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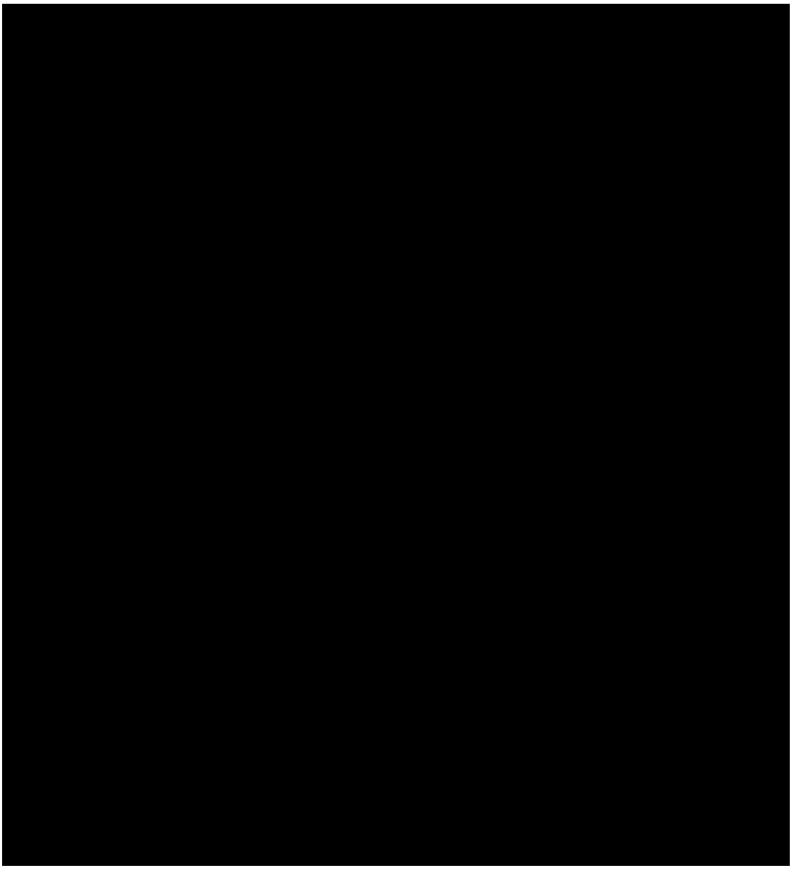

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MID-STATE CONSTRUCTION COMPANY, and Fidelity & Casualty Company of New York *v.* SECOND INJURY FUND, and Ray Davis

87-221 746 S.W.2d 539

Supreme Court of Arkansas
Opinion delivered March 14, 1988
[Rehearing denied April 4, 1988.]

Chester C. Lowe, Jr., for appellant.

E. Diane Graham, Second Injury Fund, for appellee.

Gregory Ferguson, for appellee Ray Davis.

JACK HOLT, JR., Chief Justice. In this case we granted a petition to review a decision of the court of appeals announced in an opinion not designated for publication, *Mid-State Construction Company* v. *Second Injury Fund*, CA 86-429 (Ark. App. July 15, 1987). The court of appeals affirmed an award made by the Workers' Compensation Commission against petitioners Mid-State Construction Company ("Mid-State") and its carrier Fidelity & Casualty Company of New York ("Fidelity") for a compensable injury suffered by an employee of Mid-State. Mid-State and Fidelity challenge the court of appeals' definition of the term "impairment" contained in Ark. Code Ann. § 11-9-525 (1987), formerly codified at Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985), as involving a "loss of earning capacity," which to the detriment of Mid-State and Fidelity had precluded liability as

to the Second Injury Fund (the "Fund").

We find that the court of appeals' definition of the term "impairment" as involving a loss of earning capacity is wrong for in the context of Second Injury Fund cases it seriously undermines the purpose of the Fund to encourage hiring of the handicapped. We therefore reverse and remand for proceedings consistent with this opinion.

The claimant, Ray Davis, sustained a compensable back injury in June 1981 while working for the petitioner employer, Mid-State. In 1953, prior to his employment with Mid-State, Davis had lost his right eye in an accident with a firearm. In 1959, Davis suffered a neck injury which necessitated surgery and resulted in a 10% anatomical impairment rating to the body as a whole.

Sometime in 1983, Davis sought compensation for permanent total disability based upon his condition resulting from the 1981 back injury, not the neck injury or loss of the eye. Davis testified that he suffered no disability from those earlier conditions either in combination with or independent from his 1981 injury. In proceedings not relevant to disposition of this review, it was determined both by the Commission and by the court of appeals that in light of Davis' prior conditions, the Second Injury Fund should be made a party.

The Commission subsequently affirmed the following findings of the Administrative Law Judge:

1. Claimant is entitled to an award of permanent partial disability benefits consistent with a rating of 75% to the body as a whole.
2. At the time of his June 4, 1981, compensable injury, claimant was not suffering from a disability in the compensation sense as contemplated by Ark. Stat. Ann. § 81-1313(i)(1) (Supp. 1985).
3. The Second Injury Fund has no liability, and all claims against the Fund are dismissed.

In the opinion now on review, the court of appeals affirmed the Commission's determination that the Second Injury Fund was not liable premised on the fact that there was no evidence that

Davis' condition prior to the 1981 injury involved a loss of earning capacity by which Davis could be said to have been suffering from either a disability or an impairment as those terms are defined in *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), and subsequent decisions of the court of appeals. In this, the court of appeals erred.

Section 11-9-525(a)(1) and (2) provides that the Fund is established and designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in the employer's employment. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.

Section 11-9-525(b)(3) and (4) then provides:

> If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment.
>
> After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined . . . the degree or percentage of [the] employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined . . . and the degree or percentage of disability or impairment which

> existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the Second Injury Trust Fund . . . .

It is clear that liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial *disability* or *impairment*. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. We emphasize that in the case at bar we are concerned only with the second hurdle as it relates to the term impairment.

■ In considering the question of Second Injury Fund liability, we first note that the claimant's former condition need not have met all elements of compensability under workers' compensation law. *Chicago Mill & Lumber Company* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980). Also, the former condition and the recent compensable injury cannot both have occurred in the course of the employee's employment with the same employer. *McCarver* v. *Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986).

■ The term disability has consistently been defined to involve loss of earning capacity; a definition which the petitioners do not challenge and which in the general context of workers' compensation law is set by statute and has been affirmed by this court. *See Rooney* v. *Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978) (citing Ark. Stat. Ann. § 81-1302(e) (Repl. 1976), now Ark. Code Ann. § 11-9-102(5) (1987)). That definition of disability has carried over into the context of Second Injury Fund cases. *See Second Injury Fund* v. *Fraser-Owens, Inc.*, 17 Ark. App. 58, 702 S.W.2d 828 (1986) (defining disability as "loss of earning capacity due to a work-related injury").

■ The statute governing the Second Injury Fund was amended by Act 290 of 1981, which added the words "or impairment" after the word "disability." In *Osage, supra*, the court of appeals construed the legislative intent behind Act 290 as a response to this court's holding in *Greer, supra*, and distinguished between disability and impairment in that the latter

would involve a "non-work related condition." However, the court went further and held that the impairment must have involved loss of earning capacity, as in cases involving a prior permanent partial disability. This was wrong. A claimant's non-work related condition suffered prior to the recent compensable injury need not have involved a loss of earning capacity.

In support of its position in *Osage*, the court of appeals relied upon its opinions in *Harrison Furniture* v. *Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981), and *Craighead Memorial Hospital* v. *Honeycutt*, 5 Ark. App. 90, 633 S.W.2d 53 (1982), which cases had in turn relied upon our decision in *Greer* and language from 2 Larson, *The Law of Workmen's Compensation*, § 59.32(c), at 10-434 — 437 (1987), to the effect that the prior impairment *had to have been independently producing some disability* prior to the second injury and afterwards. From this, it can be reasoned that if any existing impairments must have been producing some disability, and disability by definition involves loss of earning capacity, all impairments *a fortiori* must have involved loss of earning capacity. This reasoning, however, does not withstand close scrutiny.

The operative language in *Greer*, quoted from Larson's and reproduced by the court of appeals in *Osage*, reads as follows:

> [T]he prior impairment, although not actually a compensable disability, must have been of a physical quality capable of supporting an award *if the other elements of compensability were present*. [Emphasis ours.]

In other words, the claimant's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause for the impairment. It is the substantial nature of the impairment which is emphasized, and the elements of compensability, none of which may have existed as to the particular claimant, merely assist the fact finder in his determination as to whether the former condition was sufficient in degree to constitute an impairment qualifying the claimant as one of the "handicapped" for whose benefit the statute was enacted. *Cf. Harrison Furniture, supra*, 2 Ark. App. at 370 (discussing "disability").

Hence, before the fact finder may consider the final question of whether a claimant's former condition combined with a recent compensable injury to produce the current disability status, it must be determined whether the claimant's former condition constituted an "impairment," and the question which would be posed in each case is as follows:

> Is the physical quality of the claimant's former non-work related condition such that, were all other elements of compensability present, it would be capable of supporting an award?

As such, in determining what is an "impairment," loss of earning capacity becomes nothing more than one of the elements of compensability which, *though possibly lacking in the particular case*, constitutes a point of reference under the inquiry posed above.[1]

Any other conclusion flies in the face of Act 290 of 1981. To hold, as did the court of appeals, that there must in fact be evidence that the impairment involved a loss of earning capacity, mandates a prerequisite which (with the narrow exception that the impairment can be non-work related) directly conflicts with the language from Larson and our decision in *Greer* that the impairment need not have been a "compensable disability."

To hold otherwise would result in the unfounded and unintended situation that Second Injury Fund liability is denied in a case where a potential employee suffers from an impairment such as loss of one eye which would clearly be capable of supporting an award if the other elements of compensability were present, and the individual is subsequently hired and suffers a compensable injury, such as loss of the other eye, which combines with the former condition to produce the current disability status — complete blindness. Under the definition of impairment as set out in *Osage*, there is no Fund liability simply because the claimant was unable to demonstrate that the former condition had involved a loss of earning capacity.

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[1] To construe the clause beginning with "if" in the language quoted from Larson as meaning "provided that or so long as the other elements of compensability were present" would make the statement self-contradictory and lead to absurd results.

This would mean that the present employer and the carrier become potentially liable for the full disability. That result impermissibly distinguishes between two types of handicapped persons, contravenes the statutory scheme which makes employers liable only for the "degree or percentage of disability or impairment which would have resulted from the [recent compensable] injury had there been no preexisting disability or impairment," and defeats the purpose of the Fund to encourage the hiring of the handicapped.

For similar holdings in other jurisdictions, see *Gugelman* v. *Pressure Treated Timber Co.*, 102 Idaho 356, 630 P.2d 148 (1981) (citing case law from Alaska, California, Florida, New York, and Tennessee).

In connection with our discussion of the issue at hand, we point out that the court of appeals has defined the term "handicapped" as meaning "a physical disability that limits the capacity to work." *Fraser-Owens, supra.* To the extent the language "limits the capacity to work" can be considered as conflicting with our holding in this case, the definition cannot stand.

As to other issues before the court of appeals in the decision now on review, such as that dealing with the presumption of loss of earning capacity which attends scheduled injuries, we find it inappropriate to reach those issues in light of our holding in this case. To the extent that argument dealing with solvency of the Fund has any relevancy in this matter, we recognize that it has previously been emphasized that the Second Injury Fund is a limited and restricted fund and that the statute is to be strictly complied with, lest the Fund be exposed to liability in every workers' compensation case. *See, e.g., Fraser-Owens, supra; Second Injury Fund* v. *McCarver*, 17 Ark. App. 101, 704 S.W.2d 639, *aff'd*, 289 Ark. 509 (1986) (Newbern, J., dissenting — explaining *Arkansas Workmen's Compensation Commission* v. *Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950)). However, under the facts and issues before us, we find that any concern as to solvency of the Fund as it would be affected by our holding today is entirely premature.

Liability of the Fund was in the case at bar ruled out because there was no evidence that Davis' former condition involved a loss

of earning capacity, and therefore Davis did not meet the definition of disability or impairment. We have discarded the definitional prerequisite that an impairment involve a loss of earning capacity. As such, it remains to determine: (1) whether Davis' former neck injury and loss of the right eye constituted an "impairment" in that they were of a physical quality which, were the other elements of compensability present, would have been capable of supporting an award; and (2) whether, even if the first requirement is satisfied, Davis' former condition combined with his 1981 compensable injury to produce a disability greater than that which "would have resulted from the last injury, considered alone and of itself." Section 11-9-525(b)(3).

We find that this matter, on the record before us and in light of the grounds upon which the court of appeals based its holding in the decision on review, should be remanded to the Commission for appropriate proceedings consistent with this opinion and which resolve the issues as outlined.

Reversed and remanded.

Donna REED, d/b/a The Corner Deli, Inc. *v.*
ALCOHOLIC BEVERAGE CONTROL DIVISION

87-324 746 S.W.2d 368

Supreme Court of Arkansas
Opinion delivered March 14, 1988
[Rehearing denied April 18, 1988.]

Donna Reed, pro se.

Treeca J. Dyer, for the appellee.

DARRELL HICKMAN, Justice. The director of the Alcoholic Beverage Control Board suspended the appellant's liquor license for seven days and placed the permit on probation for 60 days. The board affirmed the director's decision. On appeal to the circuit court the board's decision was affirmed, and the appellant appeals to us *pro se*. She raises 11 arguments on appeal, most of which were not raised below. We will not address those arguments. *Arkansas Cemetery Board* v. *Memorial Properties, Inc.*, 272 Ark. 172, 616 S.W.2d 713 (1981).

The ABC director put out a pickup order on the appellant's permit because she had failed to pay a fine previously imposed. The order was served on July 7, 1986, and the permit was picked up on that date. The ABC received information that the appellant was selling beer even though her permit had been picked up. An agent from the ABC along with a detective from the Hot Springs Police Department and a confidential informant went to the liquor store to determine if the appellant was violating the law by selling liquor without a posted permit.

According to the police officer, the appellant's daughter, a 12 year old, sold a six-pack of beer to the informant. The director's order to suspend the license followed.

The main contention of the appellant is that this action is barred because other court proceedings exonerated the appellant. The appellant had been found not guilty in municipal court of contributing to the delinquency of a minor; the charge of selling liquor without a license was *nolle prossed*. The appellant cites no authority for her argument. *See Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977). However, the double jeopardy clause is limited to criminal actions and does not preclude separate civil proceedings arising out of the same incident. Evidence of acquittal of a criminal offense is not a bar to civil proceedings. *See* 21 Am. Jur. 2d *Criminal Law* § 251 (1981).

The appellant contends she was denied her constitutional rights because the board did not allow her to subpoena witnesses. The appellant was not denied the right to present or question any material witnesses. All of the witnesses the appellant asked to have subpoenaed were at the administrative hearing. The board did not permit the appellant to question the board's attorney. However, the appellant has not indicated what questions she would have asked the attorney, or how her testimony would be relevant. So no prejudice has been demonstrated. *Baldwin Company* v. *Ceco Corporation*, 280 Ark. 519, 659 S.W.2d 941 (1983).

The appellant also seems to contend that the wrong standard of review was applied in this case. This seems related to her double jeopardy argument. The board should conduct a *de novo* hearing, which it did; this decision was then appealed to the circuit court which approved the board's decision because it was

supported by substantial evidence. On appeal to us we also look to see if it is supported by substantial evidence. We do not substitute our judgment for that of the board. *Breed* v. *Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984).

In this case we find no basis to overturn the board's decision and therefore affirm the judgment of the circuit court.

Affirmed.

TONY AND SUSAN ALAMO FOUNDATION, INC. *v.* Charles D. RAGLAND, Commissioner, State of Arkansas, Department of Finance and Administration

87-119 746 S.W.2d 45

Supreme Court of Arkansas
Opinion delivered March 14, 1988
[Rehearing denied April 18, 1988.*]

*Purtle, J., would grant rehearing.

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

Timothy J. Leathers, Wayne Zakrzewski, Kelly S. Jennings, Ann Kell, Joe Morphew, Philip Raia, and *Robert Jones*, by: *John Theis*, for appellee.

DARRELL HICKMAN, Justice. This is a case involving the Arkansas sales tax. The appellant is a California based, nonprofit, charitable institution authorized to do business in Arkansas and, incidental to its charitable purpose, operates several businesses in Arkansas. Six of those businesses are the focus of this lawsuit: a restaurant, a grocery store, two service stations, a clothing store, and an auto repair shop. The legal question is whether meals, clothing, goods, and services furnished by these retail businesses to members, who are called associates, of the Alamo Foundation are sales under Arkansas law and subject to the sales tax. The chancery court held generally that the transactions were sales. However, the court held that meals prepared by the restaurant and delivered to the foundation associates at Dyer, Arkansas, were taxable at wholesale, rather than retail value. No penalty was assessed for nonpayment.

On appeal Alamo makes four arguments: (1) the transactions are not sales; (2) if they are, they are exempt from the sales tax; (3) the Gross Receipts Act, as applied to these transactions, violates the religion clauses of the federal and state constitutions; and (4) the statutory scheme of the act is discriminatory and therefore unconstitutional.

The state appeals from the chancellor's decision valuing some of the sales at wholesale rather than retail, and the failure to impose a penalty.

We affirm the decision that the transactions were sales; the Alamo Foundation is unable to claim any exemption, and the constitutional arguments are meritless. We reverse the chancellor's holding that some of the transactions should be taxed at wholesale value and affirm the chancellor's finding that no penalty should be assessed.

The facts are essentially undisputed. Alamo operates these businesses for profit and obtained a retail sales tax permit as required by Ark. Code Ann. § 26-52-201 (1987). From these businesses, the Alamo Foundation provides substantial goods and services to its "associates" and their families. "Associates" is a term applied by the Alamo Foundation to members who join or serve the foundation. The associates are also the "employees" of these businesses and other operations of the foundation. *See Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985). Associates receive no salaries. Instead, all or substantially all of their material needs are met by these businesses and other endeavors of the foundation. That includes the essentials of life: shelter, food, and clothing. For example, the Alamo Restaurant, during the audit period of September 1, 1977, through August 31, 1980, had total sales of approximately $2,300,000. Of that sum, $1,400,000 worth of food was sold to the general public; the balance of $956,345 was consumed by Alamo associates and their families. Some of this amount was transferred to foundation headquarters at Dyer for consumption there.

Alamo's first argument is that the transfer of meals, goods, and services to its associates is not a sale but merely a service to members of a religious organization; that is, if the foundation wants to give its goods and services to its people, it should not be taxed. We look to the definition of a sale in the Arkansas Gross

Receipts Act. Ark. Code Ann. § 26-52-103(a)(3)(A) (Supp. 1987) defines a sale as "the transfer of either the title or possession . . . for a valuable consideration of tangible personal property . . . ."

The question to us then is twofold: was there a transfer of title or possession of tangible personal property; if so, was valuable consideration given for the transfer? Undoubtedly, the transactions in question were transfers under this definition. The valuable consideration is the exchange of services and goods for the work of the associates.

We should mention that our decision in *Cook* v. *Southwest Hotels*, 213 Ark. 140, 209 S.W.2d 469 (1948), is not controlling. In *Southwest Hotels*, the hotel occasionally provided meals for some of its employees, and we held that these transfers were not sales. The difference is that the Alamo businesses make substantial and regular transfers to its associates. In fact, the Alamo restaurant prepared food specifically to feed its associates. It was not a matter of extra food or waste, as it is sometimes called in the restaurant business, being consumed by employees.

Were the sales exempt under the act as Alamo contends? One claiming an exemption has the burden of establishing it beyond a reasonable doubt; legislation is strictly construed against such exemptions. *See Heath* v. *Westark Poultry Processing Corp.*, 259 Ark. 141, 531 S.W.2d 953 (1975); *Hervey* v. *Tyson's Foods, Inc.*, 252 Ark. 703, 480 S.W.2d 592 (1972). The simple fact that the Alamo Foundation is a religious and charitable organization does not exempt it from paying sales tax. The foundation argues that it should be exempt under Ark. Code Ann. § 26-52-401(1) or (2) (Supp. 1987); however, none of these exemptions can be reasonably applied to Alamo's case. The act specifically provides that sales by churches and charitable organizations are generally exempt from sales tax *except* when these organizations are engaged in business for profit. Ark. Code Ann. § 26-52-401(1) or (2). Alamo does not dispute that it operates these businesses for profit.

The religion clauses of the United States and Arkansas Constitutions are the basis of the legal doctrine of separation of church and state, as well as the guarantee of the right to freely exercise one's religious beliefs without governmental interfer-

ence. Religious organizations entering the commercial and secular world necessarily do so with the understanding that they no longer enjoy the constitutional protection afforded religious organizations. There are no shields once they cross the line that separates church and state. They are no longer considered a church or religious organization, because they are not acting like one. In an analogous situation, we held that Harding College, a private religious college, was not exempt from real and personal property taxes on some businesses it operated. *Hilger* v. *Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960). In that case we said:

> The fact that the rents and revenues of a property owned by a charitable corporation are devoted to the purpose for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is *actually* and directly used for charitable purposes that the law exempts it from taxation. . . . "It is well settled that no one can exempt his property from taxation simply by the *exclusive use of the income* for public charity; for that is a matter which appeals to his own individual spirit of benevolence. It may be given today and withheld tomorrow. But a different rule prevails where the property is *directly* and *exclusively* used for that purpose."

The application of the sales tax to these transactions does not violate the religion clauses of the United States and Arkansas Constitutions. The Alamo Foundation elected to operate retail businesses for profit and, having made that choice, it must abide by the same rules under which all secular businesses operate, including taxation. *See United States* v. *Lee*, 455 U.S. 252 (1982).

Alamo finally argues that if it is not exempt from the sales tax, the statutory scheme of the Gross Receipts Act is discriminatory and therefore unconstitutional. This argument is based on the fact that the act specifically exempts several organizations such as the Boy Scouts, Girl Scouts, and 4-H Clubs from the sales tax. *See* Ark. Code Ann. § 26-52-401(7)-(10) (Supp. 1987). The foundation argues that by exempting some charitable organizations, but not its organization, the act is discriminating in violation of the equal protection and due process clauses of the

United States and Arkansas Constitutions.

However, the appellant's argument overlooks the fact that the Arkansas law exempts these organizations from paying the sales tax on their purchases, not from collecting it on their sales. The appellant's position in this case concerns sales it makes — not purchases, and so Alamo's argument cannot succeed under this statute. (In its reply brief, the appellant acknowledges this discrepancy but does not deal with it.)

We find no basis for the chancellor's decision that the meals transferred to the Alamo Foundation at Dyer should be taxed at wholesale value rather than retail value, and neither party has been able to produce any authority on the question. In *Republic Steel Corp.* v. *McCastlain, Comm'r*, 240 Ark. 979, 403 S.W.2d 90 (1966), a case involving the use tax, we stated that transfers within a company were taxable at the value of the finished product (retail), rather than at the value of the raw materials used to make the finished product (wholesale). Since the legislature has made no provision for different treatment, neither do we. All the transfers should be taxed at retail value. We find no reason to disturb the chancellor's finding that no penalty should be assessed.

Affirmed on direct appeal. Reversed in part and affirmed in part on cross-appeal.

PURTLE, J., dissents in part.

JOHN I. PURTLE, Justice, dissenting. Associates of the Foundation receive no salaries for the services they perform. They devote their full time to the Foundation, which, whether or not we approve of its beliefs and activities, is a religious organization. Most religious organizations would label such services "missionary work."

The food sales being taxed by the state are based on the food served without charge by the foundation restaurant to the associates and other needy persons. Admittedly, more food was cooked than was expected to be sold to the public. However, no money whatsoever was received by the Foundation for this food.

The food in this case was no more of a sale than the food served daily at the Union Rescue Mission. The transfer of

possession of personal property (i.e., food) is not the only necessary condition to find a sale has occurred. If it was, then the meals served at the Rescue Mission would also be subject to the sales tax. In order to tax a "transfer," valuable consideration must be given *in return for* the transfer. See Ark. Code Ann. § 26-52-103 (1987). In the present case the associates of the Foundation devoted their time to the Foundation because of their religious beliefs, not because they would receive free meals in return for their services.

In my opinion we are discriminating against the Alamo Foundation by imposing a tax on food "sales" which is not imposed upon other religious and charitable organizations. The tax should not be imposed on these "sales" by the Foundation solely because of disagreement with the manner in which the religious organization carries out its beliefs.

Willis WILLIAMS *v.* STATE of Arkansas

87-187 746 S.W.2d 44

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Leon N. Jamison, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. The only argument Willis Williams raises is that the trial court should have directed a verdict on his behalf; however, there was substantial evidence that Williams committed aggravated robbery and theft, and his conviction and sentence are affirmed.

Sue Willard, the pawn broker of a shop in Pine Bluff, testified that two men, Kenneth Kendyl and Willis Williams, were in her shop several times on the morning of August 4, 1986. First, Kendyl came into the shop and asked for the "car man" who worked next door; Williams was standing at the window but jerked back when she looked and saw him. Soon thereafter, Williams came in and asked for change for a dollar. Ms. Willard testified that this occurred between 11:00 and 11:30 a.m. Around noon Kendyl came in again and asked for the "car man" and then asked to see some jewelry. Ms. Willard handed him a necklace which he dropped; she bent over to pick it up and when she raised up, Kendyl had a .38 pistol in her face.

Another person came in and started pulling jewelry from the case. Ms. Willard was told if she looked up she would be killed; she did not look up.

Ms. Willard could not identify Williams as the other man, but others placed him at the store and connected him to the robbery. Mr. McCloud who also testified at the trial said that he saw Williams and another man leaving the shop around noon. George Parchell testified he saw Williams on the evening of the robbery and that Williams gave him a brown bag containing jewelry, which he asked Parchell to keep. Ricky Lynn Ray shared a cell with Williams and testified Williams told him that he, Williams, and his cousin Kendyl planned the robbery the night before.

At trial Williams denied that he robbed the store. He said that Kendyl robbed the store and then hid the jewelry in Williams' house.

On appeal we look to see if there is substantial evidence to support the verdict. *Williams* v. *State*, 281 Ark. 387, 663 S.W.2d 928 (1984). It was for the jury to decide who was telling the truth and what weight to give to the testimony of the

witnesses. We find that there was substantial evidence to support the verdict.

Affirmed.

Linda Carolina BRIMER *v.* STATE of Arkansas

CR 88-9 746 S.W.2d 370

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Donald R. Huffman, Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *David B. Eberhard*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. This case was certified to us by the Court of Appeals pursuant to Ark. Sup. Ct. Rule 29(1)(c) because it involves the interpretation of Ark. Code Ann. §§ 5-4-303 and 16-90-303 (1987). On November 4, 1986, the appellant entered a guilty plea to class C felony theft of property as defined in Ark. Code Ann. § 5-36-103 (1987). The trial court held a "sentencing and restitution hearing" on January 12, 1987, at which time the prosecutor recommended restitution in the amount of $138,384.65. The court found that restitution in the amount of $135,000.00 was appropriate. The court then sentenced her to six (6) years in prison, with two (2) years suspended on condition that she pay the sum of $135,000 at the rate of $200.00 per month, beginning sixty (60) days after her release from prison, and continuing for twelve years, at which time a civil judgment would be entered for the outstanding balance. There were other conditions attached to the suspended sentence.

For reversal the appellant argues that the trial court erred in: (1) ordering her to make restitution payments for a period in excess of the maximum time authorized by law; and (2) precluding the appellant from offering testimony to prove the amount for which she should be required to make restitution. We find the trial court committed reversible error in both respects and remand the case to the trial court.

The appellant was employed as a bookkeeper by Mary Morgan and her husband, Doctor Benjamin Spock, from 1982 until 1984. While so employed she misappropriated large sums of money. The parties never agreed as to the exact amount of money which the appellant misappropriated. At the hearing the prosecuting attorney recommended restitution in the amount of

$138,384.65. This amount included about $98,000.00 which the victims were fairly certain had been misappropriated. It also included $13,458 for her former employers' accountant's fees, travel expenses and attorney's fees.

During the restitution hearing the trial court refused to allow appellant's attorney to question one of the victims concerning the possibility of her own responsibility for a portion of the unaccounted funds. The appellant attempted to explain that she was not responsible for all of the funds which were alleged to be missing. The trial court ruled that any attempt by the appellant to show any amount of missing funds was due to the fault of someone other than herself was an attempt to try the issue of guilt, which had already been determined. She had pled guilty to theft of funds in an amount between $200.00 and $2,500.00. The appellant attempted to convince the court that proving she was not responsible for any amount over $2,500.00 should not be construed as an attempt to prove her innocence. However, the court rejected this contention and offered to let her withdraw her plea. Eventually she was allowed to give her own testimony concerning most of the funds. However, she was not permitted to cross-examine the victim about the missing funds which appellant sought to establish were in fact taken by this victim.

There are several different statutes involved in deciding this case. The first pertinent sections are Ark. Code Ann. § 5-36-103(a) (1987), which defines theft of property, and § 5-36-103(b)(2)(A), which classifies theft of property as a class C felony if:

> The value of the property is less than two thousand five hundred dollars ($2,500.00) but more than two hundred dollars ($200.00) . . . .

Ark. Code Ann. § 5-4-401 (1987) classifies and governs the terms of sentences. Section 401(a)(4) states:

> For a Class C felony, the sentence shall not be less than three (3) years nor more than ten (10) years . . . .

Ark. Code Ann. § 5-4-104(a), (d), and (e) (1987) govern the disposition and conditions of sentences as follows:

> (a) No defendant convicted of an offense shall be sen-

tenced otherwise than in accordance with this chapter.

. . .

(d) A defendant convicted of an offense other than a class Y felony, capital murder, treason, or murder in the second degree may be sentenced to any one or more of the following, except as precluded by subsection (e) of this section:

(1) Imprisonment as authorized by §§ 5-4-401—5-4-404; or

(2) Probation as authorized by §§ 5-4-301—5-4-311; or

(3) Pay a fine as authorized by §§ 5-4-201—5-4-203; or

(4) Make restitution; or

(5) Imprisonment and to pay a fine.

(e)(1) If a defendant pleads or is found guilty of an offense other than capital murder, treason, a Class Y felony, or murder in the second degree, the court may suspend imposition of sentence or place the defendant on probation, in accordance with §§ 5-4-301—5-4-311.

(2) If the offense is punishable by fine and imprisonment, the court may sentence the defendant to pay a fine and suspend imposition of the sentence as to imprisonment or place him on probation.

(3) The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment, but the court shall not sentence a defendant to imprisonment and place him on probation, except as authorized by § 5-4-304. [Arkansas Criminal Code of 1976, as amended in 1981 and 1983]

The exception under (e)(3) refers to Ark. Code Ann. § 5-4-304 (1987) which qualifies the type of confinement which can be given

as a condition of suspension or probation as follows:

> (a) If the court suspends the imposition of sentence on a defendant or places him on probation, it may require, as an additional condition of its order, that the defendant serve a period of confinement in the county jail, city jail, or other authorized local detention, correctional, or rehabilitating facility, at whatever time or consecutive or nonconsecutive intervals within the period of suspension or probation as the court shall direct.
>
> . . .
>
> (c) The period actually spent in confinement pursuant to this section shall not exceed ninety (90) days in case of a felony or thirty (30) days in the case of a misdemeanor. . . .

Ark. Code Ann. § 5-4-303 (1987) speaks to conditions of suspension or probation. In part this statute states:

> (a) If the court suspends imposition of sentence on a defendant or places him on probation, it shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life.
>
> . . .
>
> (c) If the court suspends imposition of sentence on a defendant or places him on probation, it may, as a condition of its order, require that the defendant:
>
> . . .
>
> (8) Make restitution or reparation to aggrieved parties, in an amount he can afford to pay, for the actual loss or damage caused by his offense . . . .
>
> . . .
>
> (f) If the court suspends the imposition of sentence on a defendant or places him on probation conditioned upon his making restitution or reparation under section (c)(8) of this section this court shall, by concurrence of the victim,

> defendant, and the prosecuting authority, determine the amount to be paid as restitution. The court shall further, after considering the assets, financial condition, and occupation of defendant, determine whether restitution shall be total or partial, [and] the amounts to be paid if by periodic payments . . . . If the court has suspended the imposition of the sentence or placed the defendant on probation conditioned upon him making restitution or reparation and the defendant has not satisfactorily made all his payments when the probation period has ended the court shall have the authority to continue to assert jurisdiction over the recalcitrant defendant and extend the probation period as it deems necessary or revoke the defendant's suspended sentence.

There is another law which addresses the limitations on suspension of imposition of sentence and probation. It is Ark. Code. Ann. § 5-4-306(a) (1987) which states:

> If the court suspends the imposition of sentence on a defendant or places him on probation, the period of suspension or probation shall be for a definite period of time not to exceed the maximum jail or prison sentence allowable for the offense charged. The court may discharge the defendant at any time.

We cannot ascertain from the record which statutes or sections thereof the court was proceeding under in pronouncing this sentence and the amount of restitution. The court was more likely operating under Ark. Code Ann. § 16-90-303 (1987) (Act 704 of 1981) when the order was entered. This section of the code states:

> (a) 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 or reparation 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.
>
> (b) The court shall specify the total amount to be compensated, the rate of compensation, if periodic payments are

> provided, and to whom it is to be paid. . . . .

However, the court's authority to set restitution is somewhat restricted by Ark. Code Ann. § 16-90-305 (1987) where it provides:

> (a) To enable the court or jury, as the case may be, to properly fix the amount of restitution or reparation, the prosecuting attorney shall, after appropriate investigation, recommend an amount that would make the victim whole with respect to the financial injury suffered, including value of property, loss or injury, cost of medical care, burial expense, if applicable, and all other measurable monetary damages directly related to the offense.
>
> (b) If the defendant disagrees with the recommendation of the prosecuting attorney he shall be entitled to introduce evidence in mitigation of the amount recommended.

Act 704 goes on to provide that the judgment granted in such cases shall become a judgment against the offender and have the same force and effect as any other civil judgment. Civil judgments are good for ten years and are renewable for successive periods of ten years, indefinitely. Such judgments are subject to levy, execution and garnishment at all times. Once the civil judgment for restitution is validly entered the victim has it within his power to pursue the collection of the judgment.

Still another statute may be considered in resentencing the defendant. Ark. Code Ann. § 16-93-401 (1987) provides that when justice and the public interest will be served the circuit court "may suspend the imposition of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best." However, the same section provides:

> (d) The period of probation, together with any extension thereof, shall not exceed five (5) years.

[redacted] Theft of property of a value between $200 and $2,500 is a class C felony and the range of punishment is three to ten years. There are several possible combinations of sentencing. These include suspension, probation, restitution, partial suspension, and partial probation, as well as the provisions of Act 378 of 1975 as amended (the Alternative Service Act). Ark. Code Ann.

§ 16-93-507 (1987). However, if the court suspends the imposition of sentence or places the person on probation, it must be for a specific period of time, not to exceed the maximum jail or prison time allowable for the offense charged. Ark. Code Ann. § 5-4-306(a) (1987). Clearly the sentence in this case extended beyond the ten year maximum sentence authorized as punishment for a class C felony. Therefore, the sentence was not one authorized by law and the case must be remanded to the trial court.

If the court suspends the imposition of sentence or places her on probation conditioned upon making restitution as provided by Ark. Code Ann. § 5-4-303, payment must be in an amount she can afford to pay and the victim, defendant and prosecuting attorney must agree on the amount. This section of the code appears to be aimed at allowing an accused to remain out of prison so long as satisfactory payments of restitution are being made. Immediate imprisonment would thwart such intent. Section 5-4-303 is available to the trial courts if deemed just and proper.

If the trial court sentences the defendant pursuant to Ark. Code Ann. § 16-90-303, the court shall, in addition to imposition of sentence, enter "a monetary judgment or reparation from the offender to the victim" that will totally or partially compensate the victim for his loss. In such case the prosecuting attorney, in order to enable the court or jury to fix the amount of restitution, "shall recommend an amount that would make the victim whole." Ark. Code Ann. § 16-90-305(a). However, if the defendant disagrees with this recommendation, she may "introduce evidence in mitigation of the amount recommended." Ark. Code Ann. § 16-90-305(b).

After release from prison an inmate is on probation under supervision of the Department of Correction. The distinction between suspension and probation is whether supervision is exercised. See commentary to § 5-4-303. That is the reason the statutes prohibit a court from sentencing a defendant to a term in prison and following it by a period of probation. Ark. Code Ann. § 5-4-104(e)(3) appears to allow a period of suspension following a term in prison.

Obviously the Arkansas criminal statutes relating to sentencing are complex, confusing and even contradictory. The

purpose of the 1976 Criminal Code was to eliminate archaic statutes, replace the profusion of overlapping statutes, and develop an evenhanded method of grading offenses. DiPippa, "Suspending Imposition and Execution of Criminal Sentences: A study of Judicial and Legislative Confusion," UALR Law Journal, Vol. 10, number 2, p. 367 (1987-88). One of the provisions of the 1976 Criminal Code (now codified as Ark. Code Ann. § 5-4-104) states: "No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter." It was a good start and easily understood. However, in due course, the General Assembly commenced patchwork modification of the code until it has reached the present state.

In his well reasoned article Professor DiPippa stated:

> The significant feature of the code's sentencing provisions is the effect of a judgment of conviction. Entry of a judgment of conviction forecloses some of the sentencing court's options. If a judgment of conviction is entered then the court may impose a fine or imprisonment or both. If a court does not enter a judgment of conviction then it may suspend imposition of a sentence or place the defendant on probation but not both. The rationale behind this scheme is to give the court a flexibility to deal with offenders in the most appropriate manner. An offender who can be fully rehabilitated by the threat of punishment may receive a suspended sentence and, upon successful completion of the period of suspension, not have a conviction on his record.

Confusion in sentencing has existed at least since our decision in *Culpepper* v. *State*, 268 Ark. 263, 595 S.W.2d 220 (1980). Although the code did not contain a section which expressly repealed the superseded statutes, the code purported to repeal "all laws and parts of laws in conflict with this Code." Some trial courts added to the confusion by continuing to follow the provisions under prior law. Moreover, the legislature has attempted to amend the code several times and has added to it on other occasions. We tried to explain the law in *Culpepper* and in *McGee* v. *State*, 271 Ark. 611, 609 S.W.2d 73 (1980). We did not clarify the law because it could not be done. However, many cases and statutes later, the sentencing provisions in Arkansas are even more complex and overlapping and are in great need of simplifica-

tion and clarification.

The judgment is reversed and remanded to the trial court with directions to resentence the defendant in accord with the various procedures available.

GLAZE, J., concurs.

HAYS, J., not participating.

Joe David THOMAS *v.* STATE of Arkansas

CR 87-188 746 S.W.2d 49

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Ford, Blair & Crabtree, by: *Terry Crabtree*, for appellant.

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

JOHN I. PURTLE, Justice. On June 26, 1987, a jury returned verdicts finding the appellant guilty of two counts of arson, four counts of burglary, and one count of theft of property. His punishment was assessed at twenty (20) years each on the arson counts and ten (10) years each on the other five convictions, the sentences to be served consecutively. His sole argument on appeal is that the evidence was insufficient to support the arson convictions. We agree, and reverse and dismiss the arson convictions. The judgment as to the other five convictions is affirmed.

The Siloam Springs Golf Course Clubhouse and the dwelling of Diana Lovett were burglarized in 1986, and shortly thereafter both buildings burned. The appellant was charged by information with the burglary and arson of both structures, two other counts of burglary, and one count of theft of property. After his arrest, the appellant made several incriminating statements. In this confession, the appellant indicated it was actually an accomplice who set the fires. The accomplice entered a guilty plea to charges of burning these properties.

The state did not call any witnesses, expert or otherwise, to establish that the fires were purposefully started. The owners of the properties testified at the trial, but they did not have any knowledge about the origin of the fires. The state clearly established that the appellant was involved in the two burglaries. It is also undisputed that both structures were destroyed by fire. However, there was no evidence introduced by the state other than the confession to indicate that the fire was of intentional origin.

■ We note initially that the appellant was charged in one of the arson counts with destroying or damaging a "vital public facility." Ark. Code Ann. § 5-38-301(a)(4) (1987). This facility was the Siloam Springs Golf Course Clubhouse. Ark. Code Ann. § 5-38-101(4) (1987) states: " 'Vital public-facility' means a facility maintained for use for public communications, transportation, supply of water, gas, or power; law enforcement; fire protection; civil or national defense; or other public service." A

clubhouse for a golf course does not meet any of the criteria set out above. Obviously, however, it is an "occupiable structure." See Ark. Code Ann. § 5-38-101(1) (1987).

The Attorney General concedes that the evidence is insufficient to support the arson convictions.

A confession of a defendant must be accompanied by other proof that the offense was committed. *McQueen* v. *State*, 283 Ark. 232, 675 S.W.2d 358 (1984). Ark. Code Ann. § 16-89-111(d) (1987) states: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed."

This statute was discussed in the context of arson in the case of *Johnson* v. *State*, 198 Ark. 871, 131 S.W.2d 934 (1939). Speaking for the court in *Johnson*, Chief Justice Griffin Smith stated the question: "Was there 'other proof' that the offense was committed? We do not think so. It is possible—perhaps probable—that the defendant's confession was true." He emphasized, however, that it is more important that the law's symmetry be preserved than that a criminal be punished in a particular case. The opinion further stated:

> There is no presumption that an unexplained fire is of incendiary origin. On the contrary, the presumption is that the fire was caused by an accident, or, at least, that it was not of criminal design. In a prosecution for arson, as in other criminal cases, it is incumbent on the state to prove the *corpus delicti*, and it is now recognized as the universal rule in the law of arson that in order to establish the *corpus delicti* it is not only necessary that the state prove the burning of the building [or property] in question, but the evidence must also disclose that it was burned by the wilful act of some person criminally responsible for his acts, and not by natural or accidental causes.
>
> . . .
>
> The "other evidence" . . . must be of that substantial character which, independent of a confession, . . . would suffice to overcome the legal presumption that the casualty was an accident, or that it resulted from natural events.

The presumption against arson and the statute requiring "other proof that the offense was committed" were recently addressed in *Boden* v. *State*, 270 Ark. 614, 605 S.W.2d 429 (1980). *Boden* cited *Johnson* with approval and reaffirmed the common law presumption against arson in the instance of an unexplained fire, and the requirement that evidence must be of a "substantial character" to rebut this presumption.

Stating the case most favorably to the state, as we are bound to do on appeal, the evidence demonstrates that the appellant confessed to the burglary and arson of the two buildings and that the buildings were destroyed by fire. However, there was no showing of the origin of the fires nor any evidence that they were intentionally set. Therefore, we must agree with the appellant that there was insufficient evidence to support the convictions on the two counts of arson.

The convictions for arson are reversed and dismissed. The judgments concerning the other convictions are affirmed.

HICKMAN and HAYS, JJ., concur.

REFCO, INC. *v.* HEINOLD COMMODITIES, INC.; John Collis and Wanda Collis, et al.

87-330 746 S.W.2d 375

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Friday, Eldredge & Clark, by: *Kevin A. Crass*, for appellant.

Stanley, Harrington & Watson, P.A., by: *Roy E. Stanley*, for appellees.

ROBERT H. DUDLEY, Justice. The creditor-plaintiff filed a foreclosure action against the debtors and named as additional defendants some other creditors who might have held inferior liens. One of the other creditors, Refco, appeals the trial court ruling that its judgment lien had expired. We affirm.

On February 27, 1984, appellant Refco obtained a judgment in a separate action in federal district court against one of the debtor-defendants who also was the titleholder of the Benton County real estate being foreclosed in this action. On November 28, 1984, the judgment was recorded in the Benton County judgment book. Ark. Stat. Ann. § 29-130 (Repl. 1979) provides that a judgment granted by a federal district court becomes a lien on real estate when a certified copy of the judgment is recorded in the permanent judgment records of the county where the judgment debtor owns real estate. Although amended in 1985, at all times material to this action Ark. Stat. Ann. § 29-131 (Repl. 1979) provided that a judgment lien would "continue in force for three [3] years from the date of the judgment and may be revived." Ark. Stat. Ann. § 29-602 (Repl. 1979) provides that a judgment lien may be revived by suing out a scire facias.

Refco did not sue out a scire facias within three years from the date of the judgment, and the trial court held that the judgment lien expired February 27, 1987, which was three years from the date of the judgment. Refco contends that the trial court's ruling was erroneous, arguing that the plaintiff filed her complaint in foreclosure on December 31, 1986, which was within the three years from the date of its judgment, and that this filing

of the complaint tolled the running of the limitation.

We reject appellant's argument. The time limit provided in § 29-131 is not a statute of limitation; it is a period of duration. The expiration of a statute of limitation extinguishes a right to enforce a remedy, but it does not extinguish the substantive right itself. *Boatman* v. *Dawkins*, 294 Ark. 421, 424; 743 S.W.2d 800, 802 (1988). The expiration of a statute of duration, however, extinguishes the substantive right itself. Under this statute of duration, § 29-131, a lien expired upon the passage of three years, unless it was revived under § 29-602. In the present case, the appellant did not comply with § 29-602, and the mere fact that it was made a party to a lawsuit during the existence of the lien did not in itself prevent the subsequent expiration of the lien.

While we have never before addressed the issue, a number of other courts have. For example, in *King* v. *Hayes*, 223 Mo. App. 139, 9 S.W.2d 538 (1928), the plaintiff obtained a judgment lien on April 12, 1921. Under Missouri law, the lien would have expired on April 19, 1924, unless it was revived in some manner. The plaintiff filed suit to foreclose on February 2, 1924 (i.e., within the three year time limit). The case was set for trial on April 8, 1924, but was continued at the defendant's request until April 25, 1924. On April 25, 1924, the defendants filed a motion for judgment on the pleadings, arguing that the plaintiff's lien had expired six days earlier. The lower court agreed, as did the appellate court. The appellate court held:

> It is true, as pointed out by plaintiff, that no execution could be issued on the judgment pleaded in plaintiff's petition after the death of D.T. Tucker, the judgment debtor. Alnutt v. Leper, 48 Mo. 319; Stoutimore v. Clark, 70 Mo. 471. The judgment, however, was a preferred claim against Tucker's estate, and, in addition to that remedy, plaintiff had the right to enforce the lien of the judgment against real estate by a bill in equity, which course plaintiff followed when this suit was instituted. Griswold v. Johnson, 22 Mo. App. 466.
>
> Such a suit, however, is not recognized by our statutes, and we are unable to find any authority for holding that the bringing of a suit of this character would take the

> place of a scire facias and thus keep the lien of the judgment in force. It is clear enough that the very foundation of plaintiff's suit was the uninterrupted continuance of his judgment lien. He knew, or should have known, that under the statute, heretofore referred to, his judgment lien would expire on the 19th day of April, 1924. The statute pointed the way, and the only way, as we understand its provisions, by which the lien of the judgment could be kept continuously in force. Bick v. Vaughn, 140 Mo. App. 595, 120 S.W. 618.
>
> The issuance of a writ of scire facias, directed to the heirs of D.T. Tucker, at any time before the 19th day of April, 1924, would have kept the lien of plaintiff's judgment alive. It was his duty, we think, to have protected his bill to enforce the judgment lien against the real estate in question by suing out a writ of scire facias before his lien expired, as provided by law.

Id. at 141-42, 9 S.W.2d at 540; *see also Rich* v. *Cooper*, 136 Neb. 463, 286 N.W. 383 (1939); *Ruth* v. *Wells*, 13 S.D. 482, 83 N.W. 568 (1900); 49 C.J.S. *Judgments* §§ 492-495, 510 (1947). We find that the Arkansas statutes should be interpreted similarly.

Affirmed.

SEVENPROP ASSOCIATES, A New York Limited Partnership *v.* Christine HARRISON

87-346 746 S.W.2d 51

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Moore, Moore-Hart & Barton, by: *Janet Moore-Hart*, for appellant.

Youngdahl & Youngdahl, P.A., by: *Thomas H. McGowan*, for appellee.

ROBERT H. DUDLEY, Justice. This appeal is dismissed because there is not yet a final judgment.

