, 479 S.W.2d 549 (1972). In *Yarbrough*, the appellant argued that the appellee had not given the notice required by Ark. Stat. Ann. § 27-2504 (Supp. 1971), which was the predecessor statute to Rule 44.1 and which was deemed superseded by the adoption of the Arkansas Rules of Civil Procedure. The present Rule is a verbatim recitation of the former statute. In *Yarbrough* the complaint had set out portions of the mortgage which stated that Louisiana law would control. This Court concluded that the notice requirement had been satisfied.

Of significance in the determination of the notice issue is A.R.C.P. Rule 10(c), which states: "A copy of any written instrument or document which is an exhibit to a pleading is a part

thereof for all purposes." In the present appeal, the appellee attached to the complaint a copy of the original contract executed between the parties. The contract clearly stated that Texas law would control. Even though this copy was almost illegible, the defendants' answers to interrogatories confirm that he did sign the contract. We find the facts in this appeal to be similar to those in *Yarbrough* and therefore conclude that the appellee properly notified the appellant that it intended to rely on Texas law.

We also conclude that the court correctly held that Texas law should apply. This Court addressed a similar conflict of laws question concerning the validity of a multistate contract in *Snow* v. *C.I.T. Corp. of the South, Inc.*, 278 Ark. 554, 647 S.W.2d 465 (1983). The Uniform Commercial Code, Ark. Stat. Ann. § 85-1-105(1), affirmatively provides that the parties to a multistate transaction may choose their own law so long as it bears a reasonable relation to the transaction. *Snow*, supra. The parties to this case chose to apply Texas law, and the transaction bears a reasonable relation to Texas. This Court has, moreover, consistently inclined toward applying the law of the state that will make the contract valid rather than void. *Stacey* v. *St. Charles Custom Kitchens*, 284 Ark. 441, 683 S.W.2d 225 (1985); *Grogg* v. *Colley Home Center, Inc.*, 283 Ark. 120, 671 S.W.2d 733 (1984); and *Cooper* v. *Cherokee Village Development Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963).

The seminal conflicts decision involving contracts is *Cooper* v. *Cherokee Village*, supra. In *Cooper*, the parties by the terms of the contract, expressed the intention that the laws of New York would govern the validity and interpretation of the contract. We stated that the parties had the right to select and intend the laws of New York to govern the contract since New York had substantial contacts with the contract. In the present appeal, the contract in question was accepted by the appellee in Fort Worth, Texas. The contract itself provided that Texas law would govern. Moreover, there is no evidence in the record that this is a case of a "cloak for usury" where the parties to a wholly Arkansas contract have sought to avoid the Arkansas usury law by having the validity of the contract determined by the law of a state having no substantial connection with the contract. See *Cooper*, supra. Since the state of Texas had substantial contacts with the contract, and since the parties expressed their intention

in the contract that Texas law would govern its construction, we hold that the trial court was correct in its determination that Texas law should apply.

The appellant also argues that there was no reasonable commercial sale of the equipment. We do not know what the specific requirements for the sale of repossessed goods are under Texas law. According to the record the equipment was sold for $3,325.95. On its face it does not appear that the sale was not commercially reasonable. However, it was the duty of the appellant to prove how Texas law would characterize this transaction and the applicable remedies available to the appellee. The appellant has failed to demonstrate that Texas law would require a different result. Therefore, we affirm the trial court on this point.

Finding no reversible error, we affirm the decision of the trial court.

GLAZE, J., not participating.

Carl WIDMER *v.* Raymond F. WIDMER, Executor of the Estate of Walter WIDMER, Deceased

87-9 731 S.W.2d 209

Supreme Court of Arkansas
Opinion delivered June 22, 1987
[Rehearing denied July 20, 1987.]

Appellant, pro se.

Hardin, Jesson & Dawson, by: *Bradley D. Jesson*, for appellee.

JOHN I. PURTLE, Justice. This is the fourth appeal in the same case by the same appellant. This time he attempts to appeal the trial court's decree ordering the sale of real estate. The appellant is an heir in the estate. He timely objected to the order to sell the property, claiming an absolute, first right of purchase as an heir.

In *Cash* v. *Cash*, 273 Ark. 32, 616 S.W.2d 13 (1981), we stated: "This appeal is from the order overruling the motion to restrain the sale of the land. The order is interlocutory in nature and was in no manner a final appealable order." The present appeal is in the same position as the appeal in *Cash*. Therefore, it must be dismissed.

The proper place for the arguments presented here is in an appeal from the order of confirmation of the sale of the property. That appeal has already been docketed in this Court as Case No. 87-136.

Appeal dismissed.

Linda L. HARGIS *v.* Freddie W. HARGIS

87-10 731 S.W.2d 198

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Pearson, Woodruff & Evans, by: *C. Thomas Pearson, Jr.*, and *Pat A. Jackson*, for appellant.

Everett & Gladwin, by: *John C. Everett*, for appellee.

ROBERT H. DUDLEY, Justice. This is an appeal from the denial of a motion to set aside a divorce decree. Appellant, Linda Hargis, and appellee, Freddie Hargis, both domiciliaries of the State of Arkansas, were married on January 31, 1986. During their one and one-half months of married life, they lived in Madison County. On March 13, 1986, they separated and the appellant moved back to her native Benton County. On March 31, 1986, appellee, Freddie Hargis, still a resident of Madison County, filed a complaint for divorce in Washington County. On May 7, 1986, an instrument executed by appellant, Linda Hargis, was filed in the Chancery Court of Washington County. It was styled "Waiver of Service and *Venue* and Entry of Appearance." The instrument "expressly waives *venue* in this action." On June 30, 1986, the decree of divorce was entered.

On August 18, within ninety days after the decree was entered, appellant filed a motion pursuant to ARCP Rule 60(b) to set aside the decree. In her motion she alleged that appellee had never lived in Washington County; that she signed the waiver of venue under duress and without counsel; that appellee had defrauded her by telling her after a reconciliation that he would not use the waiver and would not file for divorce when, in fact, he had already done so. In the motion she did not allege that she had a valid defense to the complaint for divorce and, upon a hearing, did not make a prima facie showing of such a defense. The trial court denied her motion to set aside the divorce decree. We affirm.

ARCP Rule 60(d), and its predecessor statute, Ark. Stat. Ann. § 29-509 (Repl. 1962), provides that, on collateral attack, judgments will not be vacated unless a meritorious defense is alleged and proved. In *H.G. Pugh & Co.* v. *Martin*, 164 Ark. 423, 262 S.W. 308 (1924), we even said this was a "doctrine of this court." For a case, almost identical to the one at bar, in which we affirmed the trial court in dismissing a motion to set aside a judgment, see *Burnett* v. *Burnett*, 254 Ark. 507, 494 S.W.2d 482 (1973). Here, the appellant neither alleged nor made a prima facie showing of a valid defense, thus, the decree of the lower court must be affirmed.

Though not expressly argued, the appellant, in effect, contends that Rule 60(d) is not applicable since the decree is void ab initio for lack of jurisdiction. We need not decide whether the Rule 60(d) requirement is applicable when a judgment or decree is void because the decree in this case is not void. (However, we note that in interpreting the predecessor statute we held that the requirement must be met even when fraud was practiced. *Quigley* v. *Hammond*, 104 Ark. 449, 148 S.W. 275 (1912)).

In *Bachman* v. *Bachman*, 274 Ark. 23 621 S.W.2d 701 (1981), we pointed out that there are two separate residency statutes in our divorce laws. One, Ark. Stat. Ann. § 34-1208 (Repl. 1962) deals with the necessity of residing in this State for a designated period of time before a court of this State can acquire jurisdiction. Residency in that statute is the equivalent of domicile in its more restrictive sense. Ark. Stat. Ann. § 34-1208.1 (Repl. 1962). The other residency statute, Ark. Stat. Ann. § 34-1204 (Supp. 1985), deals with venue. The part of the venue statute which is applicable to this case provides that "the proceedings shall be in the county where the complainant resides. . . ." Ark. Stat. Ann. § 34-1204 (Supp. 1985).

In *Gland-o-Lac Co.* v. *Creekmore, Judge*, 230 Ark. 919, 924, 327 S.W.2d 558, 561 (1959), we explained the difference between jurisdiction and venue as follows:

> [V]enue mean[s] the place, that is the county or district wherein a cause is to be tried; and jurisdiction mean[s], not the place of trial, but the power of the court to hear and determine a cause, including the power to enforce its judgment.

A more concise definition of the two terms is:

> Jurisdiction deals with the authority of a court to exercise judicial power. Venue deals with the place where that power should be exercised.

M. Green, *Basic Civil Procedure* 51 (1972).

Judge Newbern has written:

> An action brought in the proper county is one in which the venue is said to be properly laid. The venue concept should have to do with nothing but choosing among courts of two or more places in which jurisdiction of the subject matter and jurisdiction of the defendant or defendants exist.

D. Newbern, *Ark. Civil Prac. and Proc.*, § 6-1 (1985).

Jurisdiction cannot be conferred upon a court by consent or waiver when the court would otherwise have no jurisdiction of the subject matter of the action. *Arkansas Association of County Judges* v. *Green*, 232 Ark. 438, 338 S.W.2d 672 (1960). However, the venue of an action may be waived. *Waterman* v. *Jim Walter Corp.*, 245 Ark. 218, 431 S.W.2d 748 (1968). For example, in *Arkansas State Racing Comm'n* v. *Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956), we said "the settled rule is that an objection to venue is waived by a defendant who enters his appearance. . . ."

In this case the statute requiring residency in the State, or domicile, was clearly satisfied. The courts of this State had the authority to exercise judicial power over the res of the marriage. The suit was not filed in the county of proper venue, but the appellant expressly entered her appearance and waived venue. Since venue can be waived, the Chancery Court of Washington County could exercise its power, and the decree was not void.

Appellant points out that we have used the term "jurisdiction" in a number of cases when we were discussing the "venue" statute. We acknowledge we have, at times, inartfully used the terms. For example, in *McLaughlin* v. *McLaughlin*, 193 Ark. 207, 99 S.W.2d 571 (1936), we labeled "venue" as "jurisdiction," but even though we transposed the terms in that case, we would still reach the same result that we previously reached on that

direct appeal.

Affirmed.

HAYS and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. Neither appellant nor appellee has ever been a resident of Washington County even though appellee alleged he was in his complaint. Because I believe extrinsic fraud occurred in appellant's obtaining the divorce, I cannot agree that venue existed in the Washington County Chancery Court, much less that it could be waived. *See Murphy* v. *Murphy*, 200 Ark. 458, 140 S.W.2d 416 (1940). I would reverse and dismiss.

HAYS, J., joins in this dissent.

NATIONAL BY-PRODUCTS, INC. *v.* SEARCY HOUSE MOVING COMPANY, INC.

86-300 731 S.W.2d 194

Supreme Court of Arkansas
Opinion delivered June 22, 1987
[Rehearing denied July 20, 1987.]

Friday, Eldredge & Clark, by: *James M. Simpson*, for appellant.

Matthews & Sanders, by: *Gail O. Matthews* and *Marci L. Talbot*, for appellee.

ROBERT H. DUDLEY, Justice. The sole issue in this tort case is whether an award of punitive damages should be upheld. We hold there was no substantial evidence to support the award of punitive damages, and reverse the judgment.

On July 11, 1985, Robert Foley was driving a large tractor-trailer for appellant National By-Products, Inc. from Batesville south on Highway 167. At the same time, appellee Searcy House Moving Company was moving a house north on the same highway. Appellee could not get the house through a bridge which was just north of Bald Knob, and, while the house was being adjusted on the house moving trailer, traffic was stopped and flagged around in the one lane of traffic still open. Stacy McGee and Lorene Staggs were slowly starting to go through the open lane when appellant Foley, speeding in an over-weight truck smashed into the rear of their car, knocking it eighty feet forward, causing it to hit the house and trailer, and then to hit two bystanders. Appellant National's truck also struck the house and

then crashed into another tractor-trailer rig. Lorene Staggs died instantly and Stacy McGee died seven hours later. The estates of Lorene Staggs and Stacy McGee filed wrongful death actions against Foley and appellant National By-Products, Inc. and appellee moving company. Defendants Foley and National By-Products and defendant moving company filed cross-complaints against each other, each asking compensatory and punitive damages from the other. The cases were tried before a jury which returned compensatory damage awards of $3,000,000 to the estate of Stacy McGee, $1,400,000 to the estate of Lorene Staggs, and $15,000 to appellee moving company. In addition, separate punitive damage awards of $100,000 were given to each estate and to appellee moving company. The judgments in the wrongful death cases were satisfied and appellee moving company agreed to a remittitur of its compensatory damage award from $15,000 to $1,883.14, the stipulated amount of compensatory damages. Therefore, the only damage award involved in this appeal is the $100,000 punitive damage award made in favor of appellee moving company and against appellant National By-Products Company.

Appellant contends that the trial court erred in refusing to grant its motion for a judgment notwithstanding the verdict. The argument is meritorious. An award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. *Freeman* v. *Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983). We have previously defined wantonness and conscious indifference to the consequences. In *Ellis* v. *Ferguson*, 238 Ark. 776, 385 S.W.2d 154 (1964), we said:

> Wantonness is essentially an attitude of mind and imparts to an act of misconduct a tortious character, such conduct as manifests a 'disposition of perversity.' Such a disposition or mental state is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of danger, with indifference to consequences and with absence of all care.
>
> . . .

> It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff.

In *Freeman* v. *Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983), we quoted with approval from *St. Louis, I. M. & S. Ry. Co.* v. *Dysart*, 89 Ark. 261, 116 S.W. 224 (1919):

> The terms 'wilfulness, or conscious indifference to consequences from which malice may be inferred,' as used in the decisions of this court, means such conduct in the face of discovered peril. In other words, in order to superadd this element of damages by way of punishment, *it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences*, from which malice may be inferred.

In the case at bar there was proof of gross negligence, but gross negligence is not sufficient to justify punitive damages.

The facts, when viewed most favorably to appellee, reveal that Foley, appellant's driver, was late leaving Batesville and his truck weighed 80,480 pounds, which is 480 pounds over the legal limit. Foley had received six citations in the last year for driving an overweight truck, and appellant had paid all of the citations. One of appellant's employees testified that the company had a disciplinary procedure for drivers who got an excessive number of overweight tickets, and he testified that Foley had an excessive number of such tickets, but admitted that Foley had not been cautioned or disciplined for driving an overweight truck. Appellee's expert witness on accident reconstruction testified that the 480 pounds excess weight on the 80,000 pound rig was a contributing, but insignificant, factor in the accident.

Between Batesville and the place of the accident, Foley exceeded the 55 miles per hour speed limit while going downhill. He got so close to one car that all the driver of the car could see in his rearview mirror was the grill of Foley's tractor. He got extremely close to another car while "tailgating" downhill.

Finally, he came around a curve at the crest of a small hill and had 804 feet of clear visibility to the bridge structure where the accident occurred. The house, which was sitting on the trailer, at the bridge, was 17 feet high, 28 feet wide, and 36 feet long, and because of its added height, could be seen from about 900 feet away. Foley either did not apply his brakes, or he applied them but they did not function properly.

Appellee's witnesses said Foley was going 60 to 70 miles per hour and made no effort to stop even though he went past a vehicle with a flashing warning light. They testified his brake lights did not come on, the tires did not skid, there was no smoke from either the brakes or tires, and there were no skid marks. However, appellee's expert brake witness testified that Foley probably did apply his brakes just before the accident, but the brakes were not working properly. While the expert did not testify about standards in the industry, he did testify that the Ryder Truck Company checks truck brakes every 8,000 miles. One of the appellant's employees testified that the company policy was to adjust the trailer brakes once a month, but the brakes on this trailer had not been adjusted for three and one-half months, and the tractor brakes had not been opened for a complete inspection for almost six months, although they were adjusted about 6 weeks before the accident. He further testified that appellant conducted an internal inspection of the brakes every 50,000 miles as recommended by the American Trucking Association and, in addition, the drivers conducted a daily inspection. There was no evidence that appellant had any knowledge that the brakes were faulty.

As Foley sped downhill at 70 miles per hour, he ran into the rear of the decedent's car and then struck appellee's rig and the house.

[redacted] The foregoing facts do not show that appellant, either by its own policies or through the actions of its agent Foley, intentionally acted in such a way that the natural and probable consequence was to damage appellee's property. Nor do the facts show that appellant knew that some act of negligence was about to cause damage, but still continued to cause that damage. Accordingly, we reverse the judgment for punitive damages.

When we reverse a judgment for punitive damages, we

normally must also reverse the award for compensatory damages because the issues are so interwoven that an error with respect to one requires a retrial of the whole case. *Life & Casualty Ins. Co. of Tenn.* v. *Padgett*, 241 Ark. 353, 407 S.W.2d 728 (1966). In this case, however, the parties have stipulated as to the amount of compensatory damages, so we reverse on the punitive damages, but do not remand for new trial.

Reversed.

PURTLE and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. The majority's opinion has examined the evidence supporting punitive damages more from the appellant's standpoint than the appellee's. When viewed most favorably to the appellee, and with its fullest probative force, I believe there was substantial evidence to support the trial court's refusal to grant a motion for a directed verdict. *Dalrymple* v. *Fields*, 276 Ark. 185, 633 S.W.2d 362 (1982); *Holmes* v. *Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961); *Ray Dodge Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).

We no longer require actual malice as an essential constituent of punitive damages. It is enough if the defendant acted recklessly or wantonly, or with a conscious indifference to the safety and welfare of others using the highways. In *Dalrymple* v. *Fields, supra*, we said:

> 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 indifference for the rights and safety of others on the part of the tortfeasor.

While excessive speed may, in many circumstances, be no more than ordinary negligence, actions are not to be viewed in a vacuum, and what may be no more than negligence in one setting can readily be seen as wantonness or conscious indifference in another context. Thus driving 85 m.p.h. on certain stretches of highway may be relatively safe, or it may be negligence, depending on the traffic, weather, etc. But driving only 35 or 40 m.p.h. past a school at dismissal hour or close to a playground crowded with children with an evident indifference to the known tendencies of children could meet even restrictive concepts of wantonness. In *Airco, Inc.* v. *Simmons First National Bank*, 276 Ark.

486, 638 S.W.2d 660 (1982), we upheld a monumental award of punitive damages, not on proof that Airco had any intent to injure, but because the injury was the natural and probable consequence of Airco's conduct. It seems a fair analogy to me to say that when one knowingly drives an overloaded 18-wheeler, with defective brakes, on the highway at speeds of 70 m.p.h. by some accounts, oblivious of warning signals and without slowing down and with no apparent effort at stopping, approaching congestion on the highway, a collision is the natural and probable consequence of such conduct. At least, reasonable minds could differ on the issue of conscious indifference and that is enough.

In sum, the proof was that Robert Foley was several hours late leaving Batesville for Little Rock. His truck, an 18-wheeler, was loaded beyond the lawful limit. His truck, by whatever standard one chooses, was equipped with brakes that were not functioning properly. For some miles prior to the point of impact Mr. Foley drove so fast and so close to preceding vehicles that two of those motorists were alarmed by it and described his conduct at trial as speeding and "tailgating." Rounding a curve bearing into a straight, level stretch of highway some 900 feet from the appellee's house-moving rig, Mr. Foley proceeded at a high rate of speed (70 m.p.h. by one account) and with no discernible attempt to reduce his speed (some witnesses testified that his speed actually increased as he neared the impact point), past one vehicle with a warning light flashing, to strike the Staggs-McGee vehicle, knocking it a considerable distance in the air, and resulting in the deaths of the two occupants, before striking another vehicle and the house. Photographs of the scene attest to extraordinary force of the impact.

There was testimony that one of the brake shoes on the truck was not even touching the brake drum, rendering it useless as a braking device. There was testimony that none of the four rear brakes met Department of Transportation specifications. There was other material evidence from which an inference could be drawn that the brakes on the truck were seriously deficient and that fact was known by Foley and was in derogation of the policies of National By-Products, Inc. Lastly, there was proof from which the jury could quite properly have inferred that National By-Products, Inc., in addition to neglecting the safe operation of the truck involved, engaged in practices which promoted the over-

loading of its trucks beyond the legal limit, by routinely paying weight fines rather than demanding compliance by its drivers.

The proof, I believe, was such that a jury had a right under the law to exemplify the conduct of both defendants by assessing punitive damages. The judgment should be affirmed.

PURTLE, J., joins.

Ray CHESTNUT, et al. *v.* Al NORWOOD, et al.

87-5 731 S.W.2d 200

Supreme Court of Arkansas
Opinion delivered June 22, 1987

R. Theodor Stricker, for appellant.

Carl O. Lamar, for appellee.

STEELE HAYS, Justice. This appeal is an attempt to impose tort liability on a county judge and road foreman for damages allegedly caused by diverting surface waters onto the appellants' lands. The circuit judge dismissed the complaint without prejudice based on governmental immunity and on a lack of jurisdiction. We affirm the circuit court.

Appellants are property owners residing along Cemetary Road. In 1986 the Benton County Road Department reworked the road and installed drains which affected the flow of surface water on appellants' lands. They filed suit in circuit court against Al Norwood and Keith Knox, individually and in their capacities as county judge and "road boss." The suit alleged a cause of action in tort for negligence of the defendants. The relief sought was monetary damages.

On appeal appellants challenge the constitutionality of Ark. Stat. Ann. § 12-2901 (Repl. 1979) which reads:

> It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees.

The constitutionality of that provision has been upheld too often and too recently to be subject to serious question. *Helms* v. *Southern Farm Bureau Casualty Insurance Co.*, 281 Ark. 450, 664 S.W.2d 870 (1984); *Thompson* v. *Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984); *Chandler* v. *Pulaski County*, 247 Ark. 262, 445 S.W.2d 96 (1969). In *Chamberlain* v. *Newton County*, 266 Ark. 516, 587 S.W.2d 4 (1979) we affirmed a lower court dismissal of a suit for damages for trespass by Newton County in allegedly causing a road to be constructed on lands belonging to

Chamberlain. We pointed out that trespass was a tort and that the trial court had no jurisdiction. Ms. Chamberlain's only remedy, we said, was in the county court under Article 7, § 28, Arkansas Constitution.

[redacted] Nor can we sustain the argument that appellants' damage is not a matter "relating to . . . roads" within the language of Article 7, § 28 of the Arkansas Constitution:

> The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided.

The complaint alleges the defendants constructed drainage culverts on Cemetary Road which caused surface waters "to collect, flood and erode the plaintiff's lands." We find no merit in the argument appellants' claims are not related to roads within the meaning of the article.

[redacted] Appellants contend they initially sought relief by contacting the county judge, to no avail, and this satisfies the jurisdictional requirement of Article 7, § 28. They cite no authority for the far reaching premise that this informal step then frees them to pursue a cause of action in tort in clear contravention of the constitution and statute. Nor is the argument facially convincing. *Gray* v. *Ragland*, 277 Ark. 232, 640 S.W.2d 788 (1982); *Hazen* v. *City of Booneville*, 260 Ark. 871, 545 S.W.2d 614 (1977). We note, too, the record fails to reflect that the trial court was asked to rule on this issue. *Smith* v. *Brooks Trucking Co.*, 280 Ark. 510, 660 S.W.2d 1 (1983).

Two final arguments concern the refusal of the trial court to grant a motion by the appellants for a default judgment. When the defendants responded in a timely manner to the complaint their pleading was styled in the chancery court rather than the circuit court. However, the pleading was filed with the clerk, marked with the correct docket number and the pleading itself was doubtless placed in the appropriate case file. Its content

clearly identifies it as responsive to the complaint and a copy was forwarded to counsel for the plaintiffs. There is every reason to assume the naming of the court as chancery rather than circuit was, as appellees contend, a clerical error. Moreover, the pleading identified the parties in the style simply as "Chestnut and Chestnut, et al", plaintiffs, versus "Al Norwood, et al," defendants. On this basis appellants argue they were entitled to a default judgment against Norwood and Knox as individuals for failing to respond to the complaint.

The trial court noted that the usage of "et al" was a sufficient indication that the responsive pleading was intended to be inclusive of both the individual and official roles in which the defendants were being sued. We agree. This Court accepts as correct the decisions of the trial court which the appealing party does not show to be wrong. *Clemson* v. *Rebsamen*, 205 Ark. 123, 168 S.W.2d 195 (1943).

By this decision we are not denying recourse to the appellants for their damage, only the right to proceed in tort. Under our constitution appellants' claims are redressed in the county court, subject to the right of appeal if they are dissatisfied with the relief afforded.

The order of dismissal without prejudice is affirmed.

POLNAC-HARTMAN & ASSOCIATES *v.* THE FIRST NATIONAL BANK IN ALBUQUERQUE, as Trustee for the Jicarilla Apache Tribe, Inc., et al.

87-25 731 S.W.2d 202

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Croxton & Boyer, by: *Charles F. Hickman*, for appellant.

Pearson, Woodruff & Evans, by: *C. Thomas Pearson, Jr.*, for appellee.

DAVID NEWBERN, Justice. The appellant, Polnac-Hartman & Associates, attempted to intervene in litigation in which The First National Bank in Albuquerque sought foreclosure of mortgages against Beaver Lake Lodge Resort, Inc., White, White, Wilson & Associates, Ltd., O. L. White, Tyree F. Wilson, Jr., and Benton County Abstract Co. The foreclosure litigation was set for trial September 15, 1986, and on that day, counsel for the appellant appeared at the courthouse prepared to present an oral intervention motion. He discovered that the parties had settled the case and were proposing a consent decree. Counsel for the appellant then, on September 22, 1986, filed a motion to intervene. The motion stated simply that the appellant had performed certain services for Beaver Lake Lodge Resort, Inc., for which it was assigned certain notes and mortgages represent-

ing an encumbrance upon time shares sold by the resort and that it sought to intervene to protect its interest. The chancellor denied the motion, stating in his order that the motion was not timely and it was not presented in accordance with Ark. R. Civ. P. 24. The order provided, however, that the appellant should be allowed to intervene in aspects of the litigation remaining which were to be transferred to the circuit court. We hold the chancellor was right in not allowing the intervention in the foreclosure proceeding.

The appellant claims it had a right to intervene, and thus Rule 24(a) applies. The rule provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The appellant's argument is that the chancellor erred in finding the attempted intervention was untimely because the motion to intervene was filed before a final judgment was entered. As authority for that proposition the appellant cites *Bank of Quitman* v. *Phillips*, 270 Ark. 53, 603 S.W.2d 450 (Ark. App. 1980), in which our court of appeals held that an intervention attempted after the entry of final judgment was untimely. The appellant argues that the rationale of the *Bank of Quitman* case, if extended, supports the view that any pre-judgment attempt to intervene is timely. We cannot agree that the entry of judgment is the only criterion by which the court can measure the timeliness of the attempted intervention. Rather, the court of appeals said that timeliness of intervention is a matter within the discretion of the trial court, and its holding was buttressed by authority developed in the federal courts' interpretations of F.R.C.P. 24. *See* 3B *Moore's Federal Practice*, 24.13 (2d ed. 1987). The appellant has given us no reason to disagree with this conclusion of the court of appeals.

Another deficiency in the motion to intervene is that it contained no pleading, as required by Rule 24(c), setting forth

the claim or defense of the appellant. The appellant argues that, by attaching to its motion copies of documents assigning to it some notes and mortgages encumbrancing some time share agreements, it made clear to all concerned the interest it sought to protect, and that no party was prejudiced by the failure to file a pleading.

The failure to file a pleading with a motion to intervene was the subject of our decision in *Schact* v. *Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983). In that case a party moving to intervene refused to file a pleading setting forth its claim or defense as required by Rule 24(c) but insisted on being allowed to intervene in the litigation. The trial court denied the motion, and this court affirmed, noting that the movant had not shown entitlement to intervene as a matter of right or permissively. That, of course, is the purpose of filing a pleading. Without it, the court may not have any idea of the right asserted by the would-be intervenor. Although the appellant in this case attached the assignments to the motion, it did not state how or why they should be protected, or what the claim of priority, if any, was. There was not even a statement telling the court that the assignments were, or were related to, the same properties which were the subjects of the foreclosure action.

The trial court did not abuse its discretion in holding that the attempted intervention was untimely, and the court was clearly correct in finding the appellant did not comply with Rule 24(c) in view of its failure to file a pleading setting forth a claim or defense.

The appellant also contends that there should have been a compulsory joinder of its claim. We will not address that argument as it was not made to the trial court. *Puckett* v. *Puckett*, 289 Ark. 67, 709 S.W.2d 82 (1986).

Affirmed.

Lanny Eugene BOSNICK and Sharon L. BOSNICK
v. Jackie HILL, Stephen HILL, Verna C. METZLER
and George F. METZLER

86-292 731 S.W.2d 204

Supreme Court of Arkansas
Opinion delivered June 22, 1987

[redacted]

Daggett, Van Dover, Donovan & Cahoon, by: *Robert J. Donovan*, for appellant.

Butler, Hicky, Hicky & Routon, Ltd., for appellee.

TOM GLAZE, Justice. This case involves a warranty deed of conveyance and raises one issue: Is the grantee-covenantee entitled to recover his costs and expenses from his grantor-covenantor when the covenantee successfully defends or asserts his title against a third party's claim of adverse possession? We conclude he is so entitled and reverse the chancellor's holding to the contrary.

[redacted] Appellees, George and Verna Metzler, conveyed by general warranty deed certain acreage to appellants, Larry and Sharon Bosnick. Upon the Bosnicks' attempt to clear some of their newly-acquired acreage, the Bosnicks were informed by appellee, Stephen Hill, that Hill claimed 2.72 acres of it. After learning of Hill's claim, the Bosnicks notified the Metzlers to take whatever action that was necessary to place the Bosnicks in possession of the disputed property. The Metzlers refused, so the Bosnicks brought this suit against Hill for possession of the property and against the Metzlers for their breach of warranty. The Metzlers answered, denying any duty or liability to the Bosnicks, and Hill counterclaimed, alleging that he had acquired the 2.72 acres by adverse possession and that the title to this disputed parcel should be quieted in him. The Bosnicks prevailed in their suit against Hill, but the chancellor held they were not entitled to recover their costs and expenses against the Metzlers because of their refusal to defend or assert title to the disputed property against Hill. In sum, the chancellor held that the Bosnicks could have recovered their costs and damages only if their title and possession to the property had been defeated. In considering the correctness of the chancellor's studied opinion, we first review the law pertaining to covenants of warranty and, particularly, that which relates to the covenant of seisin.