The plaintiff, Christine Harrison, filed a tort suit and asked for $150,000.00 in compensatory damages and $500,000.00 in punitive damages. Service was had on the defendant, Sevenprop Associates, a New York limited partnership, on January 20, 1987, and the defendant did not answer. A motion for a default judgment was filed and service on that motion was perfected. Shortly thereafter, on April 21, 1987, the trial court, without hearing any proof on damages, entered a default judgment on liability as well as for all damages asked. On July 2, 1987, the defendant filed a motion to set aside the entire default judgment. The trial court recognized that the amount of damages had not been admitted by the failure to answer, *see* ARCP Rule 8(d), and vacated that part of the default judgment which had awarded damages, but left standing the default as to liability. The order partially vacating the judgment was entered on July 20, 1987, which was within 90 days of the original judgment. *See* ARCP Rule 60(b). The defendant now seeks to appeal the trial court's refusal to set aside the default as to liability. We dismiss the appeal because the refusal to set aside a default judgment as to liability is not a final judgment as required for appeal. *See* Ark. R. App. P. 2. The issue of damages remains to be tried before there can be a final order.

We have frequently held that we will not decide the merits of an appeal when the order appealed from is not a final

order. *Tapp* v. *Fowler*, 288 Ark. 70, 702 S.W.2d 17 (1986); *Fratesi* v. *Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984); *Corning Bank* v. *Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984); *Heffner* v. *Harrod*, 278 Ark. 188, 644 S.W.2d 579 (1983); *McIlroy Bank & Trust* v. *Zuber*, 275 Ark. 345, 629 S.W.2d 304 (1982). In all of these cases we have stated that in order for a judgment to be appealable, it must dismiss the parties or conclude their rights to the subject matter in controversy. Here, the issue of damages remains to be decided.

The appellee did not raise this issue of appealability, but the issue is a jurisdictional one which we raise on our own in order to avoid piecemeal appeals. *Hyatt* v. *City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982).

Appeal dismissed.

David Allen LAWSON *v.* STATE of Arkansas

CR 87-197 746 S.W.2d 544

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Sherman & James, for appellant.

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

STEELE HAYS, Justice. The question is whether our DWI enhancement statute can be coupled with our general habitual offender statute for sentencing on the same offense.

Appellant, David Lawson was charged with driving while intoxicated, and on March 18, 1987 was tried by a jury and found guilty. At the time of trial Lawson had at least three prior DWI offenses within three years of the DWI for which he was charged, and at least four prior felony convictions not related to DWI. The exact numbers are not in issue.

The court allowed the jury to set Lawson's sentence by applying both the DWI sentencing enhancement scheme for a fourth offense, Ark. Code Ann. § 5-65-111 (1987) [Ark. Stat. Ann. § 75-2504 (Supp. 1985)] and our general habitual offender enhancement statute, Ark. Code Ann. § 5-4-501 [Ark. Stat. Ann. § 41-1001 (Supp. 1985)], resulting in a range from eight to twelve years. The jury sentenced Lawson to the maximum.

On appeal Lawson raises the single argument that it was error to sentence him by applying both the DWI enhancement statute and the general habitual offender enhancement statute. We agree.

Our habitual offender statute, Ark. Code Ann. § 5-4-501 (1987) provides:

> (b) 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, may be sentenced to an

extended term of imprisonment as follows:

* * *

> (b) For a conviction of an unclassified felony punishable by less than life imprisonment, not less than seven (7) years more than the minimum sentence for the unclassified offense nor more than twice the maximum sentence for the unclassified offense.

Our DWI enhancement statute, Ark. Code Ann. § 5-65-111 (1987) provides:

> (b) Any person who pleads guilty, nolo contendere, or is found guilty of violating § 5-65-103 shall be imprisoned:
>
> * * *
>
> (3) For at least one (1) year but not more than six (6) years for the fourth or subsequent offense occurring within three (3) years of the first offense and shall be guilty of a felony.

The first, second and third offenses under the DWI statutory scheme are only misdemeanors, but as can be seen, the fourth offense becomes a felony, and under the general habitual offender statute would be an unclassified felony.

Under the DWI enhancement provision the sentence range for a fourth or subsequent offense is one to six years. But when the DWI provision is joined with the habitual offender provision the range increases to eight to twelve years, as occurred in this case. Thus the issue is whether it is proper for a specific subsequent offense penalty enhancement statute to be stacked upon a general habitual criminal statute in sentencing for a single offense? And more narrowly, is it permissible to stack two such statutes when the conduct currently being punished—the offense which triggers application of the habitual criminal statute—is a misdemeanor that has been enhanced to a felony statute only by virtue of its repetition?

We have not yet addressed this issue directly. We dealt with another aspect of the problem in *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985), but that case is distinguishable. In

Peters, the defendant had three prior DWI's, misdemeanors, and was tried for his fourth. The trial court used the procedure for determining prior convictions which is provided for habitual offenders, Ark. Code Ann. § 5-4-502 (1987) [Ark. Stat. Ann. § 41-1005 (Supp. 1985)], i.e., after the jury found the defendant guilty, the judge heard evidence in chambers to determine the number of prior convictions and then instructed the jury what the range of sentencing should be. We said the habitual offender statute was inapplicable because that statute provides extended terms for those who have committed more than one but less than four felonies and in that case, the defendant had three previous convictions, all misdemeanors. We also held that the existence of three prior convictions constitutes an element of DWI fourth offense and therefore, that issue must be heard and decided by the jury. Here, unlike *Peters*, we are not dealing with the habitual offender statute on the basis of prior DWI misdemeanors, but with four felonies unrelated to DWI charges. Moreover, in *Peters* the application of both the habitual offender statute and the DWI enhancement statute was not the issue.

In surveying other jurisdictions, we find the weight of authority to be against the stacking of enhancement statutes. *Goodloe* v. *Parratt*, 605 F.2d 1041 (8th Cir. 1979); *State* v. *Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980); *State of New Mexico* v. *Keith*, 102 N.M. 462, 697 P.2d 145 (Ct. App. 1985). Of those states that have considered the question, a clear majority have not allowed stacking of enhancement statutes in this case. *State* v. *Chapman*, *supra*; *State* v. *Keith*, *supra; People* v. *Vernon*, 83 Misc. 2d 1025, 373 N.Y.S.2d 314 (N.Y. Sup. Ct. 1975); *Ex Parte Boatwright*, 216 Cal. 677, 15 P.2d 755 (1932); *State* v. *Smith*, 12 Ariz. 272, 569 P.2d 838 (Ct. App. 1970); *State* v. *Sander*, 337 So.2d 1131 (La. 1976). Only two states appear to have allowed it: *Commonwealth* v. *Grimes*, 698 S.W.2d 836 (Ky. 1985); *Woods* v. *State*, 471 N.E.2d 691 (Ind. 1984).

While not addressing the issue directly, several states have held that penalty enhancement provisions set forth for subsequent offenses of specific crimes must be used when applicable instead of sentencing under a habitual criminal act, implying that both statutes may not be used for double penalty enhancement in sentencing for one offense. *Lloyd* v. *State*, 139 Ga. App. 625, 229 S.E.2d 106 (1976); *State* v. *Loudermilk*, 221 Kan. 157, 557 P.2d

1229 (1976); *Willeford* v. *State*, 454 S.W.2d 745 (Tex. Cr. App. 1979); *Broome* v. *State*, 440 P.2d 761 (Okla. Crim. App. 1968).

All the state courts that have dealt with the issue have done so through statutory construction. When stacking is disallowed courts have employed various construction rules: statutes authorizing a more severe punishment are deemed highly penal and therefore must be strictly construed, *State of New Mexico* v. *Keith, supra*; ambiguities in the construction of criminal statutes are resolved in favor of the rule of lenity, *Busic* v. *U.S.*, 446 U.S. 408 (1980); *State of New Mexico* v. *Keith, supra*; a different meaning of the term "felony" is found in some specific enhancement statute from the same term as used in a general habitual statute, *State* v. *Chapman, supra; Goodloe, supra*; a more specific statute will be given precedence over a more general one, *Goodloe, supra; Busic, supra.*

In sum, other courts have generally concluded on the basis of legislative intent that stacking a specific and general statute is impermissible. Applying the same rules of construction, we believe our own legislature did not intend the two statutes to be used together.

We have long recognized the familiar principle that where a special act applies to a particular case, it excludes the operation of a general act upon the same subject. *Saline County* v. *Kinkead*, 84 Ark. 329, 106 S.W. 581 (1907); *Abbott* v. *Butler*, 211 Ark. 681, 201 S.W.2d 1001 (1947). We have also always recognized the principle that penal laws should be strictly construed, *State* v. *Simmons*, 117 Ark. 159, 174 S.W. 159 (1915); *Burrell* v. *State*, 203 Ark. 1124, 160 S.W.2d 218 (1942); that all doubts in construing a criminal statute must be resolved in favor of the defendant, *Stuart* v. *State*, 222 Ark. 102, 257 S.W.2d 372 (1953); *Knapp* v. *State*, 283 Ark. 346, 676 S.W.2d 729 (1984); and that courts are not permitted to enlarge the punishment provided by the legislature either directly or by implication. *Savage* v. *Hawkins*, 239 Ark. 658, 391 S.W.2d 18 (1965); *State* v. *Simmons, supra.*

By applying these rules of construction we are satisfied the legislature did not intend this specific criminal enhancement statute should be coupled with our general criminal enhancement statute for the resulting purpose of creating a greater sentence

than if either statute had been applied singly. This is in accord with our decision in *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1985), where we were faced with an analogous situation involving the same Omnibus DWI Act at issue in the case before us. We applied the principle of the specific act overriding a general act on the same subject and held that the specific mandatory sentencing requirement under that act, excluded the discretionary probation provided for in our general criminal statutes.

We make one further point, noting first that the felony in this case which would have triggered the general habitual offender statute was otherwise only a misdemeanor and became a felony simply by virtue of its repetition. Using a felony of this nature for habitual offender purposes is specifically condemned by the ABA:

> This edition also agrees with the prior edition that misdemeanors no matter how frequent, should not be treated as a substitute for one of the [predicate] felony convictions [used for habitual offender statutes]. Experience with habitual offender statutes indicates, above all else, the need for a "bright-line" standard by which to distinguish the dangerous offender from the mere nuisance to society. American Bar Association, Standards for Criminal Justice, Second Edition, Vol. III. (1980) § 18-4.4, p. 290.

For the reasons stated the judgment is reversed and the case is remanded with directions to reduce the sentence to six years, the maximum under the Omnibus DWI Act.

REVERSED and REMANDED.

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al.
v. Henry C. GRAY, Director, Arkansas Highway and
Transportation Department, et al.

85-101 746 S.W.2d 377

Supreme Court of Arkansas
Opinion delivered March 14, 1988
[Rehearing denied April 25, 1988.*]

*Hickman, J., would grant rehearing.

Mayer, Brown & Platt, by: *Andrew L. Frey, Kenneth S. Geller* and *Douglas K. Mayer*; Of Counsel: *William S. Busker*, Vice President, Legal Affairs, American Trucking Ass'n Inc.; *ATA Litigation Center*, by: *Daniel R. Barney* and *Robert Digges, Jr.*; *Wright, Lindsey & Jennings*, by: *Peter G. Kumpe* and *Gregory T. Jones*, for appellants American Trucking Ass'ns., Inc., et al., and the appellant class.

Jack, Lyon & Jones, P.A., by: *Eugene G. Sayre*, for appellant Leon Cawood d/b/a Leon Cawood Trucking.

Thomas B. Keys; Ted Goodloe, for Arkansas State Highway Commission; *Joe Morphew*, for Dep't of Finance and Administration; and *Steve Clark*, Att'y Gen., for appellees.

Rose Law Firm, A Professional Ass'n, Jerry C. Jones and *B. Michael Bennett*, for Intervenors O.K. Enterprises, Inc.; Peterson Industries, Inc.; and Pilgrims Pride Corp. d/b/a Arkansas Poultry Federation.

Collier, Shannon, Rill & Scott, by: *Jeffrey W. King, K. Michael O'Connell*, and *Daniel J. Harrold*; and *Smith, Smith, Nixon and Duke*, by: *Griffin Smith*, and *Griffin Smith, Jr.*, for Memorandum of Owner-Operators Independent Drivers Association of America, Inc., Adaline Munn and Jacqueline Davis in support of their motion to intervene and for certification of a subclass.

DAVID NEWBERN, Justice. The appellants, American Trucking Associations, Inc., et al., (ATA) challenged the constitutionality of Act 685 of 1983, which instituted the Arkansas Highway Use Equalization Tax (HUE Tax), as a violation of the Commerce Clause. The Pulaski County Chancery Court upheld the tax, and we affirmed. *American Trucking Associations, Inc.* v. *Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986). While the case was on certiorari, the Supreme Court decided *American Trucking Associations, Inc.* v. *Scheiner*, ___ U.S. ___, 107 S. Ct. 2829 (1987), invalidating a similar Pennsylvania tax. The Supreme Court vacated our judgment in the *Gray* case and remanded it to us for reconsideration in light of its decision in the *Scheiner* case. On August 14, 1987, the appellees, Henry C. Gray, Director of the Arkansas Highway and Transportation Department, et al., were ordered by Mr. Justice Blackmun, in his capacity as Circuit Justice, to place HUE tax receipts in an interest-bearing escrow. As directed, we now reconsider our prior decision of the case. In

addition to the basic question of the constitutionality of the act, we have been asked by the appellant class represented by ATA to decide whether and to what extent taxes collected pursuant to the act are to be refunded if the act is invalidated. We are also asked to determine whether counsel for ATA are entitled to court ordered attorney fees. We hold that the act is unconstitutional, the taxpayers represented by ATA are entitled to have refunded the taxes they have paid into the escrow fund, and the case is to be remanded to the chancery court to determine the manner of refund distribution and payment of attorney fees.

1. Unconstitutionality

We need not set out the details of the HUE tax, as that was done in our earlier opinion in this case. Nor do we need to detail the Pennsylvania tax, which was held invalid in the *Scheiner* case, and the somewhat persuasive arguments about how the HUE tax differs significantly from the Pennsylvania tax. The important point to recognize is that, in the *Scheiner* case, the Supreme Court applied its "internal consistency" test and said, in effect, that if a state's tax treats truckers whose bases of operations are outside the state differently from those based in the taxing state, it violates the Commerce Clause. It is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas, despite the option, which is available to all, to pay a flat rate or a per-mile rate or a trip rate. Therefore, we have little doubt that the Supreme Court would hold that the HUE tax is unconstitutional, and that is our holding.

2. Refunds

The HUE tax promulgated by Act 685 of 1983 was repealed by Act 3 of 1987 (2nd Ex. Sess.). Thus, our decision that the tax was unconstitutional is unimportant except to the extent it may call for refunds. From the time the tax was enacted until Mr. Justice Blackmun's order of August 14, 1987, some $159 million was collected and funneled to the state treasury. After the escrow account was created, some $4.9 million was collected and placed in the account. As the HUE tax was paid by all truckers, it is obvious that some of it was paid by those based in Arkansas. Some Arkansas HUE taxpayers have intervened on behalf of all such taxpayers contending, along with the appellees, that the non-Arkansas based truckers are not entitled to a refund. The Arkansas HUE taxpayers have also made it clear that they seek

no refund.

To hold the interstate truckers were entitled to all of their HUE tax payments, we would have to apply the *Scheiner* decision retroactively. It should only be applied prospectively. The Supreme Court, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), stated three factors to be considered in deciding to apply a judgment prospectively: (1) The judgment establishes a new rule of law overruling cases or arises from a case of first impression. (2) The purpose of the law will not be thwarted by prospective application. (3) A general balancing of the equities favors prospective application.

The first factor is aimed at whether it was reasonable for the state to have conducted itself as it did, given prior Supreme Court interpretations of the Commerce Clause. The *Scheiner* decision notes that several other states besides Arkansas and Pennsylvania had enacted so-called "flat" highway taxes. Justice O'Connor, in her dissenting opinion, noted that these taxes would probably be found violative of the Commerce Clause pursuant to the *Scheiner* holding. The *Scheiner* case was decided five justices to four with strong dissenting opinions. It declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co.* v. *Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), in which "flat" highway taxes were held not violative of the Commerce Clause. We relied on those cases, among others, in our original opinion in this case.

Second, the purpose of the law espoused in the *Scheiner* decision is to secure equal treatment for inter- and intrastate commerce and thus create an area of free trade among the states. No doubt prospective application will help achieve that goal. We agree with the Washington Supreme Court which recently found itself having to decide whether a Supreme Court decision would operate only prospectively with respect to invalidation of the Washington business and occupation tax. "It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler* [*Tyler Pipe Indus., Inc.* v. *Department*

of Rev., ___ U.S. ___, 107 S. Ct. 2810 (1987)]." *National Can Corp.* v. *Department of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286 (1988).

The equities favor disallowing refund of the tax money already paid into the state treasury. The interstate, non-Arkansas based truckers have used Arkansas highways with their heavy trucks to which the HUE tax applied since 1983. To refund everything paid by them since that date would allow them an unconscionable windfall far in excess of a fair recovery for the discrimination they may have suffered due to the tax. It would constitute unfair treatment of the Arkansas-based truckers who have paid the tax and seek no refund. It is fair, however, to allow to the ATA class a refund of the HUE tax money paid into escrow since August 14, 1987, when the appellees were put on notice that the ATA's claims were ones which were likely to succeed on their merits. The escrowed funds have not been placed in the state treasury and spent or, presumably, counted on for the future.

3. Attorney fees

We have consistently recognized that when a class action results in the recovery of a "common fund" it is proper to allow attorney fees to be paid from the fund. *Powell* v. *Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980); *Marlin* v. *Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1934).

Conclusion

The case is remanded to the chancellor to determine the means by which the payments made by non-Arkansas based truckers into the HUE tax escrow fund may be refunded pro rata after deduction of attorney fees to be determined by the chancellor.

Reversed and remanded.

HICKMAN, J., dissents in part.

DARRELL HICKMAN, Justice, dissenting. I agree with the court's decision except regarding the refund. If the United States Supreme Court's decision in *American Trucking Associations, Inc.* v. *Scheiner*, ___ U.S. ___, 107 S. Ct. 2829 (1987), is to be applied prospectively, then the refund should be made from the date of that decision, or certainly no later than when we were asked, in July 1987, to place the funds in escrow. Our decision

denying that request should have reflected that I did not participate.

Theodore Clark STEWART *v.* STATE of Arkansas

CR 87-159 746 S.W.2d 58

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Robert A. Newcomb, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda,* Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Theodore Clark Stewart, was convicted of burglary. He petitioned the court for a new trial, pursuant to Ark. R. Crim. P. 37, alleging that his lawyer had been ineffective. The court denied relief, without holding a hearing, on the ground that the petition stated only conclusions rather than facts in support of the allegation. As we believe the petition stated sufficient facts to warrant a hearing,

the case is reversed and remanded.

The petition alleged that Stewart's counsel interviewed none of the state's witnesses and did not file a discovery motion to obtain the statements of the state's witnesses from the police. It alleged that counsel also did not interview any of the defense witnesses whose names had been furnished to counsel. Specifically, Stewart contends his brothers would have testified he was with them at the time the burglary was committed. He also claims that had "hospital personnel" been called on his behalf, they, along with his family members, could have testified that injuries he received were "consistent with" a car injury instead of the injury he was alleged by the state to have received in the course of committing the burglary.

If a Rule 37 petition is meritless on its face, no evidentiary hearing need be held. *Smith* v. *State*, 290 Ark. 90, 717 S.W.2d 193 (1986). No hearing need be held if the trial court can determine conclusively from the record that the petitioner's contentions are meritless. *Morrison* v. *State*, 288 Ark. 636, 707 S.W.2d 323 (1986).

Although the petition did not give the names of the "medical personnel" who might have testified on Stewart's behalf, that may well have been because he did not know who they were and had no way to find out without counsel's assistance. We cannot tell from the record before us now. Stewart's description of the testimony they might have given is sufficient to make his allegation more than conclusory. Nor do we deem it fatal to the petition that Stewart did not give the names of his brothers. His statement that they would have given alibi testimony is also more than conclusory.

Although the trial judge entered a number of factual findings about the procedural history of the case, indicating that Stewart's present counsel had filed the petition and had done nothing about it for several years, he made no findings based on the record with respect to Stewart's allegations. It is reversible error for the trial judge to fail to make reference to the parts of the record relied upon to deny the petition, *Robinson* v. *State*, 264 Ark. 186, 569 S.W.2d 662 (1978), unless we can conclude from the record as a whole that the petition has no merit. *Rawls* v. *State*, 264 Ark. 954, 581 S.W.2d 311 (1979). We can reach no

such conclusion based on the record before us. The denial of the petition is reversed, and the case is remanded for a hearing pursuant to Ark. R. Crim. P. 37.3(c).

HICKMAN and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. This petition asserts that defense counsel did not interview any of the witnesses for the defense or the state and failed to interview Stewart's brothers who would have testified that Stewart was with them at the time of the burglary; that counsel failed to move to suppress an oral confession and failed to file a discovery motion to obtain statements given to the police. The petition alleged that members of Stewart's family and "hospital personnel" could have testified that Stewart's injuries were more consistent with "a car injury" than might have been incurred in a burglary.

The trial court ruled the petition contained only broad conclusory statements alluding to unnamed witnesses, with no attempt to show how the verdict might have been affected by these alleged failures. It held that Stewart had not shown how counsel's representation failed to measure up to an objective standard of reasonableness or that, but for the failures, the results would have been different.

Stewart has provided no facts beyond his own assertions that witnesses, not one of whom is identified, would in some undisclosed fashion, have aided his defense. This will not suffice. We have held repeatedly that allegations which are not supported by facts will not justify an evidentiary hearing on post-conviction relief. *Urquhart* v. *State*, 275 Ark. 486, 631 S.W.2d 304 (1982).

Even the assertions that Stewart's brothers would have testified that he was with them at the time of the burglary, or that hospital personnel could have testified that the injuries were more consistent with an automobile accident, do not suffice to reopen a trial three years after the fact. Such allegations must be established by clear and convincing proof *Blackmon* v. *State*, 274 Ark. 202, 623 S.W.2d 184 (1981), and, to be even minimally adequate, must provide specific and detailed information from which it can be reasonably inferred that material and credible evidence could have been presented at trial but was not, due to the professional lapses of defense counsel. *Smith* v. *State*, 290 Ark. 90, 717

S.W.2d 193 (1986); *Henry* v. *State*, 288 Ark. 592, 708 S.W.2d 88 (1986); *Walker* v. *State*, 277 Ark. 284, 641 S.W.2d 19 (1982). Moreover, counsel is presumed to have performed competently, and the petitioner must overcome this presumption in a convincing fashion. *Blackmon* v. *State, supra; Edwards* v. *United States*, 256 F.2d 707 (D.C. Cir. 1958), cert. denied, 358 U.S. 847 (1958).

The majority opinion observes that Stewart's failure to identify the hospital personnel may be due to his not knowing who they are. It is not just the absence of names, but the absence of any specific information from which to weigh the substance of the allegations. If Stewart's brothers were with him at the time of the burglary, as he alleges, is it too much to ask that he specify where they were and what they were doing and when they were together? Moreover, Stewart knows why he was hospitalized for treatment, and he knows what the state's proof was on that score. He can provide in his petition or by affidavits how the injury for which he was treated was inconsistent with the state's theory. If, as he suggests, his injury was incurred in an automobile accident, he can provide the specifics of that incident as to when and where it occurred and who else was involved. A copy of the police report would at least assure us that there was in fact an accident. He tells us nothing beyond a patently conclusory assertion.

Three cases in which we granted evidentiary hearings under A.R.Cr.P. Rule 37 illustrate the difference between allegations which make a substantial showing of merit and those which are merely conclusory:

1) In *Rasmussen* v. *State*, 280 Ark. 472, 658 S.W.2d 867 (1983), the petition alleged that after being sentenced to life imprisonment on a murder charge, Ms. Rasmussen learned that the prosecutor had offered to recommend a fifteen year sentence upon a plea of guilty. She contended her attorney never communicated the offer to her. Accompanying her petition was an affidavit of the deputy prosecutor attesting to the fact that the offer had, in fact, been made. We granted an evidentiary hearing to determine whether the offer had been rejected by counsel without consulting the accused.

2) In *Lascano* v. *State*, 282 Ark. 501, 669 S.W.2d 453 (1984), Ms. Lascano alleged that she declined to testify at her murder trial for fear of her own safety and the safety of her

daughter. She claimed to have been beaten by two men who were friends of a man with whom she was involved and whose wife she was accused of having killed. Her claims were supported by the affidavit of her attorney acknowledging his belief that she was in fact threatened as claimed which had prompted him to try to withdraw from the case when Ms. Lascano refused, for the reasons stated, to testify in her own behalf. We granted the hearing to determine whether counsel's failure to explain to the trial court these reasons for his attempted withdrawal operated to deprive the accused of effective assistance.

3) In *Owens* v. *State*, 292 Ark. 292, 729 S.W.2d 419 (1987), following a conviction for rape, Owens contended he told his attorney the first time they conferred at the county jail (a week before the trial) that J.C. Cash, Arthur Cash, Carl Stewart and Osie Jones were with him and the victim at the time of the alleged rape. He maintained the the prosecutrix, who was deaf, wrote him several notes offering to have sex in return for money and drugs. He contended that the victim was not held at the house against her will, as she claimed; in fact she and Osie Jones left at one point to get more beer; that in all some thirty to thirty-five notes were exchanged, some of which would have verified Owen's claims. Several of the notes were recovered and introduced but the bulk were missing, the house having been ransacked. Owens alleged that had counsel acted sooner in his defense the notes would have been retrieved. We granted an evidentiary hearing to determine whether the four men should have been subpoenaed and whether counsel had acted with diligence in preparing Owen's defense.

In all of the foregoing cases specific facts were provided in sufficient detail that the allegations could not be labelled conclusory. In contrast, Stewart has wholly failed to provide more than general allegations, unsupported by either details or independent verification of his own assertions. Petitioner's "witnesses" are not identified except in general, and no facts are provided as to when they were with the defendant, or where, or how such proof, if credible, would refute evidence offered by the state. *Lomax* v. *State*, 285 Ark. 440, 688 S.W.2d 283 (1985); *Rawls* v. *State*, 264 Ark. 954, 581 S.W.2d 311 (1979). Even if the petition were more specific in these details, it would still be necessary to show that the decision not to call such witnesses went beyond the scope of trial strategy. In *Tackett* v. *State*, 284 Ark.

211, 680 S.W.2d 696 (1984), we said:

> It is well settled that the decision to call certain witnesses and reject other potential witnesses is largely a matter of trial strategy. Counsel must use his own best judgment to determine which witnesses will be beneficial to his client. See *Hayes* v. *State*, 280 Ark. 509, 660 S.W.2d 648 (1983).

Finally, it is necessary that a Rule 37 petitioner show how he was prejudiced by the alleged omissions of defense counsel. *Urquhart* v. *State, supra; Blackmon* v. *State, supra.* Stewart has not even alleged that he was prejudiced, much less made any attempt to show that the outcome of his trial would probably have been different. *Strickland* v. *Washington*, 466 U.S. 686 (1984); *Mason* v. *State*, 289 Ark. 299, 712 S.W.2d 275 (1986). I would affirm the trial court.

HICKMAN, J., joins this dissent.

Ewing CLINE, et ux, et al. *v.* CITY OF CLARKSVILLE, et al.

87-286 746 S.W.2d 56

Supreme Court of Arkansas
Opinion delivered March 14, 1988

Gardner, Gardner & Hardin, by: *Richard E. Gardner, Jr.*, for appellants.

Woolsey & Wilson, by: *Bruce R. Wilson*, for appellees.

TOM GLAZE, Justice. This is a zoning case in which the appellants own houses on three adjacent lots located in an unnamed subdivision in the City of Clarksville. Appellants' lots are zoned residential and are on the east side of Edgewood Street. The property owners (hereafter petitioners) who live on the west side of Edgewood petitioned the Clarksville Planning and Zoning Commission to rezone their lots from residential to commercial. The Commission rejected the request, but in an appeal by the petitioners to the Clarksville City Council, the Council approved the rezoning by a three-to-two vote. The Johnson County Chancery Court subsequently upheld the Council's action which led to this appeal; the appellants contend the chancellor erred (1) in holding that the decision of the appellee was not arbitrary and

capricious; and (2) in deciding the appellants were not entitled to damages as a result of the rezoning. We affirm.

Our review in zoning cases is guided by the rule that the right to and responsibility for classifying the various areas in the city are with the zoning authorities, and their decision will only be disturbed if it is shown that they acted arbitrarily. *City of Little Rock* v. *Parker*, 241 Ark. 381, 407 S.W.2d 921 (1966). Stated in other terms, the chancellor is required to consider whether there was any reasonable basis upon which the city council could base its zoning ruling or decision. *City of Little Rock* v. *Breeding*, 273 Ark. 437, 619 S.W.2d 664 (1981). It is also settled law that there is a presumption that the city council acted in a reasonable manner when it either zoned or refused to zone the property, and the burden is on the landowner to show otherwise. *Id.*

Here, we believe the evidence supports the chancellor's decision to affirm the rezoning of the disputed area from residential to commercial, and while the choice was a difficult one, the decision of the Clarksville City Council, the appellee here, was informed and reasoned. The record reflects that the petitioners seeking commercial zoning were prompted to do so by parties who intend to build a new Wal-Mart store on the petitioners' lots. A small commercially-zoned area immediately west of the petitioners' lots includes an existing Wal-Mart store, a Piggly-Wiggly store, a Pizza Hut, a movie store and a car dealership. The appellants' view of that commercial area is obscured only by a narrow strip of trees that are on the backside of petitioners' properties. It is noteworthy that this commercial zone (and some of the businesses) existed when the appellants purchased their lots. Two additional business establishments are located on a lot which is situated at the corner of Edgewood and Sherwood Drive streets and which abuts the petitioners' properties at their north boundary. Unquestionably, the petitioners' lots are situated in an area of commercial development.

When deciding whether petitioners' properties should be zoned commercial, appellee also considered the areas east of Edgewood Street that surround appellants' lots. In doing so, appellee noted that appellants' lots were bounded on the east by county property, which is not zoned at all. Appellee also pointed

to a bowling alley establishment located north of appellants' properties and, south of their properties, to an industrial area situated just beyond a wooded tract. To get to the appellants' properties, a person must turn east off Highway 103 South onto Sherwood Drive and then turn south onto Edgewood, which is a dead-end street that separates the appellants' and petitioners' properties. In traveling this route, one passes a Chevrolet dealership, two retail stores and a commercially-zoned lot to the south, a branch bank, a movie store, a beauty shop, a bowling alley and another commercially-zoned lot to the north.

From the foregoing evidence, we can only conclude that the appellee had a reasonable basis upon which it rezoned the petitioners' properties to commercial. Commercial growth surrounded the properties to be rezoned, and the appellants were well aware of the potential growth west of them, since some businesses were already established when the appellants purchased their lots. Even before the petitioners sought commercial zoning of their lots, appellants knew that property to their north had been zoned commercial. They were also aware that two retail businesses were in operation across the street from appellants' properties at the corner of Edgewood and Sherwood Drive streets. These considerations, along with the fact that an industrial area was south of appellants' properties and an unzoned county property abutted their lots to the east, were sufficient to support the chancellor's finding that the appellee's rezoning of petitioners' lots was not arbitrary and capricious.

In their second point for reversal, appellants, citing *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles, California*, ___ U.S. ___, 107 S. Ct. 2378 (1987), argue that the appellee's decision to rezone the petitioners' properties actually resulted in an inverse condemnation of appellants' lots. Appellants urge us to remand this cause to the chancellor with directions to transfer the matter to the circuit court to determine the damages they sustained as a result of the appellee's actions. Appellants' argument is without merit.

Appellants' reliance on the holding in *First English* is misplaced. There, Los Angeles County adopted an ordinance prohibiting the construction or reconstruction of any building or structure in an interim flood protection area that included a

campground owned by the First English Evangelical Church of Glendale. The church claimed that the ordinance denied the church the use of its campground and sought damages in inverse condemnation for such loss of use. Here, unlike in *First English*, the appellee's zoning action regulated the petitioners' properties, not the appellants'. Although the appellants claim their lots have decreased in value because the appellee rezoned the petitioners' lots to commercial, appellants' use of their properties remains residential; therefore, their use of the properties has not been denied or taken from them.

The appellee, on the other hand, was required to give due consideration to the petitioners' request to rezone their lots which are bounded on two sides by commercially-zoned property. *See City of Helena* v. *Barrow*, 241 Ark. 654, 408 S.W.2d 867 (1966); *City of Little Rock* v. *McKenzie*, 239 Ark. 9, 386 S.W.2d 697 (1965). In considering and weighing all the factors that reflect the commercial nature and growth of the area that adjoins and surrounds the petitioners' properties, we must agree with the chancellor that the appellee's decision to rezone these properties to commercial was reasonable.

Michael O'ROURKE *v.* STATE of Arkansas

CR 87-17 746 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered March 14, 1988
[Rehearing denied April 18, 1988.]

[redacted]

[redacted]

[redacted]

Witt Law Firm, P.C., by: *Ernie Witt*, for appellant.

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

TOM GLAZE, Justice. Appellant was convicted of the capital murder of his parents, Beulah and Francis O'Rourke, which occurred in July, 1983. The trial was held in Yell County, Dardanelle District, and the jury imposed the death sentence. On appeal, appellant argues the trial court erred (1) in denying the appellant's motion for a change of venue; (2) in sentencing the appellant; and (3) in instructing the jury of pecuniary gain as an aggravating circumstance. Appellant also claims there was no substantial evidence to support the jury's finding of no mitigating factors in the sentencing phase. Having reviewed these points of error along with other objections as required by Rule 36.24, A.R.Cr.P. and Ark. Sup. Ct. R. 11(f), we find no reason to reverse and, therefore affirm the appellant's conviction.

Concerning his venue argument, appellant moved for a

change of venue under Ark. Code Ann. §§ 16-88-201 and -204 (1987), stating he could not receive a fair and impartial trial in either district of the county. To support his motion, he included the affidavits of Tommie Foster, Evelene Miller, and Connie Tillman, who were registered and qualified electors of the Dardanelle District of Yell County.[1]

In order to prevail on his motion, the appellant, under § 16-88-201, was required to show that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had in that *county*. *See also Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987); *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986). The affidavits submitted by the appellant failed to show such prejudice for two reasons: (1) the three affidavits failed to allege prejudice was county-wide, and instead stated that a fair trial could not be had in the Dardanelle district; and (2) while the affiants in their affidavits alleged prejudice in the Dardanelle district, their later testimony belied their earlier allegations of prejudice. For instance, Foster testified that she did not read the affidavit she previously had signed, and Miller and Tillman both testified that they did not have any opinion as to the prejudice in the community as a whole. In addition to the deficiencies found in appellant's proof offered in support of his motion, the state produced several witnesses who testified that the appellant could get a fair trial in Yell County.

The appellant also claims the seating of the jury itself illustrated prejudice against the appellant. Appellant points out that seventeen out of forty-nine prospective jurors (or approximately 34 percent) were excused by the court, because they had formed some opinion of the guilt or innocence of the appellant. However, appellant cites no cases, and we know of none, that have held that actual bias is said to exist in the community when a certain number of jurors are excused. While the judge found it necessary to excuse some of the prospective jurors, a jury of twelve was seated, and the jurors stated that they had not formed an opinion about the appellant's guilt or innocence and would

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[1] Originally, appellant included five affidavits, but he withdrew two of the affidavits at the hearing on the motion because they were from the Danville District of Yell County.

make their decisions based only on the evidence heard in the trial.

As we previously have stated, 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*, 290 Ark. 223, 718 S.W.2d 447. We conclude that the record before us reflects that a fair and impartial jury was seated by the trial judge, and the judge did not abuse his discretion in denying appellant's motion. *Richardson*, 292 Ark. at 141-42, 728 S.W.2d at 191.

Appellant next argues that the jury's finding that no mitigating factors existed was not supported by the evidence and that the jury should have at least found that the crime was committed while he was under extreme mental or emotional disturbance. We cannot agree. In *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980), we held that it is a matter of judgment whether the facts support the jury's findings as to the issues of aggravating and mitigating circumstances, but we will not substitute our judgment for that of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory requirements. In applying that rule to the facts here, we discover at trial the appellant and the state presented conflicting expert testimony concerning appellant's mental state. Dr. Stevens, a clinical psychologist, opined that appellant suffered an extreme mental disturbance at the time the crime was committed, but the state's psychiatrist, Dr. Kaczenski, testified that, while appellant may have suffered from a severe personality disorder when the crime was committed, appellant was not out of touch with reality and knew the difference between right and wrong. In hearing this conflicting testimony, the jurors could, and obviously did, reasonably believe that appellant was capable of appreciating the wrongfulness of his conduct and was capable of conforming that conduct to the requirements of the law. *Id.* at 357-58, 605 S.W.2d at 440.

Appellant further contends the trial court erred in denying appellant's motion to postpone the sentencing proceeding and to order an evaluation of appellant's fitness to be sentenced. This contention has no merit.

Appellant, on three occasions, had been committed to the

State Hospital for evaluation and on the first two occasions, he was found unfit to stand trial. On the third evaluation, he had recovered and was determined fit to proceed to trial. After having been found guilty of murder and having received the verdict which recommended the death penalty, the appellant requested that the trial court make another determination as to appellant's fitness to proceed with sentencing, but the court refused. Appellant argues that, under the mandatory language of Ark. Code Ann. § 16-86-111 (1987), the trial court was required to postpone sentencing and to commit the appellant for observation and testing upon the appellant's counsel's request for evaluation alleging that appellant was incapable of understanding the proceedings. Section 16-86-111 superseded Ark. Stat. Ann. § 43-1303 (Repl. 1977), but the terms and requirements in both statutes are almost identical. In sum, both provisions provide that a hearing shall be held in the manner provided by law in any case in which the insanity of the defendant is alleged as a ground for postponing or not carrying out the execution of any sentence imposed as a part of the defendant's conviction.

We construed § 43-1303 in our earlier holding of *Murphy* v. *State*, 248 Ark. 794, 454 S.W.2d 302 (1970), and held that when insanity is claimed as a ground for postponement of sentence, the trial court is empowered to exercise its discretion. In *Murphy*, we were unable to say the trial court abused its discretion in denying the defendant's oral motion that the proceedings be postponed until a further mental examination could be conducted. Upon our review of the record, we believe the same holding is required here. In making his oral motion, counsel for appellant simply claimed that appellant was unfit to be sentenced and failed to recite any facts or circumstances to support his claim. The state previously had presented evidence that refuted appellant's insanity defense, and, in fact, Dr. Kaczenski testified that appellant was capable of assisting his attorney, but chose not to do so. Kaczenski explained that appellant was trying to manipulate the system by refusing to consult with counsel; he related that the appellant told him, "I could help my attorney, but I've decided I'm not going to say a word. I'm just not."

Based on the record before us, we cannot agree with appellant's contention that the trial court was mandated to commit appellant for a fourth evaluation. To the contrary, the

trial judge was very much aware of appellant's insanity defense during the three-year period this matter was pending against the appellant, and the judge properly had the appellant evaluated each time the facts warranted it. Appellant's last request for an evaluation was supported by nothing more than a bare allegation; on the other hand, the actual facts reflect appellant's request was nothing more than a manipulative attempt to avoid the sentencing. We believe the trial court was correct in denying appellant's motion.

Finally, the appellant, relying on *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S. Ct. 546 (1985), asserts he was denied due process. He argues his death sentence is invalid because the trial court instructed the jury on pecuniary gain as an aggravating circumstance and this aggravating circumstance, in violation of the eighth amendment, improperly duplicated an element of the robbery/murder offense with which he was convicted. This double-counting issue in capital murder cases was resolved by the Supreme Court's recent decision in *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S. Ct. 546 (1988). There, Lowenfield was sentenced to death by the Louisiana state courts, and he contended his sentence violated the eighth amendment because the single aggravating circumstance found by the jury, and upheld by the Louisiana Supreme Court, merely duplicated an element of the underlying offense of first-degree murder of which he was convicted at the guilt stage. In sum, the jury convicted Lowenfield under Louisiana's first-degree-murder statute, finding he had the specific intent to kill or to inflict great bodily harm upon more than one person. This element found in convicting Lowenfield of first-degree murder was the same as the one the jury found as the sole aggravating circumstance, which under Louisiana law, allowed the jury to impose the death sentence.

The Supreme Court in *Lowenfield* stated that, to pass constitutional muster, a capital-sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. The Supreme Court, in upholding Louisiana's sentencing scheme, explained the constitutionally-required-narrowing procedure as follows:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: *The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.* See also *Zant, supra,* at 876, n. 13, discussing *Jurek* and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."
>
> Here, the *"narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally-required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.* (Emphasis added.)

Lowenfield, ___ U.S. at ___, 108 S.Ct. at 555.

As was the case with Louisiana's death-penalty law which was considered in *Lowenfield*, the duplicative nature of Arkansas's statutory aggravating circumstance did not render the appellant's sentencing infirm since the constitutionally-mandated-narrowing function was performed at the guilt phase. The Constitution does not require an additional aggravating circumstance finding at the penalty phase.

Because we find no reversible error, we affirm.

Dewey ALLEN, Cleve Bond, and J.C. Cole *v.* MALVERN COUNTRY CLUB, et al.

87-341 746 S.W.2d 546

Supreme Court of Arkansas
Opinion delivered March 21, 1988

[redacted]

James C. Cole, for appellants.

William C. Gilliam, for appellee Malvern Country Club; *Glover, Glover & Roberts*, by: *Mark Roberts*, for appellee Ed Howard; and *Chris E. Williams*, for appellee Clyde Gibbons.

JACK HOLT, JR., Chief Justice. Appellants Dewey Allen, Cleve Bond, and J. C. Cole, as members and purported stockholders of the appellee Malvern Country Club ("the Club"), brought suit to enforce stockholders' rights against the Club and certain of its officers. The Club, a non-profit corporation, filed an answer which in part relied on the defense that nonprofit corporations as a

matter of law cannot issue stock and therefore do not have stockholders. Appellants filed a motion to strike that defense from the Club's answer. The motion was denied by the chancellor on the grounds that the defense was valid despite provisions for the issuance of stock in the Club's articles of incorporation and notwithstanding that shares of stock had been sold. Appellants declined to proceed further, whereupon the court entered an order dismissing the suit. This appeal followed.

Appellants argue that: (1) a 1956 circuit court order approving incorporation of the Club pursuant to its articles of incorporation precluded relitigation of the issue of whether the Club had the power to issue stock; (2) principles of corporate law together with the statutes in effect in 1956 support the Club's issuance of stock; (3) application of the 1963 Arkansas Nonprofit Corporation Act, which mandates that non-profit corporations cannot issue shares of stock, deprives appellants of due process and the right to property, or, in the alternative, the Act contains a "grandfather" clause by which the Club's original articles of incorporation remain valid even under the new law; and (4) once the Club sold stock pursuant to the contractual relationship created by the articles of incorporation and accepted the proceeds of such sales from appellants and others similarly situated, the Club could not assert as a defense that its actions in that regard were ultra vires.

The posture of this case is such that we find appellants have elected to stand upon the single issue of whether the Malvern Country Club has "stockholders." Because we agree with the chancellor's conclusion that as a matter of law the Club could not issue stock and therefore did not have stockholders, dismissal of the suit was proper.

In 1956, a petition for incorporation was filed with the Hot Spring County Circuit Court requesting that the court enter an order incorporating the Malvern Country Club as a nonprofit corporation—the object and purpose of the Club being to promote the pleasure, recreation, and bodily health of its members by means of a private country club. The petition, which was approved by the circuit court, included a proposed constitution which contained articles of incorporation. In relevant part, article five provided:

> STOCK CERTIFICATE HOLDING MEMBERS: 200 members may be elected to membership in this class upon payment of a stockholder's fee of $350.00. This class will constitute the sole voting membership of the Club. A certificate of stock shall be issued, entitling the holder thereof to all the privileges of the Club upon such terms and conditions as may be prescribed by the By-Laws, and further entitling such members to share in the property or assets of the organization

The articles of incorporation also provided for additional classes of members not authorized to own stock. Appellant J. C. Cole was a charter member and stockholder. The remaining appellants were stockholders.

At the time of incorporation, Ark. Stat. Ann. §§ 64-1301—64-1308 (1947) governed benevolent associations including those organized for the promotion of bodily or mental health. Those sections have been superseded. Nonprofit corporations such as the Club are now governed by the 1963 Arkansas Nonprofit Corporation Act, which was originally codified at Ark. Stat. Ann. §§ 64-1901—64-1921 (Repl. 1980) but is now found at Ark. Code Ann. §§ 4-28-201—4-28-206 and 4-28-209—4-28-223 (1987).

Sometime in 1969, the Club filed its articles of incorporation with the Secretary of State pursuant to the new Act. In May 1987, allegedly without notice to several stockholders, certain amendments to the articles of incorporation were proposed and adopted by the Club's members, some of whom did not hold shares of stock. In June 1987, appellants filed the underlying action seeking a declaration of their rights as stockholders and for other relief.

A review of superseded sections 64-1303—64-1308 reveals absolutely no authority for the issuance of stock by nonprofit corporations such as the Club. Conversely, those statutes which at the time of the Club's incorporation were applicable to general business corporations specifically made provision for the issuance of stock. *See* Ark. Stat. Ann. §§ 64-201—64-224 (1947). In *Chamber of Commerce* v. *Barton*, 195 Ark. 274, 112 S.W.2d 619 (1937), this court emphasized that the statutes governing business corporations *do not* cover corporations organized under the

sections governing benevolent associations (nonprofit corporations), which we described as:

> organizations . . . formed without capital stock, [and] operated not for a livelihood and not for profits, but solely as a means of enhancing or promoting the general welfare in some particular kind or class of activity.

Turning to the 1963 Arkansas Nonprofit Corporations Act, section 4-28-203 provides that the Act shall be applicable to all corporations organized thereunder and all not-for-profit corporations formerly organized under any act repealed by the new law. Section 4-28-202 defines a not-for-profit corporation as one "no part of the income of which is distributable to its members, directors, or officers," and section 4-28-219 specifically sets out that shares of stock and dividends are prohibited.

> (a) A [nonprofit] corporation shall not have or issue shares of stock.
>
> (b) No dividend shall be paid and no part of the income of a [nonprofit] corporation shall be distributed to its members, directors or officers.

As such, neither under the statutes in effect at the time of incorporation nor under the statutes which now govern non-profit corporations is there any statutory authority for the issuance of stock by entities such as the appellee Club. That result is in accordance with the general rule that nonprofit corporations simply do not issue stock and therefore have members rather than stockholders. 18A Am. Jur. 2d *Corporations* § 184 (1985).

In an attempt to avoid the proscriptions of the 1963 Act, appellants call our attention to section 4-28-204, which provides:

> (a) The provisions of [this Act] shall in no way affect any nonprofit corporation chartered under and in accordance with the laws of this state existing prior to [the effective date of this Act].
>
> (b) Any such nonprofit corporation organized prior to [the effective date of this Act] and which has not filed a copy of the order or action whereby they were granted corporate status under the then existing law may file a certified copy of the order or action . . . with the Secretary

> of State of Arkansas, and such filing shall evidence the incorporation and shall entitle the organization to recognition of its legal status, the same as one formed under the provisions of this Act.

Appellants argue that under section 4-28-204(a), the Act would not affect corporations chartered under preexisting statutes. Subsection (a), however, explicitly requires that such corporations originally be chartered in accordance with the laws of this state prior to the effective date of the new Act. It is clear that the Club was not chartered in accordance with the statutes in effect at the time of incorporation as those statutes did not give entities such as the Club the power to issue stock. We reach the inescapable conclusion that there is not now, nor has there ever been, statutory authority for the issuance of stock by the appellee Club.

Corporations organized under the laws of this state are but creatures of the legislature, *Arkansas Stave Company* v. *State*, 94 Ark. 27, 125 S.W. 1001 (1910), and the legislative power to create corporations cannot be delegated to the courts. 18A Am. Jur. 2d *Corporations* § 151 (1985). Hence, we find no support for appellants' argument that court approval in 1956 of provisions for the issuance of stock in the Club's articles of incorporation, absent statutory authority therefor, in any way validated the stock.

The laws of a particular state which grant or restrict the powers of a corporation become part of the articles of incorporation or charter of that corporation. *Arkansas Stave Co., supra.* Anyone seeking to obtain the benefit of provisions within such articles of incorporation or charter takes that benefit with the burdens prescribed by the relevant statutes, and if there is a conflict between the charter and the statutes under which the charter was issued, the charter must yield to the laws of the state. 18A Am. Jur. 2d *Corporations* §§ 73—76 (1985).

Much like the power to create the corporate status, the power to create corporate stock is a legislative function which must be exercised for such stock to have legal existence; the power to issue stock must be specifically granted by the statutes under which a corporation is formed, which results in the rule that the power to issue stock is not held to be among the incidental or

implied powers of a corporation. 11 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5153 (rev. perm. ed. 1986); 18A Am. Jur. 2d *Corporations* § 485 (1985). As such, we reject appellants' contention that the issuance of stock was incidental to the purpose of the Club or that it was an implied power of the Club.

The inevitable consequence of the absence of specific statutory authorization for the issuance of stock is that, by law, such stock is void, confers no rights on the person to whom issued, and creates no liabilities; the rule of voidness applies to disputes between shareholders or between shareholders and the corporation. *Id.* at § 509; W. Fletcher, *supra*, at § 5167. In light of the foregoing, application of the 1963 Act can work no deprivation of property since the stock at issue was void from the outset. Equally, there is no merit to the argument that having accepted the benefits of the sale of its stock, the Club was precluded from asserting that its issuance of stock was ultra vires. The sale of stock was—like the stock itself—completely void for lack of statutory authority, not merely ultra vires, and no rights or liabilities were created thereby.

Finally, while the principle of estoppel might apply to corporations having the power and authority to issue stock pursuant to the laws of the state:

> where there is an inherent lack of power in the corporation to issue the stock, neither the corporation, nor the person to whom the stock is issued, is estopped to question its validity, since an estoppel cannot operate to create stock which, under the law, cannot have existence . . . .

W. Fletcher, *supra*, at § 5169.

Affirmed.

Ralph BUSSARD *v.* STATE of Arkansas

CR 87-170 747 S.W.2d 71

Supreme Court of Arkansas
Opinion delivered March 21, 1988

Larry Dean Kissee and *Carmack Sullivan*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Ralph Bussard, was found guilty of capital murder and attempted capital murder. He argues six points for reversal. We find that the trial court erred in not suppressing a custodial statement and reverse and remand for a new trial.

Arthur Garner was murdered at the Motorport Motel near Hardy, Arkansas, which he and his wife, Florence Garner, operated. She testified that they were asleep in their bedroom on August 28, 1981, when someone rang the office doorbell at approximately 1:00 or 2:00 a.m. Her husband put on his trousers, got his gun, and went to the front office, which was directly in front of the bedroom. When he opened the door, one of the men pushed him into the bedroom. Because it was dark, Mrs. Garner could not identify any of the men, but she did see a shadow at the bedroom door and a shiny object pointed at her and Mr. Garner. Subsequently, a number of shots were fired which wounded Mrs. Garner and killed her husband, who was found lying facedown near the bedroom doorway.

On August 29, 1981, Bussard was taken into custody by the Springfield, Missouri, police while he was being treated for a gunshot wound at a local hospital. He was later convicted of an unrelated crime in Missouri and imprisoned there. On September 1, 1981, he was charged by Arkansas felony information with the murder of Arthur Garner. A detainer was placed upon him, and he was returned to Arkansas on July 9, 1982.

I. CUSTODIAL STATEMENT

While imprisoned in Missouri, Bussard retained Mr. Charles LeCompte, an attorney, to defend him on the Arkansas charges. The record reflects that LeCompte participated in the initial stages of the Arkansas proceedings. On September 24,

1982, while he was incarcerated in the Sharp County Jail, Bussard requested to make a telephone call. He was taken to the private office of the sheriff, T.J. Powell. After Bussard had finished making his call, Powell initiated a conversation by asking Bussard if he was ready to talk about the crime. Bussard then signed a rights waiver form and a handwritten inculpatory statement prepared by Powell placing Bussard at the scene of the murder. Prior to trial, Bussard's present attorney, Larry Kissee, filed a motion to suppress the statement on the basis that it was taken in violation of the accused's fifth and sixth amendment rights. The trial court denied this motion. Bussard argues that this was prejudicial error. We agree.

The United States Supreme Court in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), established the following "bright line" rule based upon the fifth amendment privilege against compelled self-incrimination: An accused in custody, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *See also Smith* v. *Illinois*, 469 U.S. 91 (1984). We have followed *Edwards*. *Hughes* v. *State*, 289 Ark. 522, 712 S.W.2d 308 (1986); *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985); *Hickerson* v. *State*, 282 Ark. 217, 667 S.W.2d 654 (1984). The *Edwards* rule embodies two distinct inquiries. First, courts must determine whether the accused actually expressed his desire for or clearly asserted his right to counsel. *Smith* v. *Illinois, supra*. "Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only upon finding that he (a) initiated further discussions with police, and (b) knowingly and intelligently waived the right he had invoked." *Id.*

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), the Court applied *Edwards* in the sixth amendment context. In *Michigan* v. *Jackson*, respondent Jackson requested appointment of counsel at an arraignment. The next day, before Jackson had an opportunity to consult with his attorney, two police officers initiated a conversation with him to confirm that he was the person who shot the victim. After the officers read him his *Miranda* rights and he agreed to proceed without counsel, Jackson confessed. The Court,

in affirming the Michigan Supreme Court's suppression of the confession, held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."

After Bussard has been charged by felony information for the murder of Arthur Garner, he asserted his right to counsel by retaining Mr. LeCompte to defend him. Although Bussard did not claim this right at an arraignment or similar proceeding as in *Michigan* v. *Jackson*, we find the prophylactic rule of *Edwards* is equally applicable when an accused employs an attorney after formal charges have been brought against him, especially, as in this case, where the authorities were fully aware that the defendant was represented by counsel. The sixth amendment guarantees an accused, at least after the initiation of formal charges, the right to rely on counsel as a medium between himself and the state. *Michigan* v. *Jackson, supra.*

Inasmuch as the sheriff initiated communication or conversation with Bussard, Bussard's subsequent waiver was invalid and his confession inadmissible. We reverse and remand for a new trial.

II. ISSUES ON REMAND

Since we are remanding this case, we will address issues that the appellant has raised and are likely to arise on retrial.

A. PHYSICIAN-PATIENT PRIVILEGE

Bussard was admitted to a hospital in Springfield, Missouri, in the early morning hours of August 28, 1981, for a gunshot wound. In a surgical procedure, Dr. Ruff removed a bullet from Bussard's chest. This bullet was later identified at trial as having been fired from a pistol found under the body of Mr. Garner at the murder scene. Bussard contends that Dr. Ruff's testimony concerning the surgery and the bullet removed from his chest was inadmissible because of certain physician-patient privileges under Missouri statutes.

It is well settled that the admissibility of evidence is governed by the law of the forum state. *Brotherhood of R.R. Trainmen* v. *Long*, 186 Ark. 320, 53 S.W.2d 433 (1932); Leflar,

Conflict of Laws, § 177 (1938); Restatement of Conflicts of Law § 597 (1934). Thus, Arkansas, not Missouri, law applies. Ark. R. Evid. 503 provides in pertinent part as follows:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition . . . .

Since the doctor's testimony did not concern any communications made for the purpose of diagnosis or treatment of Bussard's physical, mental, or emotional condition, it is admissible on remand. *Baker v. State*, 276 Ark. 193, 637 S.W.2d 522 (1982).

B. PHOTOGRAPHS

Bussard argues that the trial court erred in admitting into evidence three inflammatory photographs taken at the crime scene. The first photograph in question depicts a small portion of the head of the victim, who is lying near the bedroom doorway. The second photograph shows the victim in the same position with multiple gunshot wounds. The third photograph, which is very similar to the second, portrays the victim as well as the pistol which was found under the victim's body.

A trial court's decision to admit photographs will not be set aside absent a manifest abuse of discretion. *Fitzhugh* v. *State*, 293 Ark. 315, 737 S.W.2d 638 (1987). Inflammatory photographs are admissible if they tend to shed light on any issue, enable a witness to better describe the objects portrayed, permit the jury to better understand testimony, or corroborate testimony. *Watson* v. *State*, 290 Ark. 484, 720 S.W.2d 310 (1987). All three photographs corroborate the testimony as to the physical layout of the murder scene. Additionally, the third photograph corroborates the testimony concerning the location of the gun found under the victim's body. Accordingly, the trial court did not abuse its discretion by admitting the photographs into evidence.

C. EVIDENCE OF PRIOR ACTS

Bussard contends that the trial court erred in allowing into evidence testimony of other alleged acts of misconduct in violation of Ark. R. Evid. 404(b). On direct examination, the

prosecutor asked witness Dorothy Hudson three times if Bussard had had a fight with an individual named "Baby Bob" the night before the murder. Hudson only answered the final question by stating, "I was told. . . ." Bussard's attorney objected on hearsay grounds. The trial court sustained the objection. Since no evidence of the fight was admitted into evidence, Bussard's contention has no merit.

Bussard further argues that the series of questions was highly prejudical and not relevant to the issues being tried. Since Bussard did not raise this issue below, we do not consider it. *Stephens* v. *State*, 293 Ark. 366, 738 S.W.2d 91 (1987).

D. HEARSAY TESTIMONY

Bussard argues that the trial court prejudicially erred by admitting into evidence hearsay testimony. While attempting to lay a foundation for the introduction of photographs depicting a bloodstained automobile, the prosecutor questioned Sheriff Powell concerning his knowledge of the vehicle shown in the photograph. The defense's objection on the ground of improper authenticity was overruled, and the photographs were admitted into evidence. Powell then testified that he had personally observed the vehicle in Greene County, Missouri, on October 2, 1981, and that the photograph revealed blood under the backseat of the Bussard vehicle. The court sustained defense counsel's objection to Powell's testimony that the vehicle was Bussard's. Thereafter, the prosecutor asked Powell, "Did you or another officer who shared information with you determine that was the Bussard vehicle?" Defense counsel objected because the question called for a hearsay response. The court overruled the objection, and Powell answered, "Detective Ivan Johnson with the Greene County Sheriff's Department".

Powell's testimony was hearsay and inadmissible. However, in this instance, any prejudice that may have resulted was cured by the subsequent testimony of Detective Johnson. Johnson identified the vehicle in the photographs in question as the one which Bussard had permitted him to search pursuant to a written waiver admitted into evidence in which Bussard stated that the vehicle belonged to him.

III. DISCOVERY

Bussard complains of the state's non-compliance with our rules of discovery. The issue may not arise again on retrial, but it is nevertheless of such concern that we find it necessary to comment.

Early in the proceedings, Bussard filed a motion requesting disclosure by the state of materials subject to discovery pursuant to Ark. R. Crim. P. 17.1. The state made partial disclosures, noting in part, that physical evidence could be inspected in the Sharp County Sheriff's Office and that photographs would be subject to viewing by contacting a state police investigator in Walnut Ridge (Lawrence County). Apparently this response proved unsatisfactory as Bussard filed another motion under Rule 17.1 asking for disclosure of specific materials and information, to which the state did not respond.

During the course of pretrial proceedings, Bussard's attorney advised the court:

> Judge, there's been absolutely no discovery made in this case at all. I've had to go to the Court files and gather everything I can.

The prosecutor responded:

> Well, it's all in there. I mean, we've made discovery in the past, Your Honor, in reply to—I can see why that's kind of a little odd, but we've had two different cases. We've had a jury trial in connection with Moss and every witness known to the State is listed in the Court files.

In reviewing the record, we surmise that the prosecutor is saying that the court files in the case of Moss, who was earlier tried and convicted in the same crime, contain all of the information and exhibits of the state's case against Bussard, and that all disclosable materials are in the court files to which the appellant has access (it is admitted by the state that portions of the Moss file are a matter of trial records which are on file in this court). Referring the appellant's attorney to other files relating to the state's case against the appellant, which were located in various places, may be slightly akin to what is sometimes referred to as an open file policy. Even so, we have not given carte blanche

approval of an open file policy as an acceptable substitute for disclosure. Merely because the prosecutor declares that the files in the case are open, it cannot be taken to mean that he has fulfilled his discovery obligations. *See Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). As so aptly stated by the court of appeals in *Dever* v. *State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985), "Arkansas Rules of Criminal Procedure, Rules 17.1 through 17.3, provide that the prosecution shall cooperate with the defense counsel and provide all discoverable material to the defense. Rule 17.3 requires the prosecutor to obtain any information held by other governmental agencies and provide it to the defense." As in *Dever*, the prosecutor's actions in this case fall woefully short of what is required by the rules of discovery. Since we reverse this case on other grounds, it is not necessary for us to decide whether the prosecutor's failure to comply with the rules of discovery would also require reversal.

Reversed and remanded.

HICKMAN, HAYS, and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Supreme Court adopted the bright-line principle that an accused who has invoked his right to have counsel present during custodial investigation, or has expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities unless the accused himself initiates further conversations with the police. That rule, though well settled, has little relevancy to this case, however, because there is no proof the appellant ever invoked either his right to remain silent or his right to have counsel present before being questioned. In fact the appellant did not even testify at the suppression hearing, nor, for that matter, at trial.

The only witness at the suppression hearing was Sheriff Powell, and while he was aware that Mr. Charles LeCompte, a Springfield, Missouri, attorney, represented appellant, there was no proof that Mr. LeCompte ever had communicated with Sheriff Powell, or instructed him not to speak to appellant except through him. Thus, if appellant's contention that his 5th and 6th amendment rights were violated is to prevail, it must be on the strength of *Michigan* v. *Jackson*, 475 U.S. 625, 106 S. Ct. 1404 (1986). The two cases are clearly distinguishable. In *Jackson*, the

accused expressly requested the appointment of counsel at his arraignment on a murder charge, which was attended by the police officers involved in the investigation. Notwithstanding that explicit request, two police officers visited the accused the next morning at the jail and, after explaining his Miranda rights, obtained a confession from him. The accused was not told that counsel had been appointed, although he had inquired several times since his arraignment. On these facts the Michigan Supreme Court concluded that the *Edwards* rule applies by analogy to those situations where the accused requests counsel *before the arraigning magistrate.* " 'The police cannot simply ignore a defendant's unequivocal request for counsel.' " *Michigan* v. *Jackson, supra*, citing *People* v. *Bladel*, 421 Mich. 39, 66-67, 365 N.W.2d 56, 69 (1984). The United States Supreme Court affirmed.

I have no quarrel with the decision in *Michigan* v. *Jackson*, but I think it is a mistake to extend it beyond its own facts and especially to the facts in this case. There is not the slightest indication that appellant had requested the appointment of counsel at arraignment, either here or in Missouri, or, for that matter how Mr. LeCompte came to represent him. Nor, as I have noted, is there any evidence that appellant informed anyone that he wanted to communicate only through LeCompte. The fact is Mr. LeCompte's status in the case is something of a mystery. He was shown as receiving several information copies of filings by the state, and he approved a joint order dealing with trial scheduling, but he filed no motions and, significantly, never entered his appearance on behalf of the appellant nor was he even shown to be counsel of record. Yet, on that very ambiguous status the majority holds that *Michigan* v. *Jackson* prevents appellant from being asked in what seems to have been a thoroughly casual way if he wanted to discuss the case. I suggest that today's decision will prove a boon to those who have easy access to the criminal defense bar but of little help to those who are dependent on court appointed counsel. 1 La Fave, Criminal Procedure, § 6.4(e) (1984). And *see Moran* v. *Burbine*, 475 U.S. 412, 106 S. Ct. 1135 (1986), holding that 6th amendment right to counsel attaches at the time formal charges are initiated and not by virtue of an existing attorney-client relationship. "[A]s a practical matter it makes little sense to say that the Sixth Amendment right to

counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation." *Id.*

There is another, equally compelling reason to affirm. Even if the admission of the statement could somehow be regarded as error, it is clear there was no prejudice in this case. Appellant's statement simply admitted he was with John Moss and R.B. Smith[1] at the time of the robbery. But that fact was wholly undisputed. The defense called no witnesses. Appellant's sister testified, with obvious reluctance, that immediately after the robbery Moss and Smith brought her brother to the trailer; that Smith was driving her brother's car, and both Moss and appellant were badly wounded. She nursed appellant until a rescue unit arrived to remove him to a Springfield, Missouri, hospital. Lucille Day and Bobby Day testified that appellant, John Moss and R.B. Smith were together on August 28, 1981, just before the robbery. They said the three men were in appellant's car. Photographs of blood stains in appellant's car were also introduced. A physician and a nurse from the Springfield hospital testified to having surgically removed a lead cartridge from appellant on August 30, 1981. The cartridge was shown to have come from the pistol the victim was using at the time of the robbery. Thus, the admission of a statement by appellant that he was with Moss and Smith at the time of the robbery in the face of proof which can only be characterized as overwhelming and undisputed, was plainly harmless. We have said that where the proof of guilt is overwhelming, the requirement of prejudicial error increases accordingly. *Novak* v. *State*, 287 Ark. 271, 698 S.W.2d 499 (1985). *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984) *cert. denied*, 470 U.S. 1085 (1985). Even constitutional errors may be cured where proof of guilt is so convincing that it can be said the error is harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 (1969); *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986).

The trial court should be affirmed.

HICKMAN, J., joins this dissent.

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[1] Moss and Smith had been previously convicted of the crime.

UNION NATIONAL BANK OF LITTLE ROCK
v. Joseph HOOPER, Boyd Bond, et al.

87-239 746 S.W.2d 550

Supreme Court of Arkansas
Opinion delivered March 21, 1988

Arnold, Grobmyer & Haley, A Professional Association, for appellant.

Wright, Lindsey & Jennings, for appellee/cross appellant

Frank J. Wills III.

ROBERT H. DUDLEY, Justice. In May of 1983, the appellant, Union National Bank of Little Rock, loaned $28,819.00 to the Hooper-Bond Company. The debt was evidenced by a promissory note and was secured by a lien on a 1983 BMW automobile. Joseph Hooper and Boyd Bond, principals in Hooper-Bond, personally guaranteed payment of the note. Twenty-eight months later, in September of 1985, Union and Hooper-Bond agreed to substitute a 1984 BMW automobile as security for the loan. In November of 1985, Union filed with the Revenue Division of the Department of Finance and Administration a certified copy of a motor vehicle security agreement evidencing its security interest in the 1984 automobile. This, however, was the only step taken by Union to perfect its lien. Nothing was done with the certificate of title or the manufacturer's statement of origin. Some months later, in April of 1986, the appellee, Frank J. Wills III, purchased the 1984 automobile from Hooper-Bond for $14,000.00. At the time, Joseph Hooper, on behalf of Hooper-Bond, represented to appellee Wills that a valid certificate of title had been issued and that the vehicle was free and clear of all liens. Appellee Wills made a $5,000.00 partial payment. Hooper delivered the automobile to Wills at that time and stated that he would execute a bill of sale and give it to Wills along with the certificate of title. Upon receiving title Wills was to pay the $9,000.00 remaining due. Hooper never provided appellee Wills with a bill of sale or a certificate of title.

In October of 1986, appellant Union filed suit against Hooper-Bond Company, Joseph Hooper, and Boyd Bond alleging default on the loan and asking for possession of the car, sale of the car in a commercially reasonable manner, and deficiency judgments. In January of 1987, Union filed an amended complaint stating that it had a perfected security interest in the 1984 automobile and adding appellee Wills as a defendant. Appellee Wills subsequently filed a counterclaim against Union asking for a declaratory judgment on the issue of Union's alleged security interest, and he also filed a cross-claim against Hooper-Bond, Hooper, and Bond for compensatory and punitive damages.

The trial court entered a declaratory judgment in favor of appellee Wills and against appellant Union, ruling that Union did

not have a perfected security interest in the automobile and that Wills was entitled to possession. We affirm that part of the holding.

In addition, the trial court entered a judgment against Hooper-Bond on Wills' cross-claim, awarding Wills $2,700.00 in compensatory damages and $2,700.00 in punitive damages. The trial court further ruled that Union was entitled to subrogation on the $9,000.00 which Wills still owed to Hooper-Bond on the purchase price of the 1984 automobile. The trial court held that Wills could offset against Hooper-Bond the $2,700.00 compensatory damages but not the $2,700.00 punitive damages. On cross-appeal, Wills asserts that the trial court erred in refusing to allow offset of the punitive damages. We agree.

Even though the cases against Joseph Hooper and Boyd Bond are stayed, and still pending, the trial court found that there is no just reason to delay entering the judgment. *See* ARCP Rule 54(b). Accordingly, the trial court's order is an appealable order.

On direct appeal, Union argues that the trial court erred in ruling that Union was not entitled to possession of the 1984 automobile. The ruling of the trial court was correct.

Arkansas law provides three alternative methods for perfecting security interests in automobiles:

ALTERNATIVE A: Ark. Stat. Ann. § 75-160(b) (Repl. 1979) provides:

> (b) There shall be deposited with the department a copy of the instrument creating and evidencing such lien or encumbrance, which instrument is executed in the manner required by the laws of this State with an attached or indorsed certificate of a notary public stating that the same is a true and correct copy of the original and accompanied by the certificate of title last issued for such vehicle.

Under this provision, Union would have had to file both a certified copy of the instrument creating and evidencing the lien and the vehicle's last certificate of title. Union did not meet these requirements because it did not file the vehicle's last certificate of title.

ALTERNATIVE B: Ark. Stat. Ann. § 75-160(d) (Repl.

1979) provides:

> (d) If the vehicle is of a type subject to registration hereunder but has not been registered and no certificate of title has been issued therefor then the certified copy of the instrument creating such lien or encumbrance shall be accompanied by an application by the owner in usual form for an original registration and issuance of an original certificate of title. In every such event such application shall be accompanied by the fee or fees as provided in this Act [§§ 75-101—75-191].

Under this provision Union would have had to file a certified copy of the instrument creating and evidencing the lien accompanied by an application by the owner for registration and certificate of title. Union did not meet these requirements because there was no accompanying application for registration.

ALTERNATIVE C: Ark. Stat. Ann. § 75-161(b) (Supp. 1985) provides:

> (b) A lienholder may, at his option, record the lien on the manufacturer's statement of origin or on an existing certificate of title and in addition file with the Revenue Division of the Department of Finance and Administration a certified copy of the instrument creating and evidencing such lien or encumbrance, and shall remit therewith a fee of one dollar ($1.00) for each lien to be filed, which such recording and filing shall constitute constructive notice of such lien against the vehicle described therein to creditors of the owner, subsequent purchasers and encumbrancers, except such liens as are by law dependent upon possession. A photocopy of the manufacturer's statement of origin or of such existing certificate of title or of ownership showing the lien recorded thereon and certified as a true and correct copy by the party recording the lien shall be sufficient evidence of such recording.

Under this provision, Union would have had to record the lien on the manufacturer's statement of origin or the certificate of title and to file a certified copy of the instrument creating and evidencing the lien. Union did not meet these requirements because it did not record the lien on the manufacturer's statement

of origin or the certificate of title.

Union simply did not comply with any of the alternative methods for perfecting security interests in automobiles. Union tacitly admits it did not perfect its security interest, and, even so, asks us to excuse it from statutory compliance because it did not have the certificate of title or the statement of origin. We decline the request, and, instead, follow the quoted statutes. Aside from our interest in following the statutes, we note that Union could have easily avoided its problem by refusing to agree to a substitution of collateral until the proper documents were provided.

Since Union did not comply with the perfection requirements of the quoted statutes, appellee Wills, the subsequent purchaser, is entitled to possession and ownership of the automobile under the following provisions of Ark. Stat. Ann. § 75-160(a) (Repl. 1979):

> *No* conditional sale contract, conditional lease, chattel mortgage, or other lien or *encumbrance* or title retention instrument *upon a vehicle, of a type subject to registration under the laws of this state* other than a lien dependent upon possession, *is valid as against* the creditors of an owner acquiring a lien by levy or attachment or *subsequent purchasers* or encumbrances *with or without notice until the requirements of this article [§§ 75-160, 75-161] have been complied with.* (Emphasis added.)

In *Commercial Credit Corp.* v. *National Credit Corp.*, 251 Ark. 702, 704, 473 S.W.2d 881, 884 (1971), we wrote, "[H]aving failed to comply with Ark. Stat. Ann. § 75-160 and § 75-161, National was not a lien encumbrancer insofar as third parties are concerned under the Motor Vehicle Registration requirements."

Similarly, in this case, Union was not a lien encumbrancer insofar as Wills, the subsequent purchaser, was concerned. Thus, the trial court correctly awarded possession and ownership to Wills.

On cross-appeal Wills alleges that the trial court erred in prohibiting him from offsetting the punitive award against the remaining balance due Hooper-Bond. The argument is meritorious. On the basis of a cross-claim against Hooper-Bond, Wills

was awarded $2,700.00 compensatory damages and $2,700.00 punitive damages. Subsequently, the trial court ruled that Union was entitled to subrogation on the amount Wills owed to Hooper-Bond on the 1984 automobile. The trial court allowed Wills to offset the compensatory but not the punitive damages.

In summary, on one hand, Wills owed $9,000.00 to Hooper-Bond on the purchase price of the car. On the other hand, Hooper-Bond owed Wills $5,400.00, the total of the compensatory and punitive awards. Thus, Wills is liable to Hooper-Bond for the difference, or $3,600.00. Wills owed nothing to Union. He only owed Hooper-Bond. Union can collect through subrogation only the amount Hooper-Bond was entitled to collect. The subrogee can have rights no greater than those of the subrogor. *Aetna Casualty & Sur. Co.* v. *Taylor*, 177 Ark. 181, 5 S.W.2d 929 (1928).

Affirmed on direct appeal. Reversed on cross appeal.

PURTLE and HAYS, JJ., affirm on direct appeal and affirm on cross appeal.

GLAZE, J., affirms on direct appeal and concurs on cross appeal.

TOM GLAZE, Justice, concurring. I fully agree with the majority's decision on direct appeal, but concur as to that portion of the court's holding on cross appeal allowing Wills to offset punitive damages against Union National Bank.

First, whether the circuit court had authority to subrogate Wills' promissory note (held by Hooper Bond Co.) to the Bank was never questioned below. Yet, from my examination of the documents, I find nothing that provides for subrogation rights. Because no contractual agreement provided the remedy of subrogation, the parties should have tried the issues of subrogation and set off in chancery instead of circuit court. In *Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.*, 108 Ark. 555, 158 S.W. 1082 (1913), the court explained that the doctrine of subrogation is a creature of equity, "having for its basis the doing of complete and perfect justice between the parties, without regard to form, and its purpose and object is the prevention of injustice." *See also Baker, Adm'r* v. *Leigh*, 238 Ark. 918, 385 S.W.2d 790 (1965); *Webster* v. *Horton*, 188 Ark. 610, 67 S.W.2d

200 (1934). Likewise, the doctrine of equitable setoff is available in equity although the remedy for setoff of contract and tort claims is also provided by statute. *See* Ark. Code Ann. § 16-63-206(a) (1987). In any event, the Bank waived all equitable remedies it may have had by failing to move that the subrogation matter be transferred to chancery court.

On appeal, this court then is left with the circuit court's subrogation of the Wills' note to the Bank as not having been challenged; however, Wills' attempt to setoff his punitive damages award against that note was argued below and is now in issue and must be decided.

As the majority court suggests, the subrogee (Bank) must operate under the same conditions *and limitations* as the creditor (Hooper Bond) whose rights he inherits. 83 C.J.S. *Subrogation* § 14 (1953). Although Union National Bank argues that it is being forced to pay for the wrong of another, it is not without recourse. In *Home Insurance Co.* v. *Lack*, 196 Ark. 888, 120 S.W.2d 355 (1938), citing from 60 C.J. 728, we said, "As a general rule any person who, pursuant to a legal obligation to do so, has paid even indirectly for a loss or injury resulting from the wrong or default of another, will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter." In sum, after the setoff is permitted against the Wills' note, the Bank will be entitled to seek its cause of action against Hooper Bond (and its principals) for the punitive damages which were awarded Wills on his fraud claim against Hooper Bond. In this respect, Hooper Bond and its principals are not absolved of their wrongdoing and remain liable for it.

Lloyd EARNEST and Janice Earnest *v.* JOE WORKS CHEVROLET, INC.

87-331 746 S.W.2d 554

Supreme Court of Arkansas
Opinion delivered March 21, 1988

[redacted]

Pat Hall, for appellants.

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

STEELE HAYS, Justice. The only question presented by this appeal is whether the trial court erred in granting a directed verdict for the defendant in a property damage claim.

In August, 1983, appellant Lloyd Earnest purchased a new 1983 truck from Joe Works Chevrolet. After a few weeks, appellant had trouble with the truck flooding and missing. Sometimes the car would surge forward while being driven and at times it failed to start. There was a problem of black smoke coming from the exhaust. Appellant took the truck to the dealer in January or February of 1984, and the fuel pump was replaced and the carburetor was rebuilt. Appellant returned the truck two more times complaining of similar problems. The truck operated satisfactorily briefly after the last repair, but then continued to have the same problems.

In May 1984, while appellant was driving the truck and attempting to pass another vehicle, the truck caught fire. Appellant first noticed smoke in the cab, and by the time he pulled over the truck was already on fire. The fire spread rapidly, totally destroying the truck, as well as damaging tools and articles in the truck.

Appellant brought this action against Joe Works, Inc. and Joe Works, individually, for breach of warranty, strict liability and negligence. Joe Works brought a third party complaint against General Motors. Before trial, the parties and issues were

narrowed. Summary judgment was granted Joe Works, individually, and the appellant announced he would proceed solely on the negligence claims. Appellant moved to eliminate all claims for damages to the vehicle and certain personal property for which appellant had been reimbursed by his insurance company. The remaining claim for damages was for personal property not covered by the insurance.

The case was tried to the court only on the theory of negligence for damage to personalty valued at $3300.00. At the close of the plaintiff's case, the defendant moved for a directed verdict. The trial court granted the motion, finding there was no substantial evidence to support a verdict in favor of the appellant. Appellant contends this was error, and the evidence was sufficient to sustain a verdict.[1]

To make a prima facie case of negligence, a plaintiff must show that he sustained damages, that the defendant was negligent and that such negligence was the proximate cause of the damages. To prove negligence, a party must show that the defendant has failed to use the care that a reasonably careful person would use under circumstances similar to those shown by the evidence in the case. AMI 301, 303; *Service Communications, Inc.* v. *Wells*, 279 Ark. 378, 651 S.W.2d 100 (1983).

Here, the only evidence of negligence was the testimony of the appellant. All the testimony established was that there were problems with the truck, and the appellee had failed to rectify those problems. Appellant offered no evidence that the failure was due to negligence, or that appellee had failed to use the care a reasonably careful person or mechanic would have used under the same circumstances. There was no testimony by another mechanic, or even by the appellant, as to the nature or manner of the repair. It would be entirely speculative to hold that there was negligence simply because a vehicle continued to have problems even after being worked on. It may well have been a problem which even the highest care might not have been able to correct.

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[1] The parties have stipulated that the appeal is only from the directed verdict in favor of Joe Works Chevrolet and is not an appeal from that portion of the judgment entered in favor of General Motors, which was dismissed as being moot.

While a party may establish negligence by direct or circumstantial evidence, he cannot rely upon inferences based on conjecture or speculation. An inference cannot be based upon evidence which merely raises a possibility. *Glidewell Adm.* v. *Arkhola Sand and Gravel Co.*, 212 Ark. 838, 208 S.W.2d 4 (1948). Appellant's proof provided nothing more than a mere possibility that appellee was negligent in its repair of appellant's truck.

Not only is proof of negligence lacking, similarly, there is insufficient proof that negligence was the proximate cause of appellant's damages. Proximate cause may also be proved by circumstantial evidence, if the facts are of such nature and so related to each other that conclusion therefrom may be fairly inferred. *St. Louis Southwestern Ry. Co.* v. *Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977). No such conclusion can be drawn from the evidence presented in this case. The appellant's entire case consisted of his own testimony and that of Kenneth Allen, an assistant fire chief. Allen arrived on the scene and had helped extinguish the fire. He made an investigation at the scene and wrote a report. It was apparently appellant's theory that because the carburetor had not been properly repaired, it backfired and ignited fuel that caused the fire. However, there is absolutely no evidence to show the origin of the fire was less than total speculation.

Appellant's evidence of proximate cause was that the truck had at times backfired. However, there was no testimony that the truck had backfired at the time of the fire. Moreover, the fire chief stated unequivocally that he could not determine the origin of the fire. He noted in his report that the origin of the fire was undetermined. He stated at one point, "I have no idea where the ignition source could have been." He thought it could have been the carburetor, or other things, but all were just possibilities. Given the evidence that was presented, any inference that the fire was caused by appellee's negligence is wholly speculative and no such conclusion can be reasonably inferred.

Adding to the weakness of appellant's case is the fact that the truck had been worked on by three other shops on several occasions, as well as by appellant himself. One firm, in fact, had worked on the truck just two days before the fire. This lack of

exclusive control of the instrumentality also precludes any application of the doctrine of res ipsa loquitur. *Megee* v. *Reed*, 252 Ark. 1016, 482 S.W.2d 832 (1972); *Dollins* v. *Hartford Acc. & Indem. Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972).

It is not entirely clear whether the alleged negligence involves the repair of the truck, or in supplying a defective product. Appellant's argument seemed to indicate negligent repair, however, assuming appellant is also including a claim of negligently supplying a defective product, it adds nothing to his case.

Negligence in supplying a defective product may be shown in several ways. *See* W. Prosser & W. Keeton, *The Law of Torts*, § 96 (1984) (negligence in creating or failing to discover a flaw, negligence in failing to warn or failing to adequately warn, negligence in the sale of a defectively designed product.) However, as with the negligent repair, there was no proof offered on the necessary elements of such a claim. Without detailing the various failures of appellant's proof, suffice it to say, that even if there were negligence of this sort, as with the negligent repair, there is no proof of proximate cause that the defective parts were the cause of appellant's harm. As was pointed out earlier, the cause of the fire was undeterminable.

Finding no error, we affirm.

Dale GRADY *v.* Norma GRADY

88-4 747 S.W.2d 77

Supreme Court of Arkansas
Opinion delivered March 21, 1988

[redacted]

W.J. Walker and *Frank A. Poff, Jr.*, for appellant.

No brief filed for appellee.

STEELE HAYS, Justice. In this divorce case, Dale Grady has appealed from the chancellor's award of alimony and child support. Dale and Norma Grady were married in 1964. Six children were born of the marriage, with ages ranging from 21 to 10. Four minor children are still living at home.

Dale Grady received his law license in 1974. He had been working as a staff attorney for the Department of Correction but resigned from that position on March 28, 1986, when his gross income was approximately $1900 a month. He testified that at the time he resigned he and his wife were having serious marital problems, and two months later he moved out of the home.

When Mr. Grady moved out he began a solo law practice. He estimated his net income at $81 a week by totaling his gross receipts from June through November, 1986, subtracting his overhead, and dividing the balance by the number of weeks. Two days before the divorce hearing in November 1986 Mr. Grady filed for bankruptcy.

Norma Grady was forty-five years old at the time of the divorce. She had an eighth grade education and no special training. She spent most of the marriage as a housewife caring for the children. In March 1986 she began work cleaning houses and earned from $16 to $45 per week depending on the work. She had no savings or other assets.

Mr. Grady filed for divorce in August 1986, and a hearing was held in November 1986. The court granted the divorce and awarded custody of the children to Mrs. Grady. Mr. Grady was ordered to pay $600 a month child support and 80% of the minor children's medical and dental bills. He was ordered to pay $10 a year alimony.

I

Child Support

Appellant first argues the chancellor erred in setting child support at $600 a month when his earnings at the time of the divorce were $81 a week. He contends the court cannot base a support award on a party's earning capacity when in fact his earnings at the time of the divorce are considerably less.

There are circumstances under which it is appropriate to order child support based on a party's earning *capacity* rather than on actual earnings. 27C C.J.S. *Divorce* § 675 (1986); Annot., *Child Support — Exclusiveness or Adequacy*, 27 A.L.R. 4th 864 (1984). While in some jurisdictions the consideration of earning capacity is provided for by statute, in at least one jurisdiction it is the law irrespective of statute. *See In Re Marriage of Johnson*, 134 Cal. App. 3d 159, 184 Cal. Rptr. 444 (1982).

Under our statutes, while there is no specific provision identifying "earning capacity" as an element to be considered when ordering child support, it is nevertheless recognized as a factor. In determining the amount to be contributed for child support, the chancellor should consider the needs of the children, the resources of each parent, their respective ages, earning capacities, incomes and indebtedness, state of health, future prospects and any other factors that will aid the court in reaching a just and equitable result. *Barnhard* v. *Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972); *Perkins* v. *Perkins*, 15 Ark. App. 82, 690 S.W.2d 356 (1985); *Guffin* v. *Guffin*, 5 Ark. App. 83, 632 S.W.2d 446 (1982).

We have not dealt with this issue directly, but elsewhere it has been held that the court may consider the fact that a supporting spouse voluntarily changes employment so as to lessen earning capacity and, in turn, the ability to pay alimony and child support. *Camp* v. *Camp*, 269 S.C. 173, 236 S.E.2d 814 (1977). A court may in proper circumstances impute an income to a spouse according to what could be earned by the use of his or her best efforts to gain employment suitable to his or her capabilities. *Klinge* v. *Klinge*, 554 S.W.2d 474 (Mo. 1977).

Determining the proper circumstances is sometimes difficult.

> On the one hand, the courts must not unduly interfere with the personal lives and career choices of individuals merely because they have been involved in a divorce. On the other hand, because there has been a divorce, the courts are thrust into the middle of the parties' personal lives in order to protect the interests of the minor children who are also unwilling participants in the divorce. [*Rohloff* v. *Rohloff*, 161 Mich. App. 766, 411 N.W.2d 484 (1987).]

A supporting spouse does not have total discretion in making decisions which affect the welfare of the family, if the minor children have to suffer at the expense of those decisions. *Id.* Deciding to establish one's own business or to voluntarily assume new financial burdens cannot take unquestioned precedence over the duty owed to a dependent family. *Weisner* v. *Weisner*, 238 Pa. Super. 488, 362 A.2d 287 (1976); *Henderson* v. *Lekvold*, 95 N.M. 288, 621 P.2d 505 (1980); *Klinge* v. *Klinge, supra; Rohloff* v. *Rohloff, supra.*

This is not to say there are not situations where an income reduction is reasonable and justifiable under particular circumstances. *See, e.g., Roberts* v. *Bockin*, 315 Pa. Super. 52, 461 A.2d 630 (1983); *Shaffran* v. *Shaffran*, 217 Pa. Super. Ct. 856, 270 A.2d 251 (1970). But the court must judge the facts and circumstances of each case and when under appropriate circumstances an income based on earning capacity is attributed to a spouse, the reviewing court will not find error.

The amount of child support to be awarded, if any, rests in the discretion of the court granting the divorce and is to be determined from the situation of the parties. *Perkins* v. *Perkins*, *supra*; Ark. Code Ann. § 9-12-312 (1987); [Ark. Stat. Ann. § 34-1211 (Supp. 1985)]. The chancellor's finding will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Mitchell* v. *Mitchell*, 2 Ark. App. 75, 616 S.W.2d 753 (1981).

Here, appellant resigned from a job that was providing support for his family. No explanation was offered, nor any reason given to justify the drastic change in circumstances. The

order for child support was made effective beginning the month after the hearing. The chancellor found appellant was a licensed attorney and had been employed in that capacity since 1974, that he was in good health and had the capability of earning sufficient income to pay $600 a month child support. The chancellor did not, however, find that appellant's reasons for leaving gainful employment were proper and not to evade his responsibilities. For that reason we remand to permit the record to be amplified on that point, as well as on the current financial status of the parties.

II

Alimony

Since we are remanding we will discuss the remaining issue for the guidance of the litigants and the chancellor. Mr. Grady contends the alimony award of $10 per year was error, because it allowed the court to "reserve jurisdiction" and defer a decision on alimony to a later time. He relies on *Ford* v. *Ford*, 272 Ark. 506, 616 S.W.2d 3 (1981). In *Ford* the chancellor made no alimony award but stated in the decree that he "declined to award alimony, but retained jurisdiction for the purpose of awarding alimony in the future should the needs of the defendant require modification of the decree." On appeal the court of appeals affirmed the chancellor, but this court reversed the court of appeals and allowed alimony of $50 per month. The *Ford* court interpreted Ark. Code Ann. § 9-12-312 (1987) [Ark. Stat. Ann. § 34-1211 (Supp. 1985)] as requiring that the decree of divorce allow or disallow alimony at the time of the divorce, and not retain jurisdiction for the purpose of granting alimony in the future based on changed conditions. That provision reads:

> When a Decree shall be entered the court shall make such order touching alimony of the wife or the husband and care of the children, if there be any, as from the circumstances of the case shall be reasonable . . . .

This court has sent mixed signals on the question whether a chancellor may enter a decree pursuant to which alimony may be made effective some time after the divorce has been entered. The statute makes it clear that the basic alimony decision is to be made when the divorce decree is entered. In

Miller v. *Miller*, 209 Ark. 505, 190 S.W.2d 991 (1945), a claim for alimony was raised some months after the decree of divorce. We denied the claim because there was no provision for it in the decree. However, the opinion contained this language:

> There was no language in the divorce decree of September 25, 1944, reserving the question of alimony for subsequent disposition. When Mrs. Miller failed, either to have monthly payments of alimony provided in the decree of divorce, *or to have the question of alimony reserved for further consideration*, she allowed the decree to become res judicata on the question of alimony . . . . [Our emphasis.]

Yet in the *Ford* case we held the chancellor had no power to retain jurisdiction or to treat alimony as a matter "reserved for further consideration."

It is inequitable to hold that a spouse who may be entitled to alimony is forever barred from receiving it because the spouse who should pay it cannot at the moment of entry of the decree. It is illogical to hold, as we do, that alimony may be raised or lowered upon a showing of changed circumstances but that the spouse who may have an obligation to pay alimony may not be made to do so when his or her circumstances permit it just because they did not permit it at the time the obligation was determined.

The answer to this problem lies in our holding here that, if either spouse is entitled to alimony, the chancellor must comply with the statute by making that decision when the decree is entered. If circumstances prevent the spouse who is to pay the alimony from being able to do so, then the court may recite that fact and decline to award a specific amount. Thereafter, if circumstances change in a way that will permit the payment of alimony, the party who has been determined to be entitled to it may petition the court. By following this procedure, the court will have complied with the statute without resorting to the sort of subterfuge inherent in awarding a nominal amount.

Except for the appellant's present financial circumstances, due in part to the number of dependent children, alimony would be appropriate from a number of considerations. See *Broyles* v. *Broyles*, 268 Ark. 120, 594 S.W.2d 17 (1980), for a detailed

discussion of factors bearing on alimony. There is ample cause to assume that appellant's prospects should improve, whereas, there is little likelihood that appellee's will change materially. We can conceive of no reason why, if appellant's circumstances improve materially, the court should not be free to consider alimony.

REMANDED.

HICKMAN, J., and GLAZE, J., dissent.

TOM GLAZE, Justice, concurring in part; dissenting in part. I dissent from that part of the majority's decision that affirms the chancellor's award of alimony in the sum of $10.00 per year. Obviously, the factors that justify an award of alimony were not existent here, *see Alexander* v. *Alexander*, 241 Ark. 741, 410 S.W.2d 136 (1967), or else the chancellor would have awarded a reasonable amount. The sole reason for the $10.00 award was to allow the chancellor to retain jurisdiction of this cause for the purpose of making an award of alimony in the future. The chancellor's action was clearly contrary to *Ford* v. *Ford*, 272 Ark. 506, 616 S.W.2d 3 (1981), where this court held that our statutory law requires the divorce decree to allow or disallow alimony *and that the decree cannot retain jurisdiction for the purpose of allowing or disallowing it in the future* based on changed conditions. The majority court now chooses to overrule *Ford*, and I disagree. Because a court's award of alimony is dependent upon statutory law, my view is that the *Ford* holding was correct, since it was based upon this court's clear interpretation of Ark. Stat. Ann. § 34-1211 (Supp. 1985), now compiled as Ark. Code Ann. § 9-12-312 (1987). *See Woods* v. *Woods*, 285 Ark. 175, 686 S.W.2d 387 (1985) (wherein court discusses statutory history for basis of alimony in Arkansas).

If the rule now is that the trial court may reserve the alimony question and leave it open for anytime in the future, that court surely needs to be required to give a reason for doing so. From my review of the record, I fail to see any reason for expecting that this appellant will ever be in a position to pay alimony. He became an attorney in 1974, and he apparently made as much as $22,800.00 per year, his gross earnings in 1985. Since June 1986, he has averaged $81.00 per week, and the parties are now in bankruptcy. The parties have four minor children, and their children have had medical and other problems, which pose a continuing stress on the

parents in raising them. Undoubtedly, appellee is in desperate need, as is reflected by her doing maid work and receiving food stamps. Even apart from the financial strife involved, she testified to acts of physical and mental abuse. Nevertheless, none of these factors add up to awarding alimony, and based upon the parties' history, an alimony award is not a realistic expectation for anytime in the foreseeable future. Thus, even if I could agree with the majority that a chancellor may reserve the question of alimony for the future, the power and authority to do so should not be unfettered and should not be extended to circumstances such as those we now have before us.

HICKMAN, J., joins in this opinion.

S.L. HARVEY *v.* V.E. HARVEY

88-35 747 S.W.2d 89

Supreme Court of Arkansas
Opinion delivered March 21, 1988

Wallace, Hamner & Arnold, for appellant.

Dodds, Kidd, Ryan & Moore, for appellee.

DAVID NEWBERN, Justice. This is a divorce case involving interpretation of our statute governing distribution of marital property. The decree does not state that the marital property is to be divided equally. It divides unequally the property mentioned. We agree with the appellant's argument that the decree must be reversed because the chancellor did not state reasons for the apparent unequal division. On cross appeal, we reverse and remand the chancellor's allowance of alimony.

Mrs. S. L. Harvey, the appellant, and Mr. V. E. Harvey, the appellee, owned a corporation, Harvey, Inc., which, in turn, owned two stores called "Berry Patch." Mr. Harvey owned ninety-nine percent of the corporate stock, and Mrs. Harvey owned the remaining one percent. The chancellor found that the business was worth $400,000, and that seventy percent was attributable to the store located in North Little Rock and thirty

percent to the store in Little Rock. It was undisputed that this commercial property was marital property. The decree ordered that, in exchange for her interest in the corporate stock, Mrs. Harvey would receive the assets of the Little Rock store which she had been managing.

1. Marital property

Our statute governing distribution of property upon divorce provides that marital property is to be divided equally unless it would be inequitable to do so. Ark. Code Ann. § 9-12-315 (Supp. 1987). If it is concluded that the marital property is to be divided unequally, subsection (a)(1)(B) of the statute provides that the court must state its reasons in its order. *Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986). Additionally, subsection (a)(4) provides that when corporate stock comprises part of the marital property the court may award it to one party on condition that half "the fair market value of the securities in money or other property be set aside and distributed to the other party in lieu of division and distribution of the securities."

The chancellor had authority to distribute all stock in the corporation to Mr. Harvey. However, given the imbalance created by the award to Mrs. Harvey of the Little Rock store worth thirty percent of the value of the parties' main marital asset in exchange for her one-half interest in that asset, we must examine the decree to ascertain if she was awarded other marital property to make up for the disparity.

The decree mentions several other items of marital property, including twenty acres of "open land," shares of stock in Sears and ITT, a certificate of deposit, the marital residence, and furniture. All these items were divided equally or sold with the proceeds to be divided equally. In addition, the court awarded each party his or her individual retirement account. A collection of guns and a country club membership which were marital property were awarded solely to Mr. Harvey. No other marital property was awarded solely or in greater proportion to Mrs. Harvey to account for the disparate distribution of Harvey, Inc.