[redacted] The Metzlers warranted the title by the statutory

warranty conveyed in the terms "grant, bargain and sell," and specially covenanted that they would "defend the title to the said lands against all claims whatever." *See* Ark. Stat. Ann. § 50-401 (Repl. 1971) (all lands transferred by deed by use of the words grant, bargain and sell shall be an express covenant to the grantee, his heirs and assigns that the grantor is seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor). As this court noted in *Dillahunty* v. *Railway Co.*, 59 Ark. 629, 27 S.W. 1002 (1894), a covenant of warranty is implied by virtue of our statute, and the general rule is that, in order to recover for breach of such a covenant, an eviction, either actual or constructive, must be alleged and proven.[1] *See also Smiley* v. *Thomas*, 220 Ark. 116, 246 S.W.2d 419 (1952); *Van Bibber* v. *Hardy*, 215 Ark. 111, 219 S.W.2d 435 (1949); *Fels* v. *Ezell*, 183 Ark. 229, 35 S.W.2d 359 (1931); *Belleville Land & Lumber Company* v. *Griffith*, 177 Ark. 170, 6 S.W.2d 36 (1928); *Carpenter* v. *Carpenter*, 88 Ark. 169, 113 S.W. 1032 (1908); *Collier* v. *Cowger*, 52 Ark. 322, 12 S.W. 702 (1889). The covenant in issue here is one of seisin, which is a covenant that is broken as soon as made, if the grantor has not the possession, the right of possession and the complete title. *Seldon* v. *Dudley E. Jones Co.*, 74 Ark. 348, 85 S.W. 778 (1905). *See also Fitzhugh* v. *Crogham*, 2 J.J. Marsh; Ky. 429, 19 Am. Dec. 139 (1829); 3 E. Washburn, *Real Property* § 2382 (6th ed. 1902); *Lakelands, Inc.* v. *Chippewa & Flambeau Improvement Co.*, 237 Wis. 326, 295 N.W. 919 (1941).[2]

In view of the language in *Seldon, supra*, the Bosnicks contend Hill, not the Metzlers, had possession of 2.7 acres of the acreage deeded the Bosnicks, and Hill's possession and asserted claim of title was a breach of the Metzlers' covenant of seisin upon which the Bosnicks were entitled to recoup their litigation costs and expenses in successfully acquiring possession to the disputed land. To further support their position, the Bosnicks cite the

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[1] While § 50-401 was amended in 1917, the court in *Dillahunty* had the same relevant statutory provision before it as we do now.

[2] We note that at least one legal authority raises some doubt as to whether the mere fact that the land is in another's possession constitutes a breach of the covenant of seisin, but after raising that doubt, it proceeded to cite only cases where such possession was held a breach. 4 H. T. Tiffany, *The Law of Real Property* § 1000 (1975).

following:

> "One suing for the breach of a covenant of title is not confined in his recovery of costs and expenses to such as are incident to actions in which he defends the title to the land conveyed to him, but he may also recover cost and expenses incurred in proceedings which he has been forced to institute to protect the title supposed to have been conveyed. Thus, where a covenant of a deed is broken by reason of a defect of title, the grantee, at least where he meets requirements as to notice to, and demand upon, the grantor, may, according to some courts, himself prosecute a suit to correct the title, and, where successful, may recover of the grantor the necessary expenses thereof. Also, according to some courts, where third persons are in possession of the land conveyed and the grantee is forced to resort to legal proceedings, such as an ejectment suit, to gain possession, he may recover the expenses of such suit when he sues for breach of covenant, *if such outstanding possession was in fact a breach of a covenant of the deed.*" (Emphasis supplied).

20 Am.Jur.2d, *Covenants, Conditions and Restrictions* § 153 (1965).

[redacted] The issue evolves, then, to whether Hill's possession of the disputed parcel of 2.7 acres was a breach of the Metzlers' covenant of seisin to the Bosnicks. The language the court used in *Seldon* v. *Dudley E. Jones Co., supra*, would indicate such a breach occurred. That conclusion was reached and very well addressed in *Lakelands, Inc., supra*, wherein the Wisconsin court, quoting in part from 3 Washburn, *supra*, related with approval the law which we believe controls here:

> 'The authorities seem to be uniform . . . that if the grantor has no possession of land . . . where he undertakes to convey it by deed and entered into a covenant of seisin therein . . . this covenant is broken at once.' One can wade in the sea of adjudicated cases in order to discover what is meant by the word "seisin" until he is totally submerged and lost. But it seems clear, as matter of common sense, that a covenant of seisin implies that the covenantor is in possession of the land conveyed and all of it, and that if any

> one is actually in possession claiming adversely to the covenantor, the covenant of seisin is broken, no matter by what right he so claims, and no matter whether his claim is lawful or unlawful, and in any such case the grantee is as much entitled to recover the cost and expense of ejecting him as he would be entitled to those items in unsuccessfully defending his title if he were himself sued in ejectment. In either case he is endeavoring to vindicate his rights under his warranty. If in its suit the adverse claimant, Ilg, had prevailed the plaintiff would be entitled to his costs and attorney's fees herein, under nearly all of the adjudicated cases. 14 Am.Jur. sec. 141, p. 574. It would seem strange indeed if it could recover them if it had failed in that suit, but could not recover them if it prevailed.

237 Wis. at 342, 295 N.W. at 926.

We believe the logic and reasoning in *Lakelands, Inc.* is sound and has unquestionable application to the facts here. While the chancellor held Hill had not fully satisfied the time requirements to support his adverse claim, the chancellor determined that, at the time the Metzlers conveyed the property to the Bosnicks, Hill had fenced 2.7 acres of the property and had run cattle on it for at least three years prior to when this suit was commenced. The Bosnicks were compelled to bring this action to gain possession of the disputed parcel claimed by Hill. Accordingly, the Metzlers are therefore obligated to pay the costs and expenses reasonably incurred by the Bosnicks for their successful efforts in vindicating their rights under the covenant of seisin given them by the Metzlers.

We reverse and remand with directions to award the Bosnicks their costs and expenses, consistent with this opinion.

James D. FLADUNG *v.* STATE of Arkansas

CR 87-7 730 S.W.2d 901

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Thomas E. Brown, for appellant.

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

TOM GLAZE, Justice. Appellant was convicted of attempted capital murder and sentenced as a habitual offender to imprisonment for sixty years. He contends the court erred in (1) failing to instruct on lesser included offenses, (2) admitting prosecution evidence of a weapon test of which he had insufficient notice, (3) allowing the policeman who conducted the test to testify as an

expert witness, and (4) admitting evidence of previous offenses for the purpose of applying the habitual criminal statute, when inadequate notice was provided appellant those prior offenses would be offered. We conclude it was error to refuse to instruct on lesser included offenses and, on that point, we reverse.

Before turning to appellant's arguments, we first discuss the essential facts leading to the charges against appellant. Appellant was stopped by Arkansas State Trooper Duran because appellant's car had one headlight out. Appellant got out of his car and approached the state police vehicle. Duran asked to see appellant's driver's license. Appellant said the license was not on his person, and he returned to his own vehicle and began to grope under the seat on the passenger side. When he turned to face Duran, appellant was holding a pistol. At this point, the testimony diverges. Appellant says he realized that if the trooper found the pistol he, the appellant, would be in trouble, so he pointed it in the air and began to explain that the pistol did not work. He said Duran grabbed for the pistol and it discharged, but that he did not point it at Duran and had no intention whatever of harming him.

Duran's testimony was that, when appellant turned back towards him with the pistol, appellant was in a crouched position, aiming the pistol at Duran's torso, and was saying something unintelligible. Duran further testified that appellant pulled the trigger at least one time, and probably twice, but that the pistol misfired; Duran was able to wrest the pistol from appellant, and thereafter arrested him.

In his first point for reversal, appellant contends that he sought instructions on the lesser included offenses of aggravated assault and assault in the first degree, claiming that the jury need not have believed he had the premeditated and deliberated purpose of killing Duran. He argues that, where there is the slightest possibility that a lesser included offense may have been committed, we will require the instruction, citing *Robinson* v. *State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

The State responds, stating the trial court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. Here, the State asserts that no rational basis existed for lesser included

offenses because appellant denied pulling the trigger on the weapon, and stated he had no intention to utilize the weapon against Officer Duran. In reaching this conclusion, the State misapplies the applicable law on when lesser included instructions must be given by a trial court. We discussed this subject in some detail in our recent case of *Doby* v. *State*, 290 Ark. 408, 720 S.W.2d 694 (1986).

In *Doby*, we held that, when a defendant's defense is that he or she is entirely innocent of any crime, then no rational basis exists to instruct the jury on a lesser included offense because the only issue for the jury is whether the defendant is guilty as charged. The underlying facts in *Doby* illustrate the type situation where a lesser included instruction was found to be inappropriate. Doby was convicted of possession of a controlled substance with intent to deliver.[1] At trial and on appeal, Doby argued the court was wrong in refusing to instruct the jury that it could find him guilty of the lesser crime of "possession of a controlled substance." We rejected Doby's contention because his defense was altogether premised on the fact that he possessed no drugs whatsoever.

We alluded, in *Doby*, to our earlier case of *Roberts* v. *State*, 281 Ark. 218, 663 S.W.2d 178 (1984). There, Roberts was charged with burglary and theft of property. This court held the lower court correctly denied a lesser instruction on theft by receiving because Roberts' defense was one of alibi, *viz.*, that he was elsewhere when the burglary occurred, that he had committed no theft, and that he had possessed a matching earring for several years and it was not the one the State brought charges against him for having stolen.

The instant case is clearly distinguishable from *Doby* and *Roberts*. Appellant was charged with attempted capital murder and, at trial, he requested lesser instructions on aggravated assault and assault in the first degree. Those lesser crimes are defined as follows:

> Aggravated Assault—(1) A person commits aggravated assault if, under circumstances manifesting extreme indif-

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[1] While not relevant here, Doby also was convicted of theft by receiving a pistol.

> ference to the value of human life, he *purposely* engages in conduct that creates a substantial danger of death or serious physical injury to another. [Ark. Stat. Ann. § 41-1604(1) (Repl. 1977) (emphasis supplied).]
>
> Assault in the First Degree—(1) A person commits assault in the first degree if he *recklessly* engages in conduct which creates a substantial risk of death or serious physical injury to another person. [Ark. Stat. Ann. § 41-1605(1) (Repl. 1977) (emphasis supplied.)]

The definition of purposeful conduct and reckless conduct is set out in Ark. Stat. Ann. § 41-203(1) and (3):

> (1) "Purposely." A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.
>
> (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

When considering whether the evidence reasonably warrants giving instructions on the two foregoing crimes of aggravated assault and assault in the first degree, we first are met with the fact that appellant never denied that he had reached into his vehicle and retrieved a pistol from under his car's front seat. Instead, appellant's defense was based largely on why he grabbed his pistol when he did and what he intended to do with it after having retrieved it. Appellant's and Officer Duran's testimonies were much the same until that crucial point. It was only after appellant withdrew the pistol from the car did their stories differ in any significant way. Undoubtedly, the jury, in view of the stories given by appellant and Duran, could have believed that appellant (1) pointed the pistol at the officer and did or did not pull the trigger, (2) pointed the pistol in the air and either pulled or did not pull the trigger, or (3) explained or did not explain to the officer that the gun was inoperative. Appellant's and Duran's

versions of what transpired give rise not only to whether appellant was guilty or innocent of intending to commit attempted capital murder, but they also raise issues as to whether appellant may have either purposely or recklessly committed the respective crimes of aggravated assault or assault in the first degree. Obviously, appellant's action of retrieving his pistol from within his vehicle with Officer Duran standing by posed a substantial danger or risk that could have resulted in death or serious physical injury. Unquestionably, appellant's conduct, under the circumstances variously described, could have been determined as intentional, purposeful or reckless, depending upon what inferences a jury might draw from the stories (or combinations thereof) given by the officer and appellant. The evidence and the defense offered by appellant here are not the same "all or nothing" situations posed in the *Doby* and *Roberts* cases. Accordingly, we are compelled to reverse for the trial court's failure to give the lesser included instructions requested by appellant.

Of the remaining points raised by appellant, we need only discuss the one concerning the testimony given by the police officer who tested appellant's pistol. Appellant's other arguments concern the lack of notice given him regarding certain State evidence that the trial judge allowed to be admitted at trial. Because a retrial of this cause remedies those notice and admissibility issues, we restrict our further review only to the issue that remains a viable one: the admissibility of the expert testimony of Sergeant Bradshaw.

When the prosecution called Sergeant Bradshaw to testify about the test he had performed with the pistol, counsel for appellant notified the court that he questioned whether Bradshaw could testify as an expert. No objection was made at that time, as counsel stated his objection would depend upon the nature of Bradshaw's testimony. Bradshaw testified that he had nineteen years experience as a state trooper, had spent many hours on the firing range, and had been a weapons instructor for three years. The State did not ask that he be declared an expert, but continued to question him about the test performed on the pistol. Towards the close of direct examination, appellant's counsel objected to the testimony on the ground that Bradshaw had not been declared an expert by the court. The court responded that it found Bradshaw to be a firearms expert. The objection was then

withdrawn.

Bradshaw testified about how he performed the test, and then testified that the indentations made by the firing pin of the pistol on the casings of the bullets he fired and attempted to fire looked like those on the casings and bullets in the pistol when it was taken from the scene of the altercation between Duran and appellant. At the close of Bradshaw's testimony, counsel for appellant renewed his objection on the basis that Bradshaw had not been qualified as an expert on microscopic examination. The court stated that it had not found Bradshaw to be an expert, except to the extent of his qualifications for performing the test on the weapon, and that his testimony on the similarity in appearance of the firing pin indentations was lay testimony.

In appellant's cross-examination of Sergeant Bradshaw, it was made clear that he was not testifying about any scientific identification of the two sets of bullets and casings. In fact, Bradshaw testified clearly that he could not say that the indentations were the same. Appellant has cited no authority to convince us there was error here. Thus, we find no error in the trial court's ruling on this evidentiary point.

For the reasons stated above, we reverse and remand for the trial court's failure to give the lesser included instructions on the offenses of aggravated assault and assault in the first degree.

HICKMAN, J., dissents.

Charles D. RAGLAND *v.* Eddie W. DUMAS, d/b/a DUMAS CONSTRUCTION COMPANY

86-297 732 S.W.2d 119

Supreme Court of Arkansas
Opinion delivered June 22, 1987

[redacted]

Timothy J. Leathers, Wayne Zakrzewski, Kelly Jennings, John Theis, Ann Kell, Joe Morphew, Philip Raia, Bob Jones, by: *Joseph V. Svoboda*, for appellant.

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

TOM GLAZE, Justice. This case involves the interpretation and construction of the Arkansas Gross Receipts Act of 1941, as amended. Appellant, the Commissioner of Revenue, seeks to assess a sales tax on certain transactions performed by appellee Eddie Dumas, d/b/a Dumas Construction Company, an oil field contractor who prepares sites for oil drilling operations.

No dispute exists as to the facts and events that led to this appeal. Dumas builds temporary roads to the oil drilling sites, and prepares foundations to support drilling rigs and other heavy equipment used in the operations. On occasion, he purchases and hauls gravel and similar material to build the roads and foundations. He purchases that material from third parties, but charges his customers only his costs for the material plus a transportation fee. In this suit, appellant seeks to tax both the material costs plus the transportation fee, which represent the total amounts Dumas bills his customers on those projects requiring gravel or crushed rock.

As a result of an audit, appellant assessed Dumas sales tax, interest and a penalty in the amount of $20,907.24. After exhausting his administrative remedies, Dumas filed suit in chancery court. He argued several theories on why the sales tax should not be assessed. The chancellor agreed with one of them, finding that the extraction of oil and gas was exempt from the gross receipts tax under Ark. Stat. Ann. § 84-1904(r) and that, because site preparation and road construction were integral and direct parts of that oil and gas extraction process, such preparation and construction were exempt. The chancellor did, however, hold appellant could assess a sales tax on the clay gravel Dumas used in the construction of a foundation at one refinery—apparently finding such construction was not directly involved in the oil processing operation. Finally, the chancellor held Dumas not liable for a 10% penalty, finding there was no negligent or intentional disregard of the applicable taxing laws on the part of Dumas. On appeal, appellant argues the chancellor erred in holding that Dumas's work was exempt under § 84-

1904(r) (Repl. 1980) and that he was not liable for a penalty under Ark. Stat. Ann. § 84-4741(c) (Supp. 1985).

The standard of review for tax exemption cases is trial *de novo* on the record, and we will not reverse the chancellor's findings of fact unless they are clearly erroneous. *Western Paper Co.* v. *Qualls*, 272 Ark. 466, 615 S.W.2d 369 (1981); *S.H.& J. Drilling Corp.* v. *Qualls*, 268 Ark. 71, 593 S.W.2d 178 (1980). The party claiming an exemption from taxes has the burden of proving his entitlement beyond a reasonable doubt. *C & C Machinery, Inc.* v. *Ragland*, 278 Ark. 629, 648 S.W.2d 61 (1983). Tax exemptions must be strictly construed against exemption, and to doubt is to deny the exemption. *Arkansas Beverage Co.* v. *Heath*, 257 Ark. 991, 521 S.W.2d 835 (1975).

First, we should say we agree with appellant's contention that § 84-1904(r) is inapplicable to the situation posed here. Section 84-1904 lists a number of exemptions from the gross receipts tax, and subsection (r), upon which the chancellor relied, exempts gross receipts or gross proceeds derived from the "sale of tangible personal property consisting of machinery and equipment used directly in the extraction of oil and gas." Dumas argues (as he must in order to sustain the chancellor's holding that § 84-1904(r) applies) that the gravel he uses for site preparation and road construction purposes is "machinery" or "equipment" under that provision; thus, because the gravel (as machinery or equipment) is used directly in extracting oil, Dumas claims the gravel plus the transportation costs of delivering it to the site is exempt from taxation.

We cannot accept Dumas's argument that gravel is machinery because such a construction of the law would be inconsistent with the definition of machinery as that term has been defined by this court. In *Heath* v. *Research-Cottrell, Inc.*, 258 Ark. 813, 529 S.W.2d 336 (1975), we defined a machine as "any device consisting of two or more resistant, relatively constrained parts, which, by a certain pre-determined intermotion, may serve to transmit and modify force and motion so as to produce some given effect or to do some desired kind of work." It takes little study to arrive at the conclusion that gravel employed to construct a road totally lacks the characteristics of a machine, as that term is defined in *Heath*. Clearly, gravel does not transmit

and modify force and motion. Thus, if Dumas's argument of exemption is to prevail, it must do so based upon the fact that gravel, under the facts of this case, can be designated equipment, as that word is utilized in § 84-1904(r). Upon our careful analysis of § 84-1904(r), we cannot agree with such a contention.

[redacted] Our court has never been called upon to define the term equipment in the context of a tax case and, more particularly, as that term appears in § 84-1904(r). We note initially that the word equipment has been referred to as an exceedingly elastic term, the meaning of which depends on context. Black's Law Dictionary 631 (4th ed. 1968). Here, of course, the context or situation involved is whether a contractor's gravel furnished to build temporary roads can be viewed as equipment under § 84-1904(r), used directly in the process of extracting oil. One authority relates that as the word, equipment, is used in construction contracts, it means the outfit necessary to enable the contractor to perform the agreed service, the *tools*, *implements* and *appliances* which might have been previously used, or might be subsequently used by the contractor in carrying on other work of like character. Ballentine's Law Dictionary 440 (1930) (Emphasis ours.). This connotation, given the word equipment by *Ballentine*, appears consistent with the usage of the term where it appears elsewhere in § 84-1904(r). For example, subsection (C) of § 84-1904(r)(2) (Repl. 1980) provides that "[h]and tools, buildings, transportation equipment, office machines and equipment, machinery and equipment used in administrative, accounting, sales or other such activities of the business involved and all other machinery and equipment not directly used in the manufacturing or processing operation are not included or classified as exempt." In sum, we believe it is clear that the General Assembly, by the use of the terms machinery and equipment, intended implements, tools or devices of some degree of complexity and continuing utility and not materials, such as gravel and crushed rock, that become fully integrated into a temporary road, the utility of which ends upon the termination of each oil-extraction project.

[redacted] While we agree Dumas's work is not exempt under § 84-1904(r), we cannot agree his transactions with his customers are subject to the Gross Receipts Act. In this respect, we emphasize that, except as is specifically provided, the term sale

under that Act does not include the furnishing or rendering of service(s). Ark. Stat. Ann. § 84-1902(c) (Repl. 1980). Importantly, we find nowhere in the Act that the type contracting services provided by Dumas are specifically made subject to the gross receipts tax. *See* Ark. Stat. Ann. § 84-1903 (Repl. 1980) and (Supp. 1985). Under § 84-1902(c) of the Act, "sale," in relevant part, is defined as the transfer of either title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality or device by which such transfer is accomplished. Section 84-1902(i) further provides that all contractors are deemed to be consumers or users of all tangible personal property, including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of the Act. *See* Ark. Stat. Ann. § 84-1903 (Repl. 1980). By regulation, the State has defined "contractor" as any person who contracts or undertakes to construct, manage or supervise the construction, erection or substantial modification of any building or other improvement or structure affixed to real property. *See* Arkansas Department of Finance and Administration *Regulations—Arkansas Gross Receipts Tax* GR-3(c) (January 1, 1982).

In view of the foregoing authority, and particularly §§ 84-1902(i) and -1903, the appellant could have assessed a sales tax on the transactions between Dumas and the third parties who sold him the gravel. *Compare John B. May Co., Inc.* v. *McCastlain*, 244 Ark. 495, 426 S.W.2d 158 (1968) (contractor was consumer or user of items used in performance of the contract and court held sale to contractor was taxable). *See also Bowers* v. *Oklahoma Tax Commission*, 51 F.Supp. 652 (W.D. Okla. 1943) (under Oklahoma Use Tax Statute—almost identical to Ark. Stat. Ann. § 84-1902(i)—contractors, who were obliged to furnish material to build huts on army base, were users, not vendors, and therefore subject to the state use tax).

Here, appellant, from our review of the record at least, made no attempt to assess a tax on the gravel or construction material at the time Dumas purchased it from his suppliers. Instead, he seeks here to increase the amount of the taxable sale by adding Dumas's transportation costs to the material, thus requiring him to collect the tax from his customers on this greater, total price. *See*

Belevedere Sand & Gravel Co. v. *Heath*, 259 Ark. 767, 536 S.W.2d 312 (1976) (wherein Belevedere sold sand and gravel to its customers and this court upheld the State's taxation on the total amount charged the customer, including hauling charges; unlike in the instant case, Belevedere owned the material delivered to its customers, and the actual delivery was an added service or accommodation to Belevedere's customers).

In sum, we believe it is clear from a careful study of the Gross Receipts Act, that our General Assembly intended to impose the tax on the materials in issue here at the time of the sale between the supplier and the contractor. Thus, the Act provides for assessment of a tax when Dumas purchases his gravel, and if we accepted appellant's argument here, the materials could again be taxed when Dumas bills his customers for constructing the roads on the site. A presumption exists that the General Assembly had no intention to impose a double taxation on the same property, at least, unless the General Assembly expressly provided by law for such double taxation. *See* 84 C.J.S. *Taxation* § 41 (1954) and 68 Am. Jur.2d *Sales and Use Taxes* § 13 (1973). The General Assembly not only did not provide that a double tax be imposed, it also clearly exempted services, which we hold includes the type that Dumas performs here.

Consistent with this holding, we believe it is significant that the parties stipulated that the cost of the actual materials Dumas provided his customers constituted only ten percent of the expenses involved in the transportation of the materials and the work performed on the oil-extracting sites. Thus, the record supports the view that Dumas's delivery of the material to the sites was merely incidental to the services he provided his customers. *See* 68 Am.Jur. 2d *Sales and Use Taxes* § 76 (1973) (delivery of tangible personal property is not a sale at retail if it is merely incidental to a special service performed for the purchaser.)

In this *de novo* review, we hold that the transactions between Dumas and his customers were not sales and subject to assessment under the Arkansas Gross Receipts Act; and, accordingly, no penalty against Dumas should be imposed. Therefore, we affirm the chancellor's holding but modify it to the extent that all the monies paid by Dumas shall be refunded him rather than

subtracting that amount the chancellor found due based on the construction of the foundation at the MacMillan Petroleum, Inc. refinery.

Affirmed as modified.

STATE of Arkansas, Child Support Enforcement Unit *v.* SHERIFF OF LAFAYETTE COUNTY, Bill GRIMMETT

87-26 731 S.W.2d 207

Supreme Court of Arkansas
Opinion delivered June 22, 1987

Gregory L. Mitchell, for appellant.

Brent Haltom, Deputy Prosecuting Att'y, for appellee.

TOM GLAZE, Justice. Appellant, the State of Arkansas Child Support Enforcement Unit, brings this appeal from a judgment of the Lafayette County Circuit Court, denying its petition for a writ of mandamus and finding the property in question to be a homestead.

Appellant was granted a judgment for child support arrearages owed by Leroy Johnson in the amount of $8,650.00. Johnson was ordered to pay the judgment upon receipt of a workers' compensation settlement. Johnson received the settlement in the amount of $18,850.00, but failed to satisfy the judgment, using the money to build a house.

Appellant obtained several writs of execution for appellee to execute on the real property and house owned by Johnson. When appellee continued to refuse to execute, appellant initiated a writ of mandamus action against appellee, seeking to require him to execute on the property. Appellee responded that the writ should be denied because he claimed the property as a homestead exemption. After a hearing, the trial judge denied the petition, finding appellee was excused from executing on the property because it was Johnson's homestead. We reverse.

First, we consider whether the mandamus should have issued. The standard of review upon denial of a petition for a writ of mandamus is whether the trial court abused its discretion. *Chandler* v. *Perry-Casa Public Schools District No. 2*, 286 Ark.

170, 690 S.W.2d 349 (1985). Mandamus is a discretionary remedy which will be granted only when the petitioner has shown a clear and certain legal right to the relief sought and no other adequate remedy. *Jackson* v. *Munson*, 288 Ark. 57, 701 S.W.2d 378 (1986). Mandamus must be to enforce the performance of a legal right after it has been established and not to establish a right; there must be no discretion available to the ordered party to perform the act. *Boone County* v. *Apex of Arkansas, Inc.*, 288 Ark. 152, 702 S.W.2d 795 (1986).

There was no dispute below that appellant had a valid judgment against Johnson. Instead, appellee merely contended that he did not execute on the property because he believed to do so would have violated Johnson's homestead. On appeal, appellee argues appellant was not entitled to a writ of mandamus because it had another adequate remedy, i.e., to go to chancery court for a determination of the homestead issue. We disagree.

The facts of this case are quite similar to those in *Ghent* v. *State Use School Districts*, 189 Ark. 747, 75 S.W.2d 67 (1934). In *Ghent*, the sheriff repeatedly refused to execute on a judgment the school districts had obtained against the county treasurer and his bondsman. He contended that a legislative act relieved the treasurer and bondsman from liability under the judgment. The school districts obtained a writ of mandamus. This court affirmed, holding that when a public officer is called upon to do a plain and specific public duty, which is required by law and which requires no exercise of discretion or official judgment, a writ of mandamus is an appropriate remedy to compel the performance of the duty when it is neglected or refused. The court pointed out that the sheriff's suggested alternate remedies were not adequate, stating that "an adequate remedy, as contemplated by the law, must be one which itself enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party[,] to whom the duty is owed[,] unharmed by its performance." 189 Ark. at 750, 75 S.W.2d at 69. As the *Ghent* court further noted: "It was not the business of the sheriff to consider the effect of . . . [the legislative act], but to levy the execution, and then, if the judgment debtor was aggrieved, his remedy was ample to protect his interests without the aid of the sheriff." *Id.*

The *Ghent* case controls here. Pursuant to Ark. Stat. Ann. § 30-1001 (Repl. 1979), appellee was under a duty to execute on Johnson's property and he had no discretion in the matter. Appellant had no other adequate remedy that was as "plain and complete and as practical and efficient to the ends of justice and its proper administration as the remedy invoked." *Ghent*, 189 Ark. at 750, 75 S.W.2d at 68. Furthermore, Johnson, as the debtor, possessed the right to claim his homestead exemption either before or after the sale of the homestead on execution. *See* Ark. Stat. Ann. § 30-210 (Repl. 1979); *see also Arkansas Savings & Loan Association* v. *Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982).

Appellant also raises two other issues, *viz.*, that the trial court erroneously allowed the appellee to put Johnson's homestead exemption in issue and incorrectly determined that such an exemption exists. It is settled law that a judgment debtor's right to the exemption is a personal right, which must be exercised by the party who seeks its benefits. *Arkansas Savings & Loan Association* v. *Hayes, supra*, and *Jones* v. *Thompson*, 204 Ark. 1085, 166 S.W.2d 1036 (1942). However, we need not reach the merits here on whether Johnson has a homestead claim since the relevant, dispositive question in this appeal is whether a mandamus writ must issue to compel the appellee to levy execution against Johnson's property. In answering that question affirmatively, our inquiry ends.

Reversed.

ARKANSAS STATE BOARD OF EDUCATION,
et al. *v.* Hon. Philip B. PURIFOY, Chancellor, et al.

87-166 731 S.W.2d 209

Supreme Court of Arkansas
Opinion delivered June 22, 1987

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

Smith, Stroud, McClerkin, Dunn & Nutter, by: *Hays McClerkin*, for appellee.

PER CURIAM. A Writ of Prohibition is granted. The action filed by the Bright Star Independent School District in the Chancery Court of Miller County is an appeal from a decision by an administrative agency, the Arkansas State Board of Education. Such appeals are governed by the Administrative Procedure Act, Ark. Stat. Ann. § 5-701 through § 5-715 (Repl. 1976 and Supp. 1985).

The Quality Education Act of 1983 provides appeals from rulings by the State Board of Education may be made to a "court of competent jurisdiction." Ark. Stat. Ann. § 80-4606. We deem that court to be the circuit court. See § 5-713(b)(1). Therefore the chancery court does not have jurisdiction to entertain this suit.

Writ granted.

Charles GREGG *v.* Terry C. HARTWICK, North Little Rock Mayor; Martin GIBSON, Aubrey BLANKS, Otha WARREN, Olen THOMAS, William E. GEORGE, John EVANS, Stuart VESS & Charles KIMBRELL, North Little Rock Aldermen

87-146 731 S.W.2d 766

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Charles L. Carpenter, for appellant.

Jim Hamilton, City Att'y, by: *Thomas J. Pendowski*, Asst. City Att'y, for appellee.

JACK HOLT, JR., Chief Justice. This expedited appeal seeks a writ of mandamus ordering the appellees, North Little Rock's mayor and aldermen, to conduct a special referendum election on the voluntary annexation of certain lands by the city. The circuit court denied the request for the writ. It is from that order that this appeal is brought. We find that amendment 7 to the Arkansas Constitution requires the city to hold an election and accordingly, reverse the trial court and direct it to issue the writ of mandamus.

The history of this case is as follows. On October 21, 1986, the Pulaski Circuit Court ordered a petition for the voluntary annexation of approximately 1,500 acres into the City of North

Little Rock be granted and approved. That judgment was filed on November 21, 1986. On November 24, 1986, the North Little Rock City Council adopted Resolution No. 3075, accepting the proposed area into the city on the effective date of the circuit court judgment. Appellant, Charles Gregg, and other citizens, filed a referendum petition on December 22, 1986, to refer Resolution No. 3075 to a vote of the people for their approval or rejection. The petition contained a sufficient number of signatures to be a valid petition. The city council has not referred the resolution to a vote of the people because the council does not regard the resolution as "municipal legislation" properly subject to a referendum. When the council refused to act, Gregg filed this action in Pulaski Circuit Court on March 20, 1987, seeking a declaratory judgment that the resolution was "municipal legislation" and therefore subject to the referendum, and a writ of mandamus, directing the council members to call a special election. The trial court denied the requested relief.