The decree mentions that Mrs. Harvey had been the recipient of gifts of furs and jewelry from Mr. Harvey which she would retain as her property, and it mentions a $40,000 gift to Mrs.

Harvey from an aunt and states that the latter asset would be considered by the chancellor in other orders to be made.

Mr. Harvey refers to testimony about the value of the furs and jewelry, the fact that Mrs. Harvey received store inventory from Mr. Harvey which she did not pay for, sale of a car by Mrs. Harvey, a boat belonging to the corporation which is in Mrs. Harvey's possession, and cash in various accounts. He argues that we should affirm because these items more than make up for the disparate distribution of Harvey, Inc. We might agree with the argument had the chancellor's decree divided any of these assets in a manner favoring Mrs. Harvey or, with respect to other than the gifts, ruled Mrs. Harvey owned them outright. However, in the absence of such a division or explanation of the unequal division, we must reverse.

Mrs. Harvey argues it was error to award sole ownership of the guns and country club membership to Mr. Harvey and that the chancellor should have made a finding whether life insurance policies and Mr. Harvey's J. C. Penney pension were marital property. We assume the chancellor will make these decisions upon remand and, if sole ownership of assets is awarded, the decree will reflect compensation or explanation.

2. Alimony

In awarding alimony to Mrs. Harvey of $1,000 per month, the chancellor noted that it was "less than 20% of the discrepancy between the potential profit of the McCain Mall [North Little Rock] store and the University Mall [Little Rock] store." The decree also states that the alimony is necessary for the support of Mrs. Harvey and is not to be considered a distribution of marital property or in lieu of marital property.

The chancellor can make an award of alimony that is reasonable under the circumstances. Ark. Code Ann. § 9-12-312 (Supp. 1987). The purpose of alimony is to rectify economic imbalance in earning power and standard of living in light of the particular facts in each case. The primary factors to be considered are the need of one spouse and the other spouse's ability to pay. *Sutton* v. *Sutton*, 266 Ark. 451, 587 S.W.2d 67 (1979); *Dean* v. *Dean*, 222 Ark. 219, 258 S.W.2d 54 (1953). The award of alimony is a matter which addresses itself to the sound discretion

of the chancellor, and the award will not be reversed absent an abuse of discretion. *Wilson* v. *Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987).

For his cross appeal, Mr. Harvey argues alimony should not have been awarded. He recites Mrs. Harvey's testimony that her living expenses were $3,500 per month and contends that her salary of $2,361, when combined with potential income from property she acquired as a result of the decree, are sufficient for her support.

After the Harveys were married in 1956, Mrs. Harvey worked for a year or two until she quit her job to raise children. Mr. Harvey testified that some of the time she worked was while he was in school. Mr. Harvey had a twenty-year career with J. C. Penney, and apparently some time with Sears. The chancellor could reasonably have concluded that during the time Mrs. Harvey was a homemaker Mr. Harvey was acquiring education and experience which now give him greater earning power than Mrs. Harvey.

While we would usually affirm an award of alimony under these circumstances, we reverse and remand this one. The chancellor's order says the award was not a distribution of marital property or given in lieu of such a distribution, but it then refers to the discrepancy in income which will result from the difference in profit potential between the two Berry Patch stores. Reversal of the alimony award will give the chancellor appropriate flexibility in reconsidering the distribution of marital property if she chooses to do that rather than readopt the unequal distribution with an explanation as the statute requires.

Reversed and remanded on appeal and reversed and remanded on cross-appeal.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, et al. *v.* Jerry HUDSON, et al.

87-222 747 S.W.2d 81

Supreme Court of Arkansas
Opinion delivered March 21, 1988
[Rehearing denied April 18, 1988.*]

*Glaze, J., not participating.

Hatfield, Robinson, Staley, Marshall, Jordan & Shively, by: *Scotty Shively*, for appellants International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL and George Clark.

Youngdahl & Youngdahl, by: *Jay Thomas Youngdahl* and *Chad Farris*, for appellants Wilford W. Banks, Jim Lamb, Ed

Taylor, Ronnie E. Crider, Tommy Guzman, and A.C. Lucas.

House, Wallace & Jewell, P.A., by: *J. Bruce Cross*, for appellant/appellee Sanyo Manufacturing Corp.

Daggett, Van Dover, Donovan & Cahoon, by: *Robert J. Donovan*, for appellees.

DAVID NEWBERN, Justice. This appeal is from an order certifying a class action. The appellees, who are non-union salaried and hourly employees of Sanyo Manufacturing Corp. in Forrest City, sued the appellants, the International Union of Electrical, Radio and Machine Workers, and their Local 1106. The allegations were that the defendant unions were responsible for striking picketers who prevented plaintiff class members from entering the Sanyo plant to work and that the unions were thus liable for personal injuries and property damage sustained by plaintiff class members. The complaint asserted it was brought on behalf of the named plaintiffs and other employees similarly situated.

After a hearing, the trial judge certified the action as a class action pursuant to Ark. R. Civ. P. 23, and his order described two classes:

> (a) All salaried and non-union hourly employees who allegedly were deprived of the right to work at Sanyo Manufacturing Corporation on October 7, 8 and 9, 1985 due to the plant closing.
>
> (b) All salaried and non-union hourly employees receiving motor vehicle and/or personal damages when crossing or attempting to cross the striker picket line during the Sanyo strike on October 7, 8 and 9, 1985.

The unions make four arguments: (1) the trial court abused its discretion in certifying the class action, (2) the number of persons seeking relief was too small to meet the requirement of Rule 23, (3) there were not predominant common questions of law or fact as required by the rule, and (4) a tort action should not be allowed to proceed as a class action. We hold there was a sufficient showing of compliance with the requirements of Rule 23 and that the trial court did not abuse his discretion in certifying a class action. We find no reason to hold that a tort

action may not proceed as a class action. Thus, the order of the trial court is affirmed.

On October 7, 8, and 9, 1985, members of the unions went on strike at the Sanyo plant in Forrest City. Seven Sanyo employees brought this action against the unions, and some named union members, claiming loss of pay on days when the plant was closed because of the strike. Some of the plaintiffs also claimed damages for personal injuries and property damage sustained when some of the plaintiffs crossed, or attempted to cross, the picket line.

A hearing was held in response to the plaintiffs' request that the action be certified as a class action. Jerry Hudson, the supervisor of hourly personnel at Sanyo, testified about the strike and the accompanying violence which he was attempting to film with a video camera at the plant beginning October 7. He testified that there were some 2000 persons employed at the plant. With the exception of some 200-250 non-union hourly employees, all of those who got in were salaried employees. Mr. Hudson presented affidavits of thirty-four employees who had suffered property damage while attempting to drive their vehicles into employee parking lots. He also presented petitions signed by thirty-five employees who certified that they had been "affected by the conduct of the defendants in such manner as to qualify them as a member of the class described in the complaint."

Jack Shands, industrial relations manager at the Sanyo plant, testified that at the beginning of the strike, the company plan was to conduct minimal production so that any salaried or hourly employee would have work to do if he or she showed up. On October 7, approximately 450 employees made it through the picket line. However, apparently before the night shift on that date, the plant was closed because of the risk to employees attempting to make it through "the crowd." It was the intent of the management to get an injunction to move the strikers away from the parking lots where the violence was occurring.

Whether salaried or hourly, only the employees who came to work on October 7th were paid with the exception of some salaried employees who may have been owed paid leave. Mr. Shands presented a list showing that twenty-one hourly employees were paid during the time the plant was closed. It appears that nearly all of the salaried employees were paid during this period.

Bill Runyan, an insurance adjuster, testified that his company was employed by Sanyo to make damage appraisals on October 7. He and two fellow adjusters made seventy-three damage estimates which included damages to forty-two automobiles totaling $23,601.20. He said he was told that the damages had occurred on October 7.

1. Abuse of discretion

Independently of the issues of numerosity, common question, and whether a tort may be the subject of a class action, the unions assert the trial court abused its discretion in certifying a class action. They contend that the trial court should have recognized the traditional reluctance of this court to permit the certification of classes and refused to certify this one. The unions have good reason for their position, as we have not been clear in the interpretation of Rule 23.

Drew v. *First Fed. Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981), was the first of six significant cases in which we have considered whether it was proper to certify a class action pursuant to Rule 23, which was adopted in 1979. The party seeking class certification claimed that First Federal was committing usury and extortion by requiring a 1 % mortgage assumption fee. There was a showing that First Federal had treated all persons who had assumed mortgages held by it alike, but there was no showing that there might not be different defenses with respect to each mortgage assumption contract. We noted that in some cases First Federal might be able to prove that the effort involved in permitting the assumption would wholly justify the fee, and it should be allowed to raise that defense individually. In our general discussion of Rule 23 and class actions, we recognized that, prior to the adoption of the rule, we had not favored class actions. We cited *Ross* v. *Ark. Communities*, 258 Ark. 925, 529 S.W.2d 876 (1975), in which we had held that, under our superseded class action statute, a party seeking class certification had to show that there were common questions of law *and* fact to be decided. We noted that the new rule had liberalized that aspect of the matter by requiring only a common question of law *or* fact. We also pointed out that under our rule the party seeking certification must be able to show that the class action "is superior to individual remedies for the fair and efficient adjudication of the

controversy. Not merely efficient but also *fair* . . . ." 271 Ark. at 670, 610 S.W.2d at 878. We recognized that the chancellor had "broad discretion" in the matter and held that she had not abused that discretion in refusing certification, noting that for the class action to be superior to individual actions, it must be shown to be fair not only to the mortgage assignees seeking the certification but to First Federal, the party against whom the class would proceed.

Our second decision under the rule was *City of North Little Rock* v. *Vogelgesang*, 273 Ark. 390, 619 S.W.2d 652 (1981), in which we upheld, upon cross appeal, the trial court's decision that it had not been shown that the number of potential class members was sufficiently large to make other means impracticable. The potential class consisted of only seventeen identifiable members.

In *Ford Motor Credit Co.* v. *Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985), we denied a writ of prohibition which would have prevented a chancellor from trying a case she had certified as a class action. Ross Nesheim contended Ford Motor Credit had charged usurious interest on his car purchase contract, and on every other auto finance agreement it had written since the adoption of Amendment 60 to the Arkansas Constitution, and that the named plaintiffs should be allowed to sue for themselves and others similarly situated who had been charged usurious interest. Ford Motor Credit argued that the case could not constitutionally be tried as a class action because our rule does not provide for mandatory notice to potential class members. We held that Ford Motor Credit had no standing to raise the issue on behalf of the potential class members. While that holding has no significance in this case, the lack of a notice provision in our rule may portend future problems, and it should not be ignored in any general review of our interpretation of the rule.

The order certifying Nesheim's claim as a class action was thereafter appealed, and in *Ford Motor Credit Co.* v. *Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1985), we considered its merits. We first noted that although the chancellor had broad discretion in the matter, it was not unlimited discretion. We then compared Nesheim's claim to that of Drew against First Federal. We found similarities in that Ford Motor Credit would have varied defenses against the class members and setoffs and at least one counter-

claim against one of the members. We disapproved of the chancellor's attempt to limit the class to persons who were not delinquent in their payments to Ford Motor Credit on the ground that disputes over delinquency were sure to arise. We noted that the litigation was, like that in the *Drew* case, sure to splinter into a number of cases posing serious manageability problems. We said we were unable to ascertain a "willing class of litigants" of whose claim Nesheim's was typical and that a class member who might not want to sue the company should not be "made an unwilling litigant." Finally, we could find no prejudice to anyone in refusing to certify the class and noted our unwillingness to resolve doubts in favor of class actions and that our rule and the statute it supplanted had been construed strictly in the *Drew* and *Ross* cases, respectively.

In *Cooper Communities, Inc.* v. *Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986), realtors and property owners in Hot Springs Village claimed that the lease of a gatehouse to Cooper Communities, Inc. (Cooper) was invalid and that Cooper was engaged in an unfair trade practice because it used the gatehouse to sell lots in the village, thus gaining an unfair advantage over other would-be sellers. Sarver, the named plaintiff, presented 120 affidavits of owners saying they wanted the relief sought which was cancellation of the gatehouse lease. The chancellor certified the class, and Cooper appealed. We upheld the certification, citing the *Drew* case for the proposition that the chancellor has, again, "broad discretion" to decide whether a class action is proper. We said that the validity of the lease was the paramount issue in the case, and the certification was proper.

The most recent case is *Arkansas Louisiana Gas Co.* v. *Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988). The chancellor certified as a class of plaintiffs persons who had granted "fixed price" mineral leases to Arkansas Louisiana Gas Co. (ArkLa). The complaint relied upon a number of theories of relief, including the remedy of reformation based on mutual mistake, and estoppel. ArkLa argued that in order for any of the leases to be affected, the individual lessor would be required to show reliance or mistake. The plaintiffs argued they should be certified as a class as they had all been treated the same by ArkLa in that their fixed price leases had been ignored and they had been paid varying rates of royalties. The common question was the validity

and effect of the fixed price leases. We said:

> The appellants [ArkLa] rely primarily on the case of *Ford Motor Credit Company* v. *Nesheim*, ... In *Nesheim* the chancellor granted a conditional class action. We reversed that decision primarily because the defenses of mutual mistake, waiver, estoppel, and set off pled by the defendant as well as the defendant's possible counter claims would splinter the action into possibly 6,000 individual cases. The foreseeable problems of manageability and the lack of prejudice to anyone by denying certification led us to conclude that the class action would not be superior to individual remedies.
>
> Even if appellants are correct in this respect it does not require decertification of the class action because the appellees allege several other grounds for relief and other valid grounds for relief may be developed during the trial. Additionally, at this point in this case there are no indications of management problems or prejudice to any party in allowing the case to proceed as a class action. We are able to determine from the record a common question of fact that all "fixed price" lessors in the Cecil Field have been treated identically by the defendant lessees for a number of years. The parties have for some reason ignored the royalty amount fixed in the original leases and have paid and accepted royalties of different amounts. It is apparent that the common question of law in this case is whether the defendants' course of conduct gives rise to a cause of action in favor of the "fixed price" lessors in the Cecil Field. There is no requirement that the trial court find that the facts as to each individual of a class action must in every respect be identical with that of all other members of the class. It is enough to show that a common question of law or fact predominates over other questions affecting only individual members.
>
> If the trial court finds that the evidence presents individual questions of reliance or mistake, it could either defer those individual questions until after it disposed of the questions common to the class, or at any time prior to judgment, order an amendment of the pleadings eliminat-

> ing therefrom all reference to representation of absent persons, and order entry of judgment in such form as to affect only the parties to the action and those who were adequately represented.
>
> Although our class action rule is patterned somewhat after the federal rule, there is a considerable difference in application. The federal rule leans toward allowing class actions whereas our position tends to discourage class actions if the matter can be handled by individual action. But in *Cooper Communities, Inc.* v. *Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986) and *Drew* v. *First Federal Savings & Loan Association of Fort Smith*, 271 Ark. 667, 610 S.W.2d 876 (1981), we held that in determining the appropriateness of a class action the trial judge has broad discretion. From the record before us we are unable to say that the chancellor abused his discretion in declaring this to be a proper class action. [294 Ark. at 498-500, 744 S.W.2d at 710-711.]

The two cases that stand out in this review are the *Nesheim* and *Morris* cases. The *Nesheim* case is the only one in which we have disapproved the trial judge's action with respect to certification. In the *Morris* case there was just as much reason to disapprove the certification as in the *Nesheim* case, but we refused to do so. In the *Nesheim* case we relied on our tradition of refusing certification and upon fear of the management problems which might occur if the action were to splinter. In the *Morris* case we relied on our statements about the broad discretion of the judge, noting that perhaps management problems could be handled by the trial judge when they arose, even if that required decertification at some point.

a. Tradition

There is no need to go into the development of the class action from the old equity bill of peace remedy. A fine treatment can be found in 7A, C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure*, §§ 1751-1753 (1986). Fed. R. Civ. P. 23 is the culmination of that development. In the *Drew* case, we noted that our Rule 23 did not copy the federal rule but that, in Rule 23(a), we copied our superseded, 100-year-old statute, and

in subsection (b) we copied only a little of the federal rule.

While it is true that subsection (a) of our rule differs from that of the federal rule, the difference is one of language only. Both set out the same basic requirements for a class action. Subsection (b) of our rule, like that of the federal rule, sets out the prerequisites in addition to those found in subsection (a). Our subsection (b) is taken directly from subsections (b)(3) and (c)(1) of the federal rule. The parts of the federal rule omitted have to do with specifying further the kinds of actions which may be certified and some procedural requirements, such as the one for mandatory notice to class members mentioned above. Nothing about the parts of the federal rule omitted from our rule seems to bear on the question of whether class actions are to be favored or not. It seems apparent that the spirit of the federal rule is to be found in our Rule 23 even if all the words are not. Our attempts to cling to our pre-rule tradition may have been inconsistent with the rule. Reporter's Note 1. states the rule was based on a superseded statute which contained few procedural guidelines and that it does not change prior law. While the note is correct in stating that the rule, like the statute, has a paucity of procedural directions, we recognized in the *Drew* case that the law had been changed to "liberalize" the class action, at least in one respect. Use of it will obviously be more extensive if there need no longer be common questions of law *and* fact.

b. Broad discretion

Reporter's Note 2. to Rule 23 recognizes the "broad discretion" given to the court to protect the rights of absent class members and points out there is similar discretion in the federal rule. While the broad discretion noted is ostensibly different from broad discretion to allow or disallow a class action, the two are related. If the court has broad discretion to protect the rights of absent class members, that power should be regarded as contributing significantly to the discretion the court has to permit class actions, as the inability to protect class members would be a major impediment. In the *Drew* case, just after our discussion of the chancellor's decision that the class action was not shown to have been superior to other forms of relief and our reference to fairness discussed above, we said: "It is on this point that we cannot say the chancellor abused her 'broad discretion' (Note 2 to our Rule 23)

in finding that the class action is not superior to other remedies." Thus, beginning with the *Drew* case and through the *Morris* case, we have recognized that the "broad discretion" of the trial judge extends not only to the protection of the absent class members, but also to the question whether the class action should proceed.

c. Management

The language we have used about class actions "splintering" into separate cases requires examination in the context of Justice George Rose Smith's language in the *Drew* case. We should never depart from his assertion that, in deciding whether a class is to be certified, we must consider whether certification would be fair to all the parties. Clearly, it would have been unfair in the *Drew* case to have held that First Federal could present its defenses to the claims of some but not all of the members of the plaintiff class. Just as clearly it would have been unfair to prohibit ArkLa from presenting all its defenses with respect to the leases in the *Morris* case. Just as clearly it would be improper for us to hold that the unions in the case before us now could not present all their defenses to the individual claims of the non-union members who are the members of the putative class. But to assume that any of these injustices will occur is to assume that the action will not be managed by the trial court.

By limiting the issue to be tried in a representative fashion to the one that is common to all, the trial court can achieve real efficiency. The common question here is whether the unions can be held liable for the actions of their members during the strike. If that question is answered in the negative, then the case is over except for the claims against the named individual defendants which could not be certified as a class action. If the question is answered affirmatively, then the trial court will surely have "splintered" cases to try with respect to the damages asserted by each member of each of the subclasses, but efficiency will still be achieved, as none of the plaintiffs would have to prove the unions' basic liability.

Is that unfair? It is not unfair to the unions, as they will be able to defend fully on the basic liability claim, and they will have the opportunity to present individual defenses to the claims of individual class members if their liability has been established

in the first phase of the trial. They lose nothing. Would it be fair to the class members to require them to sue individually? The evidence so far shows that each putative class member has a claim that is too small to permit pursuing it economically. If they cannot sue as a class, the chances are they will not sue at all. We agree with the unions' argument that the sole fact that the claims are small is not a reason to permit a class action, but it is a consideration which has appeared when other courts, as we must do, have considered whether the class action is superior to other forms of relief. *See* C. Wright, A. Miller, and M. Kane, *supra*, § 1779, n. 21, citing *Roper* v. *Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), affirmed on other grounds, sub nom. *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980); *Werfel* v. *Kramarsky*, 61 F.R.D. 674 (D.C.N.Y. 1974); and *Buchholtz* v. *Swift & Co.*, 62 F.R.D. 581 (D.C. Minn. 1973).

We recognize that the trial court has substantial power to manage a class action even though the directions given in our Rule 23 are not as extensive as those given in the comparable federal rule. This power to manage the action contributes to the discretion we find in the trial court to determine whether a class should be certified. We conclude there was no abuse in this case.

2. Numerosity

Rule 23(a) provides, "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring all before the court within a reasonable time, one or more may sue or defend for the benefit of all." The unions contend the court erred in finding this requirement to have been satisfied. As we have noted above, there is a common question, and that is whether the unions may be liable for the actions of the strikers. The issue is whether there is a question which is "one of common or general interest of many persons" or whether the parties are so numerous as to make it "impracticable to bring all before the court within a reasonable time."

■ We find no error. In the *Vogelgesang* case we held that seventeen was not a sufficient number. In the *Cooper* case we held that 184 was enough. Although, as the unions point out, only thirty-five persons have indicated an interest in being class

members by affidavit, that does not define the class or limit it. With respect to the property damage and personal injury subclass, we find testimony that seventy-three damage estimates were made. With respect to the wage loss subclass, we note the testimony that the Sanyo plant closed for two days, and that the hourly employees, generally, were paid only for the time they worked. The potential class thus consists of all non-strikers who lost work time, and thus pay, during the strike. From the figures given at the outset of this opinion one can see that this subclass consists of at least several hundred employees, and we can agree that there is a question of common or general interest to "many persons."

3. Predominance

The unions argue that the single issue of their possible liability pursuant to the "mass action" theory may not be held to predominate over the individual claims of the purported class members. "Mass action" liability has been found and discussed in cases such as *International Union* v. *Russell*, 356 U.S. 634 (1958); *Rainbow Tours* v. *Hawaii Joint Council*, 704 F.2d 1443 (9th Cir. 1983); and *Alabama Power Co.* v. *Local Union No. 1333*, 734 F.2d 1464 (11th Cir. 1974). The theory espoused here is that a union may be responsible for the acts of its members on its behalf when violence erupts upon the attempt of non-strikers to enter a plant where the entrance is blocked by strikers.

On this point the unions cite the *Drew* case for the proposition that the court must find questions of both law and fact common to the class members. As noted above, that is opposite to the language of that case in which we recognized that only one or the other is required under Rule 23, and that was a change from the law as we espoused it in the *Ross* case. The only other case cited on this point by the unions is the *Nesheim* case. We agree with the unions' assertion that if we were to follow our decision in that case we would probably have to reverse here. We were mistaken in the *Nesheim* case. There was the same sort of predominant common question there as the one which exists here. To the extent the *Nesheim* case is inconsistent with our holding here, it is overruled.

The issue of the possible liability of the unions permeates the claims and prospective claims of each member of the two subclasses. It clearly predominates the individual issues which may arise if the unions are held liable under the mass action theory. If the unions prevail on that issue, then only individual claims against individual persons will remain, and the class will have to be decertified.

4. Tort claims

The unions do not seriously argue that tort claims may never be the object of class actions. Rather, their point is that this case is not typical of the "disaster" cases in which class action suits have been allowed where one event, such as a plane crash, structural failure, or fire has been responsible for injuries to a class of persons. They contend that, if a mass action can be said to be responsible for the injuries suffered, it occurred over a three-day period and involved numerous persons and events thus presenting no common question.

We disagree with that argument. Other jurisdictions have permitted class actions where the wrong alleged was, for example, nuisance which was conducted by industrial defendants over a period of time in excess of three days and in which more than one defendant was named by the plaintiff class of homeowners, each of whom had a separate damages claim. *Oakwood Homeowners Assn.* v. *Ford Motor Co.*, 77 Mich. App. 197, 258 N.W.2d 475 (1977). *See also Burks* v. *Wymer*, 307 S.E.2d 647 (W.Va. 1983).

The central question of the unions' liability will be the focus of the class action. That can be decided with respect to the subclasses even though the alleged mass action was not an instantaneous event. Again, if they are held liable in general, the unions will be able to present any defenses they may have as the claims of the individual class members are presented thereafter, the only effect of the decision being that the individual class members will not have to prove, and the court will not have to decide, the general question of union liability in each case.

Conclusion

We take no pleasure in having to overrule a case as recently decided as the *Nesheim* case. However, we believe the critical

decision occurred with our adoption of Rule 23, and we are just now fully recognizing it. While Fed. R. Civ. P. 23(b)(3) has not been the panacea hoped for by consumer advocates and others concerned with small claims, *see Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), we have no doubt that our Rule 23(b) patterned upon it permits the certification in this case. The trial judge in this case could have refused to certify the action as a class action, and we might well have upheld him in that exercise of his broad discretion. Instead, he made the certification and tentatively scheduled the trial to begin in mid-June 1988 to continue until August 1, 1988. Obviously he intends to try each of the individual claims if the common question is decided in favor of the class. We are firmly convinced that justice will be well served by this approach, whichever way the common legal question is decided.

Affirmed.

GLAZE, J., not participating.

Julia L. HUGHES *v.* STATE of Arkansas

CR 87-180 746 S.W.2d 557

Supreme Court of Arkansas
Opinion delivered March 21, 1988

William R. Simpson, Jr., Public Defender, *Howard W. Koopman*, Deputy Public Defender; by: *Didi Harrison*, Deputy Public Defender, for appellant.

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

TOM GLAZE, Justice. Appellant was convicted of the first degree murder of her son and sentenced to life imprisonment in the retrial of this case. This court previously reversed and remanded appellant's earlier conviction because the trial court erred in admitting into evidence a statement the appellant gave officers after she had requested an attorney. *Hughes* v. *State*, 289 Ark. 522, 712 S.W.2d 308 (1986). In this second appeal, appellant contends that there was insufficient evidence of premeditation and deliberation to support her conviction of first degree murder. As part of her contention, she argues the jury erred in rejecting her insanity defense and finding the proof was insufficient to show her defective mental state or inability to commit the crime. Because these arguments were not raised before the trial court, we are unable to consider them on appeal.

This court has stated numerous times that we generally will not consider errors raised for the first time on appeal. *Johnson* v. *State*, 290 Ark. 46, 716 S.W.2d 202 (1986); *Janes* v. *State*, 285 Ark. 279, 686 S.W.2d 783 (1985); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981). We have recognized certain exceptions to this rule as in death-penalty cases where this court will consider errors raised for the first time on direct appeal where prejudice is conclusively shown by the record and the court would unquestionably require the trial court to grant relief under A.R.Cr.P. Rule 37. *See, e.g., Singleton*, 274 Ark. 126, 623 S.W.2d 180. In *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980), we set out the death-penalty exception and others that this court will review for the first time on appeal, which include instances (1) where error is made by the trial judge without knowledge of the defense counsel, (2) where the trial court should

intervene on its own motion to correct a serious error, and (3) where evidential errors affect a defendant's substantial rights although they were not brought to the court's attention. *Id.* None of these exceptions are applicable here.

In *Ply* v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980), this court stated it would consider the question of sufficiency of the evidence to support a verdict, in criminal cases, when raised for the first time on appeal. After *Ply*, however, this court decided *Wicks* where we stated the general rule that an appropriate objection or argument must be made below for the issue to be considered on appeal. In listing the exceptions to that rule, the court did not mention the defendant's failure to question the sufficiency of the evidence.

A review of some of this court's cases decided after *Wicks* reflects that the defendant must raise the issue of sufficiency of the evidence below. For instance, we recently refused to consider an argument against sufficiency of the evidence to support appellant's kidnapping conviction because the issue was raised for the first time on appeal. *Johnson*, 290 Ark. 46, 716 S.W.2d 202. Also, in *Eskew* v. *State*, 273 Ark. 490, 621 S.W.2d 220 (1980), this court refused to address the appellants' argument that there was insufficient evidence to support their conviction of class A felony kidnapping because the appellants failed to raise the matter before the trial court. *See also Janes*, 285 Ark. 279, 686 S.W.2d 783; *Ballew* v. *State*, 21 Ark. App. 215, 731 S.W.2d 222 (1987).

Because appellant raises the question of sufficiency of evidence for the first time on appeal, we affirm the judgment of the trial court.

Bobby A. MORAN and Wilbur Moran, Individually and as Parents and Next Friends of Chris Moran, A Minor *v.* ARKANSAS BLUE CROSS & BLUE SHIELD, INC.

88-24 746 S.W.2d 62

Supreme Court of Arkansas
Opinion delivered March 21, 1988

Mark S. Cambiano, P.A., for appellants.

Gordon & Gordon, P.A., by: *Allen Gordon*, for appellee.

TOM GLAZE, Justice. This is an appeal from the trial court's granting of the appellee's motion for summary judgment dismissing one of the appellants' causes of action, tort of bad faith, and their claim for punitive damages. We dismiss the appeal because there is no final appealable order.

The appellants' suit against the appellee consisted of two causes of action: (1) breach of contract, and (2) bad faith failure to pay health insurance benefits. In their complaint, appellants prayed for $52,288.05 in damages for breach of contract plus interest and attorney's fees and $2,550,000 in punitive damages for the tort of bad faith. The appellee moved for a partial summary judgment on the tort cause of action of bad faith failure to pay a claim. The trial court granted the partial summary judgment, finding that the appellee was a benevolent, nonprofit

corporation and thus immune from tort liability. The trial judge, in dismissing the appellants' tort claim, also dismissed their claim for punitive damages. In the judge's letter to the attorneys, he stated, "this leaves us with the breach of contract claim, which will be tried if not settled."

Because the appellants' claim for breach of contract remains to be tried, there is no final appealable order in this case. *See* Ark. R. App. P. 2, *see also Sevenprop Associates* v. *Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988). Although the appellee failed to raise the issue of appealability in its brief, this court has held that such an issue is a jurisdictional one which we have the right and duty to raise on our own in order to avoid piecemeal appeals. *Id.* Accordingly, appellants' appeal is dismissed.

Ray BROWN *v.* STATE of Arkansas

RC 88-8 745 S.W.2d 627

Supreme Court of Arkansas
Opinion delivered March 21, 1988

James W. Haddock, for appellant.

No response.

PER CURIAM. Petitioner has filed for a rule on the clerk. However, we find that the motion is actually a motion for a belated appeal, and, treating it for what it really is, we grant the motion for a belated appeal.

Carla Blakemore CARTON *v.* MISSOURI PACIFIC RAILROAD COMPANY

87-262 747 S.W.2d 93

Supreme Court of Arkansas
Opinion delivered March 28, 1988
[Rehearing denied April 25, 1988.]

J.R. Nash, for appellant.

Herschel H. Friday, and *Elizabeth J. Robben*, for appellee.

JACK HOLT, JR., Chief Justice. The principal issue in this case is whether the White County Circuit Court, in dismissing appellant Carla Blakemore Carton's complaint, erred in holding that she was not entitled to the benefits of Ark. Code Ann. § 16-56-126 (1987) [formerly Ark. Stat. Ann. § 37-222 (Supp. 1985), and commonly referred to as the "saving statute"] in the refiling of her lawsuit, which had been dismissed on two previous occasions. We find the statute does protect Carton, and we reverse and remand for trial.

On November 25, 1981, Carton filed a tort suit in the United States District Court for the Eastern District of Arkansas, Western Division, seeking recovery for injuries allegedly sustained on January 4, 1979, in Missouri Pacific's North Little Rock terminal. Carton asked for and obtained a voluntary nonsuit on February 23, 1984.

On April 17, 1984, she refiled her complaint in the same court. On July 16, 1985, the court, on motion of the defendant, dismissed the suit with prejudice for lack of diversity finding that she was not a citizen of Arkansas at the time that she had filed either complaint. The court also found that she had fraudulently attempted to manufacture diversity jurisdiction, and therefore was not entitled to the benefits of Ark. Code Ann. § 16-56-126. The Eighth Circuit Court of Appeals affirmed the dismissal based upon lack of diversity, however, it directed the district court to enter a dismissal without prejudice. The district court entered this order on February 19, 1987.

On April 23, 1987, Carton refiled the suit in the Circuit Court of White County. Missouri Pacific filed a motion to dismiss on the grounds that Carton's claim was barred by the statute of limitations. The circuit court granted this motion finding that the claim was barred by the three year statute of limitations provided for in Ark. Code Ann. § 16-56-105 (1987), formerly Ark. Stat. Ann. § 37-206 (Repl. 1962), and that Carton's claim was not "saved" from the statute of limitations by the terms of Ark. Code

Ann. § 16-56-126. In addition, the court held that Ark. R. Civ. P. 41(a) required that the second dismissal in federal district court be treated as an adjudication on the merits, which barred Carton from further litigation of her claim. Carton contends that the court erred in both its findings.

We first address the Rule 41(a) issue. In its brief on appeal, Missouri Pacific concedes that the circuit court erred in holding that the dismissal of Carton's second complaint in federal court for lack of subject matter jurisdiction operated as an adjudication on the merits under Rule 41(a). We agree. The circuit court's ruling was incorrect. In *Cory* v. *Mark Twain Life Ins. Co.*, 286 Ark. 20, 688 S.W.2d 934 (1985), we held that where one of two dismissals is on the motion of the defendant and not the plaintiff, as in the instant case, Rule 41(a) is not applicable.

Carton also contends that the court erred in holding that she was not entitled to the benefits of Ark. Code Ann. § 16-56-126 (1987). This statute provides in pertinent part as follows:

> If any action is commenced within the time respectively prescribed in this act, in §§ 16-116-101—16-116-107, in §§ 16-114-201—16-114-209, or in any other act, and the plaintiff therein suffers a nonsuit, or after a verdict for him the judgment is arrested, or after judgment for him the judgment is reversed on appeal or writ of error, the plaintiff may commence a new action within one (1) year after the nonsuit suffered or judgment arrested or reversed. . . .

Ark. Code Ann. § 16-56-126 permits a plaintiff, who commences a suit within the applicable statute of limitations, which is subsequently dismissed for lack of subject matter jurisdiction, to refile the same action within the period of the "saving statute." *See Coleman* v. *Young*, 256 Ark. 759, 510 S.W.2d 877 (1974). For the purposes of the statute, a dismissal of a complaint on defendant's motion is the same as a nonsuit. *Norm Co.* v. *Harris*, 197 Ark. 124, 122 S.W.2d 532 (1938). *See also Lubin* v. *Crittenden Memorial Hospital*, 288 Ark. 370, 705 S.W.2d 872 (1986); *State Bank* v. *Magness*, 11 Ark. 343 (1850).

On November 25, 1981, Carton commenced the present tort action in federal district court within the applicable

three year statute of limitations of Ark. Code Ann. § 16-56-105. After taking a nonsuit, she refiled the suit in district court within one year, as required by § 16-56-126. The second action was dismissed on motion of the defendant without prejudice. Since she commenced the present suit in White County Circuit Court within one year of the second dismissal without prejudice, she is entitled to receive the benefits of § 16-56-126 and continue her lawsuit. Accordingly, the trial court erred in dismissing her complaint.

Missouri Pacific asserts that Carton should not be allowed to take advantage of the "saving statute" because she fraudulently attempted to manufacture diversity jurisdiction in district court by misrepresenting her citizenship. Since there is no evidence of misrepresentation in the record, absent the district court's findings, we do not consider this argument. Because the district court was without subject matter jurisdiction, its judgment is without validity and has no force as evidence. *Mitchell* v. *Village Drainage Dist.*, 158 F.2d 475 (8th Cir. 1946); *see also Greenstreet* v. *Thornton*, 60 Ark. 369, 30 S.W. 347 (1895). If the court's judgment has no force as evidence, it necessarily follows that its findings have no evidentiary value.

Reversed and remanded.

CITY OF SPRINGDALE *v.* Timothy P. JONES

87-321 747 S.W.2d 98

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Harper & Blocker, P.A., by: *Jeff C. Harper*, for appellant.

E. Kent Hirsch, P.A., by: *E. Kent Hirsch*, for appellee.

DARRELL HICKMAN, Justice. The City of Springdale is located primarily in Washington County, Arkansas, but its city limits extend into adjacent Benton County. The question is whether the municipal court of the City of Springdale has jurisdiction over criminal offenses committed in Benton County. The answer is no. The Arkansas Constitution prevents it.

The facts are not disputed. Timothy Jones was arrested for DWI in the city limits of Springdale, Benton County. This case was originally filed in Springdale Municipal Court, located in Washington County. Evidently the voters of the city from both counties elect the municipal judge.

After Jones was convicted, he appealed to the Washington County Circuit Court. The judge stated he would consider an oral motion for a writ of prohibition which was made by Jones and granted. The judge concluded the municipal court had no jurisdiction over offenses occurring in Benton County. He was right.

Article 2 § 10 of the Arkansas Constitution provides in part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed; . . . .

The City of Springdale asks us on appeal to solve the dilemma it finds itself in. We cannot consider a question raised for the first time on appeal and do not give advisory opinions. *Mitchell* v. *First Nat'l Bank in Stuttgart*, 293 Ark. 558, 739 S.W.2d 682 (1987); *Cummings* v. *City of Fayetteville*, 294 Ark. 151, 741 S.W.2d 638 (1987).

Affirmed.

Samuel Edward DAVID *v.* STATE of Arkansas

CR 87-157 748 S.W.2d 117

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Chris E. Williams, for appellant.

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y

Gen., for appellee.

DARRELL HICKMAN, Justice. Samuel Edward David was convicted of capital felony murder for killing Danny Whitfield in exchange for money. He was sentenced to life imprisonment without parole. On appeal he raises seven points for reversal. We find no reversible error and affirm.

The first charge against David was *nolle prossed* in 1985. In 1986 the prosecutor refiled the charge against David. Vanessa and David Clift and Thomas Ivy were granted immunity in exchange for their testimony.

On the morning of September 30, 1983, Danny Whitfield was found dead on a Hot Spring County road. A tree was lying across the road in front of Whitfield's truck, which was still running when he was found. Apparently Whitfield got out of his truck when he drove up to the tree and was shot two or three times at close range with a shotgun. There was evidence that Whitfield's wife, Donna, paid the appellant to kill her husband. Vanessa and David Clift testified that the appellant had asked them to kill Whitfield. At first they agreed but later backed out. Appellant then borrowed a shotgun from Thomas Ivy and killed Whitfield himself. These are the facts as stated most favorably to the state. *Coleman* v. *State*, 283 Ark. 359, 676 S.W.2d 736 (1984).

Appellant's first argument is that the trial judge should have recused since he signed a search warrant in the case. In *Holloway* v. *State*, 293 Ark. 438, 738 S.W.2d 796 (1987), we held that Canon 3(C)(1)(a) of the Code of Judicial Conduct does not necessarily require a judge to recuse in such cases. The appellant has failed to demonstrate that the judge was wrong in failing to recuse.

Appellant's second argument is that the trial court erred in allowing witnesses to testify regarding certain threats against the sheriff and other witnesses made by appellant. This evidence came out primarily on cross-examination of the sheriff, who was asked about restrictions on David's visitation rights while he was in jail. The appellant opened the door to such testimony. *See Berry* v. *State*, 278 Ark. 578, 647 S.W.2d 453 (1983); *Poyner* v. *State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

It is also argued that it was wrong to admit evidence of prior bad acts in violation of Unif. R. Evid. 404(b). Appellant is apparently referring to testimony that he had stashed a stolen motorcycle, killed a man, and gone skinny dipping with a married woman. We do not address this argument because no objection was made to this testimony at trial. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Appellant's third argument is that the case should have been dismissed because the charge against him was imperfect—he could not tell what he had been charged with. David was charged with capital murder in the language of Ark. Stat. Ann. § 41-1501(1)(f) (Repl. 1977) [Ark. Code Ann. § 5-10-101(a)(6) (1987)] in that he "unlawfully and feloniously, pursuant to an agreement, cause[d] the death of Danny Whitfield in return for something of value. . . ." Two sections of the statute are pertinent to the hired killer. Section 41-1501(1)(f) reads:

> A person commits capital murder if: . . . pursuant to an agreement that he cause the death of another person in return for anything of value, he causes the death of any person . . . .

Section 41-1501(1)(g) [Ark. Code Ann. § 5-10-101(a)(7) (1987)] states:

> A person commits capital murder if: . . . he enters into an agreement whereby one person is to cause the death of another person in return for anything of value and the person hired, pursuant to the agreement, causes the death of any person.

The language in the information against David closely followed that in § 41-1501(1)(f), so David has no valid complaint regarding the charge. It was only necessary that the indictment name the offense and the party to be charged. *Henderson* v. *State*, 255 Ark. 870, 503 S.W.2d 889 (1974); *see also* Ark. Stat. Ann. § 43-1006 (Repl. 1977) [Ark. Code Ann. § 16-85-403 (1987)]. The state is not required to include a statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so. *Estes* v. *State*, 246 Ark. 1145, 442 S.W.2d 221 (1969). The defense may request that the state provide more details of the crime in a bill of particulars, which David did in this

case. The state responded with this additional statement of the charge:

> On September 30, 1983, Danny Whitfield was shot with a shotgun while leaving his house to go to work. Michael Freeman found the body of Mr. Whitfield by his truck with a tree across the road in front of the truck. The authorities were notified, and Doyle Cook, Sheriff of Hot Spring County, Jack Ursery, and Finis Duvall of the Arkansas State Police investigated the shooting.
>
> The State contends Donna Whitfield had an agreement with Sam David to kill Danny Whitfield in exchange for money. Donna Whitfield paid Sam David for killing her husband and some of the payments were made through Joe David, Sam David's brother.

Between the information and the bill of particulars, David had enough information to prepare his defense, which is the purpose of a bill of particulars. *Limber* v. *State*, 264 Ark. 479, 572 S.W.2d 402 (1978); *see also* Ark. Code Ann. § 16-85-301 (1987). If he was not satisfied, he could have sought a supplemental bill of particulars. Ark. Code Ann. § 16-85-301(b) (1987).

■ Appellant's fourth point is that the state failed to produce items of discovery in violation of the due process clause of the constitution. The first item in issue is a statement of Bobby Joe Hollingshead taken by the state police. The state turned over one statement of Hollingshead to the defense but the defense sought another statement, contending that it contained exculpatory evidence. It was assumed that Hollingshead would testify. The statement was tape recorded, and the tape was lost at the sheriff's office before it was transcribed. A.R.Cr.P. Rule 17.1 requires the state to produce the statement if it existed. *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987). The state was unable to produce the tape; it could not be found. Hollingshead was not produced as a witness at trial. Except for a general allegation, we do not know exactly what the state did not do that deprived David of a fair trial. He has not said what exactly the exculpatory evidence is and why the loss of the tape was prejudicial.

■ Next, David requested copies of all notes taken during the grand jury proceedings. No transcript existed. The state

produced the relevant notes to the defense, but the appellant demanded all notes taken at the proceeding. The court reviewed the remaining grand jury notes and found that they contained the same information David already had and were otherwise irrelevant. No prejudice has been demonstrated, and we cannot say the trial court erred.

Next, David argues that the state failed to provide the defense with copies of prior convictions of the state's witnesses as the trial court ordered. During the preliminary portion of the trial, the defense informed the court that it had not received any witness conviction records from the state. Evidently, the defense wanted the state to use its resources to get this information. The court advised the state that it was responsible for any information in the NCIC computer and to find out and let the defense know of any prior convictions. At trial two of the state's witnesses admitted having prior convictions. While the state evidently did not provide this information to the defense, the appellant has failed to demonstrate prejudice, and it was thus harmless error. There is no indication evidence of other convictions existed. The defense was able to fully cross-examine the witnesses about the prior convictions once they came out. Discovery under the rules of criminal procedure is not to be a substitute for a defendant's own investigation. *Renton* v. *State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

Finally, David argues he did not receive documents requested from Donna Whitfield and Joe David. The court ordered the state to produce any documents it had on Donna Whitfield. (She did not appear at trial.) The state produced what it had and the rest of the information was presented through the testimony of other witnesses. The court also ordered Joe David, the appellant's brother, to produce certain records. The trial judge evidently was satisfied that David produced the records and that appellant had the information he needed for a defense. On appeal the appellant has not convinced us the trial judge erred. The record reflects that throughout this proceeding the trial judge assisted the defense in every way possible with regard to discovery. The appellant should have made some effort to obtain these items, rather than relying solely on the state's efforts. We find no prejudicial error concerning discovery.

Appellant's fifth argument is that the trial court should have granted a continuance. These motions for continuance were filed the day before trial and during the trial, because out-of-state witnesses were not present and because the appellant had not received some of the evidence requested pursuant to discovery. Several of appellant's witnesses were in New Mexico, and the judge ordered their presence. Two witnesses testified at trial, but three did not appear. One of those, Bryson Jacobs, was in prison in New Mexico and refused to be transported to Arkansas. Another, Ed Roza, allegedly had some health problems and was unable to travel. The trial court did grant a one day continuance during trial in order to allow for the attendance of Bryson Jacobs; once he refused to be transported, however, the trial court would not grant any further continuance to secure either witness's attendance, finding that neither was material.

Appellant argues that the trial judge had already ruled that these witnesses were material to appellant's defense when he signed the orders to secure their attendance at trial and that he was in error to change his position. The trial judge, however, stated that he had signed the orders only to accomodate the appellant and to help him secure these witnesses for trial. The trial court then held a hearing on the materiality of their testimony. The appellant testified and the judge concluded and ruled that none of the witnesses were material to the defense and refused to grant a further continuance on that basis. Neither was the court convinced that the documents appellant had not received were material. Furthermore, the court found that appellant had not been denied access to his attorney for the preparation of his defense as he contends.

The burden is on the movant to show good cause for a continuance. A.R.Cr.P. Rule 27.3. A motion for continuance is addressed to the sound discretion of the trial court and the court's decision will not be reversed absent a clear abuse of that discretion amounting to a denial of justice. *Orsini* v. *State*, 281 Ark. 348, 665 S.W.2d 245 (1984). The burden of proving prejudice and an abuse of discretion rests on the appellant. *Kelley* v. *State*, 261 Ark. 31, 545 S.W.2d 919 (1977). Ark. Code Ann. § 16-63-402 (1987) governs the granting of continuances for the absence of evidence or witnesses. The statute requires the filing of an affidavit showing what facts the affiant believes the witness will

prove and that the affiant believes these facts to be true. The appellant did not comply with the statutory requirement of an affidavit and only testified that the witnesses possessed exculpatory evidence; he did not show what their testimony would be. In *Venable* v. *State*, 260 Ark. 201, 538 S.W.2d 286 (1976), we held that the denial of a motion for continuance which is not in substantial compliance with the statute is not an abuse of discretion. Besides compliance with the statutory requirement of an affidavit, the court should consider several other factors in determining whether a continuance should be granted. *Kelley* v. *State, supra.* Among these are the diligence of the movant in obtaining witnesses, the probable effect of the testimony at trial, and the likelihood of procuring the attendance of the witness in the event of a postponement. *Kelley* v. *State, supra.*

Applying these factors to the situation before us, we are satisfied the trial court did not abuse its discretion in refusing to grant a continuance. As the judge stated:

> The court has given the defense, I think, great latitude, leeway in an attempt to secure these witnesses and been unable to do so. The trial cannot be continued any longer because it would be an indefinite continuance and just doesn't seem to me that it would be—serve any purpose to continue the trial at this stage. So your motion for a continuance on all these grounds is denied.

Finally, it should be noted that it was the appellant who requested an immediate trial date, which was no doubt a factor bringing about the need for more time. In addition, on March 5, 1987, six days before trial, appellant made a motion for the trial to proceed as scheduled, stating that he did not want a continuance.

Appellant's next point is that the trial court erred in refusing appellant's proffered instruction regarding the accomplice status of Thomas Ivy and David and Vanessa Clift. The appellant's requested instruction, AMCI 402, stated essentially that these witnesses were accomplices and their testimony must therefore be corroborated. The trial court refused this instruction, giving instead AMCI 403, which stated that if the jury found these witnesses to be accomplices, their testimony must be corroborated. The instruction given allows the jury to determine whether these witnesses were indeed accomplices to the crime.