[redacted] The purpose of a writ of mandamus is to enforce an established right or compel the performance of a duty. *Lewis* v. *Conlee, Mayor et al.*, 258 Ark. 715, 529 S.W.2d 132 (1975). Amendment 7 provides in pertinent part:

> The initiative and referendum powers of the people are hereby further reserved to the local voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, . . .
>
> . . . .
>
> Every extension, enlargement, grant, or conveyance of a franchise or any rights, property, easement, lease, or occupation of or in any road, street, alley or any part thereof in real property or interest in real property owned by municipalities, exceeding in value three hundred dollars, whether the same be by statute, ordinance, resolution, or otherwise, shall be subject to referendum and shall not be subject to emergency legislation.

[redacted] We first address whether the city council's resolution must be considered "local, special and municipal legislation" to which referendum powers apply. This court has explained that

the test for determining whether a resolution is municipal legislation "is to determine whether the proposition is one that makes new law or to execute a law already in existence. The power or authority to be exercised is legislative in its nature if it prescribes a new policy or plan; while on the other hand, it is administrative in its nature if it simply pursues a plan already adopted by the legislative body. . ." *City of North Little Rock* v. *Gorman et al.*, 264 Ark. 150, 568 S.W.2d 481 (1978); *Greenlee et al.* v. *Munn, Clerk et al.*, 262 Ark. 663, 559 S.W.2d 928 (1978); and *Scroggins* v. *Kerr*, 217 Ark. 137, 228 S.W.2d 995 (1950).

In applying this test, however, we are mindful of the fact that we have long held that amendment 7 is to be liberally construed in order that its purposes may be effectuated. *Leigh & Thomas* v. *Hall, Secretary of State*, 232 Ark. 558, 339 S.W.2d 104 (1960). In that case we stated:

> Amendment No. 7 permits the exercise of the power reserved to the people to control, to some extent at least, the policies of the State, but more particularly of counties and municipalities, as distinguished from the exercise of similar power by the Legislature, and, since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction. . . . In construing this amendment, it is our duty to keep constantly in mind the purpose of its adoption and the object it sought to accomplish. That object and purpose was to increase the sense of responsibility that the lawmaking power should feel to the people by establishing a power to initiate proper, and to reject improper legislation.

In *Lewis* v. *Conlee, Mayor, et al.*, *supra* we quoted *Cochran, Mayor* v. *Black*, 240 Ark. 393, 400 S.W.2d 280 (1966) as follows:

> We are firmly committed to a liberal construction of constitutional Amendment No. 7, bearing in mind the purpose of its adoption and the object it sought to accomplish. This amendment provides a necessary and potent protection against ill-advised, oppressive or improvident legislative functions, and actions of the electors thereunder, in attempting to obtain relief, *should not be thwarted by strict or technical construction* . . . . We are neither authorized nor remotely inclined to disturb the proper

application of this wholesome constitutional reservation of power to the people.

Applying the aforementioned test under the terms of the amendment, we hold that the resolution approving the annexation was municipal legislation in that it was a new law. The statutory procedure for annexing land provides that, before the annexation is final, the city council must pass an ordinance or resolution accepting the territory. Ark. Stat. Ann. §§ 19-305, 19-306 (Repl. 1980). Since confirmation of the annexation is dependent on this action by the city council, such action cannot be considered merely the execution of a law already in existence. Rather the power exercised by the city council prescribes a new law and is municipal legislation. In addition, amendment 7, by its terms, provides that any resolution enlarging or extending a franchise shall be subject to referendum. A resolution approving an annexation pertains to an enlargement or extension of the services offered by the city to a new area. Therefore, when the city passed the resolution approving the annexation, the voters acquired a right to hold an election. Since the voters have an established legal right, mandamus should issue to compel the election.

The North Little Rock mayor and alderman argue that, if an election is ordered, it should be postponed until a decision has been handed down by this court in an appeal that was taken of the circuit court judgment entered November 21, 1986. We decline to postpone the election. We explained in *Lewis* v. *Conlee, Mayor et al., supra,* that the matter of setting a date for an election is normally a matter of legislative discretion, but that that discretion cannot be exercised in a fashion that would nullify the intent of amendment 7. The same is true here. The people have a right, under amendment 7 to an election on the resolution passed by the city council. It is therefore up to the city to hold the election within a reasonably prompt period of time.

Accordingly, the judgment is reversed and the cause is granted with directions to the Pulaski Circuit Court to issue its writ directing the North Little Rock City Council to set the referendum election, involved herein, within a reasonably prompt

period of time.

George and Cassandra McDONALD *v.* Gary L. EUBANKS

86-233 731 S.W.2d 769

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Art Dodrill, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for

appellee.

DARRELL HICKMAN, Justice. This is a legal malpractice case. George and Cassandra McDonald retained Gary Eubanks to represent them in a personal injury lawsuit which was tried in Saline County. In that action the jury returned a verdict for the defendant which meant that the McDonalds lost their case. Eubanks failed to file an appeal. The McDonalds filed suit against Eubanks for negligence in the way he handled their lawsuit. Eubanks moved for summary judgment. The motion was accompanied by an affidavit by Eubanks and two other lawyers who represented the other side in the personal injury lawsuit. The record also contained answers by Eubanks to interrogatories. The trial judge initially granted summary judgment on the basis that Eubanks had made a prima facie case for summary judgment and the McDonalds did not submit any counter evidence. Later, however, the judge set aside his order and ordered Eubanks to answer additional interrogatories. He also gave the McDonalds at least two weeks in which to respond to the motion with counter affidavits or evidence disputing that of the lawyers, who were considered experts. It was the position of the McDonalds that such affidavits were not necessary since the affidavits were conclusory in nature, there was other evidence in the record countering those affidavits, and Eubanks had not yet made a case for summary judgment. The trial judge indicated that expert testimony by a lawyer would be necessary to refute the affidavits submitted by Eubanks because the question was one that a jury could not decide without such expert testimony. In other words, how would a jury know if Eubanks' negligence caused the loss of the lawsuit, and how would the jury know that even if an appeal were taken there was a likelihood the McDonalds would win on appeal unless the McDonalds produced evidence from experts telling them that was the case.

The judge again granted summary judgment. He should have denied it.

When considering a motion for summary judgment, the rule is that the movant has the burden of demonstrating there is no genuine issue of fact for trial. Affidavits supporting such a motion are to be construed against the movant. *Hughes Western World* v. *Westmoor Mfg.*, 269 Ark. 300, 601 S.W.2d 826 (1980).

The question to be resolved in a summary judgment is factual — are there any material facts in dispute? ARCP 56(e). Affidavits which are conclusory rather than factual are insufficient to support a motion for summary judgment. *Brewington* v. *St. Paul Fire & Marine Ins. Co.*, 285 Ark. 389, 687 S.W.2d 838 (1985). If a movant makes a prima facie case with his motion for summary judgment, with accompanying evidence, then the burden shifts to the other party, and that party must then come forward with proof to demonstrate that there is a genuine dispute on an issue of a material fact. *Givens* v. *Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982); *Cummings, Inc.* v. *Check Inn*, 271 Ark. 596, 609 S.W.2d 66 (1980).

The issue in this case was the negligence of Eubanks and whether his clients, the McDonalds, were damaged by it. Eubanks conceded he was negligent in not filing the appeal. He contends, however, that it makes no difference because the case could not have been won on appeal; there was no chance the case would be reversed. The McDonalds also alleged other acts of negligence by Eubanks in the preparation and trial of the lawsuit.

It is our judgment that Eubanks did not make a case for summary judgment. His affidavit and that of the two lawyers were almost entirely conclusory and were absent of facts which would counter the specific allegations by the McDonalds of negligence. The affidavits submitted by Eubanks in support of his motion for summary judgment said that the lawyers were familiar with the case and that Eubanks had at all times possessed and used the legal competence and skill possessed by lawyers in good standing in the legal profession. In their opinion Eubanks was diligent; and even if an appeal had been filed, the jury verdict would have been upheld.

McDonald swore in his affidavit that Eubanks told him that he would win on appeal and that McDonald's only recourse was to get a lawyer and sue him, Eubanks. The record also contained a conversation between McDonald and Eubanks after it was learned that Eubanks did not perfect an appeal. In that conversation Eubanks said:

> . . . I did it; I screwed up, and I did not do it through ignorance. I did it through stupidity . . . Now what are your options at this point. You have a lawyer that has

> screwed up, who has a million dollars worth of insurance. Unfortunately, I, there is a probability that the other side will screw up. I don't think that there is very much possibility that they will. . . This is my fault and you know if you get a lawyer you don't have to worry about me taking the stand and saying it wasn't my fault . . . I mean you, you have what is almost an open and shut case. You search all over town to be sure that the lawyer that you're going to hire is the best lawyer in town for the job. . . Anyway it all is not lost, the jury doesn't like Gary Eubanks down there. They like Fred Swaim and I don't want to be sued.

When the rules for summary judgment are applied, we have essentially conclusory affidavits filed by Eubanks and the two lawyers. We have Eubanks' answers to interrogatories. We have the specific allegations of fact made by the McDonalds alleging negligence, the sworn affidavit by George McDonald, and Eubanks' conversation with him. The motion should have been denied.

Reversed and remanded.

Opal JOHNSON *v.* Winford JOHNSON, Winnie MORTON and Wilma TURNEY

85-295 732 S.W.2d 121

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Lynn Law Firm, by: *Terry J. Lynn* and *Rebecca L. Lynn*, for appellant.

Stripling & Morgan, by: *Dan Stripling*, for appellees.

STEELE HAYS, Justice. This appeal concerns the effect of a will which was not probated within the five years allowed under Ark. Stat. Ann. § 62-2125 (Repl. 1971). Clarence Johnson died in 1978 survived by his widow of many years, appellant Opal Johnson, and by three children of a former marriage, the appellees. His will, which was never probated, divided his estate into two trusts, the Opal Johnson Trust and the Clarence Johnson Family Trust. Opal Johnson was to receive the net income from both trusts until her death, but if she remarried the income from the family trust would terminate and the corpus would be distributed to the appellees. When Clarence Johnson died his estate consisted of a farm and several certificates of deposit. The CD's were consolidated into one certificate for $49,000 issued to "The Estate of Clarence Johnson." The certificate remained with the Clinton State Bank and interest generated by the CD was paid to Opal Johnson with the approval of the appellees.

In 1985 Mrs. Johnson remarried and the children filed a petition in the Van Buren Chancery Court alleging that their father had died intestate and asking that the $49,000 be divided one-third to Opal Johnson and two-thirds to them as heirs of Clarence Johnson. Opal Johnson responded by asking that the will be admitted pursuant to Ark. Stat. Ann. § 62-2126.1 (Repl. 1971) to prove her entitlement to one-half of the assets of the estate. The chancellor held that the Clarence Johnson will was not subject to probate, more than five years having elapsed since the testator's death, that § 62-2126.1 was not applicable, and that distribution of the estate should be governed by the laws of intestate succession, dower and homestead. Mrs. Johnson has appealed, contending the trial court's decision that § 62-2126.1 is inapplicable is clearly erroneous. We think the chancellor ruled correctly.

[redacted] In 1981 the legislature adopted Act 347 (codified as Ark. Stat. Ann. § 62-2126.1). Section 1 of the Act reads:

> Except as provided in Section 66 of Act 140 of 1949, as amended, the same being Arkansas Statutes 62-2127, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of probate by the Probate Court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no proceeding in Probate Court concerning the succession or administration of the estate has occurred, and (2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

Section 2 of the Act provides that the Act is intended to supplement "existing laws relating to the time limit for probate of wills, and the effect of unprobated wills, and shall not be construed to repeal [§ 62-2125] and [§ 62-2126]." The two sections referred to are the requirement for probating a will within five years and the proviso that "no will shall be effectual for the purpose of proving title to or the right to possession of any real or personal property disposed of by will until it has been admitted

to probate." (§ 62-2126).

The avowed intent of the 1981 enactment was not to alter existing laws affecting the timely probate of wills in order to give effect to their provisions, but to evidence a claim of ownership by one who has been in possession of property consistent with the terms of an unrevoked will which was not probated. There are two essentials to the application of § 62-2126.1 — that the will is unrevoked and the claimant is in possession of the property. Here it was undisputed that the certificate of deposit remained in the possession of the Clinton State Bank, payable to "The Estate of Clarence Johnson." That fails to comply with the requirement of the law.

Mrs. Johnson argues that she was in "possession" of the property in that she received the income. But we interpret the language and intent of § 62-2126.1 to be that actual possession, rather than constructive, is contemplated for the enactment to apply and we are not inclined to extend the provision beyond its express terms.

Affirmed.

Carol Ann LAYMAN *v.* William Joseph LAYMAN

86-269 731 S.W.2d 771

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Hall, Wright, Morris & Tharel, P.A., for appellant.

Stanley, Harrington & Watson, P.A., by: *Jeff H. Watson*, for appellee.

STEELE HAYS, Justice. The issues presented by this appeal of a divorce suit are 1) whether stock in a family corporation was a gift to the husband, 2) whether the increased value of that stock became marital property and 3) whether an alimony allowance was adequate. We affirm on points 1 and 3 and reverse on point 2.

Carol and Joe Layman divorced after thirty-one years of marriage. Mrs. Layman was a housewife and the mother of three children. Mr. Layman has worked entirely for Layman's, Incorporated, a hardware and furniture business founded some forty years ago by his parents, though not incorporated until 1978. Joe Layman and his brother manage Layman's.

Joe Layman receives a salary of $91,000 per year and a bonus of $91,000. He has acquired common and nonvoting preferred shares of stock in Layman's, Incorporated, from his parents in annual amounts since the company was incorporated in 1978. An accountant estimated the stockholders' equity of the company to be $1,141,806, compared to $707,950 in 1980. The growth of the company has been due in part to the management skills of Joe Layman and his brother.

When Joe and Carol married she was employed at the telephone company, having left college after one semester. She testified that after the children finished elementary school she told Joe she wanted to go back to school. Joe did not want her to work, however, so she remained a housewife until about three years ago when, at Joe's request, she started working one day a week at Layman's. Since the separation she works three days a week at Bible Believers Cassettes, earning $4.50 per hour.

The parties agreed on a partial distribution of assets and the chancellor divided disputed items. He held that $106,000 of a debt due Layman's was marital property, but ordered Mr. Layman to pay Mrs. Layman $53,000 as alimony, ordered Mr. Layman to pay Mrs. Layman $30,000 for her interest in certain real estate, gave possession of the home to Mr. Layman with Mr. Layman to assume mortgage payments and certain miscellaneous debts. The chancellor rejected Mrs. Layman's claim that stock in Layman's was marital property. Mr. Layman was ordered to pay monthly alimony to Mrs. Layman of $1,075.00 for five years.

I

Mrs. Layman contends the chancellor erred in refusing to find that shares of common stock in Layman's, Incorporated, in the name of Joe Layman were marital property, finding instead that the stock was a gift to Mr. Layman from his parents. Mrs. Layman concedes the shares of nonvoting, preferred stock are separate property under Ark. Stat. Ann. § 34-1214(B)(1) (Supp. 1985), because gift tax returns were filed with the IRS in connection with the transfer of preferred stock. However, no gift tax returns were filed as to the shares of common stock and on that basis she urges it was wrong to exclude the common stock from the marital estate. But the absence of a gift tax return, while some evidence of the intent, is not conclusive of the issue. It was not seriously disputed that the elder Laymans wanted to transfer the ownership of Layman's to their two sons and all the stock transferred to Joe Layman was issued in his name alone. An accountant testified that no gift tax returns were filed because the transfers were not from one family member to another, but directly from the corporation. We find no proof from which it might be inferred the stock was acquired by Joe Layman other

than as a gift from his parents. The chancellor's finding that the stock in Layman's, Incorporated, was derived by gift was not clearly erroneous. ARCP 52. *Lyons* v. *Lyons*, 13 Ark. App. 63, 679 S.W.2d 811 (1984).

II

Mrs. Layman contends the stock in Layman's, even if acquired by gift, has appreciated during the marriage because of the time, effort and skill of Joe Layman, and as those are assets of the marital estate she is entitled to share in the fruits of those endeavors. We sustain the argument.

In *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), we pointed out that under our statutory scheme,[1] *all* property acquired by either spouse subsequent to the marriage is presumed to be marital property except for five specific exceptions: a) property acquired by gift, bequest, devise or descent; b) property acquired in exchange for other nonmarital property; c) property acquired after a decree of divorce from bed and board; d) property excluded by agreement; and e) the increase in value of property acquired prior to the marriage.

We have never decided whether the increase in value of nonmarital property acquired by one spouse subsequent to the marriage is marital property, but it is at least arguable that § 34-1214 includes increases in value of property acquired subsequent to the marriage by pointedly excluding from the marital property umbrella *only* increases in value of property acquired *prior* to the marriage. The specific exclusion of property acquired before the marriage carries an implication that property acquired after the marriage is covered. However, the courts which have considered similar statutory schemes have almost uniformly rejected such an interpretation, holding that an increase in value of property acquired by one spouse not attributable in any manner to any combination of funds, property, or effort by either spouse constitutes separate property if the property otherwise qualifies as nonmarital property. See cases cited at 24 ALR IV 451. *Hull* v. *Hull*, 591 S.W.2d 376 (Mo. App. 1979); *In re Marriage of Kommick*, 84 Ill. 2d 89, 417 N.E.2d 1305 (1981).

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[1] Ark. Stat. Ann. § 34-1214 (Supp. 1985).

The distinguishing factor here, of course, lies in the fact that the increases in value of the nonmarital property, the stock in Layman's is attributable in part to the time, effort and skill of Joe Layman over an extended period of time. Those endeavors belonging to the marital estate [*Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984)], it follows that Mrs. Layman is entitled to share in the fruits of such efforts. There is sound authority for this view. In *Jensen* v. *Jensen*, 629 S.W.2d 222 (C.A. Tex. 1982), it was held that the enhanced value of stock owned by the husband in a closely held corporation was marital property, even though acquired prior to the marriage, where the increased value was due primarily to the time, toil and effort of the husband. *In re Marriage of Wildin*, 39 Colo. App. 189, 563 P.2d 384 (1977), the appellate court reversed the trial court's finding that a stock portfolio belonging to the wife was not enhanced by the time and talent of the husband so as to render the increase in value marital property. To the same effect see *Cockrill* v. *Cockrill*, 601 P.2d 1334 (C.A. Tex. 1938). *In re Marriage of Fleet*, 701 P.2d 1245 (C.A. Col. 1985). In the second Potter case [*Potter* v. *Potter*, 288 Ark. 133, 703 S.W.2d 442 (1986)], without deciding the question, we noted that an increase in the value of nonmarital property was a matter of statutory interpretation which might vary with the fact situation. And see *The Arkansas Marital Property Statute and The Arkansas Appellate Courts: Tiptoeing Together Through the Tulips*, Vol. 7, UALR L. J. No. 1, at p. 36. We conclude that when one spouse makes significant contributions of time, effort and skill which are directly attributable to the increase in value of nonmarital property, as in this case, the presumption arises that such increase belongs to the marital estate.

On remand the chancellor should determine the present fair market value of the stock in Layman's, Incorporated, reduced by the fair market value of the stock at the time of acquisition. The difference should be treated as marital property. That does not, of course, mandate that such amount be divided equally, but it is not to be deemed the separate estate of Mr. Layman for purposes of an equitable division of assets.

III

The chancellor allowed alimony in the amount of $1,075 per month to terminate at the end of five years, no doubt to promote rehabilitation. Mrs. Layman is aged 50, with neither training nor education, and she urges on appeal the award is inadequate in light of the relative earning potential of the parties. However, our decision with respect to the increase in Layman's stock improves the division of property to some extent and we are not persuaded the chancellor's discretion in the allowance of alimony has been abused. *Mickle* v. *Mickle*, 252 Ark. 468, 479 S.W.2d 563 (1972). We leave the award undisturbed.

Affirmed in part, reversed in part and remanded.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority's holding that the common stock shares in Layman's, Inc. are not marital property. The shares were acquired during the marriage and were not acquired by gift, exchange or inheritance. See Ark. Stat. Ann. § 34-1214 (Supp. 1985) and *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983).

MONARK BOAT COMPANY *v.* Alfred J. FISCHER, d/b/a SALT FORK MARINA

87-34 732 S.W.2d 123

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Arnold, Hamilton & Streetman, by: *William S. Arnold*, for appellant.

Bailey, Trimble & Sellars, by: *Peter O. Thomas, Jr.*, for appellee.

DAVID NEWBERN, Justice. The principal issue presented in this appeal is whether a party against whom a judgment has been rendered in Ohio, and who contested the matter of personal jurisdiction there, may assert lack of personal jurisdiction of the Ohio court when the judgment is sought to be registered in Arkansas. Other issues are: whether the court erred in failing to register a judgment in favor of the appellant rendered on its counterclaim in the Ohio proceedings; whether the court erred in

admitting the Ohio court's "findings of fact and conclusions of law" into evidence in the registration proceeding; and whether the trial court erred in considering Ohio law as to interest on the judgment to be registered absent separate, written, notice to the appellant that it would be considered.

We find no error because: (1) the Ohio court's determination that it had personal jurisdiction of the appellant was *res judicata*, and thus binding on the appellant in the Arkansas registration proceeding; (2) the court did not err in failing to register the judgment rendered on the counterclaim, as there was no request by the appellant that it do so; (3) the "findings of fact and conclusions of law" were contained in a document which was self-authenticated in accordance with the Arkansas Rules of Evidence, and thus its admission into evidence was not improper; and (4) there was no error in considering Ohio law on interest because the appellee's pleading was sufficient to notify the appellant it would be considered.

The appellant manufactured boats in Arkansas and shipped them to Ohio where they were purchased by the appellee, a dealer. The appellee sued the appellant in an Ohio court, alleging that the appellant had, on one occasion, shipped its product to the appellee on a trailer, and that the trailer was returned to the appellant loaded with an engine owned by the appellee which later was converted by the appellant to its own use. The engine apparently was intended to be used by the appellee in a boat which was to be manufactured by the appellant, but was instead used by the appellant for its own purposes. A judgment was entered in favor of the appellee by the Ohio court for conversion in the amount of $5,250. On its counterclaim, the appellant received a judgment in the same proceeding for $383.04 "on plaintiff's [appellee's] account." The judgment for the appellant appeared in a separate paragraph and was not the basis of a set-off against the appellee's judgment.

The appellee sought, in the Drew County Circuit Court, to register the judgment in its favor pursuant to the Uniform Enforcement of Foreign Judgments Act, codified as Ark. Stat. Ann. §§ 29-801 through 29-818 (Repl. 1979). The appellant opposed registration, contending that the Ohio court had lacked personal jurisdiction of the appellant. The circuit court held that

the Ohio court had jurisdiction of the appellant because the appellant had sought affirmative relief there by its counterclaim. The judgment was ordered registered and entered awarding the appellee $7,456, consisting of $5,250 principal, $2,104 interest, and $101.85 court costs (apparently rounded to the nearest dollar).

1. Res judicata

We need not get to the arguments of the parties over whether the court properly asserted jurisdiction of the appellant on the basis that the appellant had sought affirmative relief in the Ohio court or had been doing business there in a manner sufficient to invoke the Ohio long arm statute. When the appellant appeared in the Ohio court to contest the matter of whether that court had personal jurisdiction of it, it subjected itself to the jurisdiction of that court to determine that issue. The decision of the Ohio court that it had jurisdiction of the appellant was binding on the appellant, and while it could have appealed that decision, it could not attack it in a collateral proceeding, such as the one before us now, because of the doctrine of *res judicata. Baldwin* v. *Iowa State Travelling Men's Association*, 283 U.S. 522 (1931); *Mount Holly Sunoco* v. *Executive Commercial Services, LTD.*, 164 N.J. Super. 429, 396 A.2d 1155 (1978); Restatement (Second) of Judgments § 81 (1982); Restatement (Second) of Conflicts of Laws § 96 (1971); *Developments in the Law — State Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

2. The appellant's judgment

The Ohio court issued a judgment in favor of the appellant on its counterclaim against the appellee, and the appellant contends that that judgment should have been registered by the Arkansas court because it was a part of the judgment the appellee sought to have registered. The difficulty with that argument is that the appellant did not ask that the court register the judgment in its favor. We will not reverse the trial court for failure to award relief for which no request was made. *Story* v. *American States Insurance Company*, 288 Ark. 257, 704 S.W.2d 162 (1986).

3. Admissibility of findings and conclusions

The appellant contends the trial court erred in admitting the Ohio court's findings of fact and conclusions of law because they had not been properly authenticated. This point is significant because in its findings of fact and conclusions of law, but not in the judgment sought to be registered, the Ohio court concluded that it had jurisdiction of the "case" pursuant to Ohio Civil Rule 4.3(A)(1), which is a "long arm" provision dealing with establishment of personal jurisdiction by service of process on nonresidents of Ohio who transact business in Ohio. It is this finding or conclusion we hold, in Point 1 above, binding on the appellant in these proceedings.

The appellant contends that Ark. R. Civ. P. 44(a)(1) permits authentication of a record of another state only by official publication or by an attested copy accompanied by a certificate that the officer has official custody of the document, and there is no such certificate of custody accompanying the findings and conclusions document. Arkansas Rules of Evidence 902, however, describes certain documents as "self-authenticated." They include, at A.R.E. 902(4), "[a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office . . . certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1). . . ." Paragraph (1) permits introduction without extrinsic evidence of authenticity of domestic documents under seal, including "[a] document bearing a seal purporting to be that of . . . any state . . . or of a political subdivision, officer, or agency thereof, and a signature purporting to be an attestation or execution."

The document in question here bears a seal purporting to be that of the Common Pleas Court of Guernsey County, Ohio, and it bears a certification that it is a true copy of the original, signed by a person purporting to be the Clerk of Courts, Guernsey County, Ohio. We have no doubt that the document was a self-authenticating one, and that no extrinsic evidence of its authenticity was required. It was thus admissible as an official record.

4. Judicial notice of foreign law

The appellant's final point is that Ark. R. Civ. P. 44.1 requires that a party who intends to raise a matter of foreign law must give written notice, and that it was thus error for the trial court to apply the Ohio ten percent interest rate to the judgment, as no notice had been given the appellant that the appellee intended to rely on the Ohio law in that respect.

In his pleading the appellee sought registration of the Ohio judgment pursuant to Ark. Stat. Ann. § 29-801, *et seq.* The Uniform Registration of Foreign Judgments Act encompasses §§ 29-801 through 29-818. While the use of the term "*et seq.*" is an inartful means of making reference to the codification of the entire act, we find it was sufficient notice to the appellant that the appellee would proceed according to all of the act's provisions. Section 29-814, in pertinent part, provides: "When a registered foreign judgment becomes a final judgment of this state, the court shall include as part of the judgment interest payable on the foreign judgment under the law of the state in which it was rendered . . . ." By notifying the appellant that registration of the Ohio judgment was sought pursuant to the act, the appellee placed the appellant on notice it could expect interest to be levied in accordance with the law of Ohio.

Affirmed.

Shelton DAVIS *v.* Ima M. Darby ARINGE

87-1 731 S.W.2d 210

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Meredith Wineland, for appellant.

W. J. Walker and *Frank A. Poff, Jr.*, for appellee.

TOM GLAZE, Justice. This case is a will contest and involves whether the will of the decedent, Carlton Taylor, was revoked by operation of law, pursuant to Ark. Stat. Ann. § 60-407 (Supp. 1985). The chancellor admitted the will to probate, holding § 60-407 was inapplicable to the situation posed here, and the will provision favoring Ima M. Darby, as residual legatee and devisee, was valid.

The parties have no dispute as to the facts. Taylor had executed a will nominating Darby (now Aringe) as executrix and leaving his entire estate to her, with the exception of a one-dollar bequest to his brother. Thirteen months later, Taylor married Darby, but after two years of marriage, the parties were divorced. Taylor died nineteen months after he obtained the divorce, without having changed his will. Darby petitioned to probate Taylor's will, and Shelton Davis, Taylor's cousin and sole heir, contested the will, claiming it had been revoked under § 60-407 because Taylor had married and divorced Darby since the will had been executed. The chancellor upheld the Taylor will, reasoning that Taylor had named Darby in his will when they were friends, not spouses, and that Taylor had never changed it, even though a significant amount of time had passed (nineteen months) between the parties' divorce and Taylor's death.

Section 60-407 provides:

If after making a will the testator is divorced or the

> marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse are thereby revoked. With these exceptions, no will or any part thereof shall be revoked by any change in the circumstances, condition or marital status of the testator; subject, however, to the provisions of § 60-501.

In determining whether § 60-407 applies to the Taylor will, we believe a brief recount and understanding of the history relevant to the doctrine of implied revocation is important. At common law, a woman's will was revoked by her subsequent marriage, but a man's will was not, at least, unless there was both a marriage and birth of issue. Besides having been altered by the Wills Act, 1837, these two rules have been treated differently in American jurisdictions. T. Atkinson, *Law of Wills* § 85 (2d ed. 1953); *see also* 2 W. Bowe & D. Parker, *Page on Wills* §§ 21.89 — 21.91 (3rd ed. 1960). Professor Atkinson, in his treatise on wills, notes a legislative tendency to depart from the old rules. He further observes that a considerable number of jurisdictions, by statute, have provided a man's marriage revokes his will, absolutely, or as to the spouse, unless the will in some way provides to the contrary. Atkinson, *supra.*

Similarly, the law pertaining to divorce and how it impliedly affects a testator's will has experienced change by our state courts and legislatures. In the absence of statute, it is generally agreed in this country that a divorce, unaccompanied by a property settlement, does not revoke the testator's will nor the legacy in the divorced spouse's favor. However, when such a settlement exists and the jurisdiction recognizes generally the doctrine of revocation by operation of law, it is usually held that there is a revocation in favor of the divorced spouse. Atkinson, *supra*; *accord Mosely* v. *Mosely*, 217 Ark. 536, 231 S.W.2d 99 (1950) (discussed statutory treatment and applied rule there was no revocation by operation of law after determining § 60-407 had not yet taken effect and was, therefore, inapplicable to the situation then before the court). Here, again, legislative change has occurred in recent years. Professor Atkinson recognized in his work that, in an increasing number of states, there is legislation providing that subsequent divorce revokes provisions in favor of the spouse. *Atkinson*, *supra*, citing *Moseley*, *supra.* One authority explains this new perspective or trend as follows:

> Divorce was so rare before modern legislation that it may well be treated as a new case, fairly involving the question of the application of the existing principles of common law and ecclesiastical law to a situation which could rarely, if ever, be presented under the old law for specific adjudication. It seems likely that the courts would treat divorce as a revocation if they felt that it fairly represented the intention of the average testator. The unwillingness of the courts to treat this as a revocation is due in a large part to the fact that [a] testator frequently intends his will to remain in effect in spite of the divorce. The dangers of relying on oral evidence are such that it would be unsafe to adopt a rule making the validity of the will depend upon the actual intention of the testator. The courts are thus driven to a rule which represents the probable intention of the average testator. *It seems very doubtful whether the probable intention of the average testator that a prior will should not remain in force under such circumstances is so clear as to justify the courts in adding this as a new class of revocation by operation of law.*

W. Bowe & D. Parker, *Page on Wills* § 21-101 at 523 (3rd ed. 1960) (emphasis supplied).

[redacted] In 1949, our General Assembly enacted § 60-407 in order to avoid some of the legal uncertainties in probate law that had arisen in past years when dealing with marriage and divorce issues and the doctrine of implied revocation. *See* Note, *Wills — Revocation Implied from Divorce of Testator*, 9 Ark.L.Rev. 182 (1955). When applying the plain language of § 60-407 to the instant case, we can only conclude that after Taylor executed his will, that will was not revoked by his marriage to Darby, but his divorce from her did revoke the will provisions made in her favor.