The state concedes that Thomas Ivy was an accomplice; therefore, an instruction to that effect would have been proper had the defense requested one. It did not. Instead, the defense asked for an instruction that was not proper, so the trial court was not wrong to refuse it. *Eddington* v. *State*, 225 Ark. 929, 286 S.W.2d 473 (1956).

An accomplice's testimony must be corroborated by other evidence. *See* Ark. Code Ann. § 16-89-111 (1987) [Ark. Stat. Ann. § 43-2116 (Repl. 1977)]. The corroboration must be sufficient standing alone to establish the commission of the offense and to connect the defendant with it. *Foster* v. *State*, 290 Ark. 495, 720 S.W.2d 712 (1986); *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978). It may be circumstantial evidence as long as it is substantial. *Smith* v. *State*, 282 Ark. 535, 669 S.W.2d 201 (1984).

Since it is undisputed that Thomas Ivy is an accomplice, his testimony must be corroborated. If we assume the jury found that David and Vanessa Clift were accomplices, their testimony must be corroborated. Even without the testimony of these three witnesses, there is sufficient evidence to connect appellant to this crime. There is no doubt the crime was committed. Tony Smith testified that he loaned a shotgun to Thomas Ivy and that he knew it was used by the appellant to kill Danny Whitfield. He testified that the gun was returned to him and that when he was later asked to destroy it, he did so. Joe David testified that he met with Donna Whitfield on behalf of his brother twice in order to get money from her that she allegedly owed Sam David. Other witnesses also testified that Sam David asked them to call or meet with Donna Whitfield on his behalf. Joe David also testified that Sam was nervous during the grand jury proceeding and that Sam had threatened him once, stating that he was the only connection between Sam and Donna Whitfield. Janie Spell, a friend of Donna Whitfield's, testified that before the murder, she helped Donna cash a check for $2,000 and that Donna told her not to tell Danny Whitfield about the check. An employee of Savers Federal in Hot Springs (Donna Whitfield's bank) testified that Donna Whitfield purchased two money orders from them, one on August 8, 1984, and one on August 27, 1984. The first was in the amount of $10,000 and the other was for $7,500. There is evidence that Joe David tried to cash a money order for $7,500 the same day

Donna Whitfield purchased one; however, the bank refused to cash it because it was not filled out properly. Finally, Buddy Highsmith testified that on the day before the murder he saw a car matching the description of appellant's car parked close to a culvert near the murder scene. He testified that the license number started with a "J" and had two "8's" in it; Allison David, appellant's wife, then testified that she and the appellant owned a car with the license plate number JKA 882 at the time of the murder.

Finally, appellant argues that there was insufficient evidence to support his conviction and that the trial court should have granted a directed verdict. Reviewing the evidence in the light most favorable to the state, we find substantial evidence to support the verdict. *Coleman* v. *State, supra.* The jury did not have to resort to speculation in concluding David was guilty. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

We have considered all other possible errors and find none. Supreme Court Rule 11(f).

Affirmed.

Sam SEXTON, Jr. *v.* SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

87-272 747 S.W.2d 94

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Howell, Price, Trice, Basham & Hope, P.A., by: *Dale Price*, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

DARRELL HICKMAN, Justice. Sam Sexton, Jr., a Fort Smith lawyer, had his law license suspended for one year by the Supreme Court Committee on Professional Conduct. We must reverse the decision because Sexton was not charged with a violation of a rule of professional conduct that was in existence at the time of his conduct. The committee may proceed against Sexton if he is properly charged.

The charge arose from conduct which occurred in 1983. According to the findings of the committee, when Sexton settled a claim for Danny Haffelder, who was injured in a motorcycle accident, Sexton suggested that Haffelder invest $20,000 in a company called Reclaimed Surface Coal Corporation, a company in which Sexton was involved. Sexton assured Haffelder he would double his money in 40 months. Sexton signed a promissory note to Haffelder for $40,000 as president of the company. Haffelder was paid about $12,000 on his investment, but had to file suit to obtain a judgment for the remaining $28,000. Discussion of the details of this matter are unnecessary to our decision.

Haffelder filed a complaint with the Supreme Court Committee on Professional Conduct. The executive secretary of the committee notified Sexton that he was charged with the violation

of Rules 1.8(a) and 8.4(a) of the Model Rules of Professional Conduct. Rule 8.4(a) is a general rule of misconduct, which reads:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

The specific rule, Rule 1.8(a), reads:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

These rules were not in existence at the time of Sexton's conduct. They were adopted on December 16, 1985. *See Per Curiam*, 287 Ark. 495, 702 S.W.2d 326 (1985). At the time of Sexton's conduct, he was governed by the Code of Professional Responsibility which was adopted by our order February 23, 1970. While the rules are similar, they are not the same.

The counterpart to rule 1.8 of the Model Rules of Professional Conduct under the Code of Professional Responsibility was disciplinary rule 5-104(A), which reads:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the

client has consented after full disclosure.

The old code contained ethical considerations, which served to guide attorneys regarding what was permissible conduct and what was not. One applicable to this situation is EC5-3, which reads in part:

> A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his client to invest in an enterprise in which the lawyer is interested.

Sexton made a timely motion to dismiss the charges against him because rule 1.8 was not in effect when the conduct occurred, but the motion was overruled. The committee was wrong. Due process requires notice that an act is punishable at the time it is committed. *See In Re Inquiry Concerning a Judge*, 357 So. 2d 172 (Fla. 1978). Accordingly, Sexton should have been charged under the rule in effect at the time of the alleged misconduct. *See, e.g., Kelson* v. *State Bar of California*, 549 P.2d 861, 130 Cal. Rptr. 29 (1976); *see also Montgomery County Bar Association* v. *Hect*, 317 A.2d 597 (Pa. 1974); *Attorney Grievance Commission of Maryland* v. *Kerpelman*, 420 A.2d 940 (Md. 1980). It might not matter if the rules were substantively the same, but we find a significant difference between the old rule, 5-104(A) of the Code of Professional Responsibility, and the new rule, 1.8(a) of the Model Rules of Professional Conduct.

Sexton also argues the charge should be dismissed. We do not reach this question in view of our decision to reverse the committee's decision on notice and the charge. However, we note that in *Kelson, supra*, the California Supreme Court held that the adoption of new rules of professional conduct is not a bar to a proceeding against a lawyer for an alleged violation of prior rules of professional conduct.

Sexton also argues that the committee was wrong in finding that the attorney/client relationship still existed when the investment was made. Haffelder did not invest the money until June 30, 1983. However, Sexton suggested that Haffelder invest the money the day the settlement proceeds were disbursed. At that time Sexton was still in a position of trust as a lawyer, and later events transpired on the basis of a suggestion Sexton made while

the lawyer/client relationship existed. We cannot say the committee was clearly wrong in finding that the relationship of attorney/client existed.

Reversed and remanded.

HAYS and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. There is nothing to be gained by remanding this case. In the first place, we review the record *de novo* and do not reverse the findings of the committee unless they are clearly erroneous. *Muhammed* v. *Arkansas Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 282 (1987). Moreover, this case was the subject of a lengthy hearing and a full inquiry by the committee, and neither side suggested the need for additional proof.

The charges by Mr. and Mrs. Haffelder against Mr. Sam Sexton, Jr., were defended entirely on the contention that Mr. Sexton and Mr. and Mrs. Haffelder were *at no time* in an attorney-client relationship. The hearing was focused on that issue alone. The argument that these events occurred before the effective date of the Model Rules of Professional Conduct, while mentioned in passing at the commencement of the hearing, was otherwise ignored. There was no proof whatever that the actions by Mr. Sexton of which the Haffelders complained were not improper prior to the adoption of the Model Rules. Moreover, essentially the same conduct is prohibited under the Code of Professional Responsibility. See DR 5-104(A). Certainly there was no attempt by Mr. Sexton to show that he complied with *either* rule by informing the Haffelders about the transaction. There is no testimony that Mr. Sexton met the requirement of "full disclosure" to the Haffelders as to the pros and cons of the transaction. Mr. Sexton testified that he thought it was a good investment for them and that Mr. Haffelder regarded it as "a favor" by Mr. Sexton. There is no mention of any risk involved, but it is implicit in Mr. Sexton's account of the transaction, in the form of a loan, that it was patently usurious, in that the $20,000 was to be repaid at $1,000 a month for forty months. There seems to have been no disclosure of that material fact. It is the appellant's duty to demonstrate error in the proceedings below and to present a record for which it can be determined on review that error occurred. *S.D. Leasing, Inc.* v. *RNF Corp.*, 278 Ark.

530, 647 S.W.2d 447 (1983); *Kimery* v. *Schockley*, 226 Ark. 437, 290 S.W.2d 442 (1956). This he has failed to do.

As to whether Mr. Sexton and Mr. and Mrs. Haffelder stood in an attorney-client relationship, only one conclusion is possible. The proof is overwhelming. Mrs. Haffelder, acting for her husband while he was hospitalized from his injuries, testified that she called the Sexton firm, that she spoke with Mr. Sexton and he agreed to represent them. Often thereafter she and her husband would meet with Mr. James Robb or Mr. Bennett Nolan, younger lawyers with the firm, but they always considered Mr. Sexton their lawyer and always asked first to meet with him. Mr. Haffelder's testimony corroborated Mrs. Haffelder's. While Mr. Sexton denied that he ever spoke with Mrs. Haffelder, the finding of the committee was clearly to the contrary.

If any doubt of Mr. Sexton's status were to remain, the documentary evidence dispels it entirely. When the discovery deposition of Mrs. Nancy Clower, the opposing litigant, was taken, Mr. Sexton appeared as attorney for the Haffelder's, and it was he who did the questioning. Much of the correspondence between the Sexton firm and Mr. Hugh Hardin, attorney for the Clowers's insurance carrier, was between Mr. Sexton and Mr. Hardin. Of eleven items of correspondence flowing from Mr. Hardin, seven were addressed to Mr. Sexton, three to Mr. James Robb and none to Mr. Nolan, whom Mr. Sexton contends was "lead" counsel. In one letter to Mr. Sexton, Mr. Hardin states, "In your representation of this young man" (referring to Mr. Haffelder) and proceeds to ask for income tax records. There is correspondence between Mr. Walter Niblock, who represented Mrs. Clower individually, to the carrier, urging settlement within the policy limits, and stressing Mr. Sexton's effectiveness in trial. This letter assumes that Mr. Sexton alone is representing the Haffelders. There are several letters from Mr. Sexton proposing settlement and evidencing an intimate knowledge of the case. The settlement itself, according to Mr. Hardin's records, was reached between Mr. Hardin and Mr. Sexton. The compromise settlement agreement, a detailed document, was approved by Mr. Sexton, as "attorney for the Haffelders," the settlement check of $90,000 was endorsed by Mr. Sexton, and the joint order of dismissal of the cause with prejudice was approved by Mr. Sexton and Mr. Hardin, and it was Mr. Sexton who met with the

Haffelders at the settlement conference. Lastly, it should be noted that when Mr. and Mrs. Haffelder sued Mr. Sexton some two years later, requests for admissions were served on Mr. Sexton, the first of which was a request that he admit an attorney-client relationship had existed with the Haffelders. This request was never denied.

It is true that Mr. James Robb and Mr. Bennett Nolan of the Sexton firm, testified that Mr. Sexton never represented the Haffelders, that they retained Mr. Nolan to represent them and he brought Mr. Robb into the case, and because they were younger, they were merely drawing on Mr. Sexton's experience and prestige. But even if Mr. Sexton were not expressly retained by the Haffelders, by assuming an active, high-profile role in their behalf, Mr. Sexton gave the Haffelders every right to assume that an attorney-client relationship existed. The relationship is not dependent on an express agreement, it may be implied on the part of an attorney who acts in behalf of his client in pursuance of a request by the latter. *Hirsch Bros. & Co.* v. *R. E. Kennington Co.*, 124 So. 344 (Miss. S. Ct. 1929); 88 A.L.R. 1; Corpus Juris Secundum, Vol. 7A, § 169, p. 250.

I respectfully submit on this record the committee should be affirmed.

GLAZE, J., joins this dissent.

Frank S. PATTERSON, Helen Goff and Ralph M. Patterson, Jr. *v.* STATE of Arkansas

88-25 747 S.W.2d 99

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Ralph M. Patterson, Jr., for appellants.

Callahan, Crow, Bachelor & Newell, P.A., by: *Carl A. Crow, Jr.*, for appellee.

STEELE HAYS, Justice. From the statement of the case in appellants' brief it appears that in 1980 two of the appellants filed a suit for specific performance against the State of Arkansas, appellee, in the Chancery Court of Garland County. That proceeding was later dismissed without prejudice on motion of the plaintiffs, and in 1985 an action for damages was filed by the appellants in the Garland Circuit Court. The circuit court action was then dismissed, first without prejudice, then with prejudice, resulting in this appeal. Two points are relied on for reversal: 1) It was error to dismiss this cause with prejudice as to Frank S. Patterson, who was not a party to the original cause, and 2) It was error to dismiss as to Helen Goff and Ralph M. Patterson, Jr., predicated upon ARCP Rule 41.

The case is affirmed pursuant to Rule 9, Rules of the Supreme Court and the Court of Appeals. The abstract consists of nothing more than a brief reiteration of the statement of the case. There is no abstract of the pleadings, several relevant motions, the order or orders appealed from, nor anything concerning the proceedings below. In short, it is utterly impossible to comprehend the arguments presented or to intelligently decide the issues. Finding the abstract flagrantly deficient, we affirm. *Cash* v. *Holder*, 293 Ark. 537, 739 S.W.2d 538 (1987); *Financial Security Life Assurance* v. *Powell*, 247 Ark. 609, 447 S.W.2d 64 (1969); *Reeves* v. *Miles*, 236 Ark. 277, 365 S.W.2d 461 (1963).

AFFIRMED.

John Michael CALDWELL *v.* STATE of Arkansas

CR 87-201 747 S.W.2d 99

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Shermer & Walker, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, John Michael Caldwell, was convicted of second degree battery for shooting James Roberts. He contends he was entitled to the benefit of a plea bargain from which the state withdrew before trial. He argues he was constitutionally entitled to be indicted rather than proceeded against by information and that the information was invalid because it did not contain the words, "against the peace and dignity of the State of Arkansas" in the right place. He also contends the court erred in not requiring the state to furnish him a transcription of a statement he gave before trial. We hold that, because Caldwell has not demonstrated that he relied on the plea bargain in any way, it was not error to permit the state to withdraw from it. We hold that the constitution is not violated by the information procedure, and that no error occurred with respect to the arrangement of the words of the information. We also hold no prejudice resulted from the failure to furnish the transcription. The conviction is affirmed.

1. Withdrawal from plea bargain

Toward the end of his term of office, the prosecutor offered to recommend a sentence to five years probation in exchange for Caldwell's plea of guilty to first degree battery and aggravated

assault. Caldwell signed the agreement. A new prosecutor took office before Caldwell entered a plea, and the new prosecutor refused to honor the agreement. Caldwell moved to require that the agreement be enforced. The motion was denied. The aggravated assault charge was dismissed, and, upon a plea of not guilty, Caldwell was convicted of second degree battery, a lesser offense included in first degree battery.

As authority for his contention that he was entitled to specific performance of the agreement, Caldwell cites our opinion in *Hall* v. *State*, 285 Ark. 38, 684 S.W.2d 261 (1985), in which we said that if the state does not keep a plea bargain, an accused may withdraw his guilty plea, citing *Santobello* v. *New York*, 404 U.S. 257 (1971), and *Mabry* v. *Johnson*, 467 U.S. 504 (1984). These cases involved alleged breaches of plea bargains which allegedly occurred after a guilty plea had been entered. To be distinguished are cases like this one where no plea has been entered at the time of the withdrawal.

We have no case squarely in point. The cases from other jurisdictions are discussed in Annot., *Right of Prosecutor to Withdraw from Plea Bargain Prior to Entry of Plea*, 16 A.L.R. 4th 1089 (1982). The majority of jurisdictions which have considered the issue hold that, if the defendant has not pleaded or detrimentally relied upon the agreement, the state is free to withdraw. *See, e.g., State* v. *Edwards*, 279 N.W.2d 9 (Iowa 1979), and *Wynn* v. *State*, 22 Md. App. 165, 322 A.2d 564 (1974), in both of which withdrawal was allowed, before prejudicial reliance had occurred, where a second prosecutor refused to honor an agreement entered by a predecessor.

Caldwell argues that he relied to his detriment on the agreement, but the closest he comes to saying he was prejudiced is the general statement that upon entry of the agreement he stopped preparing his defense. He makes no specific statement that any preparations were foregone or how his defense may have suffered. We find no facts showing detrimental reliance.

Caldwell also argues that it is fundamentally unfair to allow the state to renege, whether or not he has relied. Some courts might agree. *See Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979); *Ex Parte Yarber*, 437 So. 2d 1330 (Ala. 1983). We disagree for two reasons. First, if the trial court chooses not to

accept the plea bargain, it is of no effect. Ark. R. Crim. P. 25.3; *Mabry* v. *Johnson*, 467 U.S. 526 (1984). The parties have no power to bind the court, and thus it is illusory to say the state is bound by such an agreement before it is consummated by the acceptance of a guilty plea by the court. Second, this court places substance over form, *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986), and if there is no demonstrable prejudice resulting from the withdrawal we fail to see how it is unfair to allow it.

We do not mean to suggest by this discussion that if an accused has detrimentally relied to any degree or in any manner upon a plea bargain he may have specific performance of it prior to entering a plea based upon it. We will cross that bridge when we come to it. Withdrawal under those circumstances may affect only the evidence available to the prosecution. Here we hold only that absent a showing of acceptance of a plea of guilty based upon agreement and absent a showing of other detrimental reliance upon the agreement, Caldwell was not entitled to enforcement of it.

2. The information

In many cases, including *Davis* v. *State*, 246 Ark. 838, 440 S.W.2d 244 (1969), *cert. denied*, 403 U.S. 954 (1971), and *Penton* v. *State*, 194 Ark. 513, 109 S.W.2d 131 (1937), we have upheld Ark. Const., amend. 21, which permits criminal charges to be made by information, against challenges based on the Fifth and Fourteenth Amendments to the United States Constitution. There is no need to reconsider those cases here.

Arkansas Const., art. 7, § 49, provides, in part, "Indictments shall conclude: 'Against the peace and dignity of the State of Arkansas.' " This is known as the *contra pacem* clause. In *Williams* v. *State*, 47 Ark. 230, 1 S.W. 149 (1886); *State* v. *Hazle*, 20 Ark. 156 (1859); and *State* v. *Cadle*, 19 Ark. 613 (1858), we held that each count of an indictment must contain the clause. Our reason was that each count of an indictment must stand on its own.

Count I of the information against Caldwell stated the battery offense and did not contain the clause. It was, however, contained in the information after the aggravated assault count,

which was count II. The clause was not included in the body of either count but was at the conclusion of the printed information form upon which the two counts had been typed. It is apparent to anyone reading the information that the clause was intended to apply to both counts.

When Caldwell's counsel brought this matter to the attention of the court and the prosecutor, the prosecutor, for reasons we do not know, refused to amend the information to include the required words in count I. The judge remarked that with the dismissal of count II, the clause came at the conclusion of count I. While it would have been easier to decide had the remaining count in the information been expressly amended to include the clause, we agree with the trial court's conclusion that the dismissal of count II effectively amended the indictment so that count I concluded with the required clause.

3. The statement

Caldwell gave an exculpatory statement to a deputy sheriff shortly after the shooting occurred describing it as accidental. His counsel made a pre-trial motion to require production of any such statement made by Caldwell. There is no doubt that Caldwell was entitled to the statement. Ark. R. Crim. P. 17.1(a)(ii); *Williamson* v. *State*, 263 Ark. 401, 565 S.W.2d 415 (1978). Here again, however, the question is whether he suffered any prejudice by the failure of the prosecution to give him a copy of it.

Caldwell made a pre-trial motion to suppress the statement and was told by the court that the state could use the statement to impeach him if he took the stand. Caldwell's counsel agreed with the court's observation, and no objection was raised at that point with respect to failure of the prosecution to produce the statement.

During the trial the state neither introduced the statement nor mentioned it. It was referred to only when Caldwell's counsel asked the deputy sheriff who had taken the statement about it. Caldwell has not argued that the failure of the state to produce the statement was in any way prejudicial to him, and absent a showing of prejudice we will not reverse. *Dunlap* v. *State*, 292 Ark. 51, 728 S.W.2d 155 (1987).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent from that portion of the opinion which holds that criminal charges may be filed by information. I believe Amendment 21 to the Constitution of Arkansas is in direct violation of the Fourth and Fifth Amendments to the Constitution of the United States.

William L. INGRAM *v.* PIRELLI CABLE CORPORATION

87-280 747 S.W.2d 103

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Q. Byrum Hurst, Jr., for appellant.

Wright, Lindsey & Jennings, for appellee.

TOM GLAZE, Justice. This case presents questions regarding the action of tort of outrage. Specifically, we are asked whether the trial court erred in directing a verdict in favor of the appellee, the appellant's employer. The court found that the evidence was

insufficient to show appellee's conduct (or that of its agents) rose to the level required to establish an action for tort of outrage or intentional infliction of emotional distress. In viewing the evidence in the light most favorable to the appellant and giving it its highest probative value, we conclude the trial court was correct. Therefore, we affirm.

In March 1980, appellant went to work for appellee as an electrical department manager at a salary of $22,000.00 per year. His employment relationship with appellee could be characterized as good for about three years, having received a promotion to project engineer and an increase in salary sometime in 1982. Appellant's problems apparently commenced in November 1983, when Mr. Garibay became plant manager. At this time, appellant's immediate supervisor, Mr. Brennesholtz, informed appellant that the electricians and mechanics whom appellant supervised were no longer allowed to go to the maintenance department where they picked up their new job assignments from appellant. Appellant complained to Brennesholtz that this new policy crippled the operation because appellant had to anticipate when each worker would complete his job and go to him to assign another job. About a month later, Brennesholtz placed some of appellant's workers, the mechanics, under Mr. Gary Meeks, another department head. Mr. Meeks and other management level employees, apparently were allowed to use telephones to page and manage their workers when making job reassignments. Appellant stated that Garibay had put this telephone policy in effect after appellant returned from performing an engineering project in Abbeyvale, South Carolina, where appellee had another plant; appellant believed Garibay imposed the policy to harrass him, but conceded that he had never spoken with Garibay to determine the reasons the policy was formulated.

During the next ten months, matters grew worse for the appellant. In January 1984, Brennesholtz told appellant and Mr. Meeks to stay an extra hour each day so they could coordinate work, but because no one attended the meetings except appellant, he stopped going. Another problem arose in February 1984, when a machine in the plant broke down and Brennesholtz instructed appellant "to stay all night if necessary to get this machine running." Appellant refused saying, "I physically couldn't do it and to back off me." Appellant returned to work the next day and

apparently nothing else was said about that confrontation. Next, in March 1984, appellant was told he was to pick up any messages at the switchboard within five minutes of when they came in and to deliver them to his workers within five minutes. No other department manager was asked to handle messages. And finally, in August 1984, Brennesholtz requested appellant to sign a job description as electrical department manager, and the appellant refused, explaining he was the project engineer. Appellant then asked to see the job description for plant engineer, but Brennesholtz would not respond. Although appellee considered appellant's position to have reverted to electrical department manager, appellant never received a decrease in pay.

Two other employees for appellee testified, indicating they had knowledge that Garibay and Brennesholtz were putting pressure on appellant. One of the two employees said Brennesholtz voiced concern that appellant might sue appellee if the pressure continued. In October 1984, appellee had a reduction in work force due to economic conditions, and appellant was laid off with others. The plant facility was closed altogether in March 1985, and when notified of the opportunity to discuss employment opportunities at other appellee locations, appellant did not respond.

The foregoing evidence reflects a serious conflict or dispute between appellant and his supervisors, and while we believe the supervisors' conduct was petty, insulting and less than one might expect from manager level executives of a reputable firm, we cannot agree such conduct was outrageous. In *M.B.M. Co.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980), we first recognized this new tort of outrage or intentional infliction of emotional distress and defined extreme and outrageous conduct as meaning conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.

The *Counce* case, like the one here, involved the discharge of an employee; but the court rejected any suggestion that Ms. Counce's discharge, itself, supported an action for intentional infliction of emotional distress. The court further recognized that her employer was not liable for doing that which it had the legal

right to do, *viz.*, the employer had the right to terminate her. *Id.; see also* Restatement (Second) of Torts § 46, at 76 comment g (1965). *Cf. Givens* v. *Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982) (wherein the employer angrily accused his employee of not working and terminated the employee causing him to lose sleep and weight and to enter the hospital). The *Counce* court, instead, looked to the employer's conduct that occurred subsequent to Counce's discharge, and found that such conduct clearly presented a material issue of fact as to whether the employer's conduct was extreme and outrageous. That conduct included the employer's suspecting Ms. Counce of theft, forcing her to take a polygraph test by withholding her pay after she was discharged, continuing to keep her wages after she passed the test and causing her, without a satisfactory basis or reason, to lose her unemployment benefits.

In the instant case, we are faced with an employee who was first laid off and then discharged, which the appellee had a legal right to do. In addition, it is clear the appellee's supervisors had the authority to establish policies and procedures, and while some of those policies or procedures may have appeared demeaning or insulting to an employee, such conduct by an employer is not the type that gives rise to the level of being outrageous. In other words, liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Restatement (Second) of Torts § 46 comment d (1965).

We said as much in *Tandy Corp.* v. *Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), wherein we stated that our recognition of this new tort should not and does not open the doors of the courts to every slight insult or indignity one must endure in life. There, we clearly stated that the court had taken a somewhat strict approach to this cause of action.

The facts in *Bone* were similar to those in *Counce*, except the outrageous conduct giving rise to the employee's cause of action occurred immediately before his discharge. In sum, Bone's suit was based on the fact that he was accused of a theft, threatened with arrest and interrogated by company investigators who cursed him and admitted placing him under stress. However, we emphasized that even this conduct would not be outrageous, except the employer knew Bone was under extreme

emotional stress at the time; even so, the employer still denied Bone the prescription medicine that he required. One investigator, in fact, slammed a drawer when Bone reached to get his prescription. Based on these facts, we held the evidence was sufficient to support a verdict for outrage. Our holding in *Bone* is consistent with the view that the extreme and outrageous character of the conduct may arise from the actor's (employer's) knowledge that the other (employee) is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. Restatement (Second) of Torts § 46 comment f (1965).

Thus, the court in *Bone* recognized the principle announced in *Counce*, that an employer has the legal right to discharge an employee who is terminable at will; but, even so, the court contemporaneously sensitized the employer and tempered the employer's conduct in such matters when that employer possesses knowledge that the employee is peculiarly susceptible to emotional distress, whether from physical or mental origin.

From the record before us, we find nothing that reflects the appellee or its supervisors, Garibay or Brennesholtz, had knowledge that appellant was peculiarly susceptible of emotional stress. Appellant's own psychologist, who examined and tested him months after he left appellee's employment, testified that appellant revealed no identifiable mental, emotional or behavioral disorder.[1] Although appellant and his wife related that he had experienced stress, chest pains and sleepless nights when dealing with the pressures foisted upon him by his supervisors, there is nothing in the record that shows he informed appellee of these stress-related problems. Even if he had, we doubt that, under the circumstances of this case, the appellee's conduct could be described as outrageous.

In conclusion, we mention our most recent case of *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988),

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[1] The psychologist did testify that, by evaluating appellant's job and medical history and through other quantitative analyses, he was of the opinion that appellant had been under considerable stress from his job during 1983 and 1984.

which was decided after the parties herein filed their briefs. We need not discuss the facts in detail but do note that the circumstances favoring the employee's outrage claim there were much stronger than those imposed here. Nonetheless, we rejected the employee's claim, holding the employer's conduct failed to support a verdict for outrage. That conduct involved the employer's officers putting pressure on the employee which eventually led to his demotion and decision to leave his employment. Apparently, believing the employee reported the company for pricing violations, the officers took actions designed to set up the employee in order to terminate him.

In *Oxford*, we made it clear that an employer's conduct must be sufficiently egregious or extreme before the standard is met for an outrage cause of action. Obviously, the type conduct that meets that standard, first announced in *Counce* in 1980, must necessarily be decided on a case-by-case basis. While the court has taken a strict view in recognizing an outrage claim, especially in employment relationship situations, we also have said that an employer should not have an absolute and unfettered right to terminate an employee. Accordingly, we held in *Oxford* that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state.

In the instant case, we need only address the issue as to whether the appellee's conduct was outrageous since no wrongful discharge claim is before us. Thus, because we find no merit in appellant's claim for outrage, we affirm.

PURTLE and DUDLEY, JJ., dissent.

ROBERT H. DUDLEY, Justice, dissenting. The trial court directed a verdict against the plaintiff-employee, ruling that the conduct of the defendant-employer (a) was not sufficiently egregious to constitute the tort of outrage, and (b) that the appellant did not suffer severe emotional distress. The majority affirms on both points. I dissent on both points.

The rules of appellate review are very important in this case. The first of those rules is that in reviewing the granting of a directed verdict we are required to examine the evidence, including all reasonable inferences, in a light most favorable to the non-

moving party. *Stalter* v. *Coca-Cola Bottling Co.*, 282 Ark. 443, 445, 669 S.W.2d 460, 462 (1984). Sometimes we state the rule as "on appeal the evidence of the party against whom a motion for a directed verdict is granted will be given its highest and strongest probative value, with all reasonable inferences allowable." *Nunley* v. *Orrell*, 282 Ark. 593, 593, 670 S.W.2d 425, 425 (1984).

In reviewing the evidence with the above rule of review in mind, it becomes clear that six key facts were developed: (1) In March, 1980, the appellee hired appellant as a manager of the electrical department of the Pirelli Cable Corporation's Hot Springs factory. In March, 1982, he was promoted to project engineer for the factory. (2) Although the plant building was one-quarter of a mile long and covered three levels, he was required in 1983 to give out work assignments in the presence of his employees. Unlike the other supervisory personnel, he was not allowed to give out the assignments by telephone or to have the crews report to his office. (3) In January, 1984, he was told by his supervisor that he had to work 10 hours a day, seven days a week, and that the purpose was *harassment*. For the next few weeks he was required to attend a "meeting" during the tenth hour of each day. No one else would be at the "meeting," but he was required to stay there for the full hour. He was again told this was for the purpose of harassment. (4) In February, 1984, a machine in the factory sat in an inoperable condition, and there were no parts available to fix it. He was ordered to stay at the factory all night and fix the machine. (5) In the final act of harassment he was asked by his supervisor to sign a statement which provided that his position was lower than it was. (6) Throughout the year and one-half of harassment, he suffered from emotional distress and, as a direct result, had various problems such as chest pains and insomnia.

The next applicable rule of appellate review which must be considered is the rule which provides that if the above stated facts constitute substantial evidence of the tort of outrage, then it was error to take the case from the jury. *Ikani* v. *Bennett*, 284 Ark. 409, 410, 682 S.W.2d 747, 748 (1985). Accordingly, we must next examine our cases to determine whether these facts fit within the tort of outrage.

We first recognized the tort of outrage in *M.B.M. Co.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980). We said, "[W]e can and do now recognize that one who by extreme and outrageous conduct wilfully and wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress." *Id.* at 280, 596 S.W.2d at 687. However, we took care to note that to be tortious a high level of outrageousness is required: "By extreme and outrageous conduct, we mean conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.*

In *Counce*, the plaintiff was fired and the employer deducted $36.00 from her final paycheck to cover missing money, despite the fact that the plaintiff denied stealing the money and was shown to be telling the truth by a polygraph machine. In a proceeding comparable to the case at bar, we reversed the lower court's summary judgment against the plaintiff, holding, "We have no hesitation in saying there was a material issue of fact as to whether [the employer's] conduct was extreme and outrageous." *Id.* at 281, 596 S.W.2d at 688.

The facts of this case, when viewed most favorably to the appellant, show extreme harassment pursued over the period of a year and one-half. That is more egregious than was the simple withholding of $36.00 in the *Counce* case. Since we held there was a material issue of fact as to whether the employer's conduct was extreme and outrageous in the *Counce* case, and since this case is even more egregious, we should hold there is a material issue of fact in this case.

Next, the facts, as tested under the rules of appellate review, establish that the appellant felt humiliated, suffered from stress, and, as a result, had physical problems such as chest pain and insomnia. Thus, there was sufficient testimony to avoid a directed verdict on the issue of emotional distress because the motion should be granted only when the proof would not support a verdict. *Nunley* v. *Orrell*, 282 Ark. 593, 670 S.W.2d 425 (1984).

PURTLE, J., joins in this dissent.

Kathy YORK *v.* STATE of Arkansas

CR 87-207 747 S.W.2d 102

Supreme Court of Arkansas
Opinion delivered March 28, 1988

Hickam & Williams, P.A., by: *Lynn Williams*, for appellant.

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

TOM GLAZE, Justice. This appeal is from the trial court's denial of appellant's Rule 37 petition. The sole issue on appeal is whether the trial court was correct in finding that the appellant's Rule 37 petition was untimely filed. We find no error and

therefore affirm.

On November 18, 1982, the appellant was found guilty of first-degree murder and sentenced to life imprisonment. She did not appeal her conviction. Appellant filed a petition for post-conviction relief pursuant to A.R.Cr.P. Rule 37 on June 11, 1987, more than four years from the date of her commitment. Rule 37.2(c) provides that a timely petition must be filed within three years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void. Appellant in her complaint alleges several grounds for Rule 37 relief, but in this appeal she argues only that her claim of ineffective assistance of counsel is sufficient to void her conviction. Her main complaint against her attorney was his inexperience because her case was his first murder trial.

A ground sufficient to void a conviction must be one so basic that the judgment is a complete nullity. *Williams* v. *State*, 293 Ark. 73, 732 S.W.2d 456 (1987) (per curiam). This court has recognized that a judgment obtained in a court without jurisdiction to try the accused and a judgment obtained in violation of the provisions against double jeopardy are sufficient grounds to void a conviction. *Travis* v. *State*, 286 Ark. 26, 688 S.W.2d 26 (1985). Here, the appellant failed to timely file her Rule 37 petition, and now the burden is on her to demonstrate that the judgment entered is a nullity. *See id.*

This court has recently refused to recognize ineffective assistance of counsel, for failing to seek the dismissal of charges that had been nol prossed and not refiled within one year, as a ground of relief that voided a conviction. *Williams*, 293 Ark. 73, 732 S.W.2d 456. In *Williams*, we were addressing a petition for Rule 37 relief filed more than nine years after the conviction, and this court upheld the trial court's finding that the petition was untimely filed. In the present case, appellant's complaint of the inexperience of her counsel is clearly not a sufficient ground to void her conviction. Accordingly, we must find that the trial court correctly concluded that the appellant's petition for post-conviction relief was untimely filed under Rule 37.2(c).

John L. LEWIS *v.* STATE of Arkansas

RC 88-7 747 S.W.2d 91

Supreme Court of Arkansas
Opinion delivered March 28, 1988

G. B. "Bing" Colvin III, for appellant.

No response.

PER CURIAM. Appellant's attorney of record, G. B. "Bing" Colvin III, has filed on behalf of appellant a motion for rule on the clerk by which he requests that this court find Colvin's failure to timely file the record resulted from unavoidable error or excusable neglect.

Appellant, John L. Lewis, was convicted on July 28, 1987, and the order for entry of judgment and commitment was filed on July 29. Notice of appeal was filed on August 14, and an order

extending for seven months the time for filing the record was entered on November 12.

Rule 5 of the Arkansas Rules of Appellate Procedure provides that the record on appeal shall be filed with the clerk of this court within 90 days of the notice of appeal unless the trial court grants an extension. The order of extension must, however, be entered before the expiration of the 90 day period, and, with exceptions not applicable here, in no event shall the time be extended more than seven months from the date of the entry of the judgment. As such, the record would have been due no later than February 29, 1988.

Colvin's primary contention is that he relied on both oral and written representations by the Clerk of the Desha Circuit Court that the seven month time period ran from the date of notice of appeal and not the date of entry of judgment. We have repeatedly held that the attorney is responsible for filing the record and cannot shift that responsibility to the trial judge or to the court reporter or, in this case, to the clerk of the lower court. *Forrest* v. *State*, 286 Ark. 165, 690 S.W.2d 1 (1985); *Christopher* v. *Jones*, 271 Ark. 911, 611 S.W.2d 521 (1981). Under the circumstances presented here, we will not permit the record to be filed unless the attorney assumes full responsibility for presenting it late. *Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 804 (1986). A statement that it was someone else's fault or no one's fault will not suffice. *Moore* v. *State*, 268 Ark. 191, 609 S.W.2d 894 (1980).

If appellant's attorney files a motion and affidavit in this case accepting full responsibility for not perfecting the appeal and admits that the record was tendered late due to a miscalculation of the seven-month maximum limit for filing the record, then the motion will be granted. *McKimm* v. *State*, 294 Ark. 208, 742 S.W.2d 114 (1988); *Robbins* v. *State*, 287 Ark. 199, 697 S.W.2d 118 (1985); *Gibson* v. *State*, 272 Ark. 345, 614 S.W.2d 234 (1981). The attorney's negligence will be duly noted, and a copy of the opinion granting the motion will be forwarded to the Committee on Professional Conduct.

David QUIGLEY *v.* STATE of Arkansas

RC 88-6 747 S.W.2d 92

Supreme Court of Arkansas
Opinion delivered March 28, 1988

David M. Clark, for appellant.

No response.

PER CURIAM. Petitioner, David Quigley, by his attorney, David M. Clark, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to his miscalculation of the ninety-day limit for filing the record in this court. *See* Ark. R. App. P. 5(a).

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry* v. *State*, 272 Ark. 243 (1981); *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

A copy of this opinion will be forwarded to the Committee on Professional Conduct. *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

Hazel G. QUICK *v.* Charles WOODY, et al.

88-39 747 S.W.2d 108

Supreme Court of Arkansas
Opinion delivered April 4, 1988

Barron & Coleman, P.A., by: *Keith I. Billingsley*, for appellant.

Mitchell, Williams, Selig & Tucker, by: *John C. Lessell*, for appellees.

JACK HOLT, JR., Chief Justice. This case involves the

interpretation of Ark. Code Ann. § 23-42-106(c) (1987), formerly Ark. Stat. Ann. § 67-1256(b) (Repl. 1980), which subjects an agent who materially aids in the sale of unregistered, nonexempted securities to civil liability. Jurisdiction is pursuant to Ark. Sup. Ct. R. 29(1)(c).

On March 6, 1984, the appellees, Charles Woody, Charles Edward Woody, Larry Joe Woody, Ricky Don Woody, William F. Woody, Eddie Jones, and Lucille Shelton filed suit against Quick Oil Company; Transworld Petroleum, Inc., a subsidiary of Quick Oil Company; J. Gary Nolan Quick II, owner and operator of both companies; and Hazel G. Quick, Gary Quick's mother and the sole appellant in this appeal, seeking rescission of the sale and purchase of securities representing various interests in three oil and gas wells, recovery of their invested monies, interest, costs, and reasonable attorneys' fees on the basis that the securities sold were not registered in Arkansas as required by the Arkansas Securities Act, Ark. Code Ann. §§ 23-42-101—23-42-508 (1987), formerly Ark. Stat. Ann. §§ 67-1235—67-1264.14 (Repl. 1980). A consent judgment was entered against all defendants except Hazel Quick for $33,810.00, plus interest, costs, and attorneys' fees.

Subsequently, the appellees proceeded to trial against the remaining defendant, Hazel Quick. The trial court held that she, acting as an agent of the defendants, materially aided in the sale of unregistered securities to the appellees. The trial court found for the plaintiff-appellees and awarded $14,490.00 collectively to Charles Edward Woody, Larry Joe Woody, Ricky Don Woody, and William F. Woody; $4,830.00 to Charles Woody; $4,830.00 to Eddie Jones; and $4,830.00 to Lucille Shelton; plus interest, but denied their request for costs and attorneys' fees. In addition, it denied Charles Woody relief with respect to securities he purchased on December 20, 1980. Hazel Quick filed a motion for a new trial, which was denied. She now appeals. We agree with the trial court's holding and affirm.

On cross-appeal the appellees challenge the portions of the trial court's judgment that (a) deny Charles Woody relief with respect to securities purchased on December 20, 1980, and (b) deny the appellees' request for costs and attorneys' fees. We also affirm the trial court on the cross-appeal.

The material facts in this case are as follows: In June of 1980, Gary Quick, an Oklahoma resident, Quick Oil Co., and Transworld Petroleum, Inc. began offering for sale fractional undivided working interests in an oil and gas well project in Navarro County, Texas. The appellees, Arkansas residents and eventual investors in the project, initially obtained information about the investment opportunity either at an August 1980 promotional meeting in Little Rock at which Hazel Quick, also an Arkansas resident, participated or by virtue of her direct or indirect dissemination of information about the project. At trial both Hazel and Gary Quick disputed the fact that the meeting took place in August contending it was held in November, after the purchase of securities by the appellees, to answer questions concerning the venture. The record does reflect that the appellees sent their checks to Quick Oil in August 1980 and that they have not received any return on their investments.

Karen Woody, wife of appellee Larry Joe Woody, testified that the promotional meeting was held at Jan and Charles Edward Woody's house in August of 1980 to discuss the oil and gas venture with potential investors. According to Karen Woody, all of the named plaintiffs-appellees were present at the meeting. (Eddie Jones later testified that he was not present.) She also stated that during Gary Quick's presentation, Hazel Quick interrupted him numerous times with comments about what to expect in investing and also made the statement that "if we [the appellees] knew of anyone that was interested, that they [Hazel and Gary] were still looking for investors and to be sure and let them know." Additionally, Karen Woody asserted that Hazel Quick handed out business cards to the appellees while, at the same time, stating that if they came across anyone interested in investing, let her know. A business card that stated "TransDelta Gas and Oil Company, Inc. [Hazel Quick's son-in-law's company], Hazel Quick Arkansas Regional Manager," was later admitted at trial to impeach Hazel Quick's testimony that she had no knowledge of oil and gas affairs. Karen Woody and Larry Joe Woody, her husband, sent a check to Quick Oil on August 26, 1980.

Lucille Shelton, Hazel Quick's cousin and Jan Woody's mother, testified at trial that Hazel Quick met with her at Shelton's office concerning the oil and gas investment, en-

couraged her to invest, and sent or gave her a prospectus explaining the investment, which had a written notation on its face, "Remit to Hazel Quick." Shelton also attended the meeting held at her daughter's house, and sent her check to Quick Oil on August 26, 1980. Shelton further testified that it was Hazel who must have instigated communications about the meeting. However, Hazel Quick denied that she arranged the meeting.

Eddie Jones testified that while he and his wife were attending a church reunion in August 1980, Hazel Quick talked to him concerning the investment and accepted his check, upon which she filled in Quick Oil as payee. Quick Oil later received this check. He also stated that Hazel Quick was the only person he talked to directly about the investment and that she indicated to him that she was handling Gary Quick's interest in Arkansas. Lavèrne Jones, Eddie Jones' wife and Hazel Quick's cousin, testified that Hazel Quick convinced her husband to invest.

Charles Woody testified that he made his initial purchase of securities after attending the meeting and that he did not talk to Gary Quick before making his investment. However, he did communicate with Gary Quick in December of 1980, after which he purchased additional securities.

Gary Quick testified that he sold the appellees securities through telephone communications before the meeting. However, both Charles Woody and Eddie Jones asserted that they had no telephone communications with Gary prior to investing in August of 1980.

Hazel Quick contends that the trial court erred in finding that she participated as an agent of the seller and materially aided in the sale of the securities. We disagree.

This matter was tried before the court without benefit of a jury. In such cases, the findings of the trial court shall not be set aside unless clearly against the preponderance of the evidence. *Burdette* v. *Madison*, 290 Ark. 315, 719 S.W.2d 418 (1986). Furthermore, we give due regard to the trial court's superior ability to determine the credibility of the witnesses and the weight to be given their testimony. *Id.*

Ark. Code Ann. § 23-42-106(c) (1987) provides in pertinent part as follows:

> [E]very broker-dealer or agent who materially aids in the sale [of an unregistered, nonexempted security] are [sic] liable jointly and severally with, and to the same extent as the seller or purchaser [This liability is for the consideration that the purchaser paid for the security, together with interest at six percent (6%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security and any income received on it, or for damages if he no longer owns the security. Ark. Code Ann. § 23-42-106(a)(1).], unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

Ark. Code Ann. § 23-42-102(2) (Supp. 1987), formerly Ark. Stat. Ann. § 67-1247(b) (Repl. 1980), defines "agent" as "any individual, other than a broker-dealer, who represents a broker-dealer or issuer in effecting or attempting to effect the purchases or sales of securities." Ark. Code Ann. § 23-42-102(8)(D) (Supp. 1987), formerly Ark. Stat. Ann. § 67-1247(g) (Repl. 1980), states that "[w]ith respect to fractional undivided interests in oil, gas, or other mineral rights, the term 'issuer' means the owner of the right or of any whole or fractional interest in the right who creates fractional interests therein for the purpose of the offering."

■ There are no Arkansas cases interpreting the term "agent" under §§ 23-42-102(2) and 23-42-106(c). We must, therefore, examine Hazel Quick's conduct in light of a plain reading of the language of the statutes. There is evidence in the record that Hazel Quick aided in arranging a meeting of potential investors. As previously noted in Karen Woody's testimony, Hazel Quick actively participated in the meeting by interrupting Gary with comments about what to expect in investing, handing out business cards to the appellees, and stating to them that if they knew of anyone interested in investing, to let them [Hazel and Gary] know. (Hazel Quick later denied that she had any knowledge of securities.)

Hazel Quick also promoted the sale of her son's securities in her direct dealings with Eddie Jones. After talking with Mr. Jones about the investment opportunity at a church reunion, Hazel Quick accepted a check that he wrote for his interest in the project, filled in Quick Oil as payee, and forwarded the check to Quick Oil. As noted above, Mr. Jones also testified that Hazel Quick indicated to him that she was handling Gary Quick's interest in Arkansas.

On the basis of the foregoing facts, we conclude that Hazel Quick represented an issuer (Gary Quick, Quick Oil Co., or Transworld Petroleum, Inc.) in effecting or attempting to effect purchases or sales of securities to the appellees and therefore is an agent under the Arkansas Securities Act. Although Gary Quick testified he neither employed nor asked her to solicit purchasers, it is apparent that he was aware of her promotional activities and did not attempt to curtail them. Furthermore, he acquiesced in or ratified her conduct by accepting the check from Eddie Jones.

Having found that Hazel Quick was an agent, we must determine if she materially aided in the sale of unregistered securities for liability to attach. The language of § 23-42-106(c), "materially aids in the sale of securities," is not defined in the Arkansas Securities Act. However, in *Titan Oil and Gas* v. *Shipley*, 257 Ark. 278, 517 S.W.2d 210 (1974), we did interpret this language, which was then found in Ark. Stat. Ann. § 67-1256(b) (Repl. 1966). Although neither the appellant nor the appellee cited this case, its treatment of the statutory language is essential to our present analysis.

In *Titan Oil*, a representative of a company offering securities in an oil and gas project gave two investors a prospectus concerning the project and invited them to a meeting in which individuals other than the representative spoke and presented investment material. We held that the trial court's finding that the representative did not materially aid in the sale of securities was not clearly against the preponderance of the evidence.

In examining Hazel Quick's participation in the sale of securities to the appellees in light of *Titan Oil*, we quickly find that her activities fully support the trial court's finding that she materially aided in the sale of her son's securities. Hazel Quick

convinced Eddie Jones to invest in the venture at a church reunion, accepted his check, upon which she filled in Quick Oil as payee, and forwarded it to Quick Oil. Hazel Quick met with Lucille Shelton at Shelton's office to discuss the investment, encouraged her to invest, and sent or gave her a prospectus explaining the investment, which had a written notation on its face, "Remit to Hazel Quick." According to Karen Woody, appellees Lucille Shelton, Charles Woody, Larry Joe Woody, Charles Edward Woody, Ricky Don Woody, and William F. Woody all attended the investment meeting, arranged at least in part by Hazel Quick, at which Hazel Quick actively participated by telling the investors what to expect in investing, handing out business cards to them, and stating that if they knew of anyone interested in investing, to let them [Hazel and Gary] know. Based upon these facts, we cannot say that the trial court's finding was clearly against the preponderance of the evidence. She is liable to the appellees for a refund of their investments plus interest.