Darby's view or argument in this case is inconsistent in its interpretation and application of § 60-407. She argues that the first sentence of that statute, pertaining to a testator's divorce, applies *only* in instances when the testator made the will *during* his marriage but not before. On the other hand, Darby would apply the second sentence of § 60-407, because that provision upholds the validity and continued effectiveness of a testator's

will even though he marries after it was executed. *Cf. Sughrue* v. *Barlow*, 233 Mass. 468, 124 N.E.2d 285 (1919) (wherein the court revoked the will provision even though testator left everything to the woman he later married because the will did not show on its face the contemplated marriage). While Darby's interpretation of § 60-407 sustains the validity of Taylor's will and its provisions favoring her, that construction is a tortured and inconsistent application of its plain language.

In sum, to adopt Darby's argument would require us to read language into § 60-407 that simply is not there. Clearly, § 60-407 does not provide that its provision revoking a former spouse's bequest or devise upon divorce is dependent upon the testator having made his will during a marriage. To supply such language, we believe, would lend uncertainty and confusion to the law, which runs contrary to the very reason the General Assembly enacted this statute in the first place.

In *In re the Estate of Epperson*, 284 Ark. 35, 40, 679 S.W.2d 792, 794 (1984), we examined §§ 60-407 and -501 (Supp. 1985), and in doing so, made it clear that neither of these statutes makes a distinction concerning wills that predate a marriage and those made after a marriage. If such a distinction should exist, it is the General Assembly's province to make it, not this court's. Accordingly, we hold that § 60-407 applies *in toto* and that the chancellor was in error in holding otherwise.

Billy J. TILMON and Connie TILMON, d/b/a RAZORBACK HELICOPTER *v.* John PERKINS and SOUTHWESTERN ELECTRIC POWER COMPANY

87-45 731 S.W.2d 212

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Bullock & McCormick and *Kenneth A. Hodges*, for appellants.

Davis & Associates, P.A., by: *Charles E. Davis*, for appellee John Perkins.

Greenhaw & Greenhaw, by: *Leonard Greenhaw*, for appellee Southwestern Electric Power Company.

TOM GLAZE, Justice. This appeal involves a tort case in which the sole issue is whether the Yell County Circuit Court erred in dismissing the appellants' lawsuit against appellees for lack of venue. We hold the trial court's decision was correct and, therefore, affirm.

Appellants are residents of Yell County, but they rented some land located near Eureka Springs in Carroll County, so they could operate a helicopter sightseeing business. On appellants' first day of business, appellee, John Perkins, who owned adjoining land, confronted appellants, demanding the appellants cease

their operations because their helicopter take-off and landing route went over Perkins' property. About one week later, Perkins, who is employed by appellee Southwestern Electric Power Company (SWEPCO), was seen in a SWEPCO truck, stringing wire or cable from the treetops on his property. This wire posed a hazard to the landing and departing of the appellants' helicopter. Shortly after this incident and when appellant Billy J. Tilmon and two customers took off in the helicopter, Perkins positioned himself in a SWEPCO truck's cherry-picker and attempted to strike the helicopter with a pole. He repeated his attempt when the helicopter returned several minutes later. SWEPCO officials had been notified of Perkins' actions but responded only that what Perkins did on his own time was his business.

Appellants filed this suit against Perkins and SWEPCO in Yell County, alleging that Perkins' intentional acts and threats endangered the appellants' lives, interfered with their business and the use of their land and, because the acts were so outrageous, caused them great emotional stress and mental suffering. Appellants further alleged that SWEPCO was negligent in the hiring and supervising of its employees, which resulted in its joint liability with Perkins for the damages suffered by the appellants.

Appellees moved to dismiss the appellants' complaint, contending the proper venue for the suit is in Carroll County under Ark. Stat. Ann. §§ 27-601 and -613 (Repl. 1979). Appellants responded, stating Ark. Stat. Ann. §§ 27-610 (Repl. 1979) and -611 (Supp. 1985) applied, placing venue in Yell County, where appellants reside.

We first dispose of appellants' argument concerning § 27-611 because that statute establishes venue for damages to personal property and no such damages were alleged and prayed for in their complaint. Appellants' only serious contention concerns § 27-610, which provides that actions for damages for personal injury must be brought either in the county where the accident causing the injury occurred, or where the injured person resided at the time of the injury. Whether the statute applies here depends on whether the appellants' suit is one for "personal injury." We hold it is not.

This court has construed § 27-610 on many occasions, but we believe the best discussion of the term "personal injury,"

as used in that statute, appears in *Robinson* v. *Missouri Pacific Transportation Co.*, 218 Ark. 390, 396, 236 S.W.2d 575, 578 (1951), wherein we quoted the following from 56 Am.Jur. *Venue* § 15 (1947):

> A personal injury or injury to the person as these terms are used in the venue statutes is generally construed not to include every invasion of a personal right, such terms being usually limited to physical or bodily injuries.
>
> * * *
>
> [A]ctions for alienation of affections and actions for defamation of character generally are deemed not to come within the meaning of statutory provisions governing the venue of actions for personal injuries or injuries to the person.

[redacted] Consistent with the foregoing, this court repeatedly has held that corporeal or physical injuries must exist before venue can be established under § 27-610. *See Odell* v. *Arkansas General Industries Co.*, 288 Ark. 356, 705 S.W.2d 438 (1986) (held inapplicable when no physical injury involved but intentional, wrongful discharge was alleged); *Farm Bureau Mutual Insurance Co.* v. *Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983) (held inapplicable when tort of bad faith alleged); *Arkansas Valley Industries, Inc.* v. *Roberts, Judge*, 244 Ark. 432, 425 S.W.2d 298 (1968) (held inapplicable when abuse of prosecution, malicious prosecution, vexatious suit and false imprisonment were alleged); *Shultz* v. *Young*, 205 Ark. 533, 169 S.W.2d 648 (1943) (held applicable when alleged damages for physical injuries resulted from assaults); *Coca-Cola Bottling Co.* v. *Kincannon, Judge*, 202 Ark. 235, 150 S.W.2d 193 (1941) (held applicable when alleged physical pain and injury resulted from drinking from a bottle containing an insect). In the instant case, appellants failed to allege any physical injuries, and, instead, complained of great emotional stress, mental suffering, fear and apprehension for their well-being. These allegations are not ones that encompass personal injury within the meaning of § 27-610. Therefore, that statute is not applicable, and fails to localize appellants' action in Yell County.

[redacted] Since neither § 27-610 nor § 27-611 applies, the venue

for appellants' action must fall within the provisions of § 27-601 Fourth (injury to real property brought where property situated) or § 27-613 (general venue law involving "other actions" brought where defendants reside). In either case, appellants must file their action in Carroll County. Because we agree the trial court correctly dismissed appellants' Yell County action, we affirm.

John Marx PRICE *v.* STATE of Arkansas

732 S.W.2d 126

Supreme Court of Arkansas
Opinion delivered June 29, 1987

Hollingsworth & Heller, P.A., by: *Ron Heller*, for appellant.

No response.

PER CURIAM. Petitioner John Marx Price, by his attorney, has filed a motion for a rule on the clerk. His attorney, Ron Heller, has by affidavit admitted it was his fault that the record was not timely tendered.

We find that the error, admittedly made by the criminal defendant's attorney, is good cause to grant the motion for a rule on the clerk.

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

Glenda BROWN, Sam BROWN, Tawana Brown ETUE, Teresa BROWN and Troy BROWN, Surviving Spouse and Next of Kin of Roy Dewayne BROWN, Deceased *v.* ST. PAUL MERCURY INSURANCE CO.

87-38 732 S.W.2d 130

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Hani W. Hashem, for appellant.

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

JACK HOLT, JR., Chief Justice. Roy Dewayne Brown was a patient at the White House Alcoholism Treatment Center when he walked out of an unlocked door onto the roof of the building and either fell or jumped to his death on April 11, 1983. Nearly three years later, his surviving spouse and other next of kin, appellants, filed suit against the center's insurer, St. Paul Mercury Insurance Co., appellee. The trial court found that Brown's death was a "medical injury" subject to the two-year statute of limitations in Ark. Stat. Ann. § 34-2616 (Supp. 1985), and granted appellee's motion for summary judgment. We hold that the complaint was timely filed as an action for wrongful death, which carries a three-year statute of limitations. Ark. Stat. Ann. § 27-907 (Supp. 1985). Accordingly, we reverse and remand.

The trial court concluded that the two-year limitation for actions for medical injury barred the appellants' claim, based on the definition of medical injury in Ark. Stat. Ann. § 34-2613(C) (Supp. 1985), which provides in pertinent part that medical injury "means any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error or omission in the performance of such services, . . ."

The appellants argue that Brown's death was not the result of a medical injury, but was caused by the treatment center's failure to keep the premises safe for a patient in Brown's condition. In addition, the appellants contend that even if Brown's death was the result of a medical injury as defined in our statute, the cause of action by his survivors should be classified as

a wrongful death action with its accompanying three-year limitation. We find that Brown's death was a medical injury, agreeing however, that his survivors are given the benefit of the three-year statute of limitations under our wrongful death statutes.

Appellants' claim that Brown's death was not the result of a "medical injury" does not square with this court's position in *Sexton* v. *St. Paul Fire & Marine Ins. Co.*, 275 Ark. 361, 631 S.W.2d 270 (1982). In that case, an 81-year-old, mentally confused patient fell at a hospital, and died several months later from the injuries he sustained in the fall. His survivors alleged that a nurse at the hospital was negligent in not restraining the patient with a Posey vest, which had been authorized by the patient's doctor. We found that the action was for medical injuries arising out of the professional services provided by the hospital, and held:

> A hospital is required to consider the patient's capacity to care for himself and to protect the patient from dangers created by his weakened condition. Providing a safe environment for patients is within the scope of the professional services by a hospital. *Murillo* v. *Good Samaritan Hospital of Anaheim*, 99 Cal. App. 3d 50, 160 Cal. Rptr. 33 (1979).

In the case before us, Brown's death was alleged to be the result of negligence on the part of the treatment center in failing to properly supervise and restrain the activities of the deceased, and in failing to provide a safe place for treatment of Brown, who was known to be suffering from delirium tremens and mental disturbances associated with alcoholism. Certainly it was within the scope of the hospital's professional services to provide a safe environment for this patient under the circumstances, and failure to do so gives rise to a medical injury under § 34-2616(C).

Even though Brown's death is properly characterized as a medical injury, we find that appellants' claim is founded on our wrongful death statutes and that its three-year statute of limitation applies. Ark. Stat. Ann. §§ 27-906, 27-907. In addressing this issue, both parties cite out-of-state decisions in support of their relative positions as to whether the wrongful death statutes create a new and separate cause of action which carries its own statute of limitations.

Although these cases are instructive, we stand fast on our ruling in *Matthews* v. *Travelers Indemnity Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968), where we held that the wrongful death statute and its specific limitations should apply.

In *Matthews*, tumorous tissue removed from Mrs. Matthews was wrongly diagnosed as noncancerous. When Mrs. Matthews' condition worsened, her doctor ordered a re-examination of the tissue and it was discovered she had a malignancy. More than two years after the allegedly negligent diagnosis, but less than three years after Mrs. Matthews' death, Mr. Matthews, as administrator of his wife's estate, brought an action against the testing laboratory's insurer. The complaint sought compensation for the physical and mental anguish suffered by Mrs. Matthews before her death, and for Mr. Matthews' loss of consortium and mental anguish. The trial court dismissed the entire action, applying the two-year statute of limitations then governing medical malpractice, which provided that the date of the accrual of the cause of action shall be "the date of the wrongful act complained of, and no other time." Ark. Stat. Ann. § 37-205 (Repl. 1962). Matthews argued that the three-year wrongful death statute should have been applied. We said:

> In our opinion each statute is partly controlling. It is essential to recognize that two separate causes of action are being asserted by the appellant in his capacity as administrator of his deceased wife's estate. The complaint seeks in part to recover compensation for the physical and mental anguish suffered by Mrs. Matthews before her death. At common law that cause of action would not have survived the death of Mrs. Matthews, but under our survival statute it may be asserted by her personal representative. Ark. Stat. Ann. § 27-901. In that situation the personal representative is asserting the decedent's cause of action and must therefore bring suit within the period allowed by that statute of limitations which would have governed if the injured person had not died. *Smith* v. *Missouri Pac. R.R.*, 175 Ark. 626, 1 S.W.2d 48 (1927). That being the two-year malpractice act in this case, the administrator's attempt to assert Mrs. Matthews's cause of action for her physical and mental pain and suffering is barred, because the suit was not filed within two years after the wrongful

act complained of.

An administrator is also entitled to assert the cause of action for wrongful death that was created by statutes modeled after Lord Campbell's Act. Our statute, with respect to the case at bar, creates a cause of action in the surviving spouse for his loss of consortium and for his mental anguish. Ark. Stat. Ann. § 27-909. That cause of action may be asserted, as we have indicated, within three years after the death of the person alleged to have been wrongfully killed. Here the administrator's suit upon that cause of action was timely.

We are not overlooking the argument that the administrator's action for wrongful death is to some extent derivative, in that it may be extinguished either by a suit for personal injuries prosecuted by the injured person to a final judgment during his lifetime, Restatement, Judgments, § 92 (1942), or by the running of the applicable statute of limitations during the injured person's lifetime. *Hicks* v. *Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark. 1960), app. dism. 285 Fed. 2d 427 (1960). Here, however, the two-year malpractice statute had not run when Mrs. Matthews died on November 28, 1965. We are accordingly of the opinion that the administrator was entitled to assert the cause of action for wrongful death at any time within three years after Mrs. Matthews's death. Where the issue is doubtful our policy is to favor the longer of two statutes of limitation. *Jefferson* v. *Nero*, 225 Ark. 302, 280 S.W.2d 884 (1955).

Granted, in *Matthews, supra*, we were viewing the old medical malpractice statute in light of our wrongful death statutes. However, when applied to § 34-2616(C), the result is the same. Our wrongful death statute created a new and separate cause of action which could arise if death was caused by any wrongful act and which carries its own statute of limitations as part of that right. For this reason, the medical malpractice statute of limitations is irrelevant when a patient dies from his injuries before the two-year period has run.

In their complaint, the appellants alleged damages for loss of consortium, mental anguish, and funeral expenses caused

by the wrongful death of the deceased. Because these allegations fall within our statutorily created cause of action for wrongful death, coupled with our policy of favoring the longer statute of limitations when the issue is doubtful, *Matthews, supra*, we hold that the appellants' complaint was timely filed.

Reversed and remanded.

HICKMAN, PURTLE, and GLAZE, JJ., concur.

JOHN I. PURTLE, Justice, concurring. I concur with the result reached in the majority opinion. However, let the record reflect that I do not agree that the injury in this case was a medical malpractice injury. The injury and death were no more a consequence arising out of professional service than they would have been if the doctor had driven up to the institution and injured the patient by running over him with his automobile. Clearly, the cause of action in the present case did not arise during the "course of professional services."

HICKMAN, J., joins.

TOM GLAZE, Justice, concurring. I join the majority in its reversal of this cause, but I must disagree with the majority holding that Brown's death was the result of a "medical injury." The evidence here simply does not support such a holding. Some of my reasons for disagreeing with the majority on this point are already stated in the dissenting opinion found in *Sexton* v. *St. Paul Fire & Marine Insurance Co.*, 275 Ark. 361, 364, 631 S.W.2d 270, 272 (1982). Therefore, I merely adopt the dissenting views expressed in *Sexton* as supporting my concurrence in this case.

HICKMAN, J., joins in this concurrence.

Charles Wesley COGBURN *v.* STATE of Arkansas

CR 87-24 732 S.W.2d 807

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Ronald L. Griggs, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Charles Wesley Cogburn, was charged with rape for allegedly engaging in sexual intercourse with his seven-year-old daughter. He was convicted by a jury of carnal abuse in the first degree and, when the jury was unable to agree on the punishment, sentenced by the court to ten years imprisonment. On appeal, Cogburn challenges the admissibility of a videotaped interview of his daughter, the constitutionality of A.R.E. Rule 803(25)(A), the admissibility of

certain testimony, the failure to give a jury instruction, and the refusal to admit certain test results. The court of appeals certified this case to us to determine the constitutionality of Rule 803(25)(A). We find that the rule is constitutional as applied to Cogburn, but that the trial court committed error when it permitted the introduction of the videotaped interview and reverse.

1. *ADMISSION OF VIDEOTAPED INTERVIEW.*

The state filed a motion with the trial court on May 21, 1985, requesting permission to take a videotaped deposition of the victim pursuant to Ark. Stat. Ann. § 43-2036 (Supp. 1985). The motion was granted and the deposition was scheduled for July 2, 1985. At the deposition, however, the child became emotionally distressed and was unable to testify.

On earlier dates, February 13 and 15, 1985, Carol Dungan, assistant juvenile probation officer for the Union County Juvenile Court, interviewed the child at the request of Arkansas Social Services. Each interview was videotaped. In the course of the interviews, the child was given two dolls: a boy and a girl. She pretended the boy doll was her father and the girl doll was her, and described several incidents of sexual contact between the two. The defendant was not notified that the interviews were to take place and his attorney was not present for the interviews. The court permitted the state to play these videotapes for the jury, over Cogburn's objections, relying on A.R.E. Rule 803(25).

Rule 803(25) provides in part:

> (25)(A) A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, . . .

The rule then conditions the admission of such a hearsay statement on a hearing conducted by the court, outside the presence of the jury, after which the court finds that the statement possesses reasonable likelihood of trustworthiness using criteria enumerated in the rule.

Rule 803(25) applies generally to any statement made

by a child that meets the required criteria. The Legislature, however, has made specific provisions for such statements when they are videotaped. The appropriate procedure for presenting videotaped testimony of victims of sexual abuse is provided in Ark. Stat. Ann. § 43-2036 (Supp. 1985) as follows:

> In any prosecution for a sexual offense or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney and after *notice to the opposing counsel*, the court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of seventeen (17) years. *The videotaped deposition shall be taken before the judge in chambers in the presence of the prosecuting attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition* in the same manner as permitted at trial under the provisions of the Arkansas Uniform Rules of Evidence. Any videotaped deposition taken under the provisions of this Act . . . shall be admissible at trial and received into evidence in lieu of the direct testimony of the victim. However, neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the minor victim to testify at trial if that is necessary to serve the interests of justice (emphasis added).

It is an accepted rule of law that a general statute, such as Rule 803(25) (Ark. Stat. Ann. § 28-1001 (Repl. 1979 & Supp. 1985)), does not apply where there is a specific statute, such as § 43-2036, covering a particular subject matter. *Drum* v. *McDaniel*, 215 Ark. 690, 222 S.W.2d 59 (1949). Accordingly, the trial court erred in admitting the videotape under Rule 803(25).

The state concedes that § 43-2036 was not complied with in videotaping the Dungan-victim interviews. We have explained that videotaped depositions are permissible only when authorized by statute, and that the use of depositions in criminal cases is more carefully scrutinized than in civil cases. *McGuire* v. *State*, 288 Ark. 388, 706 S.W.2d 360 (1986). In *Russell* v. *State*, 269 Ark. 44, 598 S.W.2d 96 (1980) this court reversed the trial court's decision admitting into evidence a videotaped deposition

that was not authorized by statute. We stated:

> While we have approved the use of a video tape recording in taking depositions, that is only in an instance where a deposition is lawfully authorized. . . .
>
> . . . .
>
> [T]he right to take depositions in a law case rests upon statutory authority and in no case can the right be exercised unless the authority therefor exists.

Since the requirements of Ark. Stat. Ann. § 43-2036 were not followed and Rule 803(25) does not apply, the trial court erred in receiving the videotape into evidence, and we reverse the conviction on that basis. The error was prejudicial in that the defendant was denied the right to cross-examine the child at the time she made her videotaped statement, and the state was in effect permitted to offer the direct testimony of the victim twice, once through the videotape and once through live testimony.

2. *HEARSAY TESTIMONY.*

The victim made statements about the sexual abuse she allegedly suffered to her mother, Rebecca Cogburn; to Linda Coursey, a counselor at the South Arkansas Regional Health Center; and to Carol Dungan, as previously discussed. The state filed a motion to introduce this hearsay testimony on the grounds that the minor has suffered a tremendous emotional distress, and her testimony at the trial would be extremely embarrassing and difficult for her. The state argued that the testimony of the parties falls within the purview of A.R.E. Rule 803(25). After two pretrial hearings, the court permitted the testimony, but limited Dungan to either testifying about the statement or introducing the videotape. The state chose to introduce the tape.

As to the other statements offered, Cogburn argues that Rule 803(25) "clearly requires" the court to make specific findings that the statements offered possess a reasonable likelihood of trustworthiness. Cogburn states that, although a hearing was held on this question, the court simply admitted the statements without making such specific findings.

The court's action was sufficient. Rule 803(25) does not require written findings, or specific oral findings, but rather

requires the trial court to base its decision on the enumerated criteria. Two pretrial hearings were held in this case in which evidence was presented about the statements. During the hearings, the prosecutor referred constantly to the necessary criteria, commenting as he offered proof of each one. In addition, the court stated that it took "all those matters into consideration when it made its ruling", referring to the requirements of Rule 803(25). There is no merit to this argument.

Cogburn also maintains the criteria of the rule were not met in that the statements were not trustworthy. Rule 803(25) requires the judge to determine the age and maturity of the child; the time and content of the statement and the circumstances surrounding the giving of the statement; the nature and duration of the offense involved; the relationship of the child to the offender; the reliability of the assertion; the reliability-credibility of the child witness before the judge; the relationship of the child to the one offering the statement; and any other corroborative evidence of the act or any other appropriate factors.

At two pretrial hearings on the admissibility of evidence under A.R.E. 803(25), Rebecca Cogburn testified that the child was born November 7, 1977, and is able to relate events and knows the difference between telling the truth and lying. She testified that the child's teacher called and said they were having trouble with her at school, whereupon Mrs. Cogburn took the child to a counselor. The counselor suggested asking the child if she might be a sexual abuse victim. Mrs. Cogburn then talked to the child and told her that if anyone touched her where she didn't want to be touched that that was wrong and that she could talk to her about it. A week later, the child told her mother about sexual incidents with Cogburn.

The counselor testified at the pretrial hearings that she, too, discussed the allegations against Cogburn with the child and learned that the abuse began when the child was five and in kindergarten and the counselor assessed the child's mental status, her mental health and the degree of her adjustment. It was her opinion that the child was sexually abused. In *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987), we held that a medical witness could not give his opinion, in the absence of any medical evidence, that a child was sexually molested. Here, the coun-

selor's statement of opinion that the child was sexually abused was not argued as error before the trial court or in this appeal. Accordingly, we need not address this issue in this case.

The foregoing pretrial proceedings met the requirements of Rule 803(25) and no error was committed in permitting the parties' subsequent trial testimony. Had the state opted to use Dungan's testimony, that testimony would also be admissible provided it met the criteria stated above.

3. *CONSTITUTIONALITY OF A.R.E. 803(25).*

Cogburn also argues Rule 803(25) permitting hearsay testimony unconstitutionally denies a defendant the right to confront the person giving the statement. Cogburn maintains that substantive due process prohibits the admission of testimony which does not give the defendant the basic right to cross-examine the witnesses against him.

The sixth amendment's confrontation clause, made applicable to the states through the fourteenth amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The United States Supreme Court has held that the confrontation clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination. *California* v. *Green*, 399 U.S. 149 (1970). The Court explained that even if "the out-of-court statement may have been made under circumstances subject to none of these protections, . . . if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections." *Id. See also, U.S.* v. *King*, 613 F.2d 670 (7th Cir. 1980); *U.S.* v. *Green*, 548 F.2d 1261 (6th Cir. 1977).

Here, the victim testified at the trial and was subject to unbridled cross-examination. Therefore, the hearsay evidence admitted against Cogburn concerning the victim's statements under Rule 803(25) did not violate the confrontation clause and, under these circumstances, does not render the rule unconstitutional. In so holding, we must point out what is not being addressed in this opinion. Unlike our decision in *Johnson* v. *State, supra*, handed down today, no argument has been made about the

requirement in *Ohio* v. *Roberts*, 488 U.S. 56 (1980) that a declarant be unavailable before their out of court statement can be admitted at trial without violating the Confrontation Clause. Since this argument was not raised in this appeal, as it was in *Johnson*, we are unable to reach it.

4. *JURY INSTRUCTION—A.R.E. 803(25).*

Rule 803(25)(A)(3) provides:

> If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

The state concedes that the jury was not instructed by the court pursuant to this rule, but maintains Cogburn never requested such an instruction nor objected to its omission. In addition, it notes the jury was instructed generally on credibility of witnesses. The state is apparently correct and accordingly, we would not reverse Cogburn's conviction on this basis. Inasmuch as the conviction is being reversed because of the admission of the videotape, however, at a retrial the trial court should instruct the jury as required by the rule. The instruction should be given before the testimony is offered, in the nature of an admonition, rather than given at the conclusion of the case with the packet of jury instructions. *See Chappell* v. *State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). Although the rule does not specify the time at which the instruction is to be given, we think this is the better practice since it would enable the jury to truly consider the testimony as it is given in light of the admonition.

5. *EX POST FACTO APPLICATION OF A.R.E. 803(25).*

The legislature amended Rule 803 and added subsection (25) in 1985. Cogburn was arrested and charged with having committed the crime in 1984. Cogburn argues that application of Rule 803(25) to him violates the constitutional prohibition against *ex post facto* laws.

In the recent case of *Smith* v. *State*, 291 Ark. 163,

722 S.W.2d 853 (1987), this court discussed at length the admissibility of evidence in the face of an alleged *ex post facto* violation. In that case, the appellant argued that evidence which could not have been admitted against him at the time the crime was committed was made admissible by legislation which became effective before he was tried. In finding no *ex post facto* violation, this court acknowledged that a law may not lawfully be changed between the time of the offense and the time of the trial, if it affects the definition of the crime or changes the punishment or makes the amount of proof necessary to sustain the conviction less than what was required at the time of offense. *See Kring* v. *Missouri*, 107 U.S. 221 (1882) and *Government of the Virgin Islands* v. *Civil*, 591 F.2d 255 (3rd Cir. 1979). We then stated:

> We find nothing in . . . [these cases] which would require reversal here. We do not have a defendant who has lost a defense or been subjected to a trial in which "less evidence" in any direct sense is required for conviction than would have been required at the time of the offense . . . Nor are we persuaded by *U.S.* v. *Henson, supra*, for in that case, the law deemed *ex post facto* required the introduction against a testifying accused of certain *facts* which might not have been introduced had the law extant at the time of the offense been applied. That is not the case before us now. Rather, we are faced with the question whether admission of certain *evidence* of clearly admissible facts violated the *ex post facto* prohibition.
>
> . . . .
>
> While we could not condone legislation criminalizing an act after its perpetration or retroactively increasing the punishment, we can find no reason to hold that a person who commits a crime has a right to rely on rules of evidence in effect at the time of the crime which govern not the facts which may be proven but the manner in which those facts are ascertained by a witness.

Applying this analysis to the case before us, the state was required to prove the same facts at the trial as it was before Rule 803(25) was enacted. The change which occurred was allowing those facts—the sexual abuse of the child—to be proven by testimony which would not have been admissible at the time of the

crime. The trial court's ruling admitting the testimony was correct.

6. *TRUTH SERUM TESTS RESULTS.*

Prior to the trial, the defense took the deposition of Dr. Gregory S. Kaczenski. The doctor testified that he conducted a neuropsychiatric evaluation of Cogburn and an amytal interview to look for evidence of a mental disorder. The doctor stated that the amytal interview, otherwise known as administering "truth serum", lowers the inhibitions in the conscious mind and allows the person to speak freely. While under the influence of the truth serum, the doctor said that Cogburn achieved a hypnotic state and denied having sexual contact or experience with the victim. The doctor testified that, in his opinion, the test is good evidence against Cogburn having abused his daughter. The state filed a motion in limine to suppress the doctor's testimony, which was granted by the trial court.

[redacted] We do not set aside the trial court's ruling unless it is clearly against the preponderance of the evidence. *Foster* v. *State*, 285 Ark. 363, 687 S.W.2d 829 (1985). Here, the trial court was correct.

[redacted] The results of polygraph tests are not admitted unless both parties enter into a written stipulation agreeing on their admissibility. *Foster, supra*; Ark. Stat. Ann. § 42-903 (Repl. 1977). Truth serum tests are generally held to occupy the same position as polygraph tests and most courts do not recognize the admissibility of either test for the purpose of proving the truth of the matter asserted. 29 Am. Jur. 2d *Evidence* § 831 pp. 923-24 (1967). Of these courts we are persuaded by the reasoning of the Texas Court of Criminal Appeals in *Cain* v. *State*, 549 S.W.2d 707 (1977) where they stated:

> The great weight of authority in this country regards results of truth serum tests as inadmissible inasmuch as they have not yet attained scientific acceptance as reliable and accurate means of ascertaining truth or deception.
>
> . . . .
>
> "It is therefore apparent that the efficacy of neither the lie detector or the *truth serum test* have gained that

> standing and scientific recognition nor demonstrated that degree of dependability to justify the courts in approving their use in the trial of criminal cases." (*quoting Henderson* v. *State*, 94 Okl. Cr. 45, 230 P.2d 495 (1951)).

Because of the error in admitting the videotaped statement of the victim, the conviction is reversed.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the result reached by the majority opinion but I disagree with that part of the opinion which holds A.R.E. Rule 803(25) to be constitutional.

Before discussing the merits of the opinion I am compelled to state that this Court seems to me to be slowly shifting the entire responsibility of following the laws and procedures to the defense. It is as much the responsibility of the courts and the state to enforce and uphold the laws and rights of the people as it is the responsibility of the defense counsel. People are guaranteed rights by the laws and constitutions and it is the responsibility of the state to justify denial of these rights. This Court seems to have reached the point in too many cases where we find that an accused has either "failed to claim" or has "waived" his rights. The price of liberty is eternal vigilance and the price of justice has already been paid. We ought to be vigilant in the protection of the rights of individuals. It is not enough to say that the public has rights too. Of course they do. The public is the sum of individuals and denial of individual rights is the denial of the rights of the people.

The majority makes reference to the companion case of *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987), in which we hold that a medical witness could not give his opinion, in the absence of any medical evidence, that a child had been sexually abused. The majority then states that the counselor's statement of opinion in this case that the child had been sexually abused was not argued as error before the trial court or in this appeal and therefore "we need not address this issue in this case." The majority opinion concedes that the appellant in this case argues that 803(25) unconstitutionally denies a defendant the right to confront the person giving the statement. However, the majority then states that "no argument has been made about the requirement in *Ohio* v. *Roberts*, 488 U.S. 56 (1980), that a declarant be

unavailable before their out of court statement can be admitted at trial without violating the Confrontation Clause," and concludes that "since that [specific] argument was not raised in this appeal, as it was in *Johnson*, we are unable to reach it." The majority continues by stating that the state concedes that the jury was not instructed by the court pursuant to subsection (3) of 803(25), but that the state maintains that the appellant never requested such an instruction nor objected to its omission. The opinion then concludes that "the state is apparently correct and accordingly, we would not reverse Cogburn's conviction on this basis."

The three opinions being handed down today (*Cogburn* v. *State, Johnson* v. *State*, and *Hughes* v. *State*) appear to be a deliberate attempt on the part of this Court to create a "Catch 22" with respect to Rule 803(25). The opinions remind me of the Abbott and Costello comic routine of "Who's on third." Each one shifts the responsibility to the other and in the end none of the three deal with the real issue of the right to confrontation as established in the Sixth Amendment. These opinions, like old Mother Hubbard's skirt, cover everything but touch nothing.

As to the constitutionality of Rule 803(25), I doubt the validity of the legislative enactment of an addition to the rules of this Court. Under the doctrine of separation of powers, rule-making authority is a function of the Court. See *State* v. *Robinson*, 735 P.2d 801 (Ariz. 1987), in which the Supreme Court of Arizona held that state's statutory exception for child hearsay to be unconstitutional as infringing upon the Court's authority to make procedural rules for the judiciary.

Even if Rule 803(25) is considered constitutional, it was not the intent of the General Assembly to allow anything and everything an alleged child victim said to be introduced at the trial. Certainly, it was not intended to permit other witnesses to violate the rule against hearsay and testify as to the out-of-court statements of an alleged child victim and to present their own speculation on the credibility of the alleged victim.

The purpose and importance of the common law hearsay exclusion seems not to have been adequately considered by the legislature or the majority opinion. The common law exceptions to the hearsay doctrine were based upon necessity and compelling reason. Professor Wigmore has stated that the hearsay doctrine

is:

> That most characteristic rule of the Anglo-American Law of Evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure.

5 Wigmore, *Evidence*, p. 27.

Exceptions to the hearsay doctrine should be very limited in purpose and number. Exceptions should be narrowly defined and strictly construed against the exception. Certainly the legislature did not mean to open the floodgates to admit any and all statements of an alleged victim. The legislative amendment to court rule 803 in part states:

> (25)(A) A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, *provided*:
>
> 1. The Court finds, *in a hearing conducted outside the presence of the jury*, that the statement offered possesses a *reasonable likelihood of trustworthiness* using the following criteria:
>
> . . .
>
> j. The reliability-credibility of the child witness before the Judge
>
> . . .
>
> m. any other factor which the Court at the time and under the circumstances deems relevant and appropriate.
>
> . . .
>
> 2. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

[Emphasis added.]

The videotaped former statements of the victim were introduced in this case. The majority holds that this tape did not comply with the requirements of Ark. Stat. Ann. § 43-2036 and moreover, that the introduction of the tape was prejudicial. The videotaped deposition statute meets the mandates of the Confrontation Clause as most of the safeguards attendant to a trial, such as effective cross-examination by defense counsel, are preserved. The majority is correct in upholding A.S.A. § 43-2036, but it is wrong in upholding the constitutionality of Rule 803(25). The holding, as I understand it, is that the Rule as applied to Cogburn is constitutional. In my opinion the Rule, absent an affirmative showing by the state of the witness' unavailability and the statement's reliability, is a violation of the Sixth Amendment. It is also the first time that any court or legislature has authorized the admission into evidence of the out-of-court statements of a witness without attempting to comply with the Confrontation Clause or to show a compelling reason exists for the exception.

The majority acknowledges that the jury was not instructed in accordance with 803(25)(A)(3). The statute requires the trial judge to make an independent determination of the trustworthiness of the child's hearsay statements before the testimony is presented to the jury. After such determination the court must, contemporaneous with the introduction of the child's hearsay statements, instruct the jury that it is the duty of the jury to determine for themselves the weight and credibility to be given the child's out-of-court statements. In *People* v. *Mathes*, 703 P.2d 608 (Colo. App. 1985), the Colorado Court of Appeals, faced with the application of a statute that included a verbatim recitation of subsection (3) of the Arkansas statute, reversed a lower court decision because the jury had not been so instructed.

I believe the attempt by the legislature to amend our rules is an unlawful infringement upon our rule-making authority. I also believe the amendment to Rule 803 is unconstitutional because it violates the Confrontation Clause of the Sixth Amendment. I therefore would hold the statements inadmissible. The hearsay statements, allegedly made by the child, had none of the constitutional safeguards required by *Ohio* v. *Roberts*, 448 U.S. 56 (1980). The repetition of such testimony unduly prejudices the

accused. As a result of the majority opinion upholding the constitutionality of A.R.E. 803(25), the state may eventually be allowed to produce its entire case without the interference of the Confrontation Clause. I will not be a party to such a development.

I strongly disagree with the majority's interpretation of *California* v. *Green*, 399 U.S. 149 (1970). The witness in *Green* had previously testified at a preliminary hearing under oath and subject to cross-examination. The prior testimony had been fully tested by the defense. The statement therefore complied with the mandate of the Confrontation Clause. There was an additional issue in *Green* which was not addressed because it was not yet ripe for adjudication. That issue concerned the testimony of an officer that the declarant had previously told him a different story. The officer's testimony was of course hearsay, but the Supreme Court did not rule on its admissibility. The witnesses in the present case are in exactly the same status as that of the officer in *Green*. The United States Supreme Court has not approved the introduction of such evidence.

Green approved the introduction of a witness' prior sworn testimony where his trial testimony contradicted his former testimony. The prior statement, like the statement in *Roberts, supra*, was given under circumstances which afforded the defendant unrestricted cross-examination. *Green* holds that the admission in evidence of the witness' prior testimony, which had been subjected to full and effective cross-examination, did not violate the accused's right of confrontation. I agree with the holding but submit that *Green* is inapposite to the present case. For additional discussion of the constitutionality of A.R.E. 803(25), see my concurring opinion in *Joe Henry Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

Not one of the cases cited in the majority opinion is binding precedent for this case. This addition to our rule by the legislature is the only legislative act, court rule or precedent to hold that untested hearsay statements of such a nature are permissible. We have no prior decisions by this Court or the Court of Appeals interpreting this enactment. Therefore, we must look to other decisions for guidance.

Arkansas' statute, like those of quite a number of other states, was obviously molded from the Washington statute.

However, the differences are very great. The Washington statute requires the child victim to either: (1) testify at the proceeding outside the presence of the jury or (2) be unavailable as a witness. The statute, Revised Code of Washington 9 A.44.120, in pertinent part states:

> A statement made by a child when under the age of ten describing any act of sexual contact . . . is admissible in evidence in dependency . . . and criminal proceedings . . . if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings [outside the presence of the jury]; or
>
> (b) Is unavailable as a witness;
>
> *Provided*, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The Washington statute requires the victim to testify at the hearing or be unavailable as a witness, provided further that when the child is unavailable *there must be corroborative evidence of the act*. The Arkansas statute requires neither, if the majority interprets our rule correctly. Although the majority opinion seems to suggest that "any other corroborative evidence of the act" should be considered by the trial court in determining the trustworthiness of the child's hearsay statements, the Arkansas statute *does not require* corroborative evidence of the act whether the child is unavailable as a witness or not. All the other statutes that I have read are more restrictive and more narrowly defined than A.R.E. 803(25). See *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harvard L. Rev. 806 (1985).

The Washington statute was considered in *State* v. *Ryan*, 103 Wash. 2d 165, 691 P.2nd 197 (1984). The trial court in the

Ryan case allowed the introduction of out-of-court hearsay statements very similar to those which were introduced into evidence in the case before us. The prosecution and defense stipulated that the victims, boys age four and five, were incompetent to testify. The trial court held that admissions by Ryan were sufficient to corroborate the hearsay statements. The Washington Supreme Court overturned the conviction. It is difficult to understand the reasoning of the court in *Ryan* since the three separate errors found in the trial court's application of the statute were: (1) that unavailability cannot be established by stipulation of incompetency; (2) that if the victims were, in fact, found to be incompetent, then their hearsay statements would be likewise unreliable and inadmissible; and (3) that the trial court erred in failing to find circumstantial guarantees of the reliability of the hearsay statements. Although the Arkansas act requires circumstantial guarantees of trustworthiness before the admission of such statements, the majority, in effect, dispenses with this requirement. Moreover, our rule does not require unavailability or proof of incompetency.

The *Ryan* court quoted with approval the cases of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and *California* v. *Green*, 399 U.S. 149 (1970). The court further explained their statute by stating:

> The statute requires a preliminary determination "that the time, content, and circumstances of the statement provide sufficient indicia of reliability. . . ." It requires the child to testify at the proceedings, or to be unavailable, and does not alter the necessary showing of unavailability. Neither unavailability nor reliability were shown prior to admitting the hearsay testimony.
>
> . . .
>
> Unavailability means that the proponent is not presently able to obtain a confrontable witness' testimony. It is usually based on the physical absence of the witness, but may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory. [Citations omitted.] Unavailability in the constitutional sense additionally requires the prosecutor to make a good faith effort to obtain the witness' presence at trial. *Roberts*, at 74.

I have discussed the Washington statute in detail because it exemplifies the recent efforts by various states to find a satisfactory and Constitutional solution to the problem of abuse of children. I contend that the Arkansas statute goes far beyond any other attempt to deal with this vexatious problem. I will briefly discuss the Arizona statute and some cases interpreting it. The statute reads:

> § 13-1416. Admissibility of minor's statement; notice.
>
> A. A statement made by a minor who is under the age of ten years describing any sexual offense performed with or on the minor by another person or any act of physical abuse of the minor, which is not otherwise admissible by statute or court rule, is admissible in evidence in any criminal or civil proceeding if both of the following are true:
>
> 1. The court finds, in an in camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.
>
> 2. Either of the following is true:
>
> (a) The minor testifies at the proceedings.
>
> (b) The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement.

On April 15, 1986, the Arizona Court of Appeals decided the case of *State* v. *Superior Court, Pima County and Skala*, 719 P.2d 283 (Ariz. App. 1986). The court affirmed the trial court's exclusion of the hearsay testimony of the mother concerning the child's statement which occurred two days after the alleged sexual offense by the three year old child's father. The case was remanded on the grounds that the trial court did not make an in chambers independent determination of each hearsay witness' testimony for trustworthiness. The Arizona Court of Appeals stated: "In some cases, the trial court may conclude that all statements are unreliable, but that determination must be independently made as to each statement offered and/or each witness called to so testify."

The Arizona statute was subsequently struck down in *State* v. *Robinson*, 235 P.2d 801 (Ariz. 1987), in which the Supreme Court of Arizona held the statute to be unconstitutional as infringing upon the Court's authority to make procedural rules for the judiciary. The Court stated:

> Although we have previously recognized consistent statutory additions to the rules of evidence, . . . the reach of our rulemaking authority and the function of the hearsay rules, taken together, severely limit the legislature's authority to manipulate the hearsay rules, particularly in criminal cases where confrontation rights are constitutionally protected. . . . [T]he hearsay rules are at the core of the judicial function: defining what is reliable evidence and establishing judicial processes to test reliability. Under basic separation of powers principles, these judicial functions are separate and different from legislative powers.

The Arkansas version of the child hearsay statute should likewise be declared unconstitutional.

It is time we returned to the basic constitutional concept that an accused is considered innocent until proven guilty beyond a reasonable doubt. I am in complete accord with the public demand for swift and sure punishment of child molesters. However, in our zeal to rid society of such individuals we must not lose sight of the rights of others. We ought not to tear down our well-established institutions before we decide what we will replace them with. By the same logic a person should not be adjudged guilty by the untested hearsay testimony of any witness. The foundation of the doctrine prohibiting the introduction of hearsay is to prevent a conviction on untested statements made without the safeguards of confrontation and a determination of trustworthiness. Sir Walter Raleigh was convicted on hearsay testimony which had been retracted before his conviction. This is the type of trial the Sixth Amendment to the Constitution of the United States sought to prohibit. If the Amendment is bad then let it be stricken by the people instead of the courts.

Charles GARRETT *v.* Jolene GARRETT

87-18 732 S.W.2d 127

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Davidson, Horne & Hollingsworth, A Professional Association, for appellant.

Witt Law Firm, P.C., by: *R. Kevin Barham*, for appellee.

JACK HOLT, JR., Chief Justice. This case is an appeal of a Franklin County Chancery Court order in which custody of the children of Charles and Jolene Garrett was awarded to Jolene, appellee. Charles, appellant, argues that the trial court should not have taken jurisdiction of the case because an Oklahoma court had previously entered an order granting custody to him and because he was not personally served with notice of the Arkansas proceedings. We reverse and dismiss.

The events leading to the Arkansas court's decree are as follows: Charles and Jolene Garrett were married in Clarksville, Arkansas, on May 29, 1982, and immediately moved to Miami, Oklahoma. On August 11, 1986, the couple separated. Charles left their two children, ages three and two, with Jolene and went to his parents' home in Miami. The next day, Jolene took the children to Altus, Arkansas, and moved in with her parents. Two days later, on August 13, Jolene filed a complaint in Franklin County, Arkansas, asking for custody of the children. On August 15, Charles filed a petition for divorce in Ottawa County, Oklahoma, asking for custody of the children. The Oklahoma court entered an order the same day giving him temporary custody.

On September 9, the Arkansas court entered an order giving temporary custody to Jolene. Charles filed a special entry of appearance in the Arkansas court, in which he challenged the court's jurisdiction. Jolene also entered a special appearance in the Oklahoma court to challenge that court's jurisdiction.

On September 18, the Oklahoma court, after a hearing in which both parties were present and represented by counsel, found that it had jurisdiction as the "home state" as defined by

the Uniform Child Custody Jurisdiction Act (UCCJA) and continued in force its temporary order of custody in Charles. The order recited that the trial judge had, pursuant to the UCCJA, communicated by telephone with the chancellor presiding over the Arkansas proceedings, and that he had informed the Arkansas chancellor that he invoked jurisdiction over the parties and the children. On September 26, the Oklahoma court entered a final decree of divorce and awarded custody to Charles. The Oklahoma court decree stated that it had sole and exclusive jurisdiction under the UCCJA as enacted by both Oklahoma and Arkansas. No appeal was taken from the Oklahoma court decree.

The UCCJA provisions on jurisdiction relied on by the Oklahoma court, codified in Arkansas as Ark. Stat. Ann. § 34-2703 (Supp. 1985), state:

> (a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or
>
> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one [1] contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; . . . .

"Home state" is defined as

> the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, ...

Ark. Stat. Ann. § 34-2702(5) (Supp. 1985).

The Arkansas court, after a hearing in which the Oklahoma decree was put into evidence, nevertheless found that it had jurisdiction pursuant to paragraph (2) of § 34-2703, inasmuch as the parties had a significant contact with the state because Jolene and the children were residing in Arkansas, Jolene was raised in Arkansas, and the parties lived here for a substantial time before their marriage and were married here. The order also said that there was available in this state substantial evidence concerning the children's present and future care, protection, training, and personal relationships and that it was to the best interest of the children that this court assume jurisdiction. The order, entered on October 28, gave custody of the children to Jolene.

Under both the UCCJA and the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A, (PKPA) the Arkansas court erroneously exercised jurisdiction. These two acts must be read in conjunction, and where they conflict, the preemptive PKPA controls. *Norsworthy* v. *Norsworthy*, 289 Ark. 479, 713 S.W.2d 451 (1986).

The scenario in this case, and the instability created for the family, is precisely what both of these acts were designed to prevent. Their stated purposes are to avoid jurisdictional conflict with courts of different states, to promote cooperation between courts so that the custody decree is rendered by the state which can best decide the case, to discourage continuing controversies over child custody, to deter abductions, and to avoid re-litigation of custody decisions. Ark. Stat. Ann. § 34-2701 (Supp. 1985); 28 U.S.C.S. 1738A (History; Ancillary Laws and Directives).

The PKPA seeks to minimize jurisdictional controversies by giving little leeway to the court of the second state when the home state enters an order regarding custody. Subsection (a) of the PKPA states:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

Unlike the UCCJA, under the PKPA jurisdiction is given to the "home state" to the exclusion of other jurisdictional

considerations. 28 U.S.C. 1738A(4); *Norsworthy, supra.* Because Oklahoma was clearly the home state under the PKPA, which defines that term just as the UCCJA does, the Oklahoma decree was entitled to enforcement in the Arkansas court under the PKPA.

[redacted] The same result follows from the UCCJA. It is true that the UCCJA allows alternate means of jurisdiction other than in the home state when it is in the best interest of the children. There must be a "significant connection" with this state, and there must be "available in this state substantial evidence concerning the child's present and future care, protection, training and personal relationships." In *Norsworthy*, however, where an Arkansas court exercised jurisdiction under the same section utilized here, we stated that this 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."

[redacted] The Garretts had lived in Oklahoma the entire time they were married, the children were born there and lived there until Jolene took them to Arkansas two days before she filed for custody, and Charles and his family remained in Oklahoma. The Arkansas court erred in disregarding the fact that Oklahoma remained the "home state" for jurisdictional purposes. Accordingly, the Oklahoma decree must be enforced in the Arkansas courts.

Both parties allege that the decree obtained by the other was not entitled to enforcement because they were not personally served with notice. Arkansas and Oklahoma have the same notice requirements under the UCCJA for out-of-state defendants:

> (a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:
>
> (1) by personal delivery outside this State in the manner prescribed for service of process within this State;
>
> (2) in the manner prescribed by the law of the place in which the service is made for service of process in that place

in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; . . .

(c) Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

Ark. Stat. Ann. § 34-2705 (Supp. 1985).

An affidavit of personal service was entered into the record, in which the affiant states he personally delivered a copy of the Oklahoma summons and temporary order to William Gray, Jolene's father, at his usual place of residence in Altus. Jolene stated that she remembered a man throwing a bundle of papers on her porch which said Charles had filed for divorce. The service on her was "reasonably calculated to give actual notice" of the Oklahoma proceeding, and Jolene poses no convincing argument why the service on her father at the home where she was living was not adequate for this purpose.

As we have found that the Arkansas court should not have taken jurisdiction over the parties under the provisions of the PKPA and the UCCJA, it is not necessary for us to reach the issue of the notice given Charles of that proceeding.

Reversed and dismissed.

Tom ANDREWS *v.* James F. McDOUGAL, Vincent W. SKILLMAN, Jr. and Chadd L. DURRETT, Jr., d/b/a SKILLMAN and DURRETT, a Partnership

87-50 731 S.W.2d 779

Supreme Court of Arkansas
Opinion delivered July 6, 1987
[Rehearing denied September 21, 1987.]

Hanks, Gunn & Borgognoni, by: *Mary Ann Gunn*, for appellant.

Rieves & Mayton, by: *Ted Mackall, Jr.* and *Michael R. Mayton*, for appellees.

DARRELL HICKMAN, Justice. This is a legal malpractice case. The material facts are undisputed. The appellant engaged

the appellees' law firm, specifically James F. McDougal, to represent him in a case against his mother, who shot him on his front lawn on June 12, 1984. He was seriously injured. Andrews and his mother had a stormy relationship, and each had their version of the trouble between them. The appellant decided not to press criminal charges against his mother but to sue her civilly. McDougal told Andrews that since another partner, Vince Skillman, was representing Andrews' father in a divorce suit against his mother, it would be best to wait until the divorce suit was settled before filing the civil suit against his mother. McDougal waited too long. The statute of limitations for battery, which is one year, had run. Ark. Stat. Ann. § 37-201 (Supp. 1985).

The appellant sued the appellees for malpractice. The appellees filed a motion for summary judgment. The basis of the motion was that the appellant had no case for malpractice because Andrews still had a cause of action against his mother for trespass. Consequently, Andrews was not damaged by the failure to file the law suit within one year. The trial court granted summary judgment.

The appellees' argument is that firing a shot onto or over the land of another is a trespass to real property and, if the trespass is willful, both compensatory and punitive damages can be recovered. The appellees cite Restatement (Second) of Torts § 159(1); *Boyd* v. *Fulton*, 212 Ark. 555, 206 S.W.2d 753 (1947), and several annotations on trespass. Specific attention is called to a Tennessee case, *Burson* v. *Cox*, 6 Baxt. 360, 65 Tenn. 360 (1873), where the court permitted an action in trespass although a suit for assault and battery was barred by the statute of limitations.

This argument is ingenious, but it will not work. This suit was not against someone for firing a bullet across land, but a suit against someone for shooting another person, which is battery. Ark. Stat. Ann. § 37-201 specifically states a battery action must be brought within one year after it accrues.

This court and federal courts interpreting Arkansas law have repeatedly looked to the gist of the action in determining which statute of limitations to apply. See generally *Tollett* v. *Mashburn*, 291 F. 2d 89 (8th Cir. 1981); *Dunlap* v. *McCarty*, 284 Ark. 302, 280 S.W.2d 884 (1955). We look to the gist of this case. Clearly, it was an action for assault and battery, which was

barred by the one year statute of limitations. Accordingly, summary judgment should have been denied.

The appellees have filed a motion to dismiss this appeal because, evidently, the appellant has filed a suit for trespass in circuit court. The argument is that that action is evidence that the appellant still has a viable cause of action and, therefore, this appeal should be dismissed. The filing of the complaint has no effect on this appeal. The appellant does not have a viable cause of action; his cause of action existed for one year and it has expired.

Reversed and remanded.

Carlon BASSETT *v.* HOBART CORPORATION

87-73 732 S.W.2d 133

Supreme Court of Arkansas
Opinion delivered July 6, 1987

F. H. Martin, for appellant.

Kincaid, Horne & Trumbo, by: *Bass Trumbo*, for appellee.

DARRELL HICKMAN, Justice. This case was referred to us by the court of appeals because it involves the tort of conversion. The trial judge, sitting as a jury, decided that the appellant, Carlon Bassett, sold some restaurant equipment which he had no right to do. His father, Johnny Bassett, had guaranteed payment for the equipment, which was repossessed by McIlroy Bank and Trust Company and given to him as guarantor. His father died, and the appellant disposed of the property. The judge found that the appellant did not have title to the goods and did not demonstrate he had any right to sell the property; he was not administrator or executor of his father's estate; he could not prove he had authority to act for a trust which he claimed authorized him to sell the equipment; and he could not produce a valid assignment of the bank's interest in the property. The appellee, a foreign corporation, which sold the equipment originally to Sam Harrison, d/b/a End of the Rainbow, a restaurant, took a security interest in the equipment but did not perfect it by properly filing a financing statement. However, the court held that the appellee had met the burden of proof regarding conversion against the son, Carlon Bassett, who could not demonstrate a legal right to the property. A judgment of $5,500 was entered against the appellant, and we affirm.

On appeal two issues are raised. First, it is argued that the trial court wrongfully failed to apply one section of the Wingo Act, Ark. Stat. Ann. § 64-1202 (Repl. 1980), which provides in part that a foreign corporation which fails to register to do business in Arkansas cannot enforce a contract made in this state.

It is undisputed that the appellee was a foreign corporation, had failed to register in Arkansas, and was doing business in Arkansas. But the contract provided that it had to be accepted in Ohio. The trial court held the contract to be an Ohio contract, relying on the case of *Hough* v. *Continental Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982), where we said:

> . . . The trial court was correct in finding that the contract was made in Mississippi, where the final acceptance occurred. . .
>
> . . .'The rule is stated in Leflar's *American Conflicts Law* (1969), § 144 at page 353:
>
> > "The authorities are reasonably clear that, in this event, the contract is made at the time and place 'where the last act necessary to the completion of the contract was done—that is, where the contract first creates a legal obligation.' "

The appellant argues that the final act was not acceptance in Ohio but was a payment to be made by the buyer when the merchandise was delivered in Arkansas to him, a condition precedent to formation of the contract, according to the appellant. The trial court made a finding, and we cannot reverse it unless it is clearly wrong. ARCP 52. In this case we cannot say it was clearly wrong in finding this contract to be an Ohio contract, so the Wingo Act cannot bar the appellee's claim.

The second argument is essentially that provisions of the Uniform Commercial Code dictate that the appellee cannot prevail. Specifically, the appellant cites Ark. Stat. Ann. § 85-9-302 (2) (Supp. 1985) and comment 5 to Ark. Stat. Ann. § 85-3-415 (Add. 1961), which deal with assignment and subrogation. The argument is that the bank which held a valid security interest in the property, and properly repossessed it, assigned its rights to the appellant's father, who was a guarantor on the note to the

bank, or the appellant's father was, at least, subrogated to the bank's rights. Therefore, the sale was proper because these rights were superior to the unsecured rights of the appellee.

This argument must fail because the appellant did not prove he had these rights—he was the son, not the father. The trial court made these remarks and these findings:

> . . . Mr. Bassett claims he was entitled as a family member to sell, because Johnny Bassett was a Guarantor of the obligation of Rainbow Enterprises, Incorporated, to McIlroy Bank and Trust, and that the security agreement in favor of McIlroy Bank and Trust was filed on December 9, 1982, prior to the filing by the Plaintiff [Hobart]. Assuming that all this is true, . . . he did not act as a personal representative of the estate of Johnny Bassett; he hadn't been appointed. Reference is made to the Johnny Bassett Trust, and it is argued that Mr. Carlon Bassett was authorized to act on behalf of the Trust. The testimony of the Trust was that it was created by written instrument, and as the Trust was not produced, evidence was excluded by the Court as to the nature and provisions of the Trust. The written instrument would be the best evidence on the question, and would also be the best evidence on any right of Mr. Bassett to act as a Trust representative. To put it plainly, Mr. Bassett was in the position of a family member acting summarily, but unofficially, be it in good faith. It is also in evidence that the money obtained from the sale of this equipment, part of which the plaintiff had a security interest in, was used to pay the obligation of the late Mr. Bassett in Texas. It is suggested that some of this eventually came back to McIlroy Bank, but, once again, McIlroy Bank is not a party to this lawsuit. To urge that McIlroy Bank had rights under its security agreement that were superior to those of the plaintiff, but McIlroy Bank is not a party, and it cannot informally transfer its rights to Carlon Bassett . . . Now, the plaintiff did neglect to file its security agreement until McIlroy had filed its security agreement, but McIlroy is not a party of interest in this case, and Bassett cannot claim under the matter of the McIlroy security agreement. It has been argued by learned counsel that, oh, Johnny Bassett was a guarantor, and he

> stood in the shoes of the McIlroy Bank. Maybe so. But, Johnny Bassett's position and mantle cannot descend automatically on Mr. Carlon Bassett unless Carlon Bassett had been duly appointed and qualified as the personal representative of the estate of Johnny Bassett, deceased . . . .

On appeal all evidence is viewed in a light most favorable to the appellee. *Looper* v. *Madison Guaranty Savings & Loan Ass'n.*, 292 Ark. 225, 729 S.W.2d 156 (1987). The appellant must demonstrate prejudicial error was committed to obtain a reversal of a judgment. *McNair* v. *Ozark Gas Transmission System*, 292 Ark. 235, 729 S.W.2d 165 (1987). This case was tried to the judge who made findings which we cannot say were clearly wrong. ARCP 52. The appellee made a *prima facie* case, and the appellant was unable to demonstrate he had any right to the property. The appellant has been unable to demonstrate the trial judge was clearly wrong in his findings. Therefore, the judgment is affirmed.

Affirmed.

NEWBERN, J., not participating.

Sylvester WILKINS et al. *v.* STATE of Arkansas

CR 87-14 731 S.W.2d 775

Supreme Court of Arkansas
Opinion delivered July 6, 1987

[redacted]

Addie Burks, for defendant Sylvester Wilkins.

Brett B. Stein, for defendant Charles Webster Smith.

Thomas B. Montgomery, for defendant Victor Lind Johnson.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Appellants were convicted of aggravated robbery. Charles Webster Smith and Victor Lind Johnson were each sentenced to 99 years imprisonment and Sylvester Wilkins was sentenced to 25 years. Appellants raise numerous arguments for reversal, all of which are meritless.

On May 10, 1986, Barbara and Glen Phelps stopped at a rest area on Interstate 40, west of West Memphis, at approximately 3:30 a.m. When they went to the restroom, they noticed a black man wandering around. Phelps entered the men's room and went to the last stall. He heard someone say "hey." He looked over the partition and saw a black man with a gun aimed at him, demanding his money. When Phelps refused, he was shot in the collarbone. Phelps then threw his billfold under the door. Phelps got his wife and they drove to the weigh station to report the incident. Phelps was then taken to the hospital.

Unfortunately for the appellants, an Arkansas State policeman, Lt. Bobby Hambrick, driving an unmarked car, pulled into the same rest area near West Memphis about the time this incident occurred. He saw a dark colored Mercury without license plates parked. After a few minutes, the car left hurriedly without any lights on. Lt. Hambrick followed. The speeding vehicle turned its lights on when it reached the interstate, crossed the median and headed toward West Memphis at a speed of 75 m.p.h. Hambrick pulled the car over and the three appellants were in the car. The driver, Sylvester Wilkins was arrested for speeding, crossing the median and no driver's license and put in the officer's car. A trucker stopped to tell Hambrick there had been a shooting at the rest area. The car was locked, and the other two appellants said they would walk to West Memphis. On the way to the sheriff's office with Wilkins, Hambrick received a radio dispatch and returned to the car.

A deputy sheriff on patrol learned there had been a shooting

at the rest area and went to the nearby weigh station and obtained a description of the assailants from the victim and his wife. He returned to the rest area, found no evidence and learned that a blue Mercury had been left on the interstate and two individuals from the car were walking toward West Memphis. He drove to the vehicle, heard an explosion, and then saw two males between his vehicle and the Mercury. The car's back window had been broken out with a large chunk of concrete. The victim's brown billfold was found on the back floorboard. The gun used in the shooting was found 15 feet away. Appellants Johnson and Smith were then arrested. In their statements, appellants admitted they were at the rest area.

All three appellants were taken to the hospital where Mr. Phelps identified Smith as his assailant. Mrs. Phelps identified Johnson at trial as the man she and her husband saw standing outside the rest area. None of the appellants testified at the trial. They all had prior felony convictions.

First, appellants argue that the trial judge erred in ruling that Johnson could be cross-examined about his prior convictions. This is not preserved for appeal because the requirements of *Simmons* v. *State*, 278 Ark. 305, 645 S.W.2d 680 (1983), were not met. Johnson did not assert that he would testify and made no record of what his testimony would be.

Second, appellants argue they were prejudiced because they were limited to eight peremptory challenges instead of eight each. We have rejected this argument several times. *Clines* v. *State*, 280 Ark. 77, 656 S.W.2d 684 (1983). As evidence of the necessity for the additional challenges, appellants point to two jurors who would have been challenged if the appellants had not already exhausted their peremptory challenges. The juror, L.G. Stevens, owned a liquor store which had been robbed four times. He was challenged for cause and the trial court denied the motion. The second juror the appellants wanted excused was Deborah Brown. After hearing part of the testimony, Brown remembered that her husband, a part-time emergency medical technician, had worked this particular shooting incident. He told her there had been a shooting at the rest area. The trial court denied her submission for cause.

Both jurors were questioned extensively by appellants'

counsel and by the trial court. The trial court determined that the jurors were not biased. Both jurors assured the judge that their situations would not influence their decision; their decision would be based on the evidence. We cannot say that the trial judge abused his discretion. See *Swindler* v. *State*, 267 Ark. 418, 592 S.W.2d 91 (1979).