In affirming the trial court, we should note that § 23-42-106(c) allows an agent who has materially aided in the sale of unregistered, nonexempted securities to avoid liability if he proves that "he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." In the instant case, Hazel Quick did not specifically contend either below or on appeal that she did not know, and in the exercise of reasonable care could not have known, that the securities were unregistered and nonexempted. Accordingly, we do not address this issue. *See Boatman* v. *Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

On cross-appeal, the appellees contend that the trial court erred in failing to award Charles Woody relief for the additional securities he purchased December 20, 1980, through contact with Gary Quick. We disagree.

Granted, it is doubtful that Charles Woody would have known of this investment opportunity absent Hazel Quick's initial dissemination of information and encouragement to invest. However, there is no indication that Hazel Quick encouraged or solicited this second investment, nor was it purchased as a result of her influence. For this reason, he is not entitled to relief.

Appellees also cross-appeal the trial court's refusal to

award them attorneys' fees and costs. As noted above, Ark. Code Ann. § 23-42-106(a)(1) provides that any person who offers or sells unregistered, nonexempted securities is liable to the purchaser for costs and reasonable attorneys' fees in addition to the consideration paid for the securities and interest. The appellees included a prayer for costs and attorneys' fees in their complaint, but did not put on evidence at trial to establish the amount of such fees. The trial court denied their request on the ground that the appellees failed to sufficiently establish the fees and costs. Based upon the trial court's finding, we conclude that it did not abuse its discretion in this matter. It was the appellees' obligation to put on testimony as to costs and reasonable attorneys' fees.

Affirmed on appeal and cross-appeal.

BAR S BAR WESTERN STORE *v.* Phillip R. MARTIN, et al.

87-283 747 S.W.2d 113

Supreme Court of Arkansas
Opinion delivered April 4, 1988
[Rehearing denied May 2, 1988.]

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

Warner & Smith, by: *Wayne Harris*, for appellee.

DARRELL HICKMAN, Justice. This is a negligence suit over carpet damaged when a vehicle, driven by an employee of the appellee, ran into a store operated by the appellant. The accident occurred in June of 1981. The appellee does not deny liability for the damages. The case was tried before a judge. The judge dismissed the case, because it was brought in the name of the wrong party, the tenant, and not the name of the owner of the building. We affirm.

Fred and Patty Sullivan own the land and building where the store is located. They formed a corporation, the appellant, to operate the store. The corporation leased the building from the Sullivans as individuals. After the accident the appellee paid for the repairs to the building and for any loss of business suffered by the appellant. However, the appellant wanted the carpet in the entire store replaced even though only a small area of the carpet had been damaged. After suit was filed, it was discovered through a deposition that the appellant corporation did not own the building. The appellee filed a motion for summary judgment alleging the real party in interest was the Sullivans, who owned the building, and that the statute of limitations barred their recovery. The judge denied the motion, because there was a fact question since the appellant corporation alleged it had an oral agreement to maintain the premises and make repairs to the building, which would include the damaged carpet.

At the trial the judge found no oral agreement, the statute of

limitation had run, and dismissed the case.

Rule 17 of ARCP provides that only a real party in interest may bring a cause of action. That party is generally considered that person "who can discharge the claim on which suit is brought, and not necessarily the person ultimately entitled to the benefit of recovery." *Childs* v. *Philpot*, 253 Ark. 589, 487 S.W.2d 637 (1972).

Generally, a tenant is under no obligation to repair damages caused by third parties over whom he had no control. 49 Am. Jur. 2d *Landlord and Tenant* § 923 (1970). A landlord may recover for an injury which permanently depreciates or damages his property while a tenant may recover for damage to his business and loss of profits. *Carson* v. *Hercules Powder Co.*, 240 Ark. 887, 402 S.W.2d 640 (1966).

We cannot say the trial court was clearly wrong in this case in deciding that only the landlord could recover for replacement or repair of the carpet. The tenant had already recovered for its damages. No other issue was raised below.

The appellant makes the additional argument that the appellee waited too long to raise the issue that the appellant was not the real party in interest. That argument was not made to the trial court, and we do not consider it on appeal. *Mitchell* v. *First Nat'l Bank in Stuttgart*, 293 Ark. 558, 739 S.W.2d 682 (1987).

Affirmed.

Phillip Michael WHEAT *v.* STATE of Arkansas

CR 87-195 747 S.W.2d 112

Supreme Court of Arkansas
Opinion delivered April 4, 1988

Clinton Keith Jones, Jr., Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Paul L. Cherry*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. The only issue in this case is whether the reference by a police officer to "mugshots" used in a photographic lineup improperly told the jury the appellant had a prior criminal record. The trial judge denied a motion for a mistrial, and we affirm that decision.

The officer did not testify that he used a "mugshot" of the appellant in the photographic lineup; he was asked:

> Q. Can you tell us, basically, what a photographic lineup looks like?
>
> A. Yes, sir. We pull mugshots from our files, uh, based on the general uh, close to the same facial features, same age—

The appellant objected to the use of the word "mugshot." Later the police officer said that "Detective Helder provided me with the photograph of Phillip Wheat," which indicates that the photograph of the appellant was not a mugshot. The appellant must show prejudice before we will reverse a decision. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 435 (1984).

"A mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury." *Free* v. *State*, 292 Ark. 65, 732 S.W.2d 452

(1987). The appellant did not even request an admonition in this case. *See Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

Having failed to show prejudice, we find the trial judge did not commit error.

Affirmed.

BRYAN FARMS, INC. *v.* STATE of Arkansas ex rel Arkansas Department of Parks & Tourism

87-320 747 S.W.2d 115

Supreme Court of Arkansas
Opinion delivered April 4, 1988

Henry Swift and *H. David Blair*, for appellant.

Steve Clark, Att'y Gen., by: *Jeffrey A. Bell*, Deputy Att'y Gen., and *Tim Humphries*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. This is an appeal pursuant to ARCP Rule 54(b) on an interlocutory order permitting the State of Arkansas ex rel Arkansas Department of Parks and Tourism to abandon condemnation proceedings more than two years after starting the proceedings. The only point argued for reversal is that the trial court erred in allowing the appellee to abandon the condemnation proceedings after title to the condemned property

had passed to the state. Although certified to us by the trial court, the order appealed from is not an appealable order pursuant to ARCP Rule 54(b). The appeal is therefore dismissed.

Rule 54(b) reads as follows:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

There was no final judgment as to one or more but fewer than all of the claims or parties. See *Murry* v. *State Farm Mutual Auto Ins.*, 291 Ark. 445, 725 S.W.2d 571 (1987). By the express terms of the order appealed from, the matters of appropriate damages, attorney fees and costs are yet to be determined by the trial court. The case is therefore not ripe for appeal.

Appeal dismissed.

Joe S. HORNE, Jr. and Angela Kate Horne *v.* SAVERS FEDERAL SAVINGS AND LOAN ASSOCIATION

87-260 747 S.W.2d 580

Supreme Court of Arkansas
Opinion delivered April 4, 1988

Hale, Ward, Young, Green, Nixon, Jacobs & Hickey, by: *Ann P. Faitz*, for appellants.

Mitchell, Williams, Selig & Tucker, by: *Marcella J. Taylor*, for appellee.

TOM GLAZE, Justice. This case involves a foreclosure action brought by appellee on a note and second mortgage signed on June 6, 1984, by appellants, Joe and Angela Horne. The appellants defaulted on their note in May 1985. After unsuccessfully attempting to locate the appellants' whereabouts, the appellee, on October 29, 1985, filed suit against the appellants, Union National Bank (the Bank) and Mr. and Mrs. William S. Moore. The Bank held a deed of trust signed by the appellants, and the deed was prior in time to the mortgage held by appellee. The Moores were tenants who rented the subject property from the appellants at the time the appellee filed this foreclosure action.

Upon filing suit, appellee's counsel, Tim Grooms, filed an affidavit reflecting that he had made diligent inquiry as to the appellants' whereabouts, specifying he had done so by contacting the appellants' attorney, Gary Green, their tenants, the Moores, and appellant Joe Horne's father, Joe S. Horne, Sr. These persons who were contacted were either unable to disclose where the appellants were or refused to reveal their whereabouts. Service was had upon the appellants by warning order duly published in

the newspaper for two weeks. Appellee's counsel then mailed a complaint and summons, by certified receipt restricted delivery, to each of the named defendants in the action, including Joe Horne, Sr., at their last known address.

While the suit was pending, Mr. Green, appellants' attorney, notified the appellee that appellants had authorized him to offer a deed in lieu of any foreclosure and a $5,000.00 deficiency judgment. Appellee rejected that offer. Appellee continued to try to locate appellants' whereabouts by taking Mr. Horne, Sr.'s deposition, wherein he said his son and daughter-in-law were in Spain; he denied knowing their address or telephone number. Mr. Horne, Sr. conceded that his son was aware that suit had been filed against him and his wife.

On February 24, 1986, appellee filed its affidavit of service in this action, listing the services had on each defendant, and stating that the appellants' complaint and summons had been returned unclaimed. On October 15, 1986, Mr. Green executed an affidavit reflecting the appellants had not authorized him to accept service in this action, but, on October 17, 1986, Green and his law firm filed a motion requesting that appellee's foreclosure action against appellants be dismissed for insufficiency of service of process and a lack of in personam jurisdiction. On November 19, 1986, the chancellor entered an order denying appellants' motion; he found that the court had personal jurisdiction over appellants under Arkansas's long-arm statute and proper service of process was had pursuant to ARCP Rule 4(f). After denying appellants' request for rehearing, the chancellor entered a foreclosure decree against appellants on January 13, 1987, and appellants brought this appeal.

■ First, we find no merit whatever in appellants' claim that the trial court had no in personam jurisdiction so as to award a personal judgment against them. In this respect, the court in pertinent part (1) determined it had personal jurisdiction over appellants by virtue of Arkansas's long-arm statute, Ark. Code Ann. § 16-4-101(C)(1)(e) (1987), (2) adjudged that appellants owed the appellee $123,946.87, plus interest and other costs and attorneys' fees, (3) provided that the property subject to the Bank's and appellee's mortgages be sold, and (4) ordered that the appellee receive a deficiency judgment for any amount which

may be owed after the sale proceeds are distributed. Section 16-4-101(C)(1)(e), cited by the trial court, provides, among other things, that a court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from one person's having an interest in, using, or possessing real property in this state.

This court's decision in *Bowsher* v. *Digby, Judge*, 243 Ark. 799, 422 S.W.2d 671 (1968), is controlling and clearly supports the chancellor's holding that appellants were subject to the personal jurisdiction of the court. *See also Ratliff* v. *Thompson*, 267 Ark. 349, 590 S.W.2d 291 (1979), (court, citing *Bowsher* and construing long-arm statute, held that the Arkansas court had personal jurisdiction over a non-resident who had executed a contract to purchase Arkansas land that subsequently became subject to a foreclosure suit). In *Bowsher*, this court construed and upheld the constitutionality of the same long-arm provision [then Ark. Stat. Ann. § 27-2502(C)(1)(e) (Supp. 1965)] that is in issue here. In that case, the trial court had to determine whether the Pulaski Circuit Court had personal jurisdiction of Bowsher, a non-resident defendant who owned property lying in Pulaski and Perry Counties. Bowsher had authorized, by writing, a Little Rock real estate firm to sell the property, but later he violated that agreement and sold it himself. The court upheld the Pulaski County court's exercise of personal jurisdiction over Bowsher, stating:

> [P]etitioner owns real estate in this state. He depends on the laws and courts of Arkansas for protection of this property and his rights therein. He allegedly entered into a contract relating to this particular property. Arkansas has an interest in providing an effective means of redress for its residents against persons or corporations outside the state who allegedly have violated a contract relating to this realty.

The facts here are even more compelling than those in *Bowsher* in deciding that our Arkansas courts have personal jurisdiction over the appellants. The appellants not only own the Arkansas property that is the subject of this foreclosure, but also they lived on the property when they negotiated and consummated the now defaulted loan, which is the basis of this suit.

Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. In *Smith* v. *Edwards*, 279 Ark. 79, 648 S.W.2d 482 (1983), we considered the use of Rule 4(f) and the service of process procedures thereunder in giving an Arkansas court in personam jurisdiction over a non-resident defendant whose whereabouts was unknown. There, a woman was killed in an accident while riding as a passenger in a car driven by Conrad Smith. Dale Edwards was the driver of the other car involved in the collision. The deceased woman's estate sued Smith who filed a cross-complaint against Edwards, who had moved to Missouri. Smith attempted to obtain constructive service of Edwards under Rule 4(f), and when Edwards learned of the cross-complaint, he moved to dismiss, alleging improper service of process. This court upheld the trial court's dismissal of Smith's cross-complaint, but did so because Smith had failed to meet the requirements of Rule 4(f) when trying to perfect service. On this point, we recited Comment 12 to Rule 4 as follows:

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

Id. at 82, 648 S.W.2d at 484.

In considering the requirements of Rule 4(f), we found that the record reflected that Smith could have easily discovered Edward's whereabouts, but he had failed to utilize the available information to locate Edwards and to give him actual notice. That, of course, is not the situation here. Appellee's counsel was meticulous in his efforts not only to locate the appellants but also to document those efforts, in order to demonstrate how he had tried to give the appellants actual notice of the foreclosure suit filed against them. In fact, appellant Joe Horne's father testified he was sure the appellants *did* know of the suit. Appellants' knowledge of the pending action was further borne out by their attorney's offer, made shortly after the suit was filed, to settle the

dispute with the appellee.

In sum, the record reflects the appellee contacted the appellants' attorney, their tenants and Mr. Joe Horne, Sr. The attorney and Joe Horne, Sr. knew the appellants were in Spain and both were in contact with them; nevertheless, they still denied knowledge of, or refused to disclose, the appellants' whereabouts. After many efforts to locate the appellants, the appellee obtained constructive service by publication and by sending appellants a copy of the complaint and summons to their last known address. Unquestionably, the appellee demonstrated that it had made diligent inquiry of appellants' whereabouts.

Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark. Code Ann. § 16-4-102(A)(1) (1987) and ARCP Rule 4(e).[1] As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4(f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark. Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service). Rule 4 requires service resulting in actual notice in all cases where the identity or whereabouts of the defendant is known; however, in instances where his or her identity or whereabouts is demonstrated to be unknown, this Rule, particularly provision 4(f), provides a method of construction notice that is reasonably calculated to give the defendant actual notice of the proceedings

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[1] Both provisions are essentially the same, and as set out in § 16-4-102, those methods provide:

1. When the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:
   (a) By personal delivery in the manner prescribed for service within this state;
   (b) In the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;
   (c) By any form of mail addressed to the person to be served and requiring a signed receipt;
   (d) As directed by the foreign authority in response to a letter rogatory; or
   (e) As directed by the court.

and an opportunity to be heard. *See Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306 (1950), (court held statutory notice by publication is sufficient as to any beneficiaries whose interests or addresses are unknown to the trustee, since there are no other means of giving them notice which are both practicable and more effective). Accordingly, we affirm the chancellor's ruling that appellee's service under Rule 4(f) was legally sufficient.

In conclusion, we note appellants' reference to Ark. Stat. Ann. § 27-339 (Repl. 1979) (now Ark. Code Ann. § 16-58-119 (1987)), and specifically to that portion of the provision that provides that no personal judgment shall be rendered against a defendant, who is constructively summoned under § 27-339 and who does not personally appear, unless the defendant was a state domiciliary at the time he or she was served or when the cause of action arose. First, we point out § 27-339 largely is intended for use in in rem actions. *See* Newbern, Ark. Civil Prac. and Proc., § 9-12 (1985). But, more importantly, we note that the appellee made it clear, when perfecting service upon appellants, that it was proceeding under Rule 4, and the chancellor specifically found that appellee's actions complied with the requirements of Rule 4(f).[2] Thus, we find that part of appellants' argument concerning § 27-339 is of no merit in this appeal.

Because we feel the chancellor was correct on the points raised on appeal, we affirm.

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[2] In both an order and foreclosure decree, the trial court clearly held that service of process, giving it personal jurisdiction over appellants, was perfected under Rule 4(f). The court, in its foreclosure decree, further responded to the appellants' assertion that the appellee could not, under § 27-339, obtain a personal judgment against them, by explaining how § 27-339 would not avail them any relief.

Robert J. RICHARDSON *v.* CITY OF LITTLE ROCK PLANNING COMMISSION

87-194 747 S.W.2d 116

Supreme Court of Arkansas
Opinion delivered April 4, 1988
[Rehearing denied May 9, 1988.*]

*Hickman, Hays, and Newbern, JJ., would grant rehearing.

Ivester, Henry, Skinner & Camp, by: *David P. Henry*, for appellant.

Mark Stodola, City Att'y, by: *Patricia K. Benton*, for appellee.

JOHN NORMAN HARKEY, Special Justice. The Little Rock Planning Commission disapproved a subdivision application submitted by Robert Richardson. An appeal of this decision to circuit court was unsuccessful. The circuit judge concluded that certain technical violations (which presumably would have been corrected in the final plat) were not the basis for the denial, and then ruled that the Commission had discretionary authority to disapprove.

This is a case of first impression in Arkansas, insofar as it relates to the discretionary authority of planning commissions, and that it is a difficult case is evidenced by the division among members of this court.

The issue is whether a planning commission has discretionary power to disapprove a subdivision plat which meets minimum requirements set forth in the subdivision ordinance.

Article 2, Section 22, of the Arkansas Constitution, provides that the right of property is before and higher than any other constitutional sanction. This does not mean, however, that an individual is constitutionally guaranteed the right to do with such property as he or she wishes in all circumstances. Obviously, the police power and health and welfare doctrines clearly permit restrictions on property use so as to prevent detriment to the

rights of the public. *McCammon* v. *Boyer*, 285 Ark. 288, 686 S.W.2d 421 (1985). We have frequently held that the private use of property can be restricted by zoning regulations. *See, e.g., Winderoth* v. *City of Fort Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971).

A planning commission is not a legislative body but functions in an administrative capacity and derives its authority from the legislature. *City of Paragould* v. *Leath*, 266 Ark. 390, 583 S.W.2d 76 (1979); and *Arkansas Power and Light Co.* v. *City of Little Rock*, 243 Ark. 290, 420 S.W.2d 85 (1967). The enabling legislation, Ark. Code Ann. § 14-56-417 (1987), provides in pertinent part:

> Following adoption and filing of a master street plan, *the commission may prepare and shall administer, after approval of the legislative body, regulations controlling the development of land*. . . . The regulations controlling the development of land may establish or provide for the minimum requirements as to information to be included on the plat filed for record; the design and layout of the subdivision, including standards for lots and blocks, street rights of way, street and utility grades, and other similar items; the standards for improvements to be installed by the developer at his own expense, such as street grading and paving, curbs, gutters and sidewalks, water, storm and sewer mains, street lighting and other amenities. [Emphasis added.]

Once the Planning Commission has exercised its authority in drafting regulations pertaining to subdivision development, it is bound by those regulations and "shall administer" them. The Commission is guided by standards which can be uniformly applied and which give notice to subdividers of the minimum requirements with which they must comply in order to obtain approval. *Smith* v. *City of Mobile*, 374 So. 2d 305 (Ala. 1979).

We agree with the appellant that the Planning Commission exceeded its authority when it denied approval of the preliminary plat on considerations other than the minimum standards set forth in the subdivision ordinance.

When a subdivision ordinance specifies minimum standards

to which a preliminary plat must conform, it is arbitrary as a matter of law to deny approval of a plat that meets those standards. *Odell* v. *City of Eagan*, 384 N.W.2d 792 (Minn. App. 1984). Accordingly, if the plat is within the use permitted by the zoning classification and meets the development regulations set forth in the subdivision ordinance, then the plat by definition is in "harmony" with the existing subdivisions.

A primary purpose of these provisions is to ensure that a landowner's plat will be objectively measured against the concrete standards of the subdivision ordinance in effect. Thus, these provisions balance the interests of planned community growth with the private rights of landowners. *Reynolds* v. *City Council of Longmont*, 680 P.2d 1350 (Colo. App. 1984); *RK Dev. Corp.* v. *City of Norwalk*, 156 Conn. 369, 242 A.2d 781 (1968); and *Dosmann* v. *Area Plan Comm'n of St. Joseph County*, 160 Ind. App. 605, 312 N.E.2d 880 (1974).

The record clearly demonstrates that appellee denied approval of the plat based upon considerations not authorized by the ordinance. Pursuant to the subdivision ordinance Section 37.14(e)(3), appellant received a letter setting forth two reasons for denial: (1) Proximity of a proposed cul-de-sac to the adjacent lots and (2) Marginal development potential of the land, resulting in unusual lot shapes and means for access. The final plat submission from which appellant appeals does not contain a cul-de-sac, and the subdivision ordinance does not contain the term "marginal development potential." In fact, there is testimony to the effect that the term "marginal development potential" was formulated ad hoc as a reason for denying appellant's plat.

In short, a planning commission may not disregard the regulations set forth in the subdivision ordinance and substitute its own discretion in lieu of fixed standards applying to all cases similarly situated. *RK Dev. Corp.*, 156 Conn. 369, 242 A.2d 781. A planning commission is authorized and required to determine whether a plat presented is in compliance with the particular subdivision regulations. Once compliance is had, no discretionary power to disapprove exists. To rule otherwise would sublimate objective requirements, and instead substitute subjective thinking by individual members of a particular planning commission. This was never contemplated by the law.

We reverse.

GLAZE, J., concurs, HICKMAN, DUDLEY and NEWBERN, JJ., dissent, HAYS, J., not participating.

TOM GLAZE, Justice, concurring. I concur with the majority opinion holding that the Little Rock Planning Commission lacks discretion to deny approval of a subdivision plat which meets the minimum requirements set forth in the subdivision ordinance.

The trial court found that technical violations listed by the planning commission were not the basis for its denial of the Forest Hills preliminary plat but that the commission was concerned about the location of the access street in close proximity to the rear of the lots in Robinwood. The court held that the commission has discretion to consider such circumstances even though the street location otherwise complies with the minimum requirements set forth in the subdivision ordinance.

The dissent confuses the issue by arguing that Mr. Richardson has failed to meet certain minimum requirements set forth in the ordinance and that the majority ignored that fact. Not true. Neither the majority's nor my concern is with whether technical violations exist, for all agree that the requirements must be met before the final plat is approved. As already noted above, correcting those violations is implicit and mandatory under the trial court's decision. However, that is not the part of the trial court's decision with which the majority and I disagree. Rather, our concern is with the trial court's holding that the planning commission has discretion to deny the approval of a plat even if it complies with the minimum requirements set forth in the ordinance.

Unquestionably, the commission has wide discretion under Arkansas's state municipal planning laws and those subdivision ordinances enacted to control, regulate and develop land. In this respect, the commission here had discretion in enacting the extensive underlying requirements contained within the subdivision ordinance and in determining whether a plat submitted for its approval is in compliance with that ordinance. But this discretion is not unlimited. Any discretion the commission may have cannot be construed so broadly as to permit the commission

to inject ad hoc requirements at its fancy.

Indeed this is precisely what occurred. In his dealings with the planning commission, Mr. Richardson went through five plat revisions in an attempt to comply with the subdivision ordinance. He eventually submitted plats, option A, which contained no cul-de-sac, and option B, which omitted the cul-de-sac. Both plats were denied. Mr. Richardson appealed only the denial of option A, which except for certain technical violations, met the requirements of the subdivision ordinance.[1] The commission, by letter, still denied Richardson's final plat (option A); its reasons were (1) proximity of proposed cul-de-sac to the adjacent existing lots and (2) marginal development potential of the land resulting in unusual lot shapes and means for access.

The subdivision ordinance in no way mentions the term "marginal development potential," and obviously is a new term or condition coined by the commission for this particular subdivision. How can applicants meet such subjective and new criteria without looking to some objective, reasonable and uniform standards provided by the commission?

In short, the commission simply cannot disapprove an applicant's plat on a whim. Clear reasons for denial, stemming from the subdivision ordinance, must be given by the commission, so an applicant will be afforded an informed and reasonable opportunity to meet the requirements expected of the applicant. This, too, provides an objective standard by which the courts, when called upon, can review commission decisions.

Once again, the majority's decision does not change the fact that the final plat submitted for approval must conform to the requirements set forth in the ordinance. What the decision does do, however, is restrict the planning commission's power to deny approval of a plat on an arbitrary basis. Mr. Richardson should have his plat accepted or denied on the basis of uniform standards applied equally to those similarly situated. To hold otherwise subjects each developer to evershifting standards, never knowing

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[1] Again, to avoid any misunderstanding, I reiterate the point — which is also made by the majority — that Richardson must correct those noncompliances with the requirements of the subdivision ordinance, unless, of course, those violations are waived.

the extent of his or her property rights.

DARRELL HICKMAN, Justice, dissenting. This is a case of a private developer who bought land on a steep hillside in west Little Rock not suitable to easy development and then refused to change his plan because it would cost him money. The commission decided that until he met their requirements it would not be an acceptable subdivision. It is our duty to review the evidence in the light most favorable to the appellee and affirm the judgment if there is any substantial evidence to support it. *Rhea* v. *Harris*, 293 Ark. 271, 737 S.W.2d 626 (1987). Furthermore, it is our duty to affirm an administrative agency's decision unless it is arbitrary. *See Green* v. *Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984). There is no suggestion the decision was arbitrary. Using this formula, this case should be affirmed.

The majority states the issue is whether a planning commission has discretionary power to disapprove a subdivision plat which meets minimum requirements of a subdivision ordinance; but the majority ignores the fact that the appellant's plan does not comply with the minimum requirements. The street does not meet the minimum requirement for adequate site distance on a curve. The side lot lines were not at right angles with the street as required by the subdivision ordinance. There was also testimony offered that one of the lots was more than three times as deep as it was wide, which is prohibited by the ordinance. Richardson, the developer, admitted that there were inconsistencies between the plat and the subdivision ordinance requirements; yet he blindly contends that he was in strict and total compliance with the ordinance. There was testimony offered that the nonconformities in the plat could be corrected at the final platting time. However, Richardson's own witness said that he did not know whether the changes could still be made and allow for the 15 lots Richardson insists on having in the subdivision. Richardson stated that he did not want to reduce the number of lots from 15 to 12 because "they stood to lose $100,000 to $150,000." There was also testimony offered that the development would cause erosion in adjacent Robinwood Subdivision and depreciation of the value of some of the homes in Robinwood.

The commission is authorized to consider the proper drain-

age and any adverse impact on adjoining properties in deciding whether to approve a preliminary plat. For example, the subdivision ordinance specifies that its purpose is:

> To protect and provide for the health, safety and general welfare of the public.
>
> To protect and conserve the value of buildings and improvements, and to minimize adverse impact on adjoining or nearby properties.
>
> To establish a beneficial relationship between the uses of land and buildings, and the municipal street system; to require the proper location and design of streets and building lines; to minimize traffic congestion; and to make adequate provision for pedestrian traffic circulation.
>
> To encourage the wise use and management of natural resources; to provide adequate and safe recreational areas; to maintain the natural beauty and topography of the municipality and to ensure appropriate development with regard to these natural features; to minimize the pollution of air, ponds and streams; to ensure the adequacy of draining facilities.

Little Rock, Ark., Code of Ordinances § 37-2 (1978).

Both the appellant and majority rely on several cases for the rule that a planning commission does not have the discretion to deny a plat when it complies with all the technical requirements of the ordinance. First, those cases do not apply because the plat did not comply with the subdivision ordinance requirements. Next, that bold statement is a distortion of the law. The planning commission clearly has some discretion under the ordinance. If it had no discretion or could use no judgment, then there would be no need for a planning commission. The planning commission would consist of a single bureaucrat who could stamp a yes or no on a developer's plan.

A commission uses discretion, for example, when a variance is granted. The subdivision ordinance addresses this specifically:

> Where the planning commission finds, however, that extraordinary hardships or practical difficulties may result from strict compliance with these regulations, or the

> purpose of these regulations may be served to a greater extent by an alternative proposal, it may approve variances to the subdivision regulations so that substantial justice may be done and the public interest secured.

Little Rock, Ark., Code of Ordinances § 37-10.

Surely the commission has the discretion to consider the lot shapes in deciding whether to approve a preliminary plat. The ordinance specifically provides:

> The size, shape and orientation of lots shall be appropriate for the location of the subdivision and for the type of development and use contemplated.

Little Rock, Ark., Code of Ordinances § 37-24.

The Ordinance also gives the commission the discretion to consider the means for access and location of streets. It provides:

> Particular attention shall be given to width, arrangement and location of streets; utility easements; drainage; lot sizes and arrangements; and other facilities such as parks, playgrounds or school sites, public buildings, public areas and arterial streets; and the relationship of the proposed subdivision to adjoining, existing, proposed and possible subdivision of lands.

Little Rock, Ark., Code of Ordinances § 37-14.

It also states:

> All streets shall be constructed in accordance with applicable City of Little Rock standards and specifications as provided in the master street plan of the City of Little Rock or other such standards and specifications adopted by the board of directors.

Little Rock, Ark., Code of Ordinances § 37-34.

Undoubtedly, the ordinance intends for the planning commission to take into consideration the location and arrangement of streets, the lot sizes and arrangements, as well as "the relationship of the proposed subdivision to adjoining, existing, proposed and possible subdivision of lands."

The trial judge found that the technical violations of the

ordinance were not the basis of the planning commission's denial of the plat, but that the commission had discretion to deny a plat. However, the non-compliance with the ordinance certainly led to the unusual lot shapes and means for access which the planning commission gave as one of the reasons for denying the plat.

The commission gave two reasons for the denial of the appellant's plat: "(1) proximity of [the] proposed cul-de-sac to the adjacent, existing lots and (2) marginal development potential of the land, resulting in unusual lot shapes and means for access." The appellant submitted two plats; one plat had a cul-de-sac and one did not. Both the appellant and the majority opinion focus on the term "marginal development potential" and ignore the language "resulting in unusual lot shapes and means for access." The subdivision ordinance clearly provides that the commission can consider the lot shapes and means of access in deciding whether to approve a preliminary plat.

In summary the planning commission is charged with planning the orderly growth of a city. The appellant, Mr. Richardson, simply refused to try to compromise with the commission. He either made a bad purchase of marginal land, or he is trying to squeeze too much profit out of the land. People who live in the subdivision or nearby will pay for the poor planning.

It comes down to whether the duly constituted authority to govern city planning and development or a private developer will decide what is best for the city. I would affirm the trial court's decision which upheld the city planning commission.

DUDLEY and NEWBERN, JJ., join in the dissent.

Christopher GOBER *v.* William R. DANIELS, Municipal Judge

88-3 748 S.W.2d 29

Supreme Court of Arkansas
Opinion delivered April 11, 1988

Gibson & Deen, by: *Thomas D. Deen*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Appellant Christopher Gober was convicted in municipal court on charges of second offense driving while intoxicated (and other offenses) and was sentenced by appellee to sixty days imprisonment with fifty days suspended, $3,225.00 in fines with $1,800.00 suspended, and eighteen months suspended driver's license. Gober sought to appeal to circuit court and, pursuant to Ark. Code Ann. § 16-96-504 (1987), formerly Ark. Stat. Ann. § 44-508 (Repl. 1977), appellee set a $3,225.00 cash bond whereupon Gober filed a petition for writ of mandamus in circuit court asking that appellee be compelled to accept bond with approved security on the grounds that Gober could not obtain supersedeas of the lower court's judgment if required to pay a cash bond in the amount of the fines imposed which additionally worked to deny him his right to a trial *de novo* in circuit court. The circuit court issued a writ of mandamus directing that bond be reduced by the amount of the fines which were suspended, but otherwise refused to interfere with the appellee's discretion in requiring a cash bond.

On appeal, Gober argues that while the circuit court correctly found that bond could not be increased beyond the sum of the fines actually imposed, our rules of criminal procedure along with principles of constitutional law militate against the imposition of cash bonds in that amount. Appellee cross-appeals arguing that the circuit court correctly refused to set aside the cash bond requirement but erred in reducing the bond and otherwise should never have issued the writ because mandamus will not lie to compel action on discretionary matters. We agree with the appellee's final contention that mandamus was not the proper remedy and hold that the circuit court erred in issuing the writ. *Municipal Court of Huntsville* v. *Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987).

In the course of reaching our holding in this case we point out that whereas Gober relies on Rule 9.2 of the Arkansas Rules of Criminal Procedure, which deals with pretrial release bonds, Rule 1.2 provides that the rules of criminal procedure apply to proceedings in inferior courts only where their application is practicable or constitutionally required. The regimens of Rule 9.2 have no practicable application to the setting of a supersedeas bond contemplated by § 16-96-504, nor are they constitutionally required. There is a marked difference between

the purpose of supersedeas, which is to stay the effect of the judgment, and those bonds which operate to guarantee the appearance of the person.

Section 16-96-504 provides that in appeals from convictions for misdemeanors there shall be no supersedeas of the judgment unless bond shall be given with approved security. The type and amount of such a bond is a discretionary matter with the presiding municipal judge and, to that extent, it is like the bail bond discussed in *Casoli, supra.* Although mandamus will lie to require inferior courts to act when they have improperly declined to do so, the writ is never applied to control the discretion of a trial court or to correct an erroneous exercise of discretion. *State* v. *Nelson, Berry Petroleum Co.*, 246 Ark. 210, 438 S.W.2d 33 (1969). Nor will mandamus lie where some other remedy such as appeal and petition for reduction of bond accords adequate relief. *Nelson, supra.*

Because mandamus was not the proper remedy to compel action by appellee in the discretionary act of setting supersedeas bond as directed by statute, we vacate the writ and dismiss the appeal.

Appeal dismissed; writ of mandamus vacated.

Harold WILSON, et al. *v.* William Frank KOBERA, et ux.

87-338 748 S.W.2d 30

Supreme Court of Arkansas
Opinion delivered April 11, 1988

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Leonard L. Scott*, and *Frank S. Hamlin*, for appellants.

Phil Stratton and Casey Jones, Ltd.; and *Lazer, Sharp and Mayes, P.A.*, for appellee.

ROBERT H. DUDLEY, Justice. The jury found that appellants were not guilty of negligence which proximately caused the car wreck at issue in this case. Later, the trial judge ruled that the jury's finding was clearly against the preponderance of the evidence and granted a new trial. We reverse.

Blainey Hill Road in Conway runs east and west, and on January 22, 1985, between 6:30 and 6:45 a.m., the lane going east was partially covered with a thin glaze of ice. At that time, Patsy Hurley was traveling in an easterly direction on the road, attempted to stop, and hit some of the ice. The car she was driving started to skid. It ultimately came to rest in a position diagonal to the road with the front end in a ditch on the south side of the road and the rear end blocking approximately one-half of the east-bond lane. (The shoulder of the road was very narrow.) Miss

Hurley could not get her car out of the ditch. After making some telephone calls for help at a nearby residence, she returned to her car, and waited inside the warm car. Her headlights, taillights, and dome light were all on.

Soon thereafter, appellant Wilson, driving west at about 15 miles per hour in a truck owned by appellant Virco Manufacturing Company, passed the Hurley car. He saw a woman sitting motionless in the wrecked car and stopped his truck to offer assistance. At that point the shoulder of the road is so narrow that he was only able to get his right wheels off the westbound lane of traffic, leaving his truck partially on the road. His headlights were on, although there was conflicting testimony about whether they were on bright or dim. The testimony placed his truck to the west of the car driven by Miss Hurley, with the distance between the rear of his truck and the back of Miss Hurley's car as close as a car length to a length-and-a-half, and as far away as fifty to seventy-five feet. One disinterested witness testified that he did not leave "enough room to go around," while another disinterested witness testified that "there was enough room you could have driven a tractor-trailer rig, you know, between them. There was plenty of room between them." Appellant Wilson saw a car approaching from the west and waited in the truck for the car to pass.

Appellee William Frank Kobera was driving that eastbound car, a Chevrolet Chevette, which was 13 feet in length. He testified that he came over a ridge and clearly saw the truck headlights from a distance of about 800 feet. He testified that the headlights were probably on bright, at least he was blinded by them. He further testified that he was going about 30 miles per hour and that he started applying his brakes about two car lengths before he got to the parked truck. He testified that he then skidded into Miss Hurley's car. A part of his direct testimony is as follows:

> Q. Did you get your foot on the brake hard enough to feel whether they caught—
>
> A. Yes.
>
> Q. —when you were sliding on ice? Do you see what I'm asking you?
>
> A. Yes, I—I—it seemed like they caught.

Q. Did you get the sensation that you were just skimming over that ice?

A. Yes.

Appellant Wilson testified that 15 to 20 miles per hour was the maximum safe speed with ice on the road, and a State Policeman testified that the stopping distance, including reaction time, for a car traveling 30 miles per hour on a clean road is 80 feet.

The amount of daylight was in dispute. It ranged from "being dark" to just "breaking daylight."

Appellee Kobera testified that if the truck had not been in the way he could have gone around Miss Hurley's car.

Various interrogatories were submitted to the jury, one of them being, "Do you find from a preponderance of the evidence that Harold Wilson/Virco was guilty of negligence which was a proximate cause of the occurrence?" The jury answered "no." Obviously, the jury could have found either (1) that appellant Wilson was not guilty of negligence, or (2) that such negligence was not the proximate cause of the collision. Appellee Kobera filed a motion for a new trial. The trial court granted the new trial stating "it is this Court's opinion that Harold Wilson/Virco was guilty of negligence and was the proximate cause of the accident complained of herein because Harold Wilson parked the Virco truck illegally on the highway in such a position in relation to the disabled vehicle driven by Ms. Hurley, whose vehicle was out into the lane in which the plaintiff [appellee] was traveling, that he effectively created a blockade of the entire roadway."

In 1982, we amended ARCP Rule 59(a)(6) to state that a trial judge could set aside a jury verdict only when it is "clearly contrary to the preponderance of the evidence. . . ." *Clayton* v. *Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982). The trial judge cannot substitute his view of the evidence for that of the jury. *Bryant* v. *Sorrells*, 293 Ark. 276, 737 S.W.2d 450 (1987). If the trial judge denies the motion for a new trial, we will affirm if there is any substantial evidence to support the verdict. If he grants the motion for a new trial, we will affirm if he did not abuse his discretion in finding that the verdict was clearly against the preponderance of the evidence. *Brown* v. *Wilson*, 282 Ark.

450, 669 S.W.2d 6 (1984). Here, the trial judge abused his discretion because the verdict was not clearly against the preponderance of the evidence.

The trial judge ruled that the appellants were guilty of negligence because their truck was parked illegally on the highway in such a position that it "effectively created a blockade of the entire roadway." The appellant argues that the ruling is erroneous because the jury might have found that appellant Wilson did not violate Ark. Code Ann. § 27-51-1303 (1987), and might have found that he parked the truck 75 feet west of Miss Hurley's car, which left sufficient room to proceed. However, we need not pass upon the ruling on negligence because the ruling on proximate cause was certainly an abuse of discretion. The jury may well have found that the proximate cause of the collision was the appellee's speed of 30 miles per hour on a road glazed with ice. There was substantial evidence to that effect. There was testimony that the stopping distance, including reaction time, on a clean road is 80 feet, and there was testimony that one should not have driven on this road with ice at any more than 15 miles per hour. The appellee testified that he applied his brakes about two car lengths, or about 20 feet, before he reached the parked truck and began skidding on the ice. The jury had substantial evidence by which it could have found that the truck was as far as 75 feet from Miss Hurley's car and that, at the speed of 30 miles per hour, appellee simply skidded on the ice into the Hurley car, and that the position of appellant's truck was not the proximate cause of the wreck. Therefore, the trial judge abused his discretion in setting aside the jury verdict as being clearly contrary to the preponderance of the evidence.

Reversed and remanded for entry of an order consistent with this opinion.

HAYS and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. The trial court heard the testimony in this rather unusual case and concluded that the verdict was clearly against the preponderance of the evidence. In his judgment a new trial was warranted and as I cannot say his discretion was abused, I would affirm.

GLAZE, J., joins this dissent.

Donnie Wayne DAWSON, et al. *v.* Roy GERRITSEN, M.D., et al.

87-215 748 S.W.2d 33

Supreme Court of Arkansas
Opinion delivered April 11, 1988

Robert G. Gilder and *Frank Morledge*, for appellants and cross-appellees.

Rieves & Mayton, by: *Ted Mackall, Jr.*, for appellee Baptist Memorial Hospital, Forrest City, Inc.

Friday, Eldredge & Clark, by: *Calvin J. Gall*, for appellee and cross-appellant Roy Gerritsen, M.D.

STEELE HAYS, Justice. This is a second appeal by Donovan Dawson involving claims arising from the death of Mary Francis Dawson. Mrs. Dawson died intestate on October 7, 1983, the day after surgery was performed by Dr. Roy Gerritsen at Baptist Memorial Hospital, Forrest City. She was survived by her husband, Donovan Dawson, and by two minor sons, Donnie Wayne Dawson and Timothy Oliver, the latter from an earlier marriage. Mr. Dawson was appointed administrator of the estate and on October 1, 1985, he filed a wrongful death action on behalf of the heirs against Dr. Gerritsen and Baptist Memorial Hospital. The complaint specifically included the causes of action of the minor sons of Mrs. Dawson.

The defendants moved to dismiss the complaint for failure to give sixty days notice in writing of an intent to sue, as required by Section 5 of Act 709 of 1979, codified as Ark. Code Ann. § 16-114-204 (1987) [Ark. Stat. Ann. § 34-2617 (Supp. 1985)]. Recognizing the omission, the administrator took a voluntary nonsuit on December 5, 1985, and a few days later filed an identical complaint, again omitting the notice requirement. When the complaint was again dismissed by the trial court for failure to give notice, Dawson appealed and we affirmed, rejecting Dawson's contentions that the notice provision operated as a denial of due process, was special legislation, and that the complaint and summons received by the defendants in the first suit served as the written notice of an intention to sue the second time. *See Dawson* v. *Gerritsen*, 290 Ark. 499, 720 S.W.2d 714 (1986).

While the first case was under submission on appeal, another wrongful death action was filed on October 6, 1986, more than two years, but less than three years from the death of Mrs. Dawson. This is the case now before us on appeal. The action was

brought on behalf of the minor sons by their fathers as next friend, by Donovan Dawson on behalf of Donnie Wayne, and by Elton Oliver on behalf of Timothy. It is undisputed that the written notice of intent to sue was given more than sixty days prior to the filing of the complaint in this case. Both defendants moved for summary judgment, which was granted, and the plaintiffs have appealed. We affirm the trial court.

Appellants contend that under Ark. Code Ann. § 16-56-116 (1987) [Ark. Stat. Ann. § 37-226 (Repl. 1962)] minors have three years after their disabilities are removed in which to bring an action for medical malpractice, that in *Graham* v. *Cisco*, 248 Ark. 6, 449 S.W.2d 949 (1980), we held that the cause of action by a minor for medical malpractice was extended by the savings clause contained in § 37-226, even though the period of limitations for bringing an action for medical malpractice generally was limited to two years under Ark. Stat. Ann. § 37-205 (Repl. 1962). However, appellants need not rely on § 37-226, as Section 4 of Act 709 [Ark. Code Ann. § 16-114-203 (1987)] contains its own savings clause, part of which gives minors until age nineteen in which to assert a claim for a medical injury.

Appellants maintain that this is a wrongful death claim rather than a medical injury and is, therefore, subject to the three year period of limitations applicable to wrongful death actions generally under Ark. Stat. Ann. §§ 27-906 and -907 (Repl. 1979), rather than to the two year period provided for in Section 4 of Act 709. That was the issue in *Matthews* v. *Travelers Indemnity Insurance Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968), where we held that causes of action inuring to the estate of a decedent were subject to the lesser period of two years provided for in § 37-205, but that causes of action for loss of consortium and mental anguish inuring to the next of kin were subject to the three year limitation provided in §§ 27-906 and -907. The appellees counter that contention by pointing out that Act 709 was enacted well after the *Matthews* case and provides that "all actions for medical injury shall be commenced within two years after the cause of action accrues," that "the accrual of the cause of action shall be the date of the wrongful act complained of, and no other time," language they interpret as requiring every cause of action for medical injury, including wrongful death, to be brought within two years.

We do not decide whether the legislature intended that actions for wrongful death resulting from medical malpractice be subject to Act 709, because it is clear that the claims of Donnie Wayne Dawson and Timothy Oliver, irrespective of their minority, may not be severed or split from the claims of the estate and next of kin when a personal representative has been appointed. That was precisely the issue in *Reed* v. *Blevins*, 222 Ark. 202, 258 S.W.2d 564 (1953). Anthony Reed was killed in a traffic accident in Nevada County, Arkansas where his parents lived. An administrator was appointed and a wrongful death action was brought, the complaint alleging that Reed's next of kin were his parents. There was no mention of a wife and minor child residing in California, whose existence was not even known to the administrator. The case was tried, a judgment of $2,500 was awarded the plaintiff against the defendant, and the money was distributed to the parents. When the spouse and minor child brought an action of their own, the trial court sustained the defendant's plea of res judicata and we affirmed, holding that under the language of Ark. Code Ann. § 16-62-102(2)(b) (1987) [Ark. Stat. Ann. § 27-907 (Supp. 1985)], when a personal representative is appointed, that individual is "*the only person*" who can maintain an action for wrongful death, citing *St. Louis-San Francisco Ry. Co.* v. *Garner*, 76 Ark. 555, 89 S.W. 550 (1905), *Davis* v. *Railway Co.*, 53 Ark. 117, 13 S.W. 801 (1890); *St. Louis-San Francisco Ry. Co.* v. *Crick*, 182 Ark. 312, 32 S.W.2d 815 (1930). *And see Waldrip* v. *McGarity*, 270 Ark. 305, 605 S.W.2d 5 (1980).

Appellants frankly concede the holding of *Reed* v. *Blevins* is adverse to their contention, but they point to the well reasoned dissent of Justice George Rose Smith in the *Blevins* case. Admittedly, it advances sound reasons for a different result, but the fact is the opposing view prevailed and time has not weakened it. The rule is now deeply rooted in our law. *Maryland Casualty Company* v. *Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974); *Matthews* v. *Travelers Indemnity Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968); *Dukes* v. *Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961).

To uphold the appellant's arguments in this case would require that we split appellants' causes of action from those of the

estate and other next of kin brought by the personal representative, which we have consistently refused to do where a multiplicity of suits would be the result. *Lisenby* v. *Farm Bureau Mutual Insurance Company of Arkansas*, 245 Ark. 144, 431 S.W.2d 484 (1968):

> Needless to say, the rule against the splitting of a single cause of action is intended to keep defendants from being harassed by a multiplicity of suits and to lighten the already overcrowded dockets of the trial courts. In finding the existence of a single cause of action, we have placed some emphasis upon the fact that the several claims arise from a single transaction. [citations omitted] In the case at bar we are firmly of the view that the fire created only one cause of action and the plaintiffs ought not to be permitted to subdivide that cause of action, thereby burdening the defendant and the courts with a waste of time and expense that attends a needless jury trial. [Id. at 146].

Appellants also cite us to *Darnell* v. *Lea*, 162 Ark. 516, 258 S.W. 363 (1924). There we held a plaintiff was not barred from suing a man who had allegedly seduced and debauched her at age sixteen, even though an earlier suit by her guardian had been dismissed. The cases are distinguishable. The cause of action for seduction was in no sense derivative, as may be said of the cause of action bestowed under the wrongful death statutes, but arose from a tort committed directly against the person of the plaintiff. Too, the suit by the guardian was dismissed for failure to prosecute and was not res judicata as to the cause of action.

■ Here, when the second action was dismissed for failure to give written notice of an intention to sue, an earlier identical action having been dismissed on plaintiff's motion for a nonsuit, the second dismissal operated as an adjudication on the merits. Arkansas Rules of Civil Procedure, Rule 41.