Third, the trial court refused to allow the balance of Johnson's statement read to the jury after a policeman read an excerpt. The trial judge excluded the parts of Johnson's statement which would have incriminated the other appellants. This procedure is correct. *Bruton* v. *U.S.*, 391 U.S. 123 (1968); *Mosby* v. *State*, 246 Ark. 963, 440 S.W.2d 230 (1969); *Grooms* v. *State*, 251 Ark. 374, 472 S.W.2d 724 (1971).

Fourth, Johnson argues there was insufficient evidence to support his conviction. He argues that his identification as the man outside the rest room was insufficient as a matter of law. On appeal we review the evidence in a light most favorable to the appellee. *Birchett* v. *State*, 289 Ark. 16, 708 S.W.2d 625 (1986). Mrs. Phelps identified Johnson at trial. Discrepancies in testimony and the credibility of witnesses are for the jury to resolve. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986); *Taylor* v. *State*, 288 Ark. 456, 706 S.W.2d 384 (1986).

In addition to the identification, Johnson was in the back seat of the vehicle when Wilkins was arrested. The billfold was found on the floor there. He was with Smith when the car window was broken out. The gun used in the robbery was found nearby. There was substantial evidence to support his conviction.

Fifth, the appellants argue that their cases should have been severed. A trial court has discretion in this matter and will only be reversed for an abuse of that discretion. *McDaniel* v. *State*, 278 Ark. 631, 648 S.W.2d 57 (1983). In *McDaniel*, we set out the factors to be considered in determining whether or not severance should be granted: (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal

record and the other has; and (7) where circumstantial evidence against one defendant appears stronger than against the other.

In this case the defenses were not antagonistic, because there were no defenses. All of the appellants decided not to testify. Most of the evidence applied to all of the appellants, and they all took part in the robbery; one driving the car, one outside looking around, and one inside the rest room. They all left together in the speeding darkened car. When stopped, Wilkins lied about his name. The other two broke into the car. The police found the billfold in the car and the gun used in the robbery nearby. There is no evidence that one appellant deprived the other of peremptory challenges. All three appellants chose not to testify. All had prior felony convictions. Considering all these circumstances, we cannot say the trial judge abused his discretion in allowing the appellants to be tried at one trial.

Sixth, Wilkins argues there was insufficient evidence to convict him. The car he was driving was stopped soon after he sped from the scene of the robbery without headlights on. He lied about his name. He admitted being at the rest area with two other black males. Considering the evidence we have outlined, there is substantial evidence to support the conviction.

Seventh, Smith argues his identification by Mr. Phelps at the hospital should have been suppressed. This question is always one of reliability. *James* v. *State*, 270 Ark. 596, 605 S.W.2d 448 (1980). In this case the officers thought Phelps might die, and they had to promptly see if the victim could identify any of these appellants as his assailant. Appellants were shown to Phelps one at a time. The identification was approximately 30 to 45 minutes after the shooting. The trial court correctly admitted the identification.

Smith also argues that he was not advised of his right to an attorney at the showup. A defendant is not entitled to have an attorney present at a showup. *Kirby* v. *Illinois*, 406 U.S. 682 (1972); *Lewis* v. *State*, 281 Ark. 217, 663 S.W.2d 177 (1984).

Affirmed.

Robert E. CASALI *v.* Glenn R. SCHULTZ and J.A. McENTIRE, III

87-29 732 S.W.2d 836

Supreme Court of Arkansas
Opinion delivered July 6, 1987
[Rehearing denied September 14, 1987.*]

* Hickman, J., would grant rehearing.

Davidson Law Firm, Ltd., by *Charles Darwin Davidson* and *Geoffrey B. Treece*, for appellant.

Ralph Cloar, Jr. and *Hilburn, Bethune, Calhoon, Harper & Pruniski, Ltd.*, for appellees.

ROBERT H. DUDLEY, Justice. The sole issue in this case is whether the sale of a unit in a partnership constituted the sale of a security within the meaning of the Arkansas Securities Act. We hold that the transaction constituted the sale of a security.

One of the appellees, Glenn R. Schultz, wanted to purchase an investment banking firm. His extensive financial background included a bachelor's degree from Harvard University with majors in economics and banking, a law degree from Chicago Kent College of Law, experience with R. Roland, a New York Stock Exchange firm, and positions as head of the bond operation for Continental National Bank of Chicago for 10 years, and Senior Vice-President in charge of the bond department of Stephens, Inc. of Little Rock for 10 years. In 1981, he approached the other appellee, J.A. McEntire, III, a Little Rock banker, about raising the money to purchase an investment banking firm. McEntire apparently thought Schultz's idea was a sound one as he said he knew some medical doctors who were potential investors. A number of doctors, including appellant Robert Casali, were contacted. Ultimately, eight doctors, an art dealer, and appellees contributed $1,175,000.00 into a partnership which was to purchase an investment banking house. They entered into an agreement captioned, "KGS Partners Partnership Agreement." The stated purpose of the agreement was to own the controlling interest in investment banking houses and to own other real and personal property. The partnership purchased all of the stock of a New York investment banking firm, Park, Ryan & Co. and also a minority of the outstanding stock in a real estate investment company, Greenbelt Properties. The partnership had a later offering of units and appellant Casali invested more money. All together, this second solicitation raised an additional $875,000.00.

Ultimately, Park, Ryan & Co. went into bankruptcy and the partnership was liquidated. Appellant Casali filed this action

alleging that the sale of the partnership units amounted to the sale of securities and that appellees Schultz and McEntire had neither registered nor asked for exemption of the securities, and therefore, the transaction must be rescinded. *See* Ark. Stat. Ann. § 67-1256(a) (Repl. 1980), and *Graham* v. *Kane*, 264 Ark. 949, 576 S.W.2d 711 (1979). The trial court did not make a finding of fact, but ruled that, as a matter of law, the transaction was not a security. We reverse.

The only business of the partnership was a passive investment in the corporate stocks of Park, Ryan & Co. and Greenbelt Properties. As a practical matter, the partners had no business to run since all they could do was vote the common stock of Park, Ryan & Co., and they could not even vote to sell that stock without appellees' consent since the partnership agreement provided that it took unanimous agreement of all partners to sell any of the assets of the partnership.

Appellant and the other investors did not have any control over the operations of Park, Ryan & Co. Appellee Schultz's testimony on that issue is fairly abstracted as follows:

> The investors did not have the right to hire employees of Park Ryan. The investors did not have the right to fire the employees of Park Ryan. The investors did not have the right to trade securities for Park Ryan. The investors did not have the authority to buy securities for Park Ryan. The investors did not have the authority to sell securities for Park Ryan. The investors did not have the authority to set salaries for Park Ryan. The investors did not have the authority to mortgage property of Park Ryan. The investors did not have the authority to open bank accounts. The investors did not have the authority to sign checks. The investors did not have the right to incur any debts. The investors did not have any rights to sell any assets. The investors did not have the individual right to say how the stock of Park Ryan would be voted. The only thing that they had a right to do was to vote the partnership interest.

Appellee Schultz alone among the investors had the knowledge, experience, and expertise necessary to operate an investment banking house. In fact, appellant Casali did not have any training in business or management and had never traded in

securities. His only other investment was in an 80 acre farm.

The term "security" as defined in Ark. Stat. Ann. § 67-1247(1) (Repl. 1980) includes "investment contracts" and "certificate of interest or participation in any profit-sharing agreement." In *Schultz* v. *Rector-Phillips-Morse*, 261 Ark. 769, 552 S.W.2d 4 (1977), we decided to adopt a flexible concept for the term "security" since the act is remedial and should be liberally construed to afford protection to the public. Further, the legislative intent was that, regardless of the label on a document, the underlying economic substance of a security is an arrangement where the investor is a mere passive contributor of risk capital to a venture in which he has no direct or managerial control. *See* Bell, *Real Estate and Unconventional Securities Concepts Under The Arkansas Securities Act*, 3 UALR L.J. 75 (1980).

The mere fact that an investment takes the form of a general partnership does not insulate it from the reach of the Arkansas Securities Act. In construing the Federal Securities Act of 1933, which is similar to the Arkansas Act, the Fifth Circuit Court of Appeals has written:

> A general partnership or joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

Williamson v. *Tucker*, 645 F.2d 404, 424 (1981).

Here, the first of the above criteria was clearly established by the investor, appellant Casali. Appellant established that appellee Schultz, by his veto power, could assure that the general partnership would always keep its investment in the

investment banking house, and, at the same time, he had absolute control over the investment banking operation. Thus, appellant, in economic reality, was merely a passive contributor of risk capital to appellees' enterprise. Appellant had no control over the risks taken with his investment. "This subjection of the investor's money to risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction. . . ." *State of Hawaii* v. *Hawaii Market Center, Inc.*, 52 Hawaii 642, 485 P.2d 105 (1971). The transaction in the case at bar constituted a security transaction.

Reversed.

HICKMAN, HAYS, and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. This case was tried to the trial court without a jury. To reverse, this court must determine that the trial court erred as a matter of law or its findings were clearly against the preponderance of the evidence. *See* ARCP Rule 52; *see also Taylor* v. *Richardson*, 266 Ark. 447, 585 S.W.2d 934 (1979). In my opinion, this court's holding violates Rule 52.

The single and controlling issue to be decided is whether the interest the appellant (and his other general partners) purchased in KGS Partners constituted a "security transaction." If so, appellant is entitled to pursue his action to rescind the so-called security unit he purchased in KGS since KGS neither registered nor exempted any such security transactions under the Arkansas Securities Act. Of course, if the appellant's interest in KGS Partners was *not* a "security" (as the trial judge so found), the appellant's action against the appellees must fail.

In our earlier case of *Schultz & Watkins* v. *Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 552 S.W.2d 4 (1977), we fully discussed the term "security" and what constitutes one under the provisions of the Arkansas Securities Act. We held that, to determine whether a sale or transaction constitutes a security, we must look to more than how the transaction is labeled. On this point, I agree with the majority opinion where it holds that the underlying substance of a security—as defined in *Schultz*—is an arrangement where the investor is a mere passive contributor of risk capital to a venture in which he has *no* direct or managerial

control. In *Schultz*, we held that certain interests purchased in a joint venture constituted securities, because the investors there were strictly passive investors who were buying an interest in a tax shelter. We hastened to add that by no means are all general partnerships or joint venture units securities within the meaning of the Arkansas Securities Act.

The *Schultz* holding is clearly controlling here, and the only issue is whether the record supports the trial court's decision that the appellant's interests purchased in KGS are *not* securities. As the majority opinion indicates, the underlying and pertinent factual issue is whether the appellant was a passive contributor or investor of risk capital to the KGS partnership. The following summarized testimony supports the trial court's holding that the appellant and his other general partners were active, not passive, investors in KGS.

Westbrook Testimony

Dr. Kent Westbrook contacted the appellant and other doctors about forming an investment group to be involved in the bond, real estate development and leasing business. *Westbrook's role was one of the three managing partners* and was to keep the other partners informed. Westbrook said that when the *doctors-investors* were initially contacted, they specifically stated they did not want a limited partnership but instead *wanted a general partnership in which everyone had a participation in the management*. Eventually, an advisory committee was formed comprised of five of these general partners, plus Westbrook and both appellees. That committee met on a monthly basis—other general partners were invited and appellee Schultz sent minutes and a newsletter concerning the meetings to the partners. The general partners met and agreed to buy stock in Park, Ryan, Inc., a New York investment banking firm. Most of the board meetings of Park, Ryan, Inc. were held in conjunction with partnership meetings and all partners were notified of the partnership meetings.

Johnson Testimony

Sam Johnson was a general partner in KGS and attended the first organizational meeting. At that meeting, the attendees-*investors*, by consensus, *agreed* to form a partnership so that *they*

would be "involved in the management of the partnership and have a say-so, because a lot of the people voiced that they had been in limited partnerships where they felt they had no control." Johnson said that partnership meetings were held and appellant attended those meetings. KGS's progress and policies were discussed and decisions were made and voted on by the partnership members. All of the partners participated in the decision to purchase Park, Ryan, Inc. and to invest in Greenbelt Properties.

Price Testimony

Charles Price said that his law firm was employed to assist in the acquisition of the stock in the broker-dealer firm, Park, Ryan, Inc. He attended the first organizational meeting when the investors said they did not want a limited partnership because "they wanted to have a voice in how the operation ran." Price expressed his opinion that the partnership interest in KGS would not be a security. He related that the KGS partnership agreement "specifically says that each of the partners will have a voice in the partnership."* He said the partners had control over Park, Ryan, Inc. through their voting control of KGS.

*NOTE: Price referred to the KGS Partners Partnership Agreement, which reflects the partners' initial interests in the partnership were:

Schultz	12.8%
Westbrook	8.5%
McEntire	4.3%
Other partners	74.4%

Downing Testimony

Richard Downing, appellant's witness and attorney specializing in securities law, offered an opinion that the KGS partnership interest was a security, but conceded that the general partners could have removed the appellees "without either [appellee] voting on it." On cross-examination, Downing conceded that, if it could be established that the partners in KGS attended partnership meetings held in conjunction with director meetings of Park, Ryan, Inc. and those partners participated in the meetings, those facts—with some additional factors—would change his mind when determining whether a passive investor had become an active one.

McEntire and Schultz Testimonies

J.A. McEntire, III said that the partners participated in the partnership and that Dr. Westbrook came to the offices at least once a week and reported back to all the investors-partners. He stated the partners, through monthly partnership meetings and board of directors meetings, were kept advised. McEntire testified he received an oral legal opinion that the partnership interest in KGS was not a security, and understood no need existed for filing anything with the securities department.

Glenn Schultz related that he and McEntire were involved in the day-to-day management of Park, Ryan, Inc., but were getting overall direction from the partners. The doctors, he said, were to give direction as to the management of the firm. He said he had been legally advised that the KGS partnership interests were not securities.

The trial court, relying upon evidence such as that set out above, could have readily and reasonably inferred that the appellant and his other general partners retained control of KGS and, in fact, participated in and directed the affairs of that partnership. Dr. Westbrook undisputably was a managing partner, and he served as the other general partners' link to the weekly business affairs of KGS. In addition, the appellant, and other investors-partners like him, actively participated in the decision making of the business at the monthly partnership and board of directors meetings.

Admittedly, the majority has recited testimony which, if believed, could support the decision it reached. That, however, is not our function on review. We should all be able to agree, I think, that it was within the trial court's province to weigh the evidence and to observe and to determine the credibility of the witnesses in this matter. Once done, this court reverses only if the trial court was clearly erroneous in discharging its duty under Rule 52. Given the strong evidence that supports the trial court's decision here, I cannot say it was clearly wrong. This case should be affirmed.

HICKMAN and HAYS, JJ., join in this dissent.

Mildred F. HARDESTER *v.* Robert W. EUBANKS, III, Insurance Commissioner for the State of Arkansas

87-42 731 S.W.2d 780

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Cliff Jackson, P.A., for appellant.

Wright, Lindsey & Jennings, for appellee.

ROBERT H. DUDLEY, Justice. Appellant Mildred Hardester owned and operated the White River Catfish Inn which was destroyed by fire in October 1983. The Union Indemnity Insur-

ance Company of New York had issued its policy insuring the structure for $190,000.00, insuring the contents for $80,000.00, and insuring against lost profits for $42,000.00. The total coverage under the policy was $312,000.00. In the summer of 1984 the insurance company paid Madison Guaranty Savings and Loan Association, the mortgagee and the loss payee under the policy, the sum of $99,523.00 in partial satisfaction of its claim. No payment was made to appellant Hardester. On April 22, 1985, the insurance company's certificate of authority to issue insurance in Arkansas was suspended by the Arkansas Insurance Commissioner. Upon petition, the Circuit Court of Pulaski County appointed appellee Robert W. Eubanks, III, the insurance commissioner, as ancillary receiver for the insurance company, and directed him to take charge of all property of the company in Arkansas. As ancillary receiver Eubanks notified all potential claimants for the receivership and, in response, appellant Hardester filed a timely claim for money remaining due under the policy. In June 1986, Eubanks, as ancillary receiver, filed this action by interpleading the sum of $200,477.00 into the registry of the court, allegedly in full payment of the $300,000.00 limit the receiver would be liable for under the provisions of the Arkansas Property and Casualty Insurance Guaranty Act, Ark. Stat. Ann. §§ 66-5501 to -5519 (Repl. 1980). The receiver contended that by virtue of the previous payment of $99,523.00 by the insurance company and the $200,477.00 interpleaded, the full $300,000.00 due under the Guaranty Act had been tendered. The trial court held that the $200,477.00 interpleaded was sufficient to discharge the receiver's obligation under the Guaranty Act, and in so holding, denied appellant Hardester's claims for $4,659.00 in unearned premiums, $12,000.00 in unpaid benefits under the policy, and $25,049.86 which appellant Hardester paid to Madison Guaranty in satisfaction of appellant's remaining debt to Madison. We affirm, but modify, that ruling.

Ark. Stat. Ann. § 66-5505 (Repl. 1980) limits the liability of the Arkansas Property and Casualty Insurance Guaranty Fund to $300,000.00. The trial court held that the amount due from the Fund was reduced by the $99,523.00 paid by the company months before its certificate of authority was revoked. The appellant contends that the trial court erred in

reducing the amount the Fund owes by the amount the company previously paid. The argument is meritorious. The applicable statute, § 66-5505(2) provides that a covered claim "is an *unpaid claim* of an insured. . . ." Thus the fund is entitled to credit only for payment of unpaid claims. The unpaid claim is the amount remaining due. Nothing in the act even hints that claims against the fund should be reduced by an amount paid by the insurer before it became insolvent.

In their briefs, both parties make policy arguments favoring their proposed construction, or interpretation, of the act. There is no need to discuss the policy arguments because where the wording of a statute is plain, unambiguous, and self-evident, there is no room left for construction or interpretation. *Casey* v. *Scott Paper Co.*, 272 Ark. 312, 613 S.W.2d 821 (1981). We accordingly modify the holding of the trial court so that the Fund is not entitled to an off-set for amounts previously paid by the company.

However, that modification does not mean that appellant is automatically entitled to all that she claims because a covered claim must be within the limits of the policy. Ark. Stat. Ann. § 66-5505(2) (Repl. 1980). In this case the policy limit was $312,000.00. The company paid $99,523.00, which left $212,477.00 owing under the limit. The Fund tendered $200,477.00 which was $12,000.00 short of the limit. Therefore, $12,000.00 more is owing to appellant under the policy limit.

In addition, the appellant is entitled to a refund of $4,659.00 for unearned premiums. Again, the reason is that the applicable statute is clear. It provides: " 'Covered claim' shall also include one hundred percent (100%) of unearned premiums." Ark. Stat. Ann. § 66-5505(2) (Repl. 1980). Unearned premiums are in the nature of a refund of premium and do not come within the concept of payment under the policy. Thus, they do not count against the policy limit and must be repaid to appellant.

The appellant claims an additional $25,000.00 is due to her but such a claim is without merit because that amount would be beyond the policy limits.

The decree of the trial court is affirmed as modified, and the

trial court is directed to enter an order consistent with this opinion.

HICKMAN, J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I believe the majority has focused too narrowly on the term "covered claim," ignoring the intent behind the "Property and Casualty Insurance Guaranty Act." Ark. Stat. Ann. § 66-5501 et seq. (Repl. 1980). The purpose is to provide protection from insolvent insurance carriers by creating a fund contributed by other carriers and, indirectly, by the public. The act places a ceiling of $300,000 on "covered claims" so as to provide a wider distribution of recovery among existing claimants. The act expressly provides that individual covered claims "*shall*" be limited to $300,000 and "*Shall not include any amount in excess of $300,000.*" (My emphasis). Considering the overall intent and spirit of the act I do not believe it was intended to exclude amounts advanced to the insured on a particular loss which is still being processed at the time insolvency occurs. The fact that one claim has been partially processed at the time of insolvency and an interim payment made, should not give that claimant a preference over another claimant of equal standing. Under that approach, claimants whose losses may have occurred simultaneously, or even previously, to Ms. Hardester but who are still unpaid at insolvency are limited to $300,000, whereas Ms. Hardester is not. That was not the purpose of the act. I believe the trial court should be affirmed.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY *v.* Mark SMITH, Guardian of Christine SMITH, an Incompetent

87-82 732 S.W.2d 137

Supreme Court of Arkansas
Opinion delivered July 6, 1987

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

Sam T. Heuer, for appellee.

ROBERT H. DUDLEY, Justice. Appellant, State Farm Mutual Automobile Insurance Company, sold three separate insurance policies on three different automobiles to Mark and Christine Smith. Each of the policies provided identical coverage against one year's loss of income as required by the no-fault statute, Ark. Stat. Ann. § 66-4014(b) (Repl. 1980). Appellant

charged a premium on each policy for this coverage. The appellee, Christine Smith, was totally disabled in a car wreck. Each policy contained a limit on the benefits for loss of income. Appellant paid the limit of one policy but refused to pay any more. Appellee filed suit claiming that she was entitled to benefits under all three policies even though such a recovery would exceed her actual loss of income. Appellant admitted that stacking of the three policies was permissible but argued that the stacking of benefits is improper when it causes the insured to recover an amount in excess of the actual loss of income. The trial court held that the insured could collect benefits for her lost wages under each policy. We affirm.

The insured paid the three premiums to the insurance company for three separate policies. In fairness, the insurance company should pay benefits under each policy unless the insurance policies provide otherwise, or the pertinent statute provides otherwise, or the payment of benefits in excess of the actual loss would be contra to public policy.

The language in each of the policies provides that the appellant insurance company will pay 70% of the insured's weekly wage, up to a maximum of $140.00 per week, for a period of up to 52 weeks. There is no language indicating that only one policy is effective, or that benefits shall not be payable in excess of the actual loss. The policies simply do not prevent the stacking of benefits.

Many states have statutes which provide that the benefits under personal injury protection coverages shall not exceed the actual losses. Courts have uniformly enforced such statutory provisions. For example, the Texas Court of Civil Appeals cited V.A.T.S. Insurance Code, art. 5.06-3, in holding that benefits cannot in the aggregate exceed the actual loss. *Creighton* v. *Fidelity & Casualty Co. of New York*, 581 S.W.2d 815 (Tex. Civ. App. 1979). The Michigan Court of Appeals cited M.C.L. § 50.3115(3) in reaching the same result. *Beaver* v. *Auto-Owners Ins. Co.*, 93 Mich. App. 399, 286 N.W.2d 884 (1979). The Kentucky Court of Appeals cited similar provisions, K.R.S. § 304.39-060, 304.39-070, *Hargett* v. *Dodson*, 597 S.W.2d 151 (Ky. App. 1979), and the Supreme Court of Nevada cited N.R.S. § 698.010 et seq., § 698.040, § 698.070, § 698.280(1)(h), (which

have since been repealed), in reaching the same result. *Bryan* v. *Allen*, 96 Nev. 572, 613 P.2d 412 (1980). However, the Arkansas personal injury protection statute, Ark. Stat. Ann. § 66-4014 (Repl. 1980), does not contain such a limiting provision. Thus, payment in excess of the actual loss does not violate our insurance code, and the stacking of benefits is not prohibited for that reason.

The appellant does not contend that payment of benefits in excess of actual losses is contra to public policy. Accordingly, we hold that since neither the policies nor the applicable statute prohibit payment in excess of actual losses, and no public policy argument is made, the insurer is liable on multiple policies for which multiple premiums are collected.

The appellant next argues that the trial court erred in granting summary judgment for appellee because there was a factual dispute about the amount of her loss of earnings. The argument is without merit. The appellee attached affidavits to her motion for summary judgment showing her salary as a part-time school teacher for the six months immediately prior to the accident in order to show her then current salary. Of course, the purpose was to establish her future loss of income. Appellant did not offer a counter-affidavit to dispute her salary level. Even viewing all inferences and doubts in appellant's favor, as we must do in reviewing the summary judgment, we see no dispute of a material fact about the amount of appellee's loss of earnings.

Affirmed.

GLAZE, J., not participating.

Benjamin WILLIAMS *v.* STATE of Arkansas

CR 86-126 732 S.W.2d 135

Supreme Court of Arkansas
Opinion delivered July 6, 1987

John Wesley Hall, Jr., for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant, Benjamin Williams, was convicted of two counts of delivery of a controlled substance. He appealed his conviction, and it was affirmed by this court. *Williams* v. *State*, 290 Ark. 449, 720 S.W.2d 305 (1986). He subsequently filed a Motion to Correct Illegal Sentence pursuant to Ark. Stat. Ann. § 43-2314 (Supp. 1985). The trial court denied the motion. We affirm.

Appellant was charged with two counts of delivery of a controlled substance in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1985). In addition, he was charged as an habitual offender pursuant to Ark. Stat. Ann. § 41-1001 (Supp. 1985). The verdict forms given to the jury directed the jury members to set his sentence at "not less than 20 years nor more than 60 years, or life." The jury set the sentence at 60 years on each count.

Appellant argues that the jury was given the wrong range of punishment. He contends that the offenses should have been treated as an unclassified felony under Ark. Stat. Ann. § 41-1001(1)(g), with the range set at 10 to 50 years, or life, rather than a class Y felony under § 41-1001(1)(a), with the range set at

20 to 60 years, or life.

Appellant's entire argument is based upon a sentence which occurs at the end of each subparagraph in Ark. Stat. Ann. § 82-2617(a)(1)(i) (Supp. 1985). The paragraph that is pertinent to this case provides:

> (1) Any person who violates this subsection with respect to:
>
> (i) A controlled substance classified in schedule I or II, which is a narcotic drug, and by aggregate weight, including adulterants or diluents, is less than twenty-eight (28) grams, is guilty of a felony and shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life and shall be fined an amount not exceeding twenty-five thousand dollars ($25,000). *For all purposes other than disposition, this offense is a class Y felony.*

(Emphasis added.)

Appellant argues that the italicized sentence requires that the range for his punishment as an habitual offender be set in accordance with Ark. Stat. Ann. § 41-1001(1)(g), unclassified felonies, rather than under § 41-1001(1)(a), class Y felonies. We find no merit in his argument.

Ark. Stat. Ann. § 82-2617(a)(1)(i) was amended substantially in 1985 by Act No. 669. The offense was changed from a pure class Y felony to one in which the offense was gradated according to the weight of the drug delivered. The punishment under the amended statute is much harsher than that previously authorized for class Y felonies. The amended statute gives trial courts the authority to impose a fine of up to $250,000.00, and it also raises the minimum number of years for imprisonment according to the weight of the drug involved. Obviously, the General Assembly did not want trial courts to be limited to the dispositions authorized by Ark. Stat. Ann. § 41-901 for class Y felonies. Rather, the legislative intent was to take the profit out of selling drugs and to impose longer sentences. It is simply inconceivable that the General Assembly would go to such lengths to devise a harsher scheme of punishment for drug offenders under Ark. Stat. Ann. § 82-2617 and then turn around and intend for these same offenders to receive more favorable treatment under Ark. Stat. Ann. § 41-1001, the sentence en-

hancement statute. Even penal statutes should not be interpreted so strictly as to reach absurd consequences which are clearly contrary to the legislative intent. *Kinsey* v. *State*, 290 Ark. 4, 716 S.W.2d 188 (1986); *Dollar* v. *State*, 287 Ark. 61, 697 S.W.2d 868 (1985); *Fairchild* v. *State*, 286 Ark. 191, 690 S.W.2d 355 (1985).

Affirmed.

Howard Vernon HUGHES *v.* STATE of Arkansas

CR 86-198 732 S.W.2d 829

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Darrell E. Baker, Jr., and *Danny Hyslip*, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Howard Vernon Hughes was charged with rape and sexual abuse by engaging in deviate sexual activity between July and November 1985 with a five year old boy in violation of Ark. Stat. Ann. § 41-1803 and § 41-1808 (Repl. 1977). Hughes was convicted and sentenced to forty years in the Department of Correction.

On appeal Hughes contends the trial court erred in admitting hearsay evidence without first determining the child's reliability in accordance with A.R.E. Rule 803(25)(A)(1)(j). He submits also the statements were too remote in time and were not

shown to be sufficiently reliable to be admitted under A.R.E. Rule 803(25). He contends testimony proffered by the defense should not have been refused. We affirm the judgment.

The state's proof was that appellant's mother, Hazel Hughes, operated a baby-sitting service in her home. The child was left there two or three days a week from 9 o'clock in the morning until his mother got off work at about 6:00 p.m. At times the child was alone with Howard. The child's mother received information in November 1985 that prompted her to ask her son whether he had been touched around his genitals. The child, she said, readily told her that Howard had touched him there, he said Howard had made him put his penis in his mouth, that he had twisted his arm and once put him in a closet. He told his mother he did not like Howard.

The child testified at trial and described the same occurrences—Howard made him put his penis (referred to as his "peek-a-dear") in his mouth and did the same to him, that Howard had hit him, and scared him by putting him in a bedroom closet. These accusations were repeated by Sergeant Denny Halfacre of the Sheriff's Department based on his interviews with the child. He said the child also told him, "Howard tries to make me hit and be bad to other kids, but Hazel makes him stop."

Stephanie Danielson, a psychological examiner at Ozark Guidance Center, and Judith Smith, an investigative social worker with Arkansas Social Services testified to similar statements made by the child in the course of their interviews. Ms. Smith said the child told her that white sticky stuff came out of Howard's penis into his mouth. Ms. Danielson testified that using anatomically correct dolls the child had demonstrated the sexual acts which had occurred between Howard and himself and, when asked what kind of sound was made by the act of oral sex, the child made a sucking noise. He said the same thing happened to one of his friends.

Trustworthiness of the Statements

Prior to trial the state notified the defense that it intended to rely on A.R.E. Rule 803(25) and a pre-trial hearing was conducted. The state presented essentially the same testimony which was later offered at trial, except that the child did not

testify at the hearing. Ms. Danielson's testimony included her reasons for believing the child's statements to her were reliable and Ms. Smith said she had "no reason whatsoever to suspect that [the child] was not telling the truth." At the close of the hearing the trial judge ruled the statements could be admitted at trial.

On appeal appellant does not question the constitutionality of A.R.E. Rule 803(25) under the confrontation clause, rather, he submits the in camera procedure under the rule requires that the child personally appear before the trial judge at the hearing to establish the reliability-credibility of his statements if they are to be introduced at trial. We sustain the argument.

Rule 803 of the Arkansas Rules of Evidence was amended by Act 405 of 1985. The amendment added subsection 25 to A.R.E. Rule 803 by providing that the statements of a child under ten years of age concerning sexual offenses are admissible in a criminal proceeding, provided the court determines in a hearing outside the presence of the jury that the statements have a reasonable likelihood of trustworthiness using thirteen criteria, including "(j) the reliability-credibility of the child witness before the Judge." Among the other criteria are: the age and maturity of the child, the circumstances, time and content of the statement, "any other corroborative evidence," and "any other factor which the court at the time and under the circumstances deems relevant and appropriate." The emergency clause recites the alarming rate of child abuse, the need to expedite the prosecution of such crimes, and to minimize "the trauma and distress of child victims."

While we agree with appellant's argument that the wording of A.R.E. Rule 803(25) can only be read as intending that the trial judge must form his own conclusions of the trustworthiness of the statements by observing the child as a witness, we are satisfied there was substantial compliance with subsection (j) in this case by the child taking the stand at trial and testifying to the factual details on which the charges were based. The testimony of the other witnesses came afterwards, with the exception of the child's mother, and their testimony was consistent with that given by the child. *In Interest of C.K.M.*, 481 N.E.2d 883 (Ill. App. 1985). Other states have adopted statutes similar to Act 405 of 1985 and those enactments have provisions

requiring the child to appear before the trial judge unless the child is unavailable. In the latter case, other corroborative evidence is required. See Revised Code of Washington, 9 A.44.120 (1982); Kansas Stat. Ann., § 60-460 (dd) (1982); Colorado Rev. Stat. § 18-3-411(e); Ill. Rev. Stat. ch. 38, para. 115-10 (1983); Ind. Code § 35-37-4-6 (1984); Minn. Stat. § 595-02(3) (1984); Utah Code Ann. § 76-5-411 (1983).

Proximity of the Statements

We disagree, that the statements in this case were too remote in time to be admissible under A.R.E. Rule 803(25). The statements were made within a few months of the alleged events. Nothing in the act suggests that a proximity of that degree is beyond the intended scope of the act.

Testimony of Ms. Judith Smith

We find no merit in the contention that the statements given by Ms. Smith should have been excluded because she was uncertain whether she had questioned the child about the evils of lying. She said she avoided using the word "lie," preferring other methods of stressing the importance of truth. Nothing in her testimony suggests she was not alert to distinguishing between fact and falsehood.

Testimony of Ms. Stephanie Danielson

Appellant maintains the testimony of Ms. Danielson should have been excluded because, as a psychological examiner, she was not observed by a supervisor while interviewing and testing this child in January, 1986. Appellant relies on Ark. Stat. Ann. § 72-1502(A) which provides that a psychological examiner may practice certain kinds of personality appraisal, counseling, psychotherapy or personality readjustment techniques "only under qualified supervision." There was no proof that this provision was intended to apply to these procedures. The trial court interpreted the statute as intended for control within the profession and appellant has not demonstrated how that was error. Even if the act applies, Ms. Danielson's testimony that her conclusions were reached after discussions with her supervisor indicates reasonable compliance. *Ricketts* v. *Ferrell,* 283 Ark. 143, 671 S.W.2d 753 (1984).

Proffered Testimony

Appellant's remaining point is that the trial court should have permitted the defense to introduce two statements. The parents of the appellant, Roger Hughes and Hazel Hughes, were prepared to testify that in the spring of 1985, before the alleged events with Howard, they separately overheard the child talking to other children about an incident involving his mother and her boyfriend. Mr. Hughes understood the child to say that he had seen his mother "kissing her boyfriend's stomach and below." Mrs. Hughes said she overheard similar remarks from the child, "I think he said tummy and down below."

Appellant submits this proferred testimony was erroneously excluded as hearsay. He contends the purpose of the proof was to show that the child had knowledge of oral sex prior to any of the alleged acts charged to Howard. We need not weigh whether the proposed testimony was subject to a hearsay objection, as it is clear the trial judge excluded it as collateral (R.p. 591) and because he did not consider it relevant. (R.p. 607).

We note initially there is room for considerable doubt as to just what inference can be drawn from the proferred testimony. Aside from that, Mrs. Hughes was not even certain of what she heard the child say. Be that as it may, whether the remarks are probative of the conclusion that the child was thus informed about oral sex by his observations at home rather than his asserted experiences at the Hughes household is, at best, debatable, and one which resides largely with the discretion of the trial court. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W.2d 589 (1980). Giving the remarks as much probative force as possible, they do not explain the child's graphic description of Howard's ejaculation in his mouth nor the sounds he associated with the experience. We are satisfied the proferred remarks had minimal probative value and there was no abuse of the trial court's discretion in excluding them for lack of relevance. *Killensworth* v. *State,* 278 Ark. 261, 644 S.W.2d 933 (1983); *Jim Halsey Co., Inc.* v. *Bonar,* 284 Ark. 461, 683 S.W.2d 898 (1985). A.R.E. Rule 403.

For the reasons stated, the judgment of conviction is Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. My chief disagreement with the majority opinion is that I feel A.R.E. 803(25) is unconstitutional as violative of the Confrontation Clause of the Sixth Amendment. The appellant in the present case did not argue the constitutionality of A.R.E. 803(25) and I will therefore not address that issue in this opinion. For a discussion of the constitutionality of the new child hearsay exception, see my concurring opinions in *Joe Henry Johnson* v. *State,* 292 Ark. 632, 732 S.W.2d 817 (1987) and *Charles Wesley Cogburn* v. *State,* 292 Ark. 564, 732 S.W.2d 807 (1987). The appellant did, however, argue that the trial court did not comply with the requirements of Rule 803(25) itself and I agree with his argument.

The provisions of A.R.E. Rule 803(25) were not followed by the trial court in the present case. The new rule excludes from the rule against hearsay statements concerning physical or sexual abuse made by a child under ten years of age:

> *PROVIDED* The court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:
>
> . . .
>
> j. the reliability-credibility of the child witness before the Judge.
>
> . . .
>
> 3. If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

The child did not testify at any hearing conducted outside the presence of the jury. The only testimony presented by the child was that on one occasion the appellant made him put the appellant's penis in the child's mouth. That's enough to sustain a conviction. However, all the amplification and/or embellishment

presented by hearsay witnesses was probably the basis of the conviction by the jury.

One of the hearsay witnesses testified that the victim said the appellant twisted his arm. The victim testified that it did not happen. The child did not state either by tape recorded statement or trial testimony, that "sticky stuff" came out of the appellant's penis. He never referred to his penis as a "pick-a-dear", "pick a dur", or any of the other funny little names furnished by the hearsay witnesses. All of the witnesses, including the officer, stated that the appellant denied the accusations.

Witness Smith, the social worker, testified to the boy's detailed description of the alleged sexual acts between the appellant and the child. However, the child did not remember telling her any of these things. Neither did he confirm the testimony of witness Danielson, the psychological examiner, who gave equally damaging testimony.

Ms. Danielson testified that it was her opinion that the child was telling the truth and that it was her opinion that the child had been sexually abused. In the companion case of *Johnson* v. *State,* we hold that a medical witness could not give his opinion, in the absence of medical evidence, that a child had been sexually abused. We base this holding on our decision in *Russell* v. *State,* 289 Ark. 533, 712 S.W.2d 916 (1986), where we stated:

> 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.

Ms. Danielson is a licensed psychological examiner. Why should a psychological examiner be allowed to give such an opinion in this case and a psychologist not be allowed to give a similar opinion in *Russell*? The only answer is that our opinions are not consistent.

Although the victim was present at the trial and testified on behalf of the state, the trial court allowed all of the hearsay testimony from the other witnesses. The mother testified *before*

the child as to the boy's recitation to her of the accusations concerning the appellant. The police officer testified *after* the child that that's what the boy told him (or something like it). The social worker testified that that's what the child told her (or something like it). The psychological examiner testified that that's what the child told her (or something like it). It was primarily all this hearsay testimony, not the alleged victim's testimony, that contributed to the severity of the sentence, if not the conviction itself. After five (5) different versions of the alleged despicable act had been presented to the jury, the inescapable inference was that the accusations must be true.

The child did not testify that the appellant performed oral sex on him. This evidence was solely presented by hearsay witnesses who stated that they heard the child make the statements. The child was not even asked about this type of activity, nor was he questioned concerning the details of the other allegations. Judy Smith, the social worker, testified that the child did not tell her that the appellant placed the child's penis in his mouth. Her exact words were: "I don't believe he told me that Howard had put his mouth on his 'peck a doo.' " Officer Halfacre was asked the question: "Did it occur to you that you should have asked if the child had actually had to perform oral sex on this adult?" His answer was: "Okay. That I did ask. He said no." Witness Danielson stated the victim told her both acts of oral sex were performed. This witness also stated that the victim related that a sucking sound was made during the performance of oral sex. The child did not state such in his testimony nor was he asked about it.

I mention only a few of the hearsay statements to show how devastating the testimony must have been. It was absolutely unnecessary because the witness was present and testified. Even if all these statements were actually made, they should not have been admitted because there was absolutely no confrontation afforded. No power on earth can reveal what result confrontation would have had at the time the statements were allegedly made. The trial court allowed their introduction into evidence because Rule 803(25) dispenses with the right of confrontation whenever the declarant is under the age of 10 and is the alleged victim of physical or sexual abuse.

The majority opinion makes the statement that the trial judge must form his own conclusions of the trustworthiness of the hearsay statements by observing the child as a witness as required by subsection (j). Where in the record is a finding of "the reliability-credibility of the child witness *before the judge?"* The majority's statement that this requirement was met is not founded anywhere in the record. The opposite is true. There was not a hearing conducted outside the presence of the jury, or anywhere else, to determine the reliability-credibility of the child. It was impossible for the trial court to make such a determination because the child never appeared before him for such purpose at all. The trial court made absolutely no attempt to determine the trustworthiness of the alleged statements. How this Court can make the statement that the rule was substantially complied with by the child taking the stand at the trial is beyond me. This determination is supposed to take place before the introduction of the hearsay statements or the testimony of the child at the trial.

The majority is in error again where it states the hearsay witnesses' testimony was consistent with the child's testimony. The statement is only partially true because, as discussed earlier in this opinion, their testimony went far beyond the testimony of the child. He never told the jury half the things the hearsay witnesses did. Their testimony at trial, with the exception of the mother's, was presented after the testimony of the child. This testimony very obviously was not intended to prove the trustworthiness of the child's statements, but rather to prove additional criminal acts of which these witnesses had no personal knowledge and which were not even corroborated by the testimony of the victim.

The reliability of the hearsay statements is particularly lacking in this case. There is no testimony from any source which even establishes the month this crime was supposed to have occurred. All we know is that many months afterward, following two or three discussions with the child, he eventually gave several different recitations of the alleged act. The original information was filed January 7, 1986. On April 29, 1986, two days before the trial, the court permitted the state to amend the information to allege the crime occurred *between May and September,* 1985. The defense in this case was alibi and the practical effect of this

amendment was to give the defense an additional forty-five days to account for—with only two days until trial. Smith did not interview the victim until November, 1985, and Danielson did not interview him until January of 1986. It is quite clear that the statements were not within a relatively short time span of the alleged act. See *State* v. *Skala,* 719 P.2d 283 (Ariz. App. 1986), where two days was considered too remote. Certainly the legislature intended that the time of the statements in relation to the alleged offense be considered when determining the trustworthiness of the hearsay statements.

The defense proffered hearsay testimony which has long been considered within a well-established exception to the hearsay doctrine. There is no doubt that in order that justice be done the jury should have been allowed to consider the proffered testimony of Hazel and Roger Hughes, the defendant's mother and father, in determining the credibility of the victim's statements. This proffered statement occurred prior to any hearsay statement made to the state's witnesses. The testimony was offered for the purpose of showing that the child's knowledge of oral sex existed prior to the time of the alleged offense. The testimony was a statement by the child that he had come into the living room unexpectedly one night and discovered his mother "sitting on" her boyfriend and "kissing him on the stomach and below". The record clearly demonstrates that the state objected to this testimony as hearsay, and the trial court excluded it as such. The following exchange from the record:

> STATE: Judge, it is still hearsay he is trying to show.
>
> DEFENSE: It is not.
>
> THE COURT: Let him finish. He is trying to show that that's where the boy got the knowledge, so it has to be true for him to have gotten that knowledge. So it is as to the truth of the matter asserted. I will sustain objection to it.

A statement made out of court is not hearsay if offered for the purpose of providing that the statement was made, and not for the purpose of proving the truth of the matter asserted. *Nowlin* v. *State,* 252 Ark. 870, 481 S.W.2d 320 (1972); and A.R.E. 801(c).

Even if the proffered testimony were hearsay, so was that of the other witnesses. I fail to understand why the hearsay rule

applies to one and not the others. These proffered statements were no more collateral or irrelevant than were all of the other hearsay statements. They all fit the same category. The discretion of the trial court does not extend to the extent of allowing hearsay in favor of the state and rejecting it on behalf of the defense.

I cannot end this dissent without a final reference to my concurring opinions in *Johnson* and *Cogburn*. Neither can I vote to uphold a conviction based solely upon completely untested hearsay testimony. I would reverse and remand for a new trial.

Lige ROBINSON and Clayton KIDD *v.* Jerry Wayne ABBOTT

87-57 731 S.W.2d 782

Supreme Court of Arkansas
Opinion delivered July 6, 1987

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

Lovell, Arnold & Nalley, for appellee.

STEELE HAYS, Justice. Appellants ask us to overturn a jury verdict and remand for a new trial because the issue of punitive damages was improperly submitted to the jury. The jury refused to award punitive damages, but did return a verdict for the

plaintiff, now the appellee, of $50,000 in compensatory damages. While we agree with appellants that the proof was entirely insufficient with respect to punitive damages, we cannot agree the error requires remand.

Appellee Jerry Wayne Abbott sued appellants Lige Robinson and Clayton Kidd for injuries arising from a motor vehicle collision. Robinson and Kidd admitted that Robinson caused the collision and that he was Kidd's employee, but denied any grounds for punitive damages.

Before the jury was impaneled the trial judge listened to the plaintiff's proof relative to punitive damages. It consisted essentially of testimony which would clearly sustain a finding of negligence, but fell far short of establishing willful, wanton misconduct. The trial judge informed counsel for plaintiff he could "risk" making proof on that issue, but could not introduce proof of the defendants' net worth. As we have mentioned, the jury rejected the claim for punitive damages but upheld the claim for compensatory damages.

We agree with appellants that it was error to submit the issue of punitive damages to the jury on the proof of mere ordinary negligence. Even if evidence of Robinson's conduct could be considered gross negligence, an arguable point, it would not have sustained an award of punitive damages. *Wallace* v. *Dustin,* 284 Ark. 318, 681 S.W.2d 385 (1984).

Even so, we have repeatedly said that it is only harmful, thus reversible, error to submit the issue of punitive damages to the jury where there is proof of the defendant's net worth. In *KARK-TV* v. *Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983) we summarized the rule:

> The jury's refusal to award punitive damages would ordinarily render the error harmless, but appellees were permitted to present evidence of the appellant's net worth. We have held on a number of occasions that where the issue of punitive damages is erroneously submitted to the jury, *together with the defendant's financial condition,* an award of compensatory damages is tainted and cannot stand. *Dalrymple* v. *Fields,* 276 Ark. 185, 633 S.W.2d 362 (1982); *Life and Casualty Insurance Co.* v. *Padgett,* 241

Ark. 353, 407 S.W.2d 728 (1966). (Emphasis added).

We restated that principle in *Berkeley Pump Co.* v. *Reed-Joseph Land Co.,* 279 Ark. 384, 653 S.W.2d 128 (1983).

Here, there was no proof of net worth, nor any showing of prejudice, and we do not reverse for error which does not result in prejudice. *Peoples Bank* v. *Wallace,* 290 Ark. 589, 721 S.W.2d 659 (1987); *Ricketts* v. *Ferrell,* 283 Ark. 143, 671 S.W.2d 753 (1984); Rule 61, Arkansas Rules of Civil Procedure. Our Rule 61 is identical to FRCP 61. "The philosophy behind this rule is that proceedings should not be disturbed because of a technical error which resulted in no prejudice. *Gutshall v. Wood,* 123 F.2d 174 (C.A. 1942)." Reporter's Notes to ARCP Rule 61.

Affirmed.

GLAZE, J., not participating.

Joe Henry JOHNSON *v.* STATE of Arkansas

CR 86-150 732 S.W.2d 817

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Lohnes T. Tiner and *Chet Dunlap*, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. This is a child sexual abuse case in which the appellant was convicted of raping the nine-year-old son (the boy) of the woman with whom he was living (the mother). We find that one of the appellant's eight points of appeal requires reversal. It was prejudicial error for the trial court to have permitted the physician who examined the alleged victim to state, albeit indirectly, that the boy had been sexually abused. The remaining points will be addressed only to the extent it may be helpful in the event of a retrial.

The appellant and the mother had lived together for eight years. Living with them was the boy, who was the mother's son but not the son of the appellant, and a younger daughter who was fathered by the appellant.

At the trial the boy testified that the appellant was planning to go fishing on April 27, 1985, with the boy and two other men. As the plans developed, a decision was made that it would be an overnight trip, and thus the boy could not go. He testified that he became angry and went into the house where his mother whipped him for picking on his little sister. He then told his mother that the appellant had sexually molested him. His mother took him to a hospital where he told the examining doctor, a pediatrician, the same thing. The boy then testified that his statements about the appellant had been untrue, as had his subsequent, similar, statements to a police officer, social worker, and deputy prosecutor.

The testimony of other witnesses indicated that the boy had accused the appellant of having anal and oral intercourse with him and then recanting the accusation and then recanting the recantation.

Police officers testified that the appellant, during questioning after his arrest, admitted rubbing his penis around the boy's anus and saying that "it might have slipped in." They said when they began questioning the appellant he refused to permit them to tape record his statement. After they had questioned him, they asked him to sign a written version of his statement, and he said he

would not sign anything until after he had talked with a lawyer. At that point the questioning ceased. The appellant denied having made any such admission to the officers.

The evidence against the appellant thus consisted of (1) the officers' testimony about the appellant's statement, (2) the doctor's statement about what the boy had told him and his opinion that the boy had been abused, and (3) the statements of various persons about what the boy had told them when he accused the appellant and when he took back his accusations.

1. The Doctor's Opinion

The doctor who examined the boy testified he found no physical evidence of the anal intercourse the boy said had taken place that day. The doctor said that lack of such evidence would not rule out the possibility that it had occurred. He testified that the boy told him the sexual relationship with the appellant had existed for some months and the acts had occurred on several occasions. The prosecutor then asked the doctor if he had examined many other children for alleged sexual abuse. The appellant objected, and at that point wrangling in bench conferences and otherwise out of the hearing of the jury began over whether the doctor could express an opinion whether the boy in this case had been sexually abused.

The court refused to allow the doctor to express his opinion whether the boy had told him the truth. However, the court allowed the doctor to give "an opinion as to whether or not child abuse existed." The appellant objected, contending the doctor had no basis for such an opinion other than the boy's out-of-court statement. The court responded that the doctor could give his opinion based upon "history, coupled with the physical facts, the living conditions that his parent related, . . . and the facts and circumstances at hand . . . ." The appellant argued that the "history," and the completely negative physical examination were the only bases the doctor could have had for his opinion. The court said the question could be asked and if the appellant wished to cross-examine on the bases for the opinion he could do so. The doctor had been admonished not to say his opinion was based solely on his belief of what the boy told him. When the jury returned to the courtroom, the questioning went like this:

ERRATA

292 ARKANSAS REPORTS at page 637

Detach at perforation, moisten the back, and paste over the first four lines of text on page 637 of *Johnson v. State:*

BY MR. HUNTER [the prosecutor]:

Q. Doctor Kemp, during the time that you talked to [the boy] and examined him, what was his demeanor, tone of voice, that sort of thing?

BY MR. HUNTER [the prosecutor]:

Q. Doctor Kemp, during the time that you talked to [the boy] and examined him, what was his demeanor, one of voice, that sort of thing?

A. He seemed very concerned. Somewhat frightened. Worried. Very tense, anxious, and nervous. Obviously upset. Somewhat—obviously embarrassed with the conversation, and what he was saying to me.

Q. Ok. And you've indicated, Doctor Kemp, by pointing to the genital area, and the rectal area how he described what happened to him.

Did [the boy] ever use words, particular words to describe what he told you this defendant did to him?

A. He used words like his thing, and I would say, "What do you mean his thing" And he would—he would say, "Well, you know what I mean." And I would say, "No, . . ., what do you mean." And he would then point to his own penis and say, "This is what I mean, and I said, "You mean this is what you're talking about when you say his thing," and he would say, "Yes." Descriptions like that.

Q. Do you remember how he referred to his hind part?

A. He initially pointed to his rectal area in—in describing where the thing was placed.

Q. Did he refer to it ever as his bottom?

A. Yes, he used that term once.

Q. Do you remember in what connection he referred to his hind part as his bottom?

A. He kept saying to me that he—he put his thing in my bottom, or—or point—he would point say, you know, back here.

Q. Doctor Kemp, based upon your examination of [the boy], the history that you took, including his living circumstances, and physical examination, did you formulate an opinion to within a reasonable degree of medical certainty, as to whether or not [the boy] had been sub-

jected to sexual abuse?

A. Yes, I did.

Q. And Doctor Kemp, will you tell the ladies and gentlemen of the jury, please, what that opinion is?

A. I feel like I could not ignore the child's comments to me. His sincerity—

MR. TINER [defense counsel]:

Judge, I'm objecting. The answer is not responsive.

MR. HUNTER:

Your Honor, he's entitled to explain what his opinion was based on.

THE COURT:

Doctor, you said you formed an opinion. Can you state in general terms what the opinion was relative to child molestation or abuse?

A. I had an opinion based on the history that this child gave me, and my experience in dealing with children through the years, that an act had occurred that I considered detrimental to this child's health.

MR. TINER:

Judge, may we approach the Bench?

THE COURT:

Yes.

(REPORTER'S NOTE: THE FOLLOWING IS A BENCH CONFERENCE THAT TOOK PLACE OUT OF THE HEARING OF THE JURY).

MR. TINER:

Judge, at this time, we're going to move for a mistrial because he said, "Based upon the history that the child gave him, and based upon examining other children." And that's what it's based upon, and that is improper, and we're asking for a mistrial.

THE COURT:

I am going to deny your motion. And I am going to tell you at this time, Mr. Hunter, to go on to something else.

MR. HUNTER:

We are, your Honor.

MR. TINER:

We would ask the Court to admonish the jury to disregard the last statement that was made by the Doctor.

THE COURT:

No, that will be denied.

It is apparent the doctor ultimately conveyed to the jury his opinion that the boy was telling the truth. It was error, however, for the court to have permitted the doctor to have given his opinion that "an act had occurred that [he] considered detrimental to this child's health." The only "act" to which the doctor's testimony could have referred was the anal intercourse related to him by the boy. The opinion of an expert that a child has been sexually abused is not objectionable on the basis that it is an opinion on the "ultimate issue." A.R.E. 704; *Jennings* v. *State,* 289 Ark. 39, 709 S.W.2d 69 (1986). The question here is whether such an opinion may be expressed if it is based on nothing but the "history" given by the child.

In *Russell* v. *State,* 289 Ark. 533, 712 S.W.2d 916 (1986), a psychologist testified in a rape and child sexual abuse case that, based on her experience, what the child had told her was "consistent with a child who has been abused." The majority opinion said:

> 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 . . . .

In the case before us now the error was prejudicial. The majority in *Russell* v. *State, supra,* found overwhelming evidence of the accused's guilt based on the child's graphic (and unrecanted) trial testimony relating the acts of the appellant. The evidence before us now can hardly be characterized as "overwhelming," as it consisted solely of the doctor's opinion, evidence of the inconsistent, out-of-court statements of the boy, and the disputed testimony with respect to the statement allegedly made orally by the appellant.

Although the evidence against the appellant was strong enough to be permitted to go to the jury, it was not of such overwhelming proportions as to make the error in allowing the doctor to give his opinion non-prejudicial.

2. A.R.E. 803(25)(A) and the Confrontation Clause

Testimony of witnesses as to what the boy had said about the appellant was admitted pursuant to A.R.E. 803 which provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(25) (A) A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, provided:

1. The Court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

a. the age of the child

b. the maturity of the child

c. the time of the statement

d. the content of the statement

e. the circumstances surrounding the giving of the statement

f. the nature of the offense involved

g. the duration of the offense involved

h. the relationship of the child to the offender

i. the reliability of the assertion

j. the reliability-credibility of the child witness before the Judge

k. the relationship or status of the child to the one offering the statement

l. any other corroborative evidence of the act which is the subject of the statement

m. any other factor which the Court at the time and under the circumstances deems relevant and

appropriate

2. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

3. If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

4. This Section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of Evidence. . . .

The appellant's argument is that in *Ohio* v. *Roberts,* 488 U.S. 56 (1980), the Supreme Court said the Confrontation Clause of the Sixth Amendment requires, as a prerequisite to making an exception to the hearsay rule, that the witness whose out-of-court statement is to be discussed, *i.e.,* the declarant, be unavailable and that there be adequate indicia of reliability of the statement. The appellee points out that in this case the boy was not unavailable.

In *Ohio* v. *Roberts, supra,* the question was whether the testimony taken at a preliminary hearing could be used at the trial in the absence of the witness. After a general discussion of the history of the hearsay rule exceptions in the context of the Confrontation Clause, in which it was noted that both unavailability of the witness and indicia of reliability of the statement are required, the court said: "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." In this case the witness was present at the trial. He was also available for the equivalent of cross-examination, as the court allowed the appellant to call him as a hostile witness even though his testimony was favorable to the appellant.

If we were to terminate this portion of the opinion at this point, we might be interpreted as suggesting that in any case where the witness is present for the trial his prior out-of-court

statements may be substituted for live testimony as long as there are indicia of reliability of the prior statement. We do not mean to do that. In *United States* v. *Inadi,* ___ U.S. ___, 106 S.Ct. 1121 (1986), the Supreme Court considered whether the hearsay rule exception permitting admissibility of out-of-court statements of co-conspirators made in the course and furtherance of the conspiracy could be admitted despite the availability of the witnesses in question. The claim there, as here, was that *Ohio* v. *Roberts, supra,* required unavailability of the witness as a prerequisite to any exception to the hearsay rule. The Supreme Court said that case was hardly to be interpreted as a wholesale revision of the law of evidence, and that the unavailability requirement did not apply with respect to every exception to the hearsay rule. The Supreme Court noted that the unavailability requirement applied in situations where the testimony of the witness at the trial was to be the same as it had been when given out of court. Obviously the better testimony would be that given live, and cross-examination could then be much more meaningful. However, where the testimony in court can be expected to be substantially different from that given out of court, as in the case of a co-conspirator whose out-of-court statement was surreptitiously obtained, the reason for the unavailability requirement disappears. The question then becomes solely whether there are sufficient indicia of reliability to make an exception to the hearsay rule. With a touch of understatement, the Supreme Court observed:

> When the Government—as here—offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy. [106 S. Ct. at 1126]

We find the same reasons apply to permit admissibility of the out-of-court statements of an alleged child abuse victim as applied to admit the statements of the alleged co-conspirators.

One of the witnesses who testified as to the boy's out-of-court statements accusing the appellant was a psychologist. As abstracted by the appellant, his testimony included the following:

> It is not unusual for children who have been sexually abused to recant. Often children that have been abused, when they become aware of the implications, coming forward and talking about the sexual abuse, quite often they will recant. Some of the implications which they become aware of are going to court, changes that it causes in the family, and the pain they perceive they are causing other family members.

The appellant has not argued that the boy's statements lacked sufficient indicia of reliability. We quote the psychologist's testimony solely for the purpose of showing it was his expert opinion that a child is likely to recant a statement about being abused sexually by a family member. Thus, in view of the common prospect, and here the known reality, of a great difference between trial testimony and out-of-court statements of the alleged victim, the unavailability requirement does not apply in this case any more than it did in *United States* v. *Inadi, supra.*

Although the appellant's primary argument under this point is the one about unavailability, he also contends that the application of A.R.E. 803(25)(A) in this case gave the prosecution an undue advantage not available in other cases as it permitted it to prove the crime by hearsay evidence and that that violated his rights to due process and equal protection of the laws. No authority is cited for this second proposition under this point, thus we will not address it. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977). Should this become an issue upon retrial, we refer the parties and the court to Note, 83 *Colum. L. Rev.* 1745 (1983); Note, 98 *Harv. L. Rev.* 806 (1985); and Note, 13 *Pepperdine L. Rev.* 157 (1985).

3. The Appellant's Statement

The appellant argued he had asked for counsel at some point before or during the statement he gave to the police officers. They testified that he did not mention getting a lawyer until the appellant was asked to sign a written version of what he had told them. This was a credibility issue to be resolved by the trial court

in determining the admissibility of the testimony as to the appellant's statement. *Jackson* v. *State,* 284 Ark. 478, 683 S.W.2d 606 (1985).

4. Bill of Particulars

The appellant was charged with violating Ark. Stat. Ann. § 41-803 "on or about April 27, 1985[,] in Poinsett County." He filed a motion for a bill of particulars asking that the exact place and time of the acts alleged be stated. The motion was denied.

A bill of particulars as to the precise time the offense was committed need not be granted unless the time is material to the allegation. Ark. Stat. Ann. § 43-1015 (Repl. 1977); *Payne* v. *State,* 224 Ark. 309, 272 S.W.2d 829 (1954); *Venable* v. *State,* 177 Ark. 91, 5 S.W.2d 716 (1928).

Charging the location at which an offense occurred is necessary to establish the jurisdiction of the court. Ark. Stat. Ann. § 43-1016 (Repl. 1977). Therefore, it is sufficient if the court having jurisdiction of the offense alleged can be determined from the information. *Haller* v. *State,* 217 Ark. 646, 232 S.W.2d 829 (1950).

5. What is a Statement?

The appellant contended that when the boy was questioned by a police officer his responses consisted only of "yes and no" answers to questions asked, and that those responses to questions did not constitute a "statement" by the alleged child abuse victim contemplated by A.R.E. 803(25)(A). While this court has not defined "statement" in this context, other courts have done it in similar situations. For example, in *United States* v. *Katsougrakis,* 715 F.2d 769 (2nd Cir. 1983), *cert. den.* 104 S.Ct. 704 (1984), a nod of the head in response to a question was held to be a statement. In *United States* v. *Guzman,* 754 F.2d 482 (2nd Cir. 1985), questions were held admissible to give meaning to responses. In our opinion, the responses of the alleged victim in this case constituted clear assertions and were sufficient to be considered a "statement" as contemplated in the rule.

6. Conflicting Testimony

A tape recording of the boy's statement to a police officer was played for the jury. A social worker who was present when the statement was made testified she heard the boy make a statement which did not appear on the tape. The officer testified the tape contained all that was said. The appellant claims this conflict in testimony presented by the prosecution made the tape so untrustworthy that it should not have been admitted. Such a conflict goes only to the weight to be given to the testimony presented by the prosecution and not to its admissibility. *See Roleson* v. *State,* 277 Ark. 148, 640 S.W.2d 113 (1982).

7. Evidence of Other Crime

When the tape recording of the boy's statement was to be played for the jury, the appellant objected on the basis that the statement was hearsay, the rule does not permit tape recording as opposed to statements, and the witness (presumably meaning either the officer or the boy) was present in court and could testify to what the statement had been. The appellant also argued that the tape contained prejudicial evidence of another offense, that is, the boy was asked if the appellant had ever "fooled around" with the boy's sister. Focusing on that basis for the objection, the court asked what the response to the question was. At that point the appellant's counsel said, "alright, the tape is inaudible to that, Judge. I don't think—I don't think the jury's gonna be able to hear the tape anyway." The judge said he would permit the tape to be played. The appellant then asked that his objection be treated as a continuing one.

We need not decide whether the objection was waived or not. If this case is retried, it is clear that the court should review the tape before it is admitted to ascertain if it contains evidence that the appellant committed another crime and take appropriate action to see to it that any such evidence does not get before the jury.

8. The Boy's Age

The appellant contends that when the boy made his out-of-court statements accusing the appellant he was nine years old, but at the time of the trial he was ten. The appellant argues that

A.R.E. 803(25)(A) was designed to protect a young child from the trauma of a trial, and thus the critical age is the age of the child at the time of the trial rather than the age at the time the statement was made, and the rule thus does not permit the statements to be admitted.