■ By cross-appeal, counsel for the appellees seek to recover fees and expenses under Section 8 of Act 709, which provides for the recovery of reasonable costs in any action to recover for medical injury wherein the claims or defense are baseless, that is, "intentionally made without reasonable cause and found to be untrue." The trial court considered appellees'

requests for a recovery under this section and took the position the claims were not baseless. Considering the circumstances in their entirety we cannot conclude that was error. The provision in Act 709 requiring sixty days notice in writing of an intent to sue raises significant due process questions and is manifestly harsh. While we have upheld it, *Jackson* v. *Ozment*, 283 Ark. 100, 671 S.W.2d 736 (1984), we have also noted our reservations. *Dawson* v. *Gerritsen, supra*. Suffice it to say at this juncture that the appellants are not to be further penalized for attempting to escape from an obvious hardship, the equal of which may not exist elsewhere in the law.

AFFIRMED.

Jack YARBROUGH *v.* Diana YARBROUGH

87-141 748 S.W.2d 123

Supreme Court of Arkansas
Opinion delivered April 11, 1988

James P. Clouette, for appellant.

No brief filed for appellee.

TOM GLAZE, Justice. This case emanates from a divorce action in which the appellant had been ordered to make monthly child support payments. Appellant allegedly became delinquent in his payments, and the trial court issued a court order for him to appear and show cause why he should not be held in contempt. During his attempt to serve this order, Doyne Ball, a process server, was attacked and beaten by appellant. Appellant's actions resulted in the trial court's setting a hearing to determine if appellant was in criminal contempt of court. At the end of that hearing, the court found the appellant guilty and sentenced him to six months imprisonment and a fine of $100.00. We affirm.

In reviewing cases of criminal contempt, we view the record in the light most favorable to the trial judge's decision and sustain that decision if supported by substantial evidence. *Rowell* v. *State*, 278 Ark. 217, 644 S.W.2d 596 (1983); *Dennison* v.

Mobley, Chancellor, 257 Ark. 216, 515 S.W.2d 215 (1974).

The record clearly reflects that the appellant attacked and assaulted Mr. Ball. In fact, Mr. Larry Sims was an eyewitness to the assault, and testified that he observed the appellant pursue and strike Ball. A police officer testified that he arrived moments after the incident to find Ball appearing disheveled and bleeding and attempting to serve "some type of subpoena" on the appellant. Although appellant does not dispute that he struck Ball, he argues that he was not in contempt because his action did not constitute disobedience of process. Appellant further claims that, even if he were in contempt, the applicable statutory law limits the sentence that can be imposed to a maximum of ten days in jail and a fine of $50.00.

Appellant relies upon Ark. Code Ann. § 16-10-108 (1987) which sets forth the powers of the court in punishing criminal contempt. He particularly refers to subsection (a)(3) which provides that the court may punish "willful disobedience of any process or order lawfully issued or made by it," and to subsection (b)(1) which provides for a maximum of ten days imprisonment and a fine of $50.00.

This court, however, has interpreted the foregoing statutory provisions and has held they are not a limitation on the power of the court to inflict punishment for disobedience of process. *Morrow* v. *Roberts, Judge*, 250 Ark. 822, 467 S.W.2d 393 (1971). Stated in other terms, this court, citing Article 7, § 26 of the Arkansas Constitution, held the Legislature cannot abridge the power of the courts to punish for contempt in disobedience of their process; the Constitution specially reserved this inherent power in the courts, when delegating authority to the Legislature to regulate punishments for contempts. *Spight* v. *State*, 155 Ark. 26, 243 S.W. 860 (1922); *Ford* v. *State*, 69 Ark. 550, 64 S.W. 879 (1901). Also relevant to the present case, we point out that, in *Bryan* v. *State*, 99 Ark. 163, 137 S.W. 561 (1911), this court held that a person's resistance of process, or evasion or circumvention of an officer in the service of process, where it is sufficient to amount to contempt of court, is disobedience of process, and therefore falls within the language of the constitution, which in effect forbids regulation by the Legislature. *See also Spight*, 155 Ark. 26, 243 S.W. 860.

Here, appellant clearly resisted Ball's efforts to serve the trial court's order on him, and did so by conduct that could be characterized not only as willful, but also as criminal in nature. Because the appellant acted in willful disobedience of the court's process or order, the trial court, according to well-established law, was not limited to those penalties prescribed by § 16-10-108.[1]

Finally, appellant contends that the sentence imposed by the trial court constitutes cruel and unusual punishment. That argument, however, was not raised below, and, therefore, we are unable to consider it for the first time on appeal. *See, e.g., Boatman* v. *Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. This court never ceases to amaze me, especially in matters of chancery. Now it has conferred jurisdiction to try criminal cases upon chancellors. In the process it points out that a state statute is ineffective in restricting the contempt powers of chancellors and this court. At the same time the majority opinion ignores the United States Constitutional provisions concerning due process and double jeopardy.

Without doubt the record reveals that the appellant violated a criminal law when he attacked Doyne Ball and is most probably liable for civil damages. However, he has been or will be tried on criminal charges and may or may not be sued for damages. That is up to the victim. As disgusting as appellant's action may appear, he is still entitled to due process and equal protection of the law.

Punishment for indirect contempt is a matter for the General Assembly to define. Article 7, Section 26, of the Constitution of Arkansas states:

> The General Assembly shall have power to regulate by law the punishments of contempts not committed in the pres-

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[1] We note that a person may demand a jury trial in a criminal contempt proceeding when the possible imprisonment may exceed six months. *Taylor* v. *Hayes*, 418 U.S. 488 (1974); *Edwards* v. *Jameson*, 283 Ark. 395, 677 S.W.2d 842 (1984).

ence or hearing of the courts, or in disobedience of process.

The General Assembly has enacted legislation presently codified at Ark. Code Ann. § 16-10-108 (1987). This section of the code defines contempt which is within the inherent discretion of the courts. The statute also defines acts constituting contempt committed outside the presence and hearing of the court and in disobedience of process. Pursuant to Article 7, Section 26 of the Constitution the General Assembly is granted such authority. The various provisions in § 16-10-108 clearly stand alone and are severable. Therefore, we are bound to give effect to those sections which were lawfully enacted. Contempts committed outside the presence of the court, or which do not interrupt its proceedings or impair its respect, are limited by the Constitution to punishment established by law. In this case punishment has been limited by the legislature to a fine of no more than $50 and imprisonment of no more than ten (10) days.

Punishment for contempt committed in the "presence or hearing" of the court is inherent and is specifically reserved to the courts. However, the General Assembly is specifically authorized by the Constitution to regulate punishment for contempt committed outside the presence and hearing of the courts and in disobedience of process.

The assault on Mr. Ball clearly was not in the presence or hearing of the court. Therefore, it is a matter which the General Assembly has the power to regulate by law. The offensive conduct here arose out of an attempt by the process server to serve an order of the trial court upon the appellant. The chancellor found the appellant guilty of "interfering with a person authorized to serve papers, orders and process of the court by attacking and beating Doyne Ball who had served or was serving an order of the court and making return of service thereon."

The "process" Ball was serving was an order for appellant to appear at a "show cause" hearing. The appellant appeared as ordered. Therefore, he was not in disobedience of this order nor was he in violation of any other order revealed by the record. He apparently became enraged when he was served and assaulted the process server. The assault occurred nowhere near the court. His action constituted a violation of criminal law and subjected him to civil liability. The additional punishment by the chancellor in the

form of jail time and a fine clearly violates the constitutional prohibition against multiple punishments for the same offense. Two punishments for the identical act is simply not tolerated under the Constitution.

The majority cites several cases in support of its opinion. However, I find none of them on point. In *Morrow* v. *Roberts, Judge*, 250 Ark. 822, 467 S.W.2d 393 (1971), the trial court held Morrow in contempt for failing to obey a subpoena to appear, and separately for failure to get a hair cut. This court affirmed the failure to obey but reversed his conviction for refusal to get his hair cut. Morrow's failure to obey the subpoena was a refusal to obey the order of the court. *Spight* v. *State*, 155 Ark. 26, 243 S.W. 860 (1922), involved a contempt citation by the grand jury against Spight for hiding when the sheriff was trying to serve him with a subpoena to testify before the grand jury. *Bryan* v. *State*, 99 Ark. 163, 137 S.W. 561 (1911), also was based upon disobedience of process.

No reference is made by the majority to any of the leading cases concerning contempt. In *Freeman* v. *State*, 188 Ark. 1058, 69 S.W.2d 267 (1934), this court extensively reviewed prior contempt cases and reversed the trial court's finding of contempt for activities committed out of the presence or hearing of the court; in *Edwards* v. *Jameson, Judge*, 284 Ark. 60, 679 S.W.2d 195 (1984), we reversed a contempt of court conviction based upon a disturbance outside the courtroom because there was no reflection upon the integrity of the court and no disturbance of its proceedings; in *Clark* v. *State*, 287 Ark. 221, 697 S.W.2d 895 (1985), this court, speaking of criminal contempt, stated: "[t]his is a problem the legislature needs to address as we are confined to the resolution of specific issues and it is not the function of this court to promulgate guidelines and rules for criminal contempt charges."

Similarly in *Clark* v. *State*, 291 Ark. 405, 725 S.W.2d 550 (1987), we thoroughly reviewed our decisions in matters relating to contempt of court. In *Clark II* the appellant filed a motion requesting the trial court to recuse. The motion was baseless and accused the judge of criminal misconduct. The trial judge was not aware that the scurrilous motion had been filed until some time later when he ordered Clark to show cause why he should not be

held in contempt. The court convicted Clark of criminal contempt and we reversed on the ground that the judge should have recused.

Upon retrial before another judge, Clark was again found guilty of criminal contempt for filing the motion accusing the first judge of being a crook. We again reversed because the facts of the case were insufficient to form the basis for a contempt conviction. The thrust of our holding in *Clark II* was that the motion was not presented in a manner as to be "disruptive of proceedings before the court or in such a way as to incite disruption or disrespect for the court by others." Therefore, such acts did not constitute contempt.

The *Clark II* opinion cited with approval language from *In Re Larry Little*, 404 U.S. 553 (1972), as follows:

> There is no indication, and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding. Therefore, "the vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig* v. *Harney*, 331 U.S. 367, 376 (1947). "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown* v. *United States*, 356 U.S. 148, 153 (1958).
>
> The reversal of this conviction is necessarily required under our holding in *Holt* v. *Virginia*, 381 U.S. 131 (1965). There attorneys filed motions that the trial judge recuse himself and for a change of venue, alleging that the judge was biased. The motion for change of venue alleged that the judge intimidated and harassed the attorneys' client. The court adjudged the attorneys in contempt for filing these motions. We reversed for reasons also applicable here:

> "It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part." *Id.* at 136 [404 U.S. at 555-556]

The *Clark II* opinion, after carefully examining all our prior cases on contempt and many of the decisions of the United States Supreme Court, concluded that even those justices constituting the majority would have affirmed "had there been any disruption or open insult or degrading comment whatsoever accompanying the filing of the motion."

It is my opinion that the majority in this case takes a step backward and that this decision is a knee-jerk reaction to a criminal assault which in no manner disrupted court proceedings or reflected on the integrity of the court. Such matters should be left to the discretion of the victim and the criminal and civil courts. Further, by the express terms of the Arkansas Constitution, it is the General Assembly that has the power to regulate contempts committed outside the presence or hearing of the courts. It has done so. The conduct of appellant in this case is not in violation of the statute.

I would reverse and dismiss.

Sanders McDaniel CARTER *v.* STATE of Arkansas

CR 87-209 748 S.W.2d 127

Supreme Court of Arkansas
Opinion delivered April 18, 1988

William R. Simpson, Jr., Public Defender, *Steff Padilla*, Deputy Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender, for appellant.

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

ROBERT H. DUDLEY, Justice. On November 18, 1986, a criminal committed the felonies of rape and aggravated robbery of the prosecutrix and the burglary of her home. During the forty to forty-five minute ordeal, the criminal, who had entered the home through a kitchen window off a deck, threatened to kill the prosecutrix with a knife, and also told her that if she called the police he would come back at a later time and slit her throat. In spite of his threat, she called the police, reported the crimes, and gave a description of the criminal. One night about a month and one-half later, on January 4, 1987, she heard someone on the deck and saw a man pass by the window. She called the police and they immediately caught the appellant on the deck. Later that day, and again at trial, she identified the appellant as the person who had committed the earlier rape, aggravated robbery, and burglary. The appellant was charged with those three felonies and was also charged with the later attempted burglary. The attempted burglary charge was severed and later dismissed. Appellant was convicted of the three felonies. We affirm the convictions.

Before trial the appellant made a motion to exclude the evidence about the later attempted burglary under A.R.E. Rule 404(b), and, at trial, repeatedly objected to the introduction of the evidence. The trial judge admitted the evidence, and the appellant contends the rulings were erroneous. The argument is without merit.

A.R.E. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admis-

> sible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under A.R.E. Rules 404(b), quoted above, and 403, the weighing rule, evidence of other crimes will be admitted only if (1) it has independent relevance and (2) its relevance is not substantially outweighed by the danger of unfair prejudice. *Price* v. *State*, 268 Ark. 535, 539, 597 S.W.2d 598, 600 (1980).

As to the first requirement, independent relevance, this means that the evidence must be " 'relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal.' " *Id.* at 538, 597 S.W.2d at 599 (quoting *Alford* v. *State*, 223 Ark. 330, 334, 266 S.W.2d 804, 806 (1954)). Here, the evidence was admissible to show identity. The return to the original crime scene, perhaps to make good his threat to slit the prosecutrix's throat for having called the police, tends to establish that he was the same person who committed the earlier felonies.

As to the second requirement, that the probative value not be *substantially outweighed* by the danger of unfair prejudice, this is a balance we accord the trial judge "wide discretion in deciding, and he will not be reversed on appeal unless he has abused such discretion." *Id.* at 539, 597 S.W.2d at 600. Here, the identity of the person who committed the three felonies was the key issue. The prosecutrix identified the appellant as the person who broke into her home and raped and robbed her. The defense then cross-examined the prosecutrix and attempted to show that her identification of the defendant was flawed. In addition, the defendant's mother strongly implied that the prosecutrix was mistaken in identifying the defendant because she, the mother, testified that the defendant was at home on the night the crimes were committed. The probative value of the evidence went to identification, and we cannot say the trial judge abused his wide discretion in deciding that the probative value was not substantially outweighed by the danger of unfair prejudice.

The appellant next argues that the evidence was insufficient to support his conviction for aggravated robbery. "Aggravated robbery" is defined as follows:

> (1) A person commits aggravated robbery if he commits robbery as defined in Section 2103 of Act 280 of 1975 (Arkansas Statutes Annotated 41-2103) and he:
>
> (a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or
>
> (b) inflicts or attempts to inflict death or serious physical injury upon another person.

Ark. Stat. Ann. § 41-2102(1) (Supp. 1985) [now codified with minor stylistic changes at Ark. Code Ann. § 5-12-103 (1987)].

"Robbery," a necessary element of aggravated robbery, was defined at the time of the crime as follows:

> (1) A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

Ark. Stat. Ann. § 41-2103 (Repl. 1977) (amended in 1987 to add the words "felony or misdemeanor" before the word "theft") [amended version appears at Ark. Code Ann. § 5-12-102 (Supp. 1987)].

"Physical force" is defined as "any bodily impact, restraint, or confinement, or threat thereof." Ark. Stat. Ann. § 41-2101 (Repl. 1977) [now codified with minor stylistic changes at Ark. Code Ann. § 5-12-101 (1987)].

The appellant argues that physical force was used to commit the rape, but after that was over, no physical force was used to commit the robbery.

■■ On appeal, we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the jury finding, and " '[s]ubstantial evidence' means that the jury could have reached its conclusion without having to resort to speculation or conjecture." *Osborne* v. *State*, 278 Ark. 45, 53, 643 S.W.2d 251, 254 (1982). Here, there was substantial evidence for the jury to reach its verdict. The prosecutrix testified that the appellant threatened her with a knife, repeatedly beat her, and told her he would kill her if she did not do what he said. She believed his threat was genuine. When he

was going through her purse for money, she thought he would start hitting her again. The testimony constituted very substantial evidence that there was an immediate threat of death or serious physical injury to the prosecutrix, at least until she surrendered her money.

Pursuant to Rule 11(f) of the Rules of the Supreme Court and Court of Appeals, we state that we find no errors prejudicial to the appellant, who was sentenced to life imprisonment on the rape conviction in this case.

Affirmed.

ARKANSAS CONTRACTORS LICENSING BOARD *v.* BUTLER CONSTRUCTION CO., Inc. of Barling, Arkansas

87-333 748 S.W.2d 129

Supreme Court of Arkansas
Opinion delivered April 18, 1988

Steve Clark, Att'y Gen., by: *Rick D. Hogan*, Asst. Att'y Gen., for appellant.

Davidson, Horne, & Hollingsworth, A Professional Association, by: *Cyril Hollingsworth* for amicus curiae Arkansas Chapter of the Associated General Contractors of America, Inc.

Walters Law Firm, by: *Bill Walters*, for appellee.

STEELE HAYS, Justice. The issue is whether appellee Butler Construction Co., Inc. was required by law to have a contractor's license before constructing a dental clinic for Dr. Robert Ward. The Arkansas Contractors Licensing Board, after a hearing, determined that Butler had undertaken to erect the clinic without a contractor's license, in violation of Act 150 of 1965, codified as Ark. Code Ann. §§ 17-22-101 et seq. (1987) [Ark. Stat. Ann. §§

71-701 et seq. (Supp. 1985)]. Butler was fined $2,960 and enjoined from performing any work in excess of $20,000 prior to being licensed as a contractor. Butler appealed to circuit court, where the Board was reversed upon findings that 1) because Butler received less than $20,000 for his supervision of the construction he was not subject to the act, 2) the Board's Exhibit No. 5 was hearsay and should not have been considered, and 3) a witness for the Board was not sworn before testifying. The Board has appealed the order of the circuit court. We reverse.

I

The Board unanimously found that Butler was acting as a contractor within the meaning of Ark. Code Ann. § 17-22-101 (1987). That section defines a contractor as any person (including a corporation) who, for a fixed fee, undertakes to construct any building or other improvement (except single family residences), when the cost of the work to be done is $20,000 or more, including labor and materials. On appeal the circuit judge noted that Butler was to receive $15,000 for supervising the work and hence was not a contractor within the meaning of the act. That was clearly error.

When a decision of an administrative agency is appealed, a number of general rules of appellate review apply: the evidence is given its strongest probative force in favor of the ruling of the administrative agency. *Arkansas Department of Human Services* v. *Simes*, 281 Ark. 81, 661 S.W.2d 378 (1983); *Franks* v. *Ammoco Chemical Co.*, 253 Ark. 120, 484 S.W.2d 689 (1972). The interpretation of a statute by an administrative agency, while not conclusive, is highly persuasive. *Public Service Commission* v. *Allied Telephone Co.*, 274 Ark. 478, 625 S.W.2d 515 (1981). A court may not substitute its judgment for that of the administrative agency unless the decision of the agency is arbitrary and capricious. *Green* v. *Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984). The construction of a statute by an administrative agency should not be overturned unless it is clearly wrong. *Moore* v. *Tillman*, 170 Ark. 895, 282 S.W. 9 (1926). A court may not reverse a decision of an administrative agency if there is any substantial evidence to support its decision. *Williams* v. *Scott*, 278 Ark. 453, 647 S.W.2d 115 (1983); *Arkansas Department of Human Services* v. *Sims*, 281 Ark. 81, 661 S.W.2d 378 (1983).

The decision of the Contractors Licensing Board was, we believe, entirely consistent with the legislative intent behind Act 150. The figure of $20,000 used in the act, rather than being intended to apply simply to the fee or commission received by the contractor, is meant to apply to the cost of the project, including labor and materials. If the overall cost of the project equals or exceeds $20,000, a license is required under the Act. This, essentially, was our holding in *Bird* v. *Pan Western Corp.*, 261 Ark. 56, 546 S.W.2d 417 (1977). Any other interpretation would sorely cripple the objective of this legislation. The building permit for this clinic authorized construction costing an estimated $125,000. The four bids submitted ranged from a low of $148,932.24 (Butler's bid) to a high of $182,231.00. It is true that Mr. Butler testified that he submitted a bid simply as a courtesy to Dr. Ward, that he was merely to supervise the work and receive $15,000, irrespective of the bids. However, it is undisputed that this clinic was to cost in the range of $125,000 by Butler's own estimate and there was evidence, though disputed, that it could cost as much as $148,000. Butler urges that he was working for a fixed fee, that he furnished no labor or materials, other than one employee, that all other labor and materials came directly from subcontractors. However, the Board unanimously rejected that concept of the arrangement and the contract itself between Dr. Ward and Butler effectively refutes that theory of the agreement in that Butler agreed to be responsible for obtaining all material and supplies and to provide all services in connection with the construction so as to provide the owner with a turnkey completion of the clinic.

II

Over Butler's objection, a bid tabulation form was introduced which reflected four bids. Butler's bid of $148,932.24 was low and Schriver & Son Construction Company's bid of $182,231 was high. It appears the hearing examiner declared the exhibit inadmissible on grounds of hearsay, yet permitted it to become part of the record and the Board, Butler contends, considered it in reaching its decision. Even so, this was not a sufficient basis for reversal of the decision of the Board. The bid tabulation had little bearing on the outcome of the case, as the facts are not in any real dispute. The entire theory of appellee's

defense is based on a question of law. The only relevance of the bid tabulation was the amount of Butler's "bid" of $148,000. But the cost of the project, whether $125,000 or $148,000, is immaterial to Butler's defense, which is that irrespective of the overall cost, Butler's fee was less than $20,000. The rules of evidence applicable to administrative proceedings are more relaxed, *Evans* v. *Arkansas Racing Commission*, 270 Ark. 788, 606 S.W.2d 578 (1980); *Fisher* v. *Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967). Besides, Butler testified to this same information without objection, hence, the bid tabulation was merely cumulative of other identical evidence.

III

Another reason for the circuit court's reversal of the Board was that a witness for the Board, Mr. Bill Mullinax, was not sworn before testifying. Granted, the record does not reflect either Mr. Mullinax or Mr. Butler being sworn before giving testimony at the hearing. There is no contention the witnesses were not sworn, only that the record does not affirmatively indicate that they were. Just how this became an issue before the circuit court is not clear; it is clear, however, that no one objected to Mr. Mullinax testifying without first being sworn and the omission, if it occurred, may not be raised on appeal unless it was preserved at the administrative hearing. *Arkansas Cemetery Board* v. *Memorial Properties, Inc.*, 272 Ark. 172, 616 S.W.2d 713 (1981). *Hennesey* v. *S.E.C.*, 285 F.2d 511 (3d Cir. 1960); *Unemployment Commission* v. *Aragon*, 329 U.S. 143 (1946).

Reversed and remanded with directions to enter an order consistent with this opinion.

Michael Anthony RONNING *v.* STATE of Arkansas

CR 87-57 748 S.W.2d 633

Supreme Court of Arkansas
Opinion delivered April 18, 1988
[Rehearing denied May 16, 1988.]

McDaniel & Wells, P.A., by: *Phillip Wells*, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant Michael Ronning was

convicted of the capital murder of Diana Lynn Hanley and sentenced to life imprisonment without parole. On appeal Ronning raises twelve points. Finding no reversible error, we affirm the judgment.

In March of 1984 Diana Hanley and Darrell Meredith began living together in a house on Bridger Road in Jonesboro. Meredith was a house builder and in December, 1984 he was contacted at the job site by a man who wanted work and who identified himself as Michael Haroldson. Meredith didn't need anyone, but Haroldson came back a week later, with his wife and baby in the car, pleading for work of any kind. Meredith put him to work on December 6. When another worker quit Meredith hired Larry Brown, and Haroldson and Brown drove to work together from Pocahontas in an old Plymouth automobile belonging to Haroldson. The car, a 1965 model, was cream colored, badly rusted, and emitted dense smoke from the exhaust.

On Friday, January 3, Haroldson and Brown came to Meredith's house to be paid. Meredith had about $1,100 in cash in a lock box. Meredith asked the two men to wait outside while Diana retrieved the lock box from its hiding place and Meredith proceeded to pay them, Haroldson receiving $77. Meredith testified that he noticed Haroldson look at the money in the lock box several times and that he "got real quiet."

On Monday Meredith got up at the usual time, had coffee with Diana and left for work about 7:20 a.m. Diana was wearing a red robe Meredith had given to her for Christmas. Meredith went straight to the job site where Brown was waiting for him. Haroldson did not show up for work that day.

When Meredith got home that evening Diana's Corvette was in the driveway but she was not there. Her coat was still where she had left it the night before and her purse, cigarettes and billfold were beside the couch. There was no money in her purse. Meredith called several friends to see if they knew where Diana might be and when he was unable to locate her he became worried and called the sheriff. While waiting for a deputy to come he thought of the lock box and found that it was empty. It had contained seven $100 bills after he and Diana had withdrawn some of the money over the weekend. He later discovered that a large Bowie knife was missing from the kitchen.

Attention quickly focused on Michael Haroldson because of reports that a car matching the description of the Plymouth was seen in the driveway of Meredith's home on the morning of Diana Hanley's disappearance.

The Sheriff of Randolph County was contacted. He undertook an investigation and learned that Michael Haroldson was in fact Michael Ronning, and was wanted on burglary charges in Michigan. The Ronning home was watched and at 10:30 p.m. the Plymouth automobile was observed, though Ronning was not there. Ronning's wife gave the officers the clothes Ronning had worn that day. Eventually a search of the area was begun and Ronning was found hiding in some shrubbery about seventy-five yards behind the house. He was taken into custody during the early hours of January 7, 1985.

On January 19 a trapper found the body of Diana Hanley. It was located a half mile off the O'Kean Cut-off road between Pocahontas and O'Kean, partially covered with branches. Diana Hanley's throat had been cut by three stab wounds from a large knife. There were bruises to the left side of the jaw. Her garments, including the red robe, were up around her shoulders exposing the lower two-thirds of her torso. There were scratches and abrasions on her upper thighs. She had been bound at the hands and feet. In the opinion of the medical examiner she had been raped, though the lapse of time rendered that opinion conjectural.

I

THE COURT ERRED IN FAILING TO DISMISS THE INFORMATION AGAINST APPELLANT ON THE BASIS OF IMPROPER VENUE.

Michael Ronning was arrested in Randolph County, where the body of Diana Hanley was discovered. She was last seen alive in Craighead County, where the information was filed charging Ronning with burglary, kidnapping and murder.

Ronning cites Ark. Code Ann. § 16-88-109 (1987) [Ark. Stat. Ann. § 43-1417 (Repl. 1977)], providing that when two or more counties have jurisdiction of the same offense, the county in which the defendant is first arrested shall proceed to try the offense to the exclusion of the others. He also cites language from

Fairchild v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984), to the effect that because the victim was kidnapped in Pulaski County and murdered in Lonoke County, venue was proper in the county where the murder occurred. Since Ronning was arrested in Randolph County and the murder presumably occurred in Randolph County, Ronning argues that a defense motion to transfer to Randolph County should have been granted.

We need not determine whether venue lay in Randolph County to the exclusion of Craighead County because before the motion to transfer was filed the defense asked for, and was granted, a change of venue. The case was transferred to Crittenden County where the trial was held. It was not error for the court to refuse a second request for a venue change. Ark. Code Ann. § 16-88-203 (1987) [Ark. Stat. Ann. § 43-1518 (Repl. 1977)].

II

THE COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN SHERIFF JOHNSON TESTIFIED THAT THE APPELLANT WAS BEING HELD ON MICHIGAN CHARGES.

During the prosecutor's interrogation of Craighead Sheriff Floyd Johnson, Johnson spoke of conversations with Ronning as to the possibility of Ronning being released on bond. He was asked, "And most of those questions related to his getting out on bond?" Answer: "Yes sir. He told me that — when I informed him that we would probably hold him on a burglary charge based on the information that we had at that point — he told me that he wasn't too concerned about the charges in Michigan and he wasn't too concerned about the burglary."

The answer prompted a motion for a mistrial which the trial court denied. Appellant points to Rule 404(b) of the Arkansas Rules of Evidence which excludes evidence of other crimes to show the character of a defendant in order to prove the defendant acted in conformity therewith. *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). However, it seems clear the reference to Michigan charges, the nature of which were not disclosed, was not deliberately prompted by the question and the trial court's admonition to the jury to disregard the remark was a

sufficient handling of the incident. *Foster* v. *State*, 285 Ark. 363, 687 S.W.2d 829 (1985).

III

THE COURT ERRED IN FAILING TO GRANT A MISTRIAL IN THAT ONE OF THE JURORS STATED IN OPEN COURT THAT HE WAS HARD OF HEARING AND THERE WERE "SKIPS" IN HIS HEARING THE TESTIMONY.

During the state's closing argument in rebuttal one of the jurors asked counsel to speak up and expressed some difficulty in hearing the arguments, resulting in this exchange:

The Court:	Were you able to hear the evidence presented in this case?
Juror:	Yes.
The Court:	You didn't have trouble with the evidence — the testimony you heard?
Juror:	There were some skips.
The Court:	Do you feel that you heard all the testimony?
Juror:	Right.

Appellant moved for a mistrial, which was denied, and on appeal cites case law that a juror who is physically unfit to discharge the duties of a juror, or who is incapable of hearing the testimony, is not qualified. *Commonwealth* v. *Brown*, 231 Pa. Super. 431, 332 A.2d 828 (1974); *State* v. *Reed*, 10 So. 2d 28 (La. 1944); *Bell* v. *O'Connor Transport, Limited*, 94 Idaho 406, 489 P.2d 439 (1971). Appellant submits that a trial should not only be fair, but should have the appearance of fairness as well. *Henslee* v. *State*, 251 Ark. 125, 471 S.W.2d 352 (1971).

While we do not dispute the authority for this point, we disagree that the fairness of the trial, or its appearance, was undermined by this development. We find no significant inability by the juror to hear the testimony. He acknowledged some "skips" but he maintained he had heard all the testimony. Without more, we cannot conclude that the trial court's broad discretion to act upon mistrial motions was improperly exercised by refusing to abort the trial. *Combs* v. *State*, 270 Ark. 496, 606

S.W.2d 61 (1986).

IV

THE CONVICTION OF THE APPELLANT SHOULD BE REVERSED DUE TO NUMEROUS REFERENCES MADE BY THE PROSECUTING ATTORNEY IN HIS CLOSING ARGUMENT OF THE APPELLANT'S FAILURE TO TESTIFY.

Appellant cites a number of instances in closing argument when the prosecutor allegedly violated the principle established by *Griffin* v. *California*, 380 U.S. 609 (1965), that the decision of a defendant not to testify in his own behalf may not be argued as evidence of guilt. We will not report all the rather lengthy excerpts relied on, as we find only one objection to these remarks and that was on a wholly different basis than now argued.

We quote from the record, p. 1055:

> They not only did that with this place of business that Victoria Ronning had told them this defendant had been at, but they also checked out other coffee shops and truck stops to see if they could find anyone who saw this defendant drinking coffee or served him coffee or saw him getting his car boosted or having trouble with his car, and they were unable to elicit any person that could come before you and say that he was there like he told Victoria Ronning he was. Now why was he lying about that? Why do you lie if the truth won't hurt you?
>
> [Defense Counsel]:
>
> Your honor, I'm going to have to object as far as he's saying that he's lying. It's not been proven through any kind of testimony that he was lying.
>
> [Prosecutor]:
>
> Your Honor, this is closing argument.
>
> [Defense Counsel]:
>
> I understand this is closing argument, but I think he's gone a little too far in saying that he's lying.
>
> [The Court]:

> Ladies and gentlemen, the Court will instruct you — as I've previously done — that opening statements, remarks during the trial and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any arguments, statements or remarks of the attorneys having no basis in the evidence should be disregarded by you.
>
> Gentlemen, you're permitted to argue any reasonable inferences from what's been received in evidence.
>
> Ladies and gentlemen of the jury, it will be for you to determine what has been received in evidence and your recollection of the evidence. Alright, you may continue.

The objection, clearly, was to the prosecutor's argument that Michael Ronning was lying when he told his wife he was at the 76 Truckstop at the time of Diana Hanley's disappearance. There was no objection based on the defendant's failure to testify in his own behalf. In hundreds of cases we have repeated the fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court. *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

V

THERE WAS NOT SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE VERDICT OF GUILTY RETURNED BY THE JURY.

Appellant submits the evidence of guilt was insufficient to support the verdict. Noting that the proof was entirely circumstantial, he asserts the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis. *Ward* v. *State*, 6 Ark. App. 349, 642 S.W.2d 328 (1982). However, this standard for weighing the evidence is addressed to the jury, as on appeal we view the evidence only to determine whether there is substantial evidence to support the verdict. *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

We reject the contention that there was no substantial evidence of guilt. The evidence, viewed in the light most favorable to the state and with all reasonable inferences consis-

tent therewith, fully supports the verdict. The circumstances which point in that direction are these: On Friday afternoon when he paid Brown and Ronning, Meredith noticed Ronning's interest in the cash in the lock box and that Ronning got very quiet as he observed it. On Monday morning Meredith expected to find Ronning at work but Ronning failed to appear at the job throughout the day. There is evidence that Victoria Ronning, too, thought Ronning was going to work on Monday when he left the house. Numerous witnesses testified to the fact that a vehicle matching Ronning's automobile, which was conspicuous for several reasons, was seen in the driveway at the Meredith residence from about 8:15 a.m. until as late as 10:30 or 11:00. Kenneth Ray Brewer saw the car at about 8:10 and noticed a person beside the car. He had the "impression" it was a man. Floyd Stonecipher passed the Meredith house between 7:45 and 8:00 a.m. and saw an old, rusty white car of Chrysler make with a Michigan license plate. The Corvette was also in the drive. Gary Keyser saw the car as described about 8:00 o'clock that morning. Steve Tyler saw the car around 8:00 and noticed that it did not have an Arkansas license plate. When he came back by between 10:30 and 11:00 he did not see the car. Kathy Hall testified that as she was going to work on that morning at "shortly after ten," no later than 10:20, a car pulled onto Hwy. 49 from Bridger Road which startled her because it did not stop. The car was old, with rust spots, and smoked rather badly. The car she saw resembled a photograph of the Ronning car and contained two people. One neighbor, Mr. Riley Futrell, testified he saw the car in the drive between 12:00 and 12:30, which is later, by perhaps an hour or more, than the other witnesses. However, inconsistencies in the testimony are matters for the jury.

Mary Meyer testified that as she drove from Jonesboro to Brookland that morning around 10:15 a car meeting her swerved unexpectedly toward her and attracted her attention. A man was driving with a woman passenger. As the cars passed she had direct eye contact with the woman, who looked "scared to death." The car matched the Ronning vehicle and had out of state tags. The witness was vaguely aware of a laundry basket in the backseat with something red draped over it. She identified Michael Ronning as the driver and was "75% sure" the passenger was Diana Hanley. Harry Gordon testified that on January 6

he took his wife to work at the Black River Vo-Tech. Sometime between 10:15 and 10:45 he saw Michael Ronning with a female passenger headed toward the O'Kean Cut-off.

There was proof that some of the fibers from the red robe were on the floor of the Ronning vehicle and two such fibers were recovered from the jeans worn that day by Michael Ronning. There was also proof that Ronning was familiar with the O'Kean Cut-off. Doyle Bruce testified that he operated a furniture and vehicle upholstery shop in Pocahontas and Victoria Ronning worked for him. He said that on the morning of January 6 Michael Ronning came to the shop a few minutes before 11:30, that Victoria was surprised to see him and asked him why he wasn't working. Michael told her he had had car trouble, that he had stopped at the 76 Truckstop in Walnut Ridge for coffee. There was testimony from investigating officers that none of the employees at the 76 Truckstop could identify Michael Ronning as having been there the morning of January 6.

Other pertinent circumstances included evidence that on Friday evening Ronning took his tools from Meredith's truck where he ordinarily left them; that a pair of gloves was found in the Ronning vehicle after it was impounded, though Ronning never used gloves at work and had once refused Meredith's offer to furnish him with a pair; that while Ronning was in jail before the discovery of Diana Hanley's body Mrs. Ronning talked to him in the presence of Officer Dickie Howell. Officer Howell said Mrs. Ronning told Michael that the police knew he had not gotten the money by forging a check, as he had said, and the police wanted to know where he got the money. Howell said Ronning became upset and said, "Shut-up, you son of a bitch, about that extra money I had. Don't you tell anybody about the money." Mrs. Ronning began to cry and left. Officers tried unsuccessfully to subpoena Mrs. Ronning for trial but were unable to locate her although two officers had gone to Dallas in an attempt to find her.

Two final circumstances are consistent with guilt: The testimony of Sheriff Johnson that while in custody and after having been given the Miranda warnings Ronning told him that he might be able to help the sheriff on the burglary but that he could not help with locating the woman; and the fact that Ronning attempted to hide when the police began looking for

him. As might be expected, there were circumstances pointing toward other possibilities, but in determining the sufficiency of the evidence we do not weigh evidence on one side against the other, we simply determine whether the evidence in support of the verdict is substantial. *Ricketts* v. *State*, 292 Ark. 256, 729 S.W.2d 400 (1987).

VI

THE COURT ERRED IN RULING THAT AN IN CUSTODY STATEMENT MADE BY THE APPELLANT QUALIFIED AS EITHER A CONFESSION OR A DECLARATION AGAINST INTEREST, AND THEREFORE ADMISSIBLE IN EVIDENCE AT TRIAL.

VII

THE COURT ERRED IN ADMITTING THE STATEMENT MADE BY THE APPELLANT TO SHERIFF JOHNSON IN THAT AFTER APPELLANT REQUESTED TO HAVE AN ATTORNEY APPOINTED, ALL QUESTIONING BY SHERIFF JOHNSON SHOULD HAVE CEASED.

Points VI and VII are closely related and will be considered together. By pretrial motion appellant asked the trial court to rule that the state could not introduce either as a confession or as a declaration against interest a remark attributed to Ronning by Sheriff Floyd Johnson, that Ronning told the sheriff he could possibly help him with the burglary, but could not help in locating Diana Hanley.

Appellant argues that the remarks, even if made, constitute neither a confession, nor an admission against interest. He points out that a confession is an admission of guilt [*Workman* v. *State*, 267 Ark. 103, 589 S.W.2d 20 (1979)], which this is not, and a declaration against interest is one which is contrary to the pecuniary or proprietary interest of the declarant and, hence, admissible as an exception to the hearsay rule. A.R.E. Rule 804(b)(3). But it is not necessary that the admissibility of the remarks rest on one or the other of these categories, but on whether they are relevant and were intelligently made pursuant

to the Miranda warnings, that is, with an awareness by the declarant that the remarks could be used as evidence. As to their relevancy, that involves the trial court's discretion, and it hardly taxes the concept of relevancy to point out that for Ronning to profess some knowledge concerning a burglary of the Meredith dwelling, which coincided with the disappearance of Diana Hanley, is a circumstance bearing on the probability that Ronning was involved in her disappearance and murder. A.R.E. Rules 401 and 402. As to the Miranda warnings, no serious argument can be made that they were not given Michael Ronning. Officer Howell testified that he twice administered the Miranda warnings and Ronning acknowledged in writing that he understood the warnings. Ronning did not dispute this testimony and acknowledged that he understood his rights.

Turning to the other point, No. VII, Ronning contends Sheriff Johnson ignored the doctrine of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), by continuing to question him after Ronning had invoked his sixth amendment right to counsel. But the express finding of the trial court was that Ronning's remarks came in the course of a conversation which Ronning initiated and following a statement, rather than a question, from Johnson. The abstract of the suppression verifies this finding by quoting Ronning's testimony verbatim: "Yes, my statement about being able to help was a response to his question. This was toward the end of the conversation. *It was a response to a statement of his, I guess, not a question.*" [Our italics.]

VIII

THE COURT ERRED IN FAILING TO GRANT APPELLANT PERMISSION TO HAVE CERTAIN PHYSICAL EVIDENCE BY APPELLANT'S EXPERT WITNESS PRIOR TO TRIAL.

Appellant maintains that by pretrial motion he asked that the red fibers recovered from Ronning's gloves, blue jeans and car be sent to Dr. Irving Stone of Dallas, Texas, employed by the defense for scientific analysis, but the state objected on grounds the fibers might be lost. Appellant concedes the trial court ordered the state crime lab to make the fibers available to the defense but since appellant lacked the funds to bring Dr. Stone to Little Rock, he urges the trial court should have ordered the fibers

delivered for analysis. The record indicates, however, that "numerous fibers" were mailed to Dr. Stone for examination, while others (presumably the two recovered from the blue jeans) were not, but were available at all times for inspection by the defense.[1] We cannot say the trial court's broad discretion over such matters was abused by this handling of the issue.

IX

THE CONVICTION OF THE APPELLANT SHOULD BE REVERSED DUE TO IMPROPER COMMENTS MADE BY THE PROSECUTING ATTORNEY CONCERNING THE ABSENCE AT TRIAL OF APPELLANT'S WIFE, VICTORIA RONNING.

Appellant advances the argument that prejudicial error occurred during closing argument when the prosecutor told the jury:

> You heard the testimony about Victoria Ronning. You heard Officer Howell testify about trying to find her, trying to get her subpoenaed to bring her into court, and you heard him say that he even went to Dallas, Texas, to try to find her, but to no avail. *And what does that tell you, inferentially?* (R. 1054).

However, the remarks were not objected to and, therefore, the allegation of error may not be argued on appeal. *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

X

THE CONVICTION OF THE APPELLANT SHOULD BE REVERSED BASED ON COMMENTS MADE BY THE PROSECUTING ATTORNEY THAT WERE INTENDED TO INFLAME THE JURY AGAINST APPELLANT.

At separate points in closing argument counsel for the state made these comments:

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[1] Record, p. 99.

> I think what you are talking about here is a psychopathic killer, and these people, they feel no remorse, they feel no pain of conscience.
>
> * * * * *
>
> And realize that if you are wrong, you are going to turn a psychopathic killer loose.
>
> * * * * *
>
> Don't turn him loose to run amidst the law abiding people of this area, and any other area he might go.

No objection was offered to the first and third excerpts. Following the second, defense counsel interposed an objection to the characterization, "psychopathic killer," which the trial sustained, again reminding the jury that closing argument was only an aid to the jury and not evidence. The objection having been sustained and the jury admonished, no error occurred.

XI

THE VERDICT OF THE APPELLANT SHOULD BE REVERSED IN THAT THE APPELLANT WAS DENIED A FAIR TRIAL DUE TO NUMEROUS LEADING QUESTIONS ASKED BY THE PROSECUTING ATTORNEY DURING THE STATE'S CASE.

XII

THE CUMULATIVE EFFECT OF THE ERRORS OF THE TRIAL COURT AND THE PROSECUTING ATTORNEY TAINTED THE PROCEEDINGS AND AMOUNTED TO CUMULATIVE ERROR REQUIRING REVERSAL.

In the recent case of *Alexander* v. *Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986), we reversed a medical malpractice case because there was a pervasive misuse of leading questions by the defense in the production of evidence which the trial court was unable to control. Appellant cites this language from the *Alexan-*

der decision:

> There are limits to everything and when counsel cannot or will not abide by the rules of evidence and of the trial court, and the trial court cannot stop the violations, we have to. The contention on appeal is that although not one instance of counsel's conduct would be cause for reversal, all of the violations combined to deny the appellant a fair trial.

In this case we have examined the ten specific instances of leading questions by counsel for the state cited by the appellant. However, this was a lengthy trial and there was an evident attempt by counsel to comply with the trial judge's directive to avoid leading questions. We are satisfied the situation is not comparable to *Alexander* v. *Chapman.*

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

Finding no error, the judgment is affirmed.

CRAIGHEAD COUNTY BOARD OF EDUCATION, Joe Boone, Doyle Yarbrough, and Robert Flannigan *v.* Mearl HENRY

87-314 748 S.W.2d 132

Supreme Court of Arkansas
Opinion delivered April 18, 1988

Bill W. Bristow, P.A., for appellants.

Henry, Walden & Davis, by: *Troy Henry*, for appellee.

DAVID NEWBERN, Justice. Appellant, Craighead County Board of Education, dismissed Mearl Henry, the appellee, from his position as county school superintendent. The other appellants are Joe Boone, Doyle Yarbrough, and Robert Flannigan, who were apparently the only three members of the board. Henry sought a declaratory judgment to the effect that the dismissal was illegal because appellant Flannigan, who had voted to dismiss Henry, was not legally a member of the board when the vote was taken because he had forfeited his membership when he became mayor of Monette, Arkansas. Combined with his claim for a declaratory judgment was Henry's claim for damages for unlawful dismissal. The trial court held that Flannigan could not have been a member of the board when the vote on Henry was taken because Ark. Code Ann. § 6-12-101(b) (1987) provides that a county board of education member shall be one who does "not hold any salaried . . . office of the state or any political subdivision thereof." A final judgment was issued on this claim, and the matter was certified as being appealable pursuant to Ark. R. Civ. P. 54(b). We reverse because we find the statute to be in conflict with Ark. Const. art. 19, § 26, which provides in part that "officers of the public schools may be elected to fill any executive or judicial office."

The argument of the board is that Flannigan is not a public school officer so the constitutional provision does not protect him from the application of the statute. The contention is that he is a "county officer" rather than a public school officer, and that he

cannot be a public school officer because he is affiliated with no school district. No explanation or authority is given to support the proposition that one may not be both a county officer and a public school officer. The board cites *Cade* v. *State*, 185 Ark. 1150, 51 S.W.2d 857 (1932), but there it was held only that a county board member and a county superintendent of schools were county officers; it was not held that they were not public school officers. Nor is there explanation of the argument that one must serve a particular school district to be a public school officer. *Maddox* v. *State*, 220 Ark. 762, 249 S.W.2d 972 (1952), is cited, but there it was held only that a school teacher and a superintendent were not "public officers" but were, instead, school employees. No reference was made to the constitutional provision.

We need only look to the statutes creating county boards of education to see that the general assembly contemplated that they be public school officers. Ark. Code Ann. § 6-12-108(a) (1987) provides:

> 6-12-108. Schools under board supervision — Superintendent.
>
> (a) The public schools of each of the several counties of the state, except those schools in districts which employ a superintendent of schools, shall be under the general direction and supervision of the county board of education insofar as is provided in this chapter.

Arkansas Code Ann. § 6-12-109 (1987) provides:

> 6-12-109. Powers and duties.
>
> (a) It shall be the duty of the county board of education to supervise and direct all its employees in the performance of their duties and, in addition thereto, the board shall have all powers, duties, and responsibilities respecting the public schools of the several counties which are set forth in subsection (b).
>
> (b) Specifically, these duties, among others, shall include the following:
>
> (1) To apportion all school funds as provided by law and in conformity to the regulations of the State Board of Education;

(2) To form local school districts, change boundary lines of school districts, dissolve school districts and annex the territory of such districts to another district, create new school districts, and perform all other functions regarding changes in school districts, in accordance with the law;

(3) To transfer funds and attach territory which is in no school district to other districts as may seem best for the educational welfare of the county;

(4) To cause to be set aside from funds in the county general school fund amounts necessary for the expenses of the board and of the county school supervisor's office;

(5) To administer the compulsory school attendance laws in the county;

(6) To approve budgets of school districts coming under the provisions of this chapter;

(7) To appoint all school directors in all school districts where the authority to do so has heretofore been conferred on any county judge of any county.

While we recognize the rule that we presume statutes not to be unconstitutional, *HCA Medical Services of Midwest, Inc.* v. *Rodgers*, 292 Ark. 359, 730 S.W.2d 229 (1987), and that the longevity of a statute is persuasive of its constitutionality, *South Central District of the Pentecostal Church of God of America, Inc.* v. *Bruch-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980), we cannot ignore the words of the Constitution and the legislative scheme giving the county board of education responsibilities for public schools. The fact that board members are county public school officers makes them no less "officers of the public schools." Therefore, we conclude Ark. Code Ann. § 6-12-101(b) (1987) is unconstitutional to the extent it precludes county board of education members from holding elected executive or judicial office because it is in conflict with art. 19, § 26 of the Constitution.