The birth certificate of the boy showed that his tenth birthday occurred May 3, 1985. His accusatory statements were given on April 27 and 30, 1985. His statements recanting the accusations occurred after May 3, 1985. The court ruled that it would be unfair to the appellant to exclude the boy's statements made after May 3, 1985, in the circumstances of this case, and he admitted both the accusatory statements and the recantations citing A.R.E. 803(24).

Although the judge's ruling was probably not responsive to the appellant's objection, we find no error here. We have found no authority, and the appellant has cited none, supporting the appellant's interpretation of Rule 803(25)(A) as meaning that the declarant must be less than ten years old at the time of the trial as opposed to the time the statement was made. The rule refers to a "statement made by a child under ten years" as being admissible. Our view is that had the authors of the rule meant to restrict it to a statement made by a child "under ten years of age at the time of the trial" they would have said so. It seems clear to us that the Rule permits the statements to be admitted in this case because they were "made by a child under ten years."

Reversed.

PURTLE, and DUDLEY, JJ., concur.

HAYS, J., dissents.

JOHN I. PURTLE, Justice, concurring. Although I agree with the result, I write a concurring opinion primarily because of the misleading statement of the majority:

> If we were to terminate this portion of the opinion at this point, we might be interpreted as suggesting that in any case where the witness is present for the trial his out-of-court statements may be substituted for live testimony as long as there are indicia of reliability of the prior statement. We do not mean to do that.

The opinion actually accomplishes exactly what it says it does not do. But in the words of Humpty Dumpty—the words mean what the majority says they mean. The opinion does not hold that in all cases where a witness is present at trial his prior out-of-court statements may be substituted for live testimony. However, the opinion does hold that, pursuant to A.R.E. 803(25), in all cases where the declarant is the alleged child victim of sexual/physical abuse and is present for the trial, his out-of-court statements may be substituted for live testimony as long as there are indicia of reliability of the prior statements. The alleged child victim was present in the case under consideration and was in fact questioned by defense counsel during the course of the trial.The majority misinterprets *Ohio* v. *Roberts,* 448 U.S. 56 (1980). There the transcript of the witness' preliminary hearing testimony was allowed into evidence because the witness was unavailable at the trial. The former testimony was taken subject to the full right of confrontation, i.e. taken under oath and subject to full and effective cross-examination. Further, the state had made substantial efforts to compel the witness' attendance at the trial of Roberts.

The thrust of *Roberts* was that the right to confrontation was not violated because the witness could not be located and the evidence indicated that her prior testimony bore sufficient indicia of reliability that it afforded the trier of fact a satisfactory basis for the determination of the truth of the former testimony. After canvassing the many previous cases that had examined the relationship between the Confrontation Clause of the Sixth Amendment and the many exceptions to the hearsay rule, Justice Blackmun, writing for the Court, stated:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . .
>
> The second aspect operates once a witness is shown to

> be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."

The testimony admitted in *Roberts* included questioning of the witness by Roberts' attorney. Confrontation was not only afforded, it was utilized.

What the majority in the present decision appears to overlook is that in *Roberts* the witness or declarant was, in fact, unavailable. The majority at one point, without expressly doing so, attempts to distinguish *Roberts* on the basis that in the present case the declarant was not unavailable. It is precisely because the witness was not unavailable that the testimony should not have been admitted. To hold otherwise flies right smack dab in the face of both the Confrontation Clause of the Sixth Amendment and the common law rule against the admission of hearsay. The Arkansas act attempts to allow any and all (the more the better?) recitations of prior statements even though the declarant is available for trial and cross-examination. Neither this Court nor the General Assembly possesses the power to nullify this fundamental principle of Anglo-American law against the admission of such evidence.

The majority reaches its conclusion in the present case by analogy to *U.S.* v. *Inadi,* ___ U.S. ___, 106 S.Ct. 1121 (1986), where the statements in dispute were those of an unindicted co-conspirator. The admission of the out-of-court statements of a co-conspirator is founded on the concept of agency. See A.R.E. 801(d)(2)(v). To compare the out-of-court statements of an alleged child abuse victim with the statements of co-conspirators in a drug ring seems, at best, rather strained. The Court in *Inadi* stated:

> If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding

> principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

The Court did not reject the confrontation requirement but rather reaffirmed it in the language quoted above. The opinion further stated: "These same [confrontation] principles do not apply to co-conspirators' statements." The opinion expressly distinguished *Roberts* where it stated:

> The admission of co-conspirators' declarations into evidence thus actually furthers the "Confrontation Clause's very mission" which is to "advance 'the accuracy of the truth-determining process in criminal trials.' "

Moreover, the reasoning behind the decision in *Inadi* has been brought into question by the Supreme Court's recent decision in *Cruz* v. *New York,* ___ U.S. ___, 107 S. Ct. 1714 (1987). Justice Scalia, writing for the Court, held that where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him.

Ohio v. *Roberts,* supra, is still valid law on this subject according to the opinion in *Kentucky* v. *Stincer,* ___ U.S. ___, 107 S. Ct. 2658 (1987), where the Court considered a Kentucky statute which closely resembles A.R.E. 803(25). In *Stincer* the trial court conducted an in chambers hearing, at which the accused was excluded, to determine the competency of two child victim witnesses. The accused's counsel was present at the hearing. The hearing was held out of the presence of the jury and the defense counsel was allowed full cross-examination. The *Stincer* holding is limited to the question of whether due process and confrontation were denied the appellant by excluding him from the hearing at which the reliability-credibility of the seven and eight year old victims was determined. The Court held that the accused's rights were not violated. I agree with the decision. Both reliability and confrontation were preserved. The majority opinion in this case preserves neither.

I recognize the child sexual molestation problem in this country is serious and demands immediate attention, not only

from the courts but from the legislature and the general public. The effort to deal with this problem must be undertaken with all deliberate speed. However, deliberate is the word of caution which we must always keep in mind. History has proven time and again that decisions hastily made in the heat of anger, or in a state of excitement, are frequently found to have been unwise.

Children are apt to be confused on cross-examination by a lawyer. They frequently cannot recall exact dates, places and complete details of prior experiences. They may be reluctant or scared, or they may be vindictive. Also, children sometimes respond in a manner intended to please the parent or interviewer. These are but a few of the matters which must be considered in deciding the trustworthiness of hearsay statements. These problems must be resolved by the simple process of the trial court making a prior independent evaluation of the credibility-reliability or trustworthiness of not only the child witness, but also of each prior hearsay statement. Corroboration of such hearsay testimony is mandatory if we are to preserve our system of justice. The child in this case, a nine year old boy, made the accusation after the appellant refused to take the child on an overnight fishing trip. After the appellant told the alleged victim he could not go, the child went inside the house and started trouble with his little sister, for which his mother whipped him. He then told his mother the appellant had been molesting him. The mother took him to a pediatrician the same day. The doctor found absolutely no evidence that the child's accusation was true. The child said the appellant had done it to him that day and for several months before. The child subsequently recanted his story.

The doctrine of exclusion of hearsay existed long before the Constitution and Bill of Rights were adopted by the people of the United States. The hearsay exclusion was a basic tenet of the common law. Trial by depositions was found to be fundamentally lacking in trustworthiness and thus such Star-Chamber proceedings were swept aside by the adoption of the Sixth Amendment. Justice Marshall, in his dissenting opinion in *Inadi,* 106 S.Ct. at 1129, remarked: "The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee." Exceptions have eroded the Confrontation Clause and the rule against hearsay. However, the

present erosion seems not to be founded so much upon the test of reliability in search of the truth as it is upon the convenience of the state. Exceptions to the rule against hearsay must be permitted only for a compelling reason, and then the exceptions should be narrowly defined and strictly construed. Especially in light of the procedure providing for videotaped testimony of the child, A.S.A. § 43-2036, which retains most of the safeguards attendant to a trial, I would require an affirmative showing of reliability and unavailability.

The inherent untrustworthiness of hearsay, as clearly demonstrated in the present case, led to the development of the hearsay exclusion doctrine in the common law. The exceptions to the hearsay doctrine were few in number and were founded upon a showing of reliability *and* necessity. The hearsay testimony in this case should be required to pass this two-part test demanded by *Ohio* v. *Roberts*. We have no indicia, even on appeal, of the circumstances relating to reliability at the time these hearsay statements were allegedly made. No case I have read holds that a statute as broad as 803(25) is constitutional. See my concurring opinion in *Charles Wesley Cogburn* v. *State,* 292 Ark. 564, 732 S.W.2d 807 (1987). Therefore, I insist the Arkansas procedure is unconstitutional.

ROBERT H. DUDLEY, Justice, concurring. I concur solely to issue a caveat to the trial judges hearing criminal cases.

The Uniform Rules of Evidence are perhaps the most outstanding of the Uniform Laws. The trial judges and trial lawyers have grown accustomed to the use of them and appreciate using rules which are located in one place, rather than in scattered cases. For the first time since their adoption, the courts are faced with the question of whether a rule of evidence is in existence.

The Uniform Rules were adopted as the Arkansas Rules of Evidence by an invalid session of the General Assembly. *See Ricarte* v. *State,* 290 Ark. 100, 717 S.W.2d 488 (1986). We declared their adoption invalid, but then, under our rule-making authority, adopted them as court rules. *Ricarte, id.* at 104. The Legislature later enacted Rule 803(25), but this Court has not adopted such a rule, and probably will not do so.

The question then becomes whether this Court or the

General Assembly has the authority to promulgate rules of evidence. This separation of powers issue was not raised in the case at bar and is not answered by today's opinion.

Obviously, the trial judges are going to be faced with the question of whether Rule 803(25) is a part of the Rules of Evidence. If I were a trial judge faced with such a decision, I would carefully consider the following language in the *Ricarte* case, *supra,* at 104:

> Under our own rule-making power and under existing statutory authority, as of this date we adopt the Uniform Rules of Evidence as the law in Arkansas. We have no misgivings about either the validity of our action or its wisdom, but a few comments are appropriate.
>
> For more than fifty years there has been a steady trend in favor of committing to the courts the regulation of practice and procedure. Dean Wigmore took a strong stand in the matter as early as 1928. Editorial, 23 Ill. L. Rev. 276. Many others agreed. In 1940 the American Bar Association chose as the subject for its annual Ross essay contest: "To What Extent May Courts under the Rule-Making Power Prescribe Rules of Evidence?" The winning essay by Prof. Thomas F. Green, Jr., argued persuasively that all rules of evidence are properly subject to the courts' rule-making power. 26 A.B.A.J. 482 (1940). Other pertinent articles include another Ross essay submitted by Charles A. Riedly, 26 A.B.A.J. 601 (1940); Morgan, "Rules of Evidence—Substantive or Procedural?," 10 Vanderbilt L. Rev. 467 (1957); and Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making," 55 Mich. L. Rev. 623 (1957).
>
> Arkansas has kept step with the progress made elsewhere. Our Constitution of 1874 confers upon the Supreme Court "a general superintending control over all inferior courts of law and equity." Art. 7, § 4. We note in passing that the Supreme Court of New Mexico relied on almost that identical language in the New Mexico constitution as authority for the court's action in adopting the Uniform Rules of Evidence as the law in that state. *Ammerman* v. *Hubbard Broadcasting, Inc.,* 89 N.M. 307,

551 P.2d 1354 (1976), where the court analyzed in depth its rule-making power.

In 1971, the Arkansas legislature used mandatory words in committing the regulation of criminal practice and procedure to this court:

> The Supreme Court of the State of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings in criminal cases.

Ark. Stat. Ann. § 22-242 (Supp. 1985). That action was not an improper delegation of legislative power; it merely recognized the court's inherent power. *Miller* v. *State,* 262 Ark. 223, 555 S.W.2d 563 (1977). The statutory language quoted above was repeated in a 1973 statute by which the legislature recognized the Supreme Court's power to prescribe rules with respect to procedure in civil cases. § 22-245. Under those statutes, we have adopted the Rule of Criminal Procedure and the Rules of Civil Procedure. More recently we adopted rules for the certification of court reporters. We are not the first court to adopt the Uniform Rules of Evidence by judicial action. That step has been taken not only in New Mexico, as mentioned earlier, but also in Florida, *In re Florida Evidence Code,* 372 So.2d 1369 (1979); in Montana, Montana Rules of Evidence, Ch. 10, Mont. Code Ann. (1984); and in Wisconsin, *In re Promulgation of Rules of Evidence,* 59 Wis. 2d R1-R377 (1973). The Supreme Court of the United States adopted the Federal Rules of Evidence pursuant to federal statutes quite similar to the 1971 and 1973 statutes enacted in Arkansas. See Reporter's Note, 409 U.S. 1132 (1972).

STEELE HAYS, Justice, dissenting. I find no error in the trial court permitting Dr. Charles Kemp to express an opinion as a medical expert that this child had been sexually abused. The trial judge told the doctor not to state that the boy was testifying truthfully, and not to rely solely on what the boy had told him. Working within those limits the doctor was asked if he could formulate an opinion as to sexual abuse with a reasonable degree

of medical certainty based on the history he took, the living circumstances, and physical findings; the doctor said he could and proceeded to state it.

The jurors doubtless recognized the doctor was merely stating an opinion and they were not bound by it in the slightest. The defense was free to show on cross-examination whether it was based on fact or on conjecture and that is how we ought to leave it, to the judgment of the trial court. We have recognized that the trial court is in the best position to weigh all the factors affecting the admissibility of evidence, *McQueen* v. *State,* 283 Ark. 231, 675 S.W.2d 358 (1984), and we should, I believe, be restrained in overruling those actions.

Ivan HALL, Mona HALL, Individually, and Ivan HALL, as Father and Next Friend of Troy HALL and Justin HALL *v.* Del LUNSFORD

87-52 732 S.W.2d 141

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Gordon L. Humphrey, Jr., Legal Services of Arkansas, for appellant.

Bob Keeter, for appellee.

TOM GLAZE, Justice. This case involves landlord/tenant issues and was initiated by the appellee filing an action for unpaid rent, damages to the rental house and monies owed on a propane bill. Appellants answered, denying the appellee's allegations and counterclaimed for damages, alleging appellee had breached an implied warranty of habitability. The trial judge granted the appellee's motion to dismiss appellants' cause of action based upon an implied warranty theory, holding no such action exists in Arkansas. The judge's order left intact appellants' wrongful eviction action as well as the appellee's claim for rents and other damages. Although the parties' other claims remain pending below, appellants filed this appeal from the trial court's order without first complying with Rule 54(b) of the Arkansas Rules of Civil Procedure. *See Sherman* v. *G & H Transportation, Inc.*, 287 Ark. 25, 695 S.W.2d 832 (1985). Therefore, we must dismiss the appeal.

Appellants suggest the trial court's order here was a final and appealable one under Ark. R. App. P. 2(a)2 and (a)4. To further support their argument, appellants stated in oral argument that they had agreed with appellee that, if appellants failed to prevail in this appeal on the implied warranty issue, the appellants would not contest the remaining matters and would agree to a consent order. In sum, the appellants' argument suggests this appeal could possibly resolve the parties' entire dispute below.

Of course, the question of whether a final order exists is a jurisdictional issue to be decided by the appellate court and, that being true, the parties here, by their agreement, cannot make that determination. It is a settled rule of law that whether a final order exists is a jurisdictional question which the appellate court has the duty and right to raise in order to avoid piecemeal litigation. *See Hyatt* v. *City of Bentonville,* 275 Ark. 210, 628 S.W.2d 326 (1982). In this respect, the trial court's order, for it to be final and appealable, must have dismissed the parties from the court, discharged them from the action or concluded their rights to the subject matter which is in controversy. *Id.* Clearly, the court's order failed to comply with these requirements, nor have the parties attempted to obtain the trial court's final determination of a claim or certification under Ark. R. Civ. P. 54(b).

Because there has been no final or otherwise appealable order entered, we lack jurisdiction to hear the appeal. *Budd* v. *Davis,* 289 Ark. 373, 711 S.W.2d 478 (1986).

Appeal dismissed.

Joyce Davis HARVEY *v.* Rod BELL

87-12 732 S.W.2d 138

Supreme Court of Arkansas
Opinion delivered July 6, 1987

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

Ball, Mourton & Adams, Ltd., by: *Stephen E. Adams*, for appellee.

TOM GLAZE, Justice. This case involves opposing parties who are real estate developers in Eureka Springs, and who are each developing subdivisions in close proximity of one another. Their conflict ensues from appellee's "hookup" to an existing sewer line located within a subdivision established by appellant. Appellant contends appellee's action constituted an intentional trespass and encroachment, which entitles appellant to punitive damages and a mandatory injunction, compelling removal of appellee's sewer connection and manhole from appellant's property. Appellee's primary response, contained in his cross-appeal, is that appellant's sewer line had been dedicated to the public and that appellee's sewer hookup was lawfully installed within that public easement.

At trial, the chancellor rejected the appellant's and appellee's contentions (offered again here on appeal) but instead, determined that appellee had performed the sewer construction mistakenly but in good faith, that appellant's request for removal of the sewer hookup would require a forfeiture and deny equity, and that appellant was entitled to no punitive damages but was entitled to a judgment in the sum of $1,000, representing the damage to the lot on which the construction took place. Because we find the law and evidence support appellee's argument that his sewer connection was constructed within a publicly-dedicated easement, we affirm the chancellor's decision, denying appellant's request for an injunction and punitive damages, but reverse

his award of compensatory damages to appellant.

Our decision largely turns on the plat filed by appellant when she developed the Breezy Point Subdivision in 1976. In that plat, appellant dedicated "all roads and easements for the use of the general public and for installation of utilities." While the plat depicted the only road, Breezy Point Drive, that ran through the entire subdivision containing nineteen tracts, it did not define or locate the dedicated easements. The sewer line easement in issue here runs north-south about eight feet inside the west boundary line of Breezy Point tracts 4A, 9, 10, 11 and 12, which tracts, themselves, are located on the west side of the subdivision. Breezy Point Drive fronts these five tracts along their east boundary lines and Dairy Hollow Road abuts them along their west boundary lines.

In 1983, appellee purchased property west of Dairy Hollow Road and Breezy Point Subdivision, and in 1984, he contacted officials with the City of Eureka Springs about his plans to build apartments on his newly-acquired land. After submitting his master plan for building the apartment units, the city officials gave appellee permission to connect to the north-south sewer line situated on the aforementioned five tracts in Breezy Point Subdivision. In making this connection, appellee constructed a sewer line from his land east, crossing Dairy Hollow Road and extending about eight feet onto tract 9, where the hookup was made and a manhole was installed. After learning of appellee's action, appellant filed this suit.

Appellant, by filing her plat on Breezy Point Subdivision, expressly dedicated that subdivision's utility easements for the use of the general public. Arkansas law concerning dedicated property is well-established, and in recounting that law in the early case of *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S.W.2d 395 (1909), the court said:

> An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable.

* * *

> The fact of dedication depends upon the intention of the owner to dedicate to the public, as clearly and unequivocally manifested. But it is held that "the intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts."

See also Poskey v. *Bradley,* 209 Ark. 93, 189 S.W.2d 806 (1945); *Holthoff* v. *Joyce,* 174 Ark. 248, 294 S.W.2d 1006 (1927) and *Hope* v. *Shiver,* 77 Ark. 177, 90 S.W.2d 1003 (1905).

Appellant argues the plat she filed failed to specifically show any defined utility easements. Her plat's omission of such specifications is not fatal to her dedication of such easements. She immediately caused the construction of the sewer easement in question here in 1976 or 1977, shortly after her filing the plat. *Cf. Bradley* v. *Arkansas Louisiana Gas Co.,* 280 Ark. 492, 659 S.W.2d 180 (1983) (wherein no specific location of right of way was given in grant; court held subject to accepted standards of reasonableness, grantee was free to locate pipe line, but once selected, the right of way becomes fixed). Also, the law of this state has been long established that an unbounded easement is a grant of a valid right of way and that the limits are to be determined by the lines of reasonable enjoyment. *Fulcher* v. *Dierks Lumber & Coal Co.,* 164 Ark. 261, 261 S.W.2d 645 (1924).

Appellant's own testimony reflects she intended the sewer line dedicated for public use, but wishes to limit its use to preclude appellee. Although she claimed she had never dedicated the sewer line to Eureka Springs, she conceded the line connected to the city's main sewer line, and if the line on her tracts clogged or broke, she expected the city to fix it. She also testified that another developer (who owned property outside and north of appellant's subdivision), and "maybe" the city, had previously connected onto this Breezy Point sewer line. Mr. Charles Fargo, an inspector for the city, testified that he knew the city had "some type of an easement" to access and fix the sewer line and that the city maintained that line. Fargo said that the city had tapped the sewer line for another apartment development near appellee's property.

Thus, the record clearly reflects the appellant dedicated the sewer-line easement to the public, and, since then, the city has

accepted, maintained and tapped into that line. While appellant now seeks to limit access to the line, she had provided no such restriction or reservation in the Breezy Point plat which was used to dedicate the subdivision's utility easements. The respective rights of the public and owner dedicating easements are subject to the following rule:

> Unless there are reservations, the general public, that is to say any and everyone, has the right to use dedicated property to the full extent to which such easements are commonly used; and the person making the dedication may not object to such use whether the public owns the fee or only a right of way. However, no right exists to impose on the property dedicated burdens in addition to those placed on the property by the dedicator himself.

26 C.J.S. *Dedication* § 54 (1956).

Here, the city directed the appellee to hookup to the Breezy Point sewer line on Tract 9 and that connection indisputedly is a use which could reasonably and commonly be expected. In addition, appellant related that she had never intended to build anything "over the sewer line." Appellant's objection is that she had not intended the city or appellee to cross onto her tracts to intersect the line—an intention that has not been substantiated by her actions. Appellant has, by manifested acts, expressed that she expects the city to maintain the sewer line and had, even before this suit was filed, permitted the city to hookup to the line for a development north of her subdivision. Such actions only support her earlier dedication of the utility easement contained in the plat that was filed establishing Breezy Point Subdivision.

In this *de novo* review, we conclude the appellant had dedicated the sewer line easement to the general public, and, therefore, the appellee's sewer hookup was lawful and within the lines of reasonable enjoyment and compatible with the public sewer line.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion literally adds insult to injury inasmuch as the opinion not only allows the appellee to appropriate the appellant's property for his own use, it also takes away the piddling sum awarded by the trial

court. I am beginning to understand the dialogue between Socrates and Thrasymachus, as recorded by Plato in his *Republic,* where it is stated: "Justice is in the interest of the stronger."

The city had no right to permit the appellee to go onto appellant's property and connect his apartment complex's sewer system onto the appellant's privately installed system. I make these statements because I do not find anywhere in the record where the site of the connection was within the dedicated right-of-way. Apparently the majority finds no such dedication either as the opinion resorts to finding an "implied dedication."

According to the plat introduced into this record, the appellee constructed a manhole *outside the dedicated right-of-way* and connected his sewer to a line on the appellant's property. In all probability appellant deliberately installed the sewer line on her own property in order to prevent such intrusions as in the case before us.

The fact that the location of this particular connection was more desirable and less expensive than another does not authorize the appellee to privately condemn appellant's property for his own personal gain. I am not a real estate expert, but I am able to read the plat of Breezy Point Subdivision, and if the exhibit correctly locates the connecting point of appellee's sewer line, there is no doubt that the appellee trespassed upon appellant's property and permanently damaged it. The appellant should at least be indemnified for this permanent trespass on her property.

Wayne DUNCAN *v.* STATE of Arkansas

731 S.W.2d 784

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Wayne Emmons, for appellant.

No response.

PER CURIAM. Petitioner, Wayne Duncan, by his attorney, Wayne Emmons, has filed a motion for rule on the clerk. His attorney admits he failed to tender the record within the time constraints required under Rule 5 of the Arkansas Rules of Appellate Procedure, due to oversight plus on-going negotiations with the prosecuting attorney. On June 5, 1987, the trial court held a hearing pursuant to our per curiam in this cause dated February 23, 1987.

Upon our review of counsel's motion with attached affidavit and the record submitted herein, we find that the error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See* per curiam dated February 5, 1979, 265 Ark. 964; *Terry* v. *State,* 272 Ark. 243 (1981).

A copy of this opinion will be forwarded to the Committee on Professional Conduct. *In re: Belated Appeals in Criminal Cases,* 265 Ark. 964 (1979).

DUDLEY, J., would deny.

Chester ROSS *v.* STATE of Arkansas

CR 87-65 732 S.W.2d 143

Supreme Court of Arkansas
Opinion delivered July 6, 1987

Appellant, pro se.

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

PER CURIAM. In 1986, the Court of Appeals affirmed the petitioner Chester Ross's convictions for several offenses committed in Poinsett County. *Ross* v. *State,* CACR 85-111, January 22,

1986. He now seeks postconviction relief pursuant to Criminal Procedure Rule 37.

The State in its response to the petition urges that the petition be dismissed because the petitioner filed a petition for writ of habeas corpus in federal district court before he filed the petition in this court. The federal district court considered the habeas petition on its merits and dismissed it. The State cites our opinion in *Barton* v. *State,* 278 Ark. 159, 644 S.W.2d 272 (1983), as precedent for our dismissing the Rule 37 petition. We do not find *Barton* to be controlling.

In *Barton* the petitioner pleaded guilty and subsequently sought to vacate the plea pursuant to Rule 37. The trial court denied the petition, but the petitioner did not pursue an appeal to this court. Rather, he filed a petition for writ of habeas corpus in federal court which was denied. He then requested from this court permission to proceed with a belated appeal of the denial of the Rule 37 petition. We denied the motion for belated appeal, concluding that the petitioner who was aware of his right to appeal had waived that right without good cause.

Here, the petitioner is not asking to file a belated petition for postconviction relief or asking for any other extraordinary consideration. The only difference between this petition and any other petition for postconviction relief filed in this court under Rule 37 is that the federal court acted on the merits of the habeas petition filed there without requiring the petitioner to exhaust state remedies first. The state concedes that none of the issues now raised in this court under Rule 37 was contained in the habeas petition, but even if the issues were the same, this court will not refuse to consider a timely Rule 37 petition simply because the federal court has already considered a petition for writ of habeas corpus.

The greatest part of the petition is taken up with allegations that petitioner was not offered effective assistance of counsel. He alleges that counsel: (1) did not adequately prepare the defense; (2) did not timely object to the introduction of tainted evidence; (3) did not offer adequate evidence to substantiate his innocence; (4) did not vigorously cross-examine witnesses and thus stripped him of the presumption of innocence; (5) did not present an effective opening statement or closing argument; (6) conducted

the voir dire such that the veniremen became aligned with the State; (7) only argued one issue on appeal; (8) failed to "draw out" that the guns were not taken from or near him upon arrest; (9) did not point out in cross-examination discrepancies in witnesses' testimony; (10) failed to request a change of venue after the court showed it was prejudiced; and (11) permitted the prosecutor to put words in the mouths of witnesses.

None of the enumerated allegations warrants an evidentiary hearing because petitioner does not provide any factual support for them. For instance, he does not explain to what evidence counsel should have objected, what meritorious issues were omitted on appeal, why a change of venue was needed or what conduct of counsel caused the veniremen to align themselves with the prosecution. This court has consistently held that the petitioner in a collateral attack on a judgment has the burden of providing facts to support his allegations. *Smith* v. *State,* 290 Ark. 90, 717 S.W.2d 193 (1986). Moreover, factual support must establish that the petitioner suffered actual prejudice from his attorney's conduct. *Campbell* v. *State,* 283 Ark. 12, 670 S.W.2d 800 (1984). The conclusory allegations raised by petitioner do not demonstrate that he was prejudiced by any act or omission of counsel. *See Jeffers* v. *State,* 280 Ark. 458, 658 S.W.2d 869 (1983). *See also Whisenhunt* v. *State,* 292 Ark. 33, 727 S.W.2d 847 (1987).

Petitioner makes one allegation of ineffective assistance of counsel for which he provides factual support but does not demonstrate that he suffered any prejudice arising from counsel's conduct. He contends that counsel should have objected when the trial judge answered three questions from the jury. He urges that the court should have simply reread the jury instructions to them and argues that the judge's answers amounted to an expression of opinion. The record does not support petitioner's conclusion.

When the jury indicated during deliberations that it had questions, the judge called it back in to open court. The jury's first question concerned the difference between concurrent and consecutive sentences. The court briefly explained the differences but correctly informed them that while a jury could make a recommendation on a concurrent or consecutive sentencing, the court was not bound by that recommendation.

The second question concerned the differences between the offenses of breaking or entering and theft of property and the sentence for each. In response, the trial court said:

> I am not sure I understand what your question is. Breaking and entering is a Class D felony under the Arkansas Criminal Code punishable by eight to fifteen years an an habitual criminal. Theft of property involving a firearm or more than $200 is a Class D felony punishable by ten to thirty years as an habitual. In other words, there is a distinction under the code of the classification or the seriousness of the crime between breaking and entering and theft.

The foreman responded, "I believe that takes care of it, sir." Petitioner who received the minimum sentence of eight years does not contend that the statement of the court was inaccurate, and there was no apparent prejudice to him.

The last question from the jury was, "Is it necessary for us to know how much time he spent originally before?" The court answered, "No, that is something that you should not concern yourselves with." The answer was again accurate.

There is a strong presumption that counsel was effective. *Strickland* v. *Washington,* 466 U.S. 668 (1984). To prove ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and that counsel made an error so serious that he was not functioning as the counsel "guaranteed" by the sixth amendment to the Constitution. Second, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial whose outcome cannot be relied on as just. Petitioner has offered nothing to demonstrate that counsel's failure to object to the judge's answers affected the outcome of his trial.

Petitioner next argues that the evidence is insufficient to support the judgments of conviction. Rule 37 provides a means to collaterally attack a judgment. Since the question of whether evidence was sufficient to sustain a judgment constitutes a direct challenge to the conviction, the question must be settled at trial and on the record on appeal. *Pride* v. *State,* 285 Ark. 89, 684 S.W.2d 819 (1985); *Swisher* v. *State,* 257 Ark. 24, 514 S.W.2d

218 (1974).

Finally, petitioner alleges that the dismissal of certain unnamed persons from the jury constituted "judicial prejudice." The meaning of the allegation is unclear, but in any event, the issue is one which could have been raised at trial. When an argument could have been made in the trial court, it is not a basis for collateral attack on the conviction, unless it presents a question so fundamental as to render the judgment of conviction absolutely void. *Swindler* v. *State,* 272 Ark. 340, 617 S.W.2d 1 (1981). Conclusory allegations are not sufficient to void a judgment.

Finally, petitioner requests a writ of certiorari to supplement the trial record with the complete voir dire of the jury and the opening statements and closing arguments. Since petitioner has not stated any ground for postconviction relief in this petition, there is no reason to supplement the record.

He also complains that he was not provided a copy of the "court records" and trial transcript. Before a motion for a transcript will be granted, the petitioner must show that he has some reasonably compelling need for specific documentary evidence to support the grounds raised in the petition. *Austin* v. *State,* 287 Ark. 256, 697 S.W.2d 914 (1985). Petitioner has not cited any compelling need for specific documentary evidence.

Petition denied.

[redacted]

[redacted]

[redacted]