Reversed and remanded.

HICKMAN, J., dissents.

NORTHWEST TIRE SERVICE and Tri-State Insurance Company *v.* Arlie EVANS

87-360 748 S.W.2d 134

Supreme Court of Arkansas
Opinion delivered April 18, 1988

Mashburn & Taylor, by: *Michael H. Mashburn*, for petitioners.

Bassett Law Firm, by: *Curtis L. Nebben*, for amicus curiae Tyson Foods, Inc.

Walter A. Murray, for amicus curiae Arkansas Self-Insured Association.

Jan N. Tolley, for respondent.

DAVID NEWBERN, Justice. The sole issue to be considered here is whether the furnishing, by an employer, of replacement medicine to an injured employee is payment of "compensation" and thus tolls the statute of limitations applicable to a workers' compensation claim. The Arkansas Workers' Compensation Commission held that it did not. The Arkansas Court of Appeals reversed. We affirm the court of appeals.

The statute to be considered is Ark. Code Ann. § 11-9-

702(b) (1987):

> Time for Filing for Additional Compensation. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater. The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs, and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies.

The respondent, Arlie Evans, received a compensable injury in 1976. His partial disability payments ended in 1980, and payments for treatment other than medication ended in October, 1983. Thereafter, he received payments on his claim only for prescription refills. In April, 1985, Evans filed for additional benefits, claiming he had become permanently and totally disabled. The commission denied his claim on the ground that the statute of limitations had run. The court of appeals held that, because no one-year period had elapsed between payments, the limitations period had not run. To reach that decision, it was necessary to characterize furnishing prescription refills as "compensation."

The court of appeals relied on its decision in *Alred* v. *Jackson Atlantic, Inc.*, 268 Ark. 695, 595 S.W.2d 249 (Ark. App. 1980), in which it was clearly held that payments for prescription refills constituted compensation and thus tolled the statute. The petitioners suggest that the *Alred* case is distinguishable on the ground that the prescription refills there may have been "treatment" and here the commission has held they were "purely replacement medicine." The suggestion is that having a prescription filled may constitute "treatment" and the furnishing of it may toll the statute, but a refill is somehow not to be characterized as "treatment" because it is "purely replacement medicine." As the distinction escapes us, we move on to consider whether the *Alred* case should be overruled.

The petitioners contend the *Alred* decision "on the surface at

least" conflicted with our decision in *Mohawk Rubber Co.* v. *Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979). There we held that, because of the exceptions in the second sentence of the statute, a worker could be entitled to have his orthopedic footwear replaced, but that the replacement of the shoes more than two years after the injury and more than one year after the last payment of compensation would not revive the claim. There was no doubt in the *Mohawk* case that the statute had run because more than a year had elapsed between payments of compensation, and thus the court of appeals correctly distinguished it in its opinion in the *Alred* case.

In both the *Alred* case and the case now before us, the court of appeals noted that "compensation" includes the furnishing of medicine only to the extent that it is "reasonably necessary" for treatment of the compensable injury. *See* Ark. Code Ann. §§ 11-9-102(9), 11-9-508(a), and 11-9-509 (1987). This correct conclusion blunts the argument that by merely having a prescription refilled at the employer's expense an injured employee can forever prevent the statute from running.

We appreciate the general assembly's interest in providing a time limitation on an injured employee's claim. We understand the legislative decision to tie the limitation to the continued furnishing of compensation. The period of treatment, including reasonably necessary medication, plus a year is a reasonable period in which to determine the full extent of the injury. We held in *Ragon* v. *Great American Indemnity Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954), that medical payments constituted "compensation" in addition to disability payments for the purpose of determining an attorney fee under the workers' compensation law. Combining that decision with our understanding of the statute under consideration here and the policies behind it, we conclude the court of appeals' construction of the statute was correct. Even if there were substantial doubt about the legislative intent, we would interpret the statute liberally in favor of the injured worker, given the highly remedial nature of the workers' compensation law. *See Gill* v. *Ozark Forest Products, Inc.*, 255 Ark. 951, 504 S.W.2d 357 (1974); *McGhee Hatchery Co.* v. *Gunter*, 237 Ark. 448, 373 S.W.2d 401 (1963).

Affirmed.

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

JACK HOLT, JR., Chief Justice, dissenting. I respectfully dissent. I do not feel as though our holding in *Ragon* blends with the statute under consideration nor does it furnish us a basis for holding that the court of appeals' construction of the statute was correct. In dissenting to the court of appeals' construction, Chief Judge Corbin stated:

> Arkansas Statutes Annotated § 81-1318(b) is clear and unambiguous. Under the statute, a claimant is not eligible to receive compensation for additional medical benefits unless the claim is filed within one year of the date of last payment of compensation or two years from the date of the injury. The statute's 1968 amended sentence goes on to explain that the limitations periods for additional benefits *shall not apply* to replacement of medicine, crutches, artificial limbs, etc., required as a result of the compensable injury. In this case, appellant is clearly entitled to receive replacement medicines indefinitely under the express language of the amended sentence of Arkansas Statutes Annotated § 81-1318(b). However, it is also clear that merely receiving replacement medicines without any medical treatment will not operate to toll the statute for additional benefits once the statutory period has run. [Emphasis in original.]

I agree.

Judge Corbin, appropriately concludes: "[A]ny expansion of the act should come from the legislature, not the courts."

HICKMAN, J., joins in this dissent.

SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY *v.* Mary Irene COWGER

87-300 748 S.W.2d 332

Supreme Court of Arkansas
Opinion delivered April 18, 1988
[Rehearing denied May 16, 1988.*]

Friday, Eldredge & Clark, by: *Laura A. Hensley* and *C. Tab Turner*, for appellant.

Hendren & Hood, for appellee.

DAVID NEWBERN, Justice. The appellant, Southern Farm Bureau Life Insurance Company (the company), insured the life of Ronald Cowger. Mr. Cowger was killed in a tractor accident, and the company refused to pay the $100,000 policy amount to the beneficiary, appellee Mary Irene Cowger, because Mr. Cowger had misrepresented his health when applying for the policy. In accordance with our decision in *National Old Line Ins. Co.* v. *People*, 256 Ark. 137, 506 S.W.2d 128 (1974), the trial

* Hickman, J., would grant rehearing.

court instructed the jury that, if the fact or facts not revealed in the insurance application were not the cause of death, the misrepresentation would not bar recovery. We overrule that case, but we do so prospectively only, and thus the judgment before us now is affirmed. We also affirm the part of the judgment allowing a fee of $33,000 to Mrs. Cowger's counsel.

Mr. and Mrs. Cowger wanted to borrow from a bank to build chicken houses on their farm. The bank required that Mr. Cowger's life be insured. Mr. Cowger applied for a $100,000 policy with the company and submitted to a physical examination conducted by a paramedic on behalf of the company who asked him questions about his health and wrote down Mr. Cowger's answers on a form. Mr. Cowger's responses included his statements that he had not suffered stomach or liver disorders or used alcohol to excess in the last ten years. The truth was that Mr. Cowger had been hospitalized more than once during that time and had been diagnosed as having cirrhosis of the liver, acute alcoholism, and delirium tremens. The evidence showed, and it is not contested by Mrs. Cowger, that Mr. Cowger was aware of his condition when he applied for the policy.

On June 21, 1986, which was within the two-year period in which the policy remained contestable, Mr. Cowger was killed by being pinned beneath an overturned tractor on a slope he was attempting to mow. He had been released from his final hospitalization for alcoholism symptoms the day before. No blood test was done, and there was no evidence Mr. Cowger was drunk or drinking when his death occurred.

1. Causation

In *Old Republic Ins. Co.* v. *Alexander*, 245 Ark. 1029, 436 S.W.2d 829 (1969), the insurer sued to rescind a health policy on the ground that the insured had stated he had not had "heart trouble." The insured counterclaimed to recover on the policy for injury to his leg from a shooting accident. We upheld a judgment denying rescission and awarding damages on the counterclaim because a negative answer to the question about "heart trouble" was not necessarily a misrepresentation. The insured had been diagnosed as having more than one kind of heart disease, but the results of exploratory surgery were negative.

Justice George Rose Smith filed a concurring opinion in which he stated he would have reached the same result on the counterclaim because the insured's heart condition had nothing to do with the leg injury. The opinion quoted part of what is now Ark. Code Ann. § 23-79-107 (1987) as follows:

> Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent; or
>
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the same premium or rate or would not have provided coverage with respect to the hazard resulting in the loss if the facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Justice Smith contended that these provisions were only the minimum requirements of an insurer's proof and that "irrelevant" misrepresentations should not bar insurance claims.

In *National Old Line Ins. Co.* v. *People, supra*, we adopted Justice Smith's position. In that case, an applicant for credit life insurance stated in the application, which was also the policy document issued by a car dealer as agent for the insurer, "I hereby apply for the insurance shown above and represent that I am now in good health, both mentally and physically, and free from any mental or physical impairment of any chronic disease, and am the age shown above." Just above the applicant's signature appeared the statement in larger capital letters, "I AM NOW IN GOOD HEALTH." The jury, responding to an interrogatory, concluded that the policy application contained no misrepresentation. The undisputed evidence was that the insured was not in good health but had been treated, for four years before making the application, for high blood pressure and diabetes.

The majority opinion quoted the statutory language above and concluded that there must be a causal relation between the

misrepresentation and the loss for recovery to be barred, presumably meaning a causal relation between the condition misrepresented and the loss. We stated that subsection (a)(3) of the statute supported the conclusion to some extent by this language: "the insurer in good faith . . . would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known." We said, "Thus it would be a defense to the insurer, in a back injury case, to show that if the applicant had disclosed a history of back trouble it would have excepted that hazard from the policy." Justice Byrd filed a persuasive dissenting opinion, the essence of which was that we were guilty of a gross misinterpretation of the statute.

While it may be that subsection (a)(3) offers some support for our rationale when combined with the assumption that the statute states only a minimum of proof the insurer must make to bar recovery for misrepresentation, that conclusion ignores the remainder of the quoted statutory language. The statute could not be clearer in stating that misrepresentation will not bar recovery unless it is fraudulent or "[m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer." As one critic of our opinion put it:

> Whatever tendency the language emphasized by Justice Smith in paragraph [(a)(3)] of [the statute] may have, when lifted out of context to suggest a requirement that a misrepresented fact has contributed to the loss for which policy benefits are sought, fades when the paragraph is read as a whole.

D. F. Adams, *Misrepresentation in the Procurement of Insurance*, 4 UALR L.J. 17, at 79 (1981).

Our opinion in the *National Old Line* case, however, did not rest solely on the support we found in the statutory language. We wrote:

> Fairness and reason support the view that a causal connection should be essential. Otherwise, when the insured is killed by a stroke of lightning or by being run over by a car, the insurance company could successfully deny liability by showing that the insured was suffering from diabetes when he stated that he was in good health.

> Such considerations of fairness are especially pertinent to a credit life insurance policy like the one before us. This was a short-term policy, to remain in force for only three years. The company made no medical examination of the applicant, relying upon him either to refuse to sign the application if he was not in good health, in which case the policy would never be issued, or to "clip a note" to the application, explaining his health condition. The appellant had the burden of proving its affirmative defense, but it made no effort to show that the automobile salesman who took People's application made any explanation of the printed form or of the significance of the representation of good health. If People had lived for three years the insurer would have sustained no loss. In the circumstances it is plainly unjust to permit the company to deny liability on the basis of a misrepresentation that had no connection with People's death (or so the jury might have found) and that would have provided no defense to the insurer if the policy had excluded coverage for loss resulting from the undisclosed ailments. [256 Ark. 142, 506 S.W.2d at 131.]

Given the emphasis placed on the type of policy and the type of medical inquiry which occurred in the *National Old Line* case, there is the temptation to limit its holding to credit life policies tendered by automobile salespersons where no detailed medical questions are asked. We cannot do that because the sweep of principle adopted in the opinion is too broad. We have applied the ruling only in very similar cases, *Ford Life Ins. Co.* v. *Samples*, 277 Ark. 351, 641 S.W.2d 708 (1982); *Ford Life Ins. Co.* v. *Jones*, 262 Ark. 881, 563 S.W.2d 399 (1978), and not in "regular" insurance cases where the misrepresentation occurred in response to a more thorough investigation of the health of the prospective insured. Thus this is, in a way, a case of first impression in this court, and we do not feel that our decisions have become as much a part of the statute as its very words. *See Lucky* v. *Equity Mut. Ins. Co.*, 259 Ark. 846, 537 S.W.2d 160 (1976). *Cf. Crawford* v. *Emcasco*, 294 Ark. 569, 745 S.W.2d 132 (1988). Our court of appeals has, however, applied our *National Old Line* case rationale in a regular term life insurance policy case, like the one before us now, *Capitol Old Line Ins. Co.* v. *Gorondy*, 1 Ark. App. 14, 612 S.W.2d 128 (1981), and in a health insurance policy

case, *Ward* v. *Union Life Ins. Co.*, 9 Ark. App. 131, 653 S.W.2d 153 (1983). In cases like the credit life cases where the insurance application questions and the answers required are very general and not detailed, the factual question whether the applicant for insurance has indeed misrepresented his or her health will be more difficult, and presumably, the fact-finder's determination will be subjected to the sort of scrutiny we gave it in our majority opinion in *Old Republic Ins. Co.* v. *Alexander, supra.* Where, however, as here, it is clear and virtually uncontested that a misrepresentation has occurred, resulting in the issuance of a policy of insurance which would not otherwise have issued, we could not approve a finding of fact to the contrary.

With respect to the fairness and justice statements made in our opinion in the *National Old Line* case we must point out that there are counter-considerations. The policy we have adopted is that regardless of a misrepresentation which causes the insurer to undertake a risk, liability will occur unless the loss is related to the fact misrepresented. This places the policy applicant in the position of being able to gamble that he or she will not sustain a loss caused by the existence of the fact misrepresented. The misrepresentation may or may not have an effect. The party defrauding the insurance company may or may not be rewarded. On the other hand, the honest applicant who has the same facts to reveal will be denied insurance because of telling the truth.

It may be that these policy considerations balance each other. We might even conclude, if it were up to us, that the fairness and justice considerations do come down somewhat on the side of the insured who has lied in order to obtain coverage. Our point is, however, that the decision has been made by the body properly charged with making such decisions, that is, the general assembly. We incorrectly ignored their decision in the *National Old Line* case and we now correct our error.

In reaching this result, we are not alone. In his 1981 article cited above, Professor Adams reported that of seventeen states which had adopted statutory rules on misrepresentation resembling our statute none had construed such a statute as incorporating the kind of causation requirement found in the *National Old Line* case, and at least three states had rejected such a reading. We have found cases published since the date of the article

rejecting our earlier position (although not specifically mentioning our decision), *Wickersham* v. *John Hancock Mut. Life Ins. Co.*, 413 Mich. 57, 318 N.W.2d 456 (1982); *McAllister* v. *AVEMCO Ins. Co.*, 528 A.2d 758 (Vt. 1987), and none adopting it. *See also* 7 G. Couch, *Insurance,* §§ 35:47 and 35:87 (2d ed. 1985).

While we now conclude that an insurer may defend a policy claim on the ground of a misrepresentation which caused the issuance of the policy but with respect to which the fact or facts misrepresented were not necessarily related to the loss sustained, we do not apply the new rule to this case. We do not know that the parties relied on our old rule in making their contract, but we must assume they did and not apply this decision retroactively. *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952). *See also Crawford* v. *Emcasco, supra; Lucky* v. *Equity Mut. Ins. Co., supra.*

2. Attorney fee

This case began with the filing by the company of a suit to rescind the policy. That suit died for lack of service of process, and Mrs. Cowger then brought this action. Her attorney agreed to represent her on a contingent fee basis for one-third of the recovery. Arkansas Code Ann. § 23-79-208(a) (1987) provides that a recovery against an insurer who refuses to pay will include a twelve percent penalty with "all reasonable attorneys' fees for the prosecution and collection of the loss."

Mrs. Cowger's attorney stated to the trial court that his regular hourly fee was $80 and that he had recorded 104.9 hours spent on the case which did not include early conferences. He also stated he charged $1,000 per day for trial (in this case $2,000 total) and he sought $800 per day for the presence of his associate attorney at the trial, $438.50 for court reporter fees and depositions, $12.90 telephone charges and $7.20 postage. The company objected to all charges other than the hourly charge and the $1,000 per day trial charge. Thus, apparently the company would not object to having awarded against it an attorney fee of $10,392. The trial court awarded $33,000.

In *Old Republic Ins. Co.* v. *Alexander, supra,* which we decided in 1969, we held that a fee of $6,000 was not excessive

where the recovery was $51,000 and we awarded an additional $1,500 for the attorney's fee on appeal. In his typically thorough fashion, Justice Fogleman reviewed the authorities on the question of the appropriateness of a fee to be awarded against a recalcitrant insurer.

> Appellant also contends that the attorney's fee of $6,000 allowed by the trial court was exorbitantly excessive. It correctly states that the fee contemplated [by the statute] is not a speculative or contingent fee but such a fee as would be reasonable for a litigant to pay his attorney for prosecuting such a case. It is not correct, however, as suggested by appellant that the mere time involved is the only factor to be considered. The purpose of the statute . . . is to permit an insured to obtain the services of a competent attorney. The amount of the fee allowed should be such that well prepared attorneys will not avoid this class of litigation or fail to devote sufficient time for thorough preparation. It would not only be commensurate with the time and amount of work required but also with the ability present and necessary to meet the issues that arise. Also we have often considered the sum recovered or the amount involved in an action in allowing fees or in considering fees allowed by trial courts. The statute requires that we do so in cases, such as this, where the insurance company brings suit to cancel a policy. It is also appropriate that consideration be given to the trial judge's acquaintance with the case. When we consider from an inspection of the record the nature of the cause, the novelty of some of the questions presented, the heat of the contest, the time necessary for preparation of the case, the standing and ability of the attorneys on both sides, and the knowledge of the trial court of the nature and the extent of the services rendered, we cannot say that this allowance on a recovery of $51,000 and interest was excessive. [Citations omitted.]

See also the factors set out in *Southall* v. *Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 283 Ark. 335, 676 S.W.2d 228 (1984), and *Equitable Life Assurance Soc. of the United States* v. *Rummell*, 257 Ark. 90, 514 S.W.2d 224 (1974), where we reiterated that the statute does not contemplate the awarding of a contingent fee

against the insurer.

The fee awarded by the trial court was not precisely one-third of the recovery. The judgment for Mrs. Cowger was for $100,000 plus eight percent interest from the date of Mr. Cowger's death. The twelve percent penalty based on the judgment plus interest came to $12,899.60. Her total recovery from the company, exclusive of the attorney fee, was thus something over $120,000. The contingent fee would thus be roughly $40,000. The fee of $33,000 was awarded after a hearing in which testimony was given by attorneys not involved in this claim as to what would be reasonable. In these circumstances, we cannot say the trial court abused his discretion in setting the fee. We award an additional $1,500 fee to Mrs. Cowger's attorney for the prosecution of this appeal.

Affirmed.

HICKMAN and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. Nothing in the majority opinion justifies overruling the established principle of Arkansas insurance law that to deny recovery an insurer must show a causal connection between a fact misrepresented in an application for life insurance and the subsequent loss. While this principle appeared in *National Old Line Ins. Co.* v. *People*, 256 Ark. 137, 506 S.W.2d 12 (1974), as an interpretation of the Arkansas Insurance Code of 1959, it actually has been a part of Arkansas law since it was first stated in *Inter-Ocean Casualty Co.* v. *Huddleston*, 184 Ark. 1129, 458 S.W. 23 (1932). A doctrine so well established in the law should not be so easily overruled, in the absence of compelling reasons.

Having been a part of our law for over a decade the rule has doubtless become a basis for insurers to anticipate losses. Professor Adams had noted Justice Byrd's comment in *National Old Line* that "the burden initially cast on insurers by the rule is not likely to remain with them, for premium rates will be adjusted to absorb the added cost . . . ." Adams, *Misrepresentation in the Procurement of Insurance*, 4 U.A.L.R. L.J. 17 (1981). To reverse the rule now invites insurers to retain the benefits which will result from our change of position.

While the majority concedes that fairness favors a causal

connection requirement, it denies that the statute admits of such an interpretation. The majority does not challenge Justice Smith's conclusion that the statute "merely provides a minimum prerequisite to the insurer's successful defense." *Old Republic Ins. Co.* v. *Alexander*, 245 Ark. 1029, 1044, 436 S.W.2d 829, 838 (1969). Nor does it complain that the causation requirement runs against public policy; indeed, several states have explicitly incorporated the requirement into their statutes. Kan. Stat. Ann. § 40-418 (1986); Mo. Rev. Stat. § 376.580 (1959); R.I. Gen. Laws § 27-4-10 (1979). Rather, under the rubric of honoring legislative intention, the majority has imposed its own judgment over time-tested law. Had the legislature actually intended not to require proof of a causal connection, it could have acted to clarify its position during any one of the legislative sessions conducted since *National Old Line* was handed down in 1974. Generally, legislative inaction following a practical interpretation of a statute is evidence that the legislature intends to adopt such an interpretation. Sutherland Stat. Const. § 49.10 (4th ed.). "There is a strong authoritative effect of judicial interpretive opinions that the legislature has acquiesced in by the lapse of time without action." Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. Kan. L. Rev. 1 (1954). Accord, *Shivers* v. *Moon Distributors*, 223 Ark. 371, 265 S.W.2d 947 (1954). By its long acquiescence in the *National Old Line* holding, the legislature has expressed its satisfaction with our interpretation of the insurance code. Thus, the majority is shunning this legislative expression by overruling *National Old Line* and giving a new and different meaning to the act. For these reasons I believe the trial court should be affirmed.

HICKMAN, J., joins this dissent.

SHELTER MUTUAL INSURANCE COMPANY *v.* Alice M. TUCKER

87-217 748 S.W.2d 136

Supreme Court of Arkansas
Opinion delivered April 18, 1988

Goodwin, Hamilton & Moore, for appellant.

Branch, Thompson & Philhours, for appellee.

TOM GLAZE, Justice. Appellee was in her automobile when she was struck from behind by another car driven by an uninsured motorist, Sheila Smith. Appellee, having uninsured motorist coverage with the appellant insurance company, subsequently filed suit against both Smith and the appellant. At trial, appellee received a jury verdict of $25,000.00, the maximum amount due under her policy, plus $9,979.70 in medical expenses. The court further awarded appellee a 12% penalty plus attorney's fee in the sum of $12,500.00. Appellant raises four issues on appeal, but we find that none warrant a reversal. Therefore, we affirm.

Appellant first argues the trial court erred in granting appellee's motion in limine thereby excluding evidence that appellee was not wearing her seat belt at the time of the collision. Such evidence was developed at the pre-trial evidentiary deposition of Dr. George Wood. Dr. Wood testified that the appellee reported she was not wearing her seat belt at the time of the accident, and when hit by Smith's car, she was thrown against the dashboard, which resulted in complaints by her of back and neck pain.

Pertinent to the point argued here, appellant refers to and emphasizes the following testimony given by Dr. Wood which was proffered but excluded at trial:

> Q: Based on the report of the manner of the sustaining of the injury and her report to you and her history that she had not worn a seat belt, in your opinion, did the failure to wear the seat belt result in more severe physical injuries or trauma than would have happened if she had been wearing her seat belt?
>
> A: The absence of a seat belt makes her more of a free object and can result in other injuries. It probably makes no difference as far as the neck is concerned because that's never restrained by the seat belt. For the lower portion of the body, it does make it more prone to be thrown about.

* * *

Q: Is it a fair statement to say that testimony in that regard is sheer speculation and conjecture relative to what injuries she may or may not have received?

A: To specifically say what would happen if she was wearing a seat belt would be extremely hard to imagine. As I mentioned before with regard to the neck, the seat belt probably had no effect. With regard to the back, it may have had an effect, and then again it may not. With this problem, relatively minor trauma can excite it; and minor trauma can occur within the confines of a seat belt.

Q: Let me rephrase my question because of the objection. Would you have to resort to speculation and conjecture to testify relative to an increase or decrease in this injury when you factor in a seat belt?

A: Yes.

Immediately before the above testimony, Dr. Wood opined that the spinal stenosis he found in appellee's low back or lumbar region was not caused by the automobile accident. Relying on Wood's testimony, as well as statements made by this court in *Harlan* v. *Curbo*, 250 Ark. 610, 446 S.W.2d 459 (1971), appellant contends that appellee's nonuse of her seat belt was evidence of comparative negligence and admissible as such. Alternatively, appellant asserts such evidence should be admissible on the issue of mitigation of damages. Even if appellant's legal arguments concerning the nonuse of seat belts had merit, we need not reach them since they cannot be supported by the speculative nature of the proffered testimony given by Dr. Wood.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. A.R.E. Rule 401. The trial court has discretion in ruling on the relevance of evidence and will not be reversed in the absence of an abuse of discretion. *See, e.g., Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). In the instant case, the relevance, if any, of Wood's testimony would be to connect appellee's nonuse of her seat belt with the

injuries she sustained. Concerning this issue, his testimony is nothing but confusing; he even conceded that he would have to resort to speculation and conjecture to testify relative to the increase or decrease in appellee's injury when "you factor in a seat belt."

In its second point for reversal, appellant alleges the trial court erred in failing to direct a verdict on the issue of medical expenses. Citing the case of *Henry and Aclin Ford* v. *Landreth*, 254 Ark. 483, 494 S.W.2d 114 (1973), appellant claims the appellee improperly introduced medical bills into evidence without proof that they were reasonable or that the bills were incurred as a result of the accident.

As we pointed out in *Bell* v. *Stafford*, 284 Ark. 196, 680 S.W.2d 700 (1984), a party seeking to recover medical expenses in a personal injury case has the burden of proving both reasonableness and necessity of those expenses. However, expert medical testimony is not essential in every case to prove the reasonableness and necessity of medical expenses. *Id.* We added further in *Bell* that the testimony of the injured party alone, in some cases, can provide a sufficient foundation for the introduction of medical expenses incurred. *Id.* at 199 and 680 S.W.2d at 702; *see also Eggleston* v. *Ellis*, 291 Ark. 317, 724 S.W.2d 462 (1987). We have also held that, while not controlling, evidence of expense incurred is some evidence of reasonableness. *Blissett* v. *Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970).

In the cases cited above, the issue on appeal was the admissibility of medical bills and whether the plaintiff laid a sufficient foundation to establish a casual relationship between the accident and those medical expenses claimed by the plaintiff. Here, appellee identified all of the medical bills introduced at trial as having been incurred as a result of her back injury. Appellant offered no objection to the bills or appellee's testimony concerning them.

Although Dr. Wood was not requested to identify or justify the causal nature or reasonableness of appellee's medical bills, his testimony does support the legitimacy of many of those bills. For example, on August 27, 1984, he admitted the appellee into the hospital for testing and routine laboratory studies and did not discharge her until September 8, 1984. While appellant

contends on appeal that the testimony of appellee's doctor reflects she was a hypochondriac and exaggerated her complaints, appellant did not question below the admissibility of the medical expenses presented by the appellee on these or any other grounds. In addition, it is settled law that the trial judge has discretion in deciding whether a witness has laid a sufficient foundation to testify about reasonableness and causal relationship. Even if the trial judge had been called on to rule on the admissibility of appellee's medical expenses, we believe, given the record before us, the judge would have been well within his discretion to have admitted the medical bills into evidence.

For its third asserted error, appellant claims the trial court erred in allowing appellee to introduce the deposition of Dr. Larry E. Mahon. Appellant asserts that it objected below to the deposition's introduction by stating that none of the conditions prescribed in ARCP Rule 32(a)(3) governing the use of depositions in court had been met by the appellee. Appellee, on the other hand, argues that, in preparation for trial, the appellant decided that it needed to take Dr. Mahon's "evidentiary deposition" for use at trial and that the parties had waived any restrictions posed under Rule 32.[1] Appellee also suggests that since the appellant had instituted the taking of Mahon's "evidentiary deposition" and was represented when the doctor's testimony was given, Rule 32(a)(1) permitted the deposition's introduction. In overruling the appellant's objection, the trial judge's ruling was broadly stated as follows:

> I think anything that you take in a deposition, discovery or evidentiary purposes, of a witness having knowledge or information regarding the subject matter of the trial, and particularly as in this case he is an expert witness, develop and then take the deposition of that expert witness and then for any reason decide it is not beneficial or to your advantage to use that witness, then the opposing party has a right at that time to call that witness.

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[1] While we recognize it may be customary for some members of the Bar to use the designation "evidentiary deposition," such designation is found nowhere in the Arkansas Rules of Civil Procedure, and the mere reference to a deposition as being evidentiary is no reason, in itself, for a deposition to be introduced at trial.

While we agree that the trial judge was correct in overruling the appellant's objections, we cannot agree with his reasoning since the rationale he gave conflicts with the restrictions and dictates of Rule 32. That rule in pertinent part provides:

> (a) Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1000.
>
> * * *
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 32 is essentially the same as Fed. R. Civ. P. 32, which has been construed to point out that any party, not only the party who took the deposition, may use the deposition of a witness, whether or not a party, for any purpose at the trial or hearing, if the party demonstrates to the court the existence of one of the conditions specified in Rule 32(a)(3). *See* 4A Moore's

Federal Practice ¶ 32.05 (1987). In the instant case, it is undisputed that none of the conditions set out in Rule 32(a)(3) were present to justify the use of Dr. Mahon's deposition at trial. Nor, as is permitted under Rule 32(a)(1), was Mahon's deposition offered at trial for the purpose of contradicting or impeaching his testimony as a witness; he never appeared at trial as a witness for either party. In sum, the appellant's use of Dr. Mahon's deposition does not fit any of the purposes set out in Rule 32(a), and if the trial court's ruling is to be sustained, it must be done based on other reasoning.

We have carefully reviewed the record, and the conclusion is inescapable that counsel for appellant and appellee determined they needed to obtain an "evidentiary deposition" of both Dr. Mahon and Dr. George Wood. Appellee's counsel states that, by stipulation and agreement of the parties, the doctors' depositions were evidentiary and taken to be utilized as evidence in the case. Appellant's counsel was less certain about such an agreement as to Dr. Mahon's deposition, saying "[T]here may be somewhere, but I don't recall any discussions specifically as to whether it would be evidentiary or by way of discovery." He added that such a decision or agreement may have been reached with regard to Dr. Wood's deposition, which had been taken at appellee's expense. In fact, appellant's main concern at trial, when arguing that appellee should be prohibited from introducing Mahon's deposition as a part of her case, was that appellee was required to reimburse the appellant its expenses for having been the party that took Mahon's deposition. Without such a reimbursement and agreement to use the deposition, appellant argued appellee could not use it at trial.

Our examination of the record reflects that both parties took Wood's and Mahon's depositions with the view that both depositions would be presented to the jury when this cause was tried. Both counsel directed their questions to the jury when inquiring of the doctors at the time their depositions were taken. Each attorney was careful to pose questions to, and amplify on answers given by, the doctors so the jury would understand their deposition testimony. In this respect, appellant's counsel (as did appellee's) repeatedly asked each doctor to explain to the jury the medical terms and remarks that were a part of the doctors' testimonies. We also note that throughout both doctors' deposi-

tions, the parties' counsel interposed objections, including those to leading questions, which were reserved to be ruled on at trial.

At trial, appellant offered no objection to the introduction of Wood's deposition, obviously because appellant relied on that deposition in presenting its case below. Appellant later in the proceeding, objected to the admission of Mahon's deposition, but even then, appellant indicated that it still might use Mahon's deposition when presenting its defense. As to this last point, surely if Rule 32 precluded the appellee's use of Mahon's deposition at trial, those same proscriptions in the Rule would apply to the appellant's use of it.

Rule 32(b) provides that an objection may be made at the trial or hearing to receiving into evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness was then present and testifying. Nonetheless, that Rule does not prohibit the parties to agree, as the record reflects the parties—either expressly or impliedly—did here, to use depositions, thereby waiving those conditions or restrictions set forth in Rule 32(a). Because the record before us so clearly reflects that the parties took both doctors' depositions with the intent that the testimony would be introduced and read to the jury, we affirm the trial court's ruling allowing those depositions into evidence.

Appellant contends in its final point that the trial court erred in awarding a judgment for $34,979.20 to the appellee when the jury found that appellee's total damages were only $25,000.00. Again, we find the appellant's argument to be without merit.

In her policy with the appellant, appellee paid a premium and had coverage for both uninsured motorist damages in the amount of $25,000.00 per person and medical payments to the extent of $10,000.00 per person. Appellee's medical payment provision stated that an insured shall not recover duplicate benefits for the same elements of loss under this or any similar insurance. After finding that the uninsured motorist's negligence was the proximate cause of the accident, the jury, in interrogatory number two, set the amount of appellee's damages, resulting from the occurrence, at $25,000.00. In a third interrogatory, the jury was asked whether the appellee incurred reasonable medical expenses for bodily injuries within twenty-four months of the

occurrence. In answering that question in the affirmative, the jury found in a fourth interrogatory that the amount of medical expenses was $9,979.20. The jury had been instructed by the trial judge to treat each interrogatory as a separate verdict.

In reviewing the jury's finding to each interrogatory, we cannot say that the jury granted recovery for the same elements of loss or that the *total* damages that could be awarded was $25,000.00. Specifically, neither the interrogatories submitted (without objection) to the jury, nor the jury's answers to those interrogatories, reflect that the medical expenses were in any way included in or a part of the $25,000.00 amount awarded under appellee's uninsured motorist coverage. Consistent with the terms of the interrogatories given the jury, the jury was justified in awarding damages of $25,000.00 plus medical expenses of $9,979.20, and was not, as suggested by the appellant, limited to the $25,000.00 amount set out in the uninsured motorist provision.

In the alternative, the appellant contends that the trial court should have allowed it to set off the damages due under the medical payment provisions by the amount paid under the uninsured motorist coverage. This court has held that an insurance company is prohibited from setting off one payment under its policy against another one under the same policy. *State Farm Mut. Auto. Ins. Co.* v. *Sims*, 288 Ark. 541, 708 S.W.2d 72 (1986). We have recognized that the right of reimbursement and credit is allowed pursuant to Ark. Code Ann. § 23-89-207 (1987) in a situation where there are payments from more than one source. *Id.* That is not the case here.

Because we find no merit in the appellant's points of error, we affirm.

Thomas MUELLER, et al. *v.* Radcliffe KILLAM, et al.

87-296 748 S.W.2d 141

Supreme Court of Arkansas
Opinion delivered April 25, 1988

Warner and Smith, by: *P.K. Holmes III*, for appellant Thomas C. Mueller.

Peel, Eddy and Gibbons, by: *David L. Eddy*, for appellants Adrienne Gans Simon; Ottilie Graves a/k/a Gypsy Cosden Graves; Joshua S. Cosden, Jr., a/k/a Joshua Seney Cosden, Jr., and Barbara B. Cosden, his wife; Helen Elizabeth Lockwood; Joshua Stanley Cosden, Jr.; Marjorie Cosden Annan; Ottilie McPherson; Josephine Rider; and Frances Moley.

Hardin, Jesson & Dawson, by: *Bradley D. Jesson*, for

appellants Texas Oil & Gas Corp. and TXO Production Corp.

Pryor, Barry, Smith & Karber, by: *John D. Alford*, for appellees.

JACK HOLT, JR., Chief Justice. The appellees, Radcliffe Killam, et al., filed a complaint against the appellants, Thomas Mueller, et al., praying that title to certain mineral interests be confirmed in the appellees, that certain oil and gas leases, along with any assignments or other conveyances of the appellants be set aside, for an accounting for all oil, gas, or other minerals produced by the appellants on the mineral acres, and for damages for trespass. The trial court found that the appellees were owners of the mineral acres and that appellants Mueller and Texas Oil and Gas Corporation had trespassed upon the mineral interests of the appellees. Pursuant to an agreement of the parties to bifurcate the issue of damages from the issue of liability, the court retained jurisdiction of the case for the purposes of determining damages as a result of the trespass and for hearing the cross-complaint of appellants Mueller and Texas Oil and Gas Corporation against the "Cosden Group" appellants. The decree specified that "[t]his order shall constitute a final appealable order of the Court. . . ." We hold to the contrary and dismiss this appeal because the decree was not one from which an appeal may be taken under Ark. R. App. P. 2 and Ark. R. Civ. P. 54(b).

Ark. R. App. P. 2 provides in pertinent part:

(a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the trial court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action.

Ark. R. Civ. P. 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay

and upon express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Whether a final judgment, decree, or order exists is a jurisdictional issue which we have a duty to raise, even if the parties do not, in order to avoid piecemeal litigation. *Sevenprop Assoc.* v. *Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988); *Kilgore* v. *Viner*, 293 Ark. 187, 736 S.W.2d 1 (1987); *Hall* v. *Lunsford*, 292 Ark. 655, 732 S.W.2d 141 (1987); *Fratesi* v. *Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984). Parties by agreement cannot make this determination. *Hall, supra.* To be final and appealable, a trial court's order, decree, or judgment must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Id.; Tapp* v. *Fowler*, 288 Ark. 70, 702 S.W.2d 17 (1986); *Hyatt* v. *City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982). "A final judgment or decision is one that finally adjudicates the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original position." *Thomas* v. *McElroy*, 243 Ark. 365, 420 S.W.2d 530 (1967). A judgment or order is not final and appealable if the issue of damages remains to be decided. *Bryan Farms, Inc.* v. *State*, 295 Ark. 180, 747 S.W.2d 115 (1988); *Sevenprop Assoc., supra; Kilgore, supra.*

The trial court's decree did not finally adjudicate or conclude the rights of the parties, discharge them from the action, or dismiss them from the trial court. Instead, the court bifurcated the issues before it and reserved determination of the issue of damages for a later date. Accordingly, its decree was not a final judgment or decree under Ark. R. App. P. 2 and Ark. R. Civ. P. 54(b). As an aside, we further note that the trial court's order did not comply with Rule 54(b) since the order did not make an express determination that there was no just reason for delay. *Tackett* v. *Robbs*, 293 Ark. 171, 735 S.W.2d 700 (1987).

Appeal dismissed without prejudice.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I would consider the case on its merits. While it is before us, we would save time, trouble and expense by deciding this issue now. Maybe Rule 54(b) should be modified to be more flexible.

ARKANSAS STATE HIGHWAY COMMISSION, et al. *v.* UNION INDEMNITY INSURANCE COMPANY of New York, A New York Company, and Robert M. Eubanks III, Insurance Commissioner, State of Arkansas

87-348 748 S.W.2d 338

Supreme Court of Arkansas
Opinion delivered April 25, 1988

Thomas B. Keys, Maria L. Schenetzke, and *Ted Goodloe,* for appellant Arkansas State Highway Commission.

Junius Bracy Cross, Jr., for appellant Lofland Company of

Arkansas, Inc.

Jack East III, for appellees.

DARRELL HICKMAN, Justice. The question in this case is whether the Arkansas State Highway Department, and a materialman who supplied material to a highway job, have a claim against the Arkansas Property and Casualty Insurance Guaranty Fund when the claim arose after the insurance company that issued the surety bond on the job had been declared insolvent. The trial court held that under Arkansas law the appellants did not have a claim, and we agree.

In September of 1984, the Arkansas State Highway Commission entered into three contracts with Case Construction Company for jobs at Overflow Creek, Clear Creek Culvert and Cool Easy Creek totaling $525,000. The surety bonds for the three jobs were issued by Union Indemnity of New York. It is uncontroverted that the New York court that declared Union Indemnity insolvent and ordered its liquidation on July 16, 1985, had the authority to do so. The order provided that all obligations of Union would terminate as of August 17, 1985. The Arkansas Insurance Commissioner received notice of the liquidation on July 17, 1985, filed a local action and was appointed ancillary receiver for Union.

The highway commission did not receive personal notice by mail of the New York action, but notice was published in the Arkansas Gazette on August 9 and 16, 1985. A senior highway department employee knew of the insolvency on August 13, 1985.

The parties stipulated that "[n]either the Commission nor AHTD declared Case in default of his contractual obligations . . . before August 16, 1985." It was not until early November of 1985 that the Commission declared Case to be in default of all three projects. The highway department filed a claim for $118,000. Appellant Lofland supplied material in the amount of $1,611.87 before August 17, 1985, and the trial court allowed the claim for that amount. However the court denied a claim for materials amounting to $10,224.74 which were supplied after August 17, 1985.

The only question is whether the appellants had a claim under the Guaranty Fund or the Uniform Insurers Liquidation

Act, Ark. Code Ann. § 23-68-101—132 (1987). Those acts provide in part:

> This chapter shall apply to covered claims existing prior to the determination that an insurer is an insolvent insurer and to covered claims arising within thirty (30) days after the determination of insolvency or before the policy expiration date if less than thirty (30) days after the determination of insolvency or before the insured replaces the policy or effects its cancellation, if he does so within thirty (30) days of the determination of insolvency. [§ 23-90-111(a)]
>
> 'Covered claim' is an unpaid claim of an insured or third party liability claimant which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies, and which is issued, or assumed whereby an assumption certificate is issued to the insured, by an insurer licensed to do business in this state, in cases where the insurer becomes an 'insolvent insurer' after March 30, 1977, and the third party claimant or liability claimant or insured is a resident of this state at the time of the insured event, or the property from which the claim arises is permanently located in this state. [§ 23-90-103]
>
> No contingent and unliquidated claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to this chapter, except that the claim shall be considered, if properly presented, and may be allowed to share where:
>
> (1) The claim becomes absolute against the insurer on or before the last day for filing claims against the assets of the insurer. [§ 23-68-128(a)(1)]

The appellants argue they had a claim or contingent claim from the inception of the issuance of the surety agreement and rely on the case of *In the Matter of the Liquidation of Wisconsin Surety Corporation* v. *Anderson*, 112 Wis. 2d 396, 332 N.W.2d 860 (1983). The Wisconsin court held the surety has a liability coextensive with that of the principal which arises from

the time the surety agreement is entered into. The trial judge relied on *U.S.F. & G.* v. *Fultz*, 76 Ark. 410, 89 S.W. 410 (1905), which provides that a claim against a surety arises upon the principal's default. We agree. A claim against a surety does not arise until the obligee suffers actual damage. *C. & L. Rural Electric Co-op Corp.* v. *American Casualty Co.*, 199 F. Supp. 220 (W.D. Ark. 1961). The highway department did not declare Case Construction in default until November of 1985. The contractor was not in default on the contract within the critical time period so there is no doubt that the highway department did not have a claim under Arkansas law. Appellant Lofland delivered materials after August 17, 1985; therefore, he could not have a claim within the necessary time period.

The appellants argue they had no notice of the insolvency and were deprived of their rights without due process of law. Of course, there was no requirement that Lofland receive personal notice because there was no way to know of Lofland's existence. Lofland's argument is essentially the same as the highway department. The highway department received notice in time to file a claim. It was simply determined they had no claim. The fact they did not receive notice of the insolvency is immaterial.

Affirmed.

Donald McDOUGALD *v.* STATE of Arkansas

CR 87-213 748 S.W.2d 340

Supreme Court of Arkansas
Opinion delivered April 25, 1988

Robert Philip Remet, for appellant.

Steve Clark, Att'y Gen., by: *David B. Eberhard*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant, Donald McDougald was charged with capital felony murder in that he had committed a burglary and in furtherance of that felony, he or his accomplice had caused the death of another. A jury trial was held on May 7, 1987, and appellant was found guilty and sentenced to life without parole. Appellant brings this appeal, raising two points for reversal. We affirm the judgment.

I

Ineffective Assistance of Counsel

Appellant first argues he was denied a fair trial due to ineffective assistance of counsel. Counsel for appellant admitted in opening argument that appellant had participated in the burglary and appellant claims that was ineffective assistance of counsel. This point however, was not raised below and therefore may not be raised on appeal. *Rogers* v. *State*, 289 Ark. 257, 711 S.W.2d 461 (1986); *Sumlin* v. *State*, 273 Ark. 185, 617 S.W.2d 372 (1981).

II

Right to Remain Silent Not Intelligently Waived

Appellant next argues that the trial court erred in denying his motion to suppress statements made to the police. His primary

argument is that the confession was not voluntary because at the time he gave it he was under the influence of drugs and alcohol and could not have knowingly and intelligently waived his rights.

While the state has the burden of proving, by a preponderance of the evidence, the voluntariness of a custodial confession, any conflict in the testimony is for the trial court to resolve. While we make an independent determination based on the totality of the circumstances, we will not reverse the trial court unless its determination is clearly erroneous. *Graham* v. *State*, 277 Ark. 465, 642 S.W.2d 880 (1982).

The fact that appellant may have been under the influence of alcohol or drugs at the time of his statement, will not of itself invalidate his confession, but will only go to the weight accorded it. *Kennedy* v. *State*, 255 Ark. 163, 499 S.W.2d 842 (1973); *Johnson* v. *State*, 6 Ark. App. 342, 642 S.W.2d 342 (1982); *Bryant* v. *State*, 16 Ark. App. 45, 696 S.W.2d 773 (1985). Whether an accused had sufficient capacity to waive his constitutional rights, or was too incapacitated due to drugs or alcohol to make an intelligent waiver, has remained a question of fact to be resolved by the trial court. *Baker* v. *State*, 289 Ark. 430, 711 S.W.2d 816 (1986); *Abdullah* v. *State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *Fuller* v. *State*, 278 Ark. 450, 646 S.W.2d 700 (1983); *Hunes* v. *State*, 274 Ark. 268, 623 S.W.2d 835 (1981).

When deciding the voluntariness of a confession we consider a number of factors, including mental capacity, and when an appellant has claimed intoxication from alcohol or drugs, we have made a closer examination of his mental state. We stated in *Kennedy* v. *State, supra*, that the test of voluntariness of one who claims intoxication at the time of waiving his rights and making a statement, is whether the individual was of sufficient mental capacity to know what he was saying—capable of realizing the meaning of his statement—and that he was not suffering from any hallucinations or delusions. We further noted in *Kennedy* that it was significant in making a finding of voluntariness that the appellant answered questions without indications of physical or mental disabilities, that the appellant remembered a number of other details about the interrogation even though she could not remember waiving her rights, and that

a statement was given in a short period of time (four or five hours) after her rights had been read to her.

The evidence presented at the suppression hearing indicated appellant had consumed various pills, amphetamines and muscle relaxants, as well as a great deal of alcohol, for the two days preceding his arrest. Jill Harton, who was with appellant when he was arrested, testified appellant was in a confused, drugged state and had to be physically supported by the police when he was taken from her apartment. Some of the officers' testimony indicated they saw evidence of appellant's "binging" and that he was intoxicated to some extent at the time of the arrest. Appellant's own testimony was not that conclusive. The most he could say about his mental condition was that he could not think clearly and was confused. He stated he could not remember going over the rights form or being told he was entitled to a lawyer.

Appellant also relies on the testimony of a psychologist, Dr. Spellman, who specializes in drug counseling. Spellman had interviewed appellant sometime after his arrest and compiled an inventory as to what appellant had ingested prior to his arrest. On that basis, Dr. Spellman concluded there was not time for the drugs to wear off, and appellant was incapable of knowingly and voluntarily waiving his rights.

However, Dr. Spellman had not seen appellant during the time appellant was with the police nor during the interrogation and his conclusion was based on appellant's account of the events. In light of that fact and the evidence presented by the state, his testimony was not persuasive.

The state presented evidence supporting its contention that appellant was sufficiently in control of his faculties to knowingly waive his rights. Appellant was twenty-four years of age, had graduated from high school and stated he could read "pretty well" and understand what he read. He was held for not more than an hour after his arrest before he was questioned and there was no questioning about the incident until the rights were read to appellant. When the Miranda rights were read, appellant was advised of the crime he was accused of and then each right was individually read to him. He was asked after each one if he understood and the officer wrote down that answer. At the end of

reading the rights, appellant initialed each answer and signed the statement. It was only shortly after the questioning began—about two minutes—that appellant began to implicate himself in the crime. The interrogation itself appears to have been no more than two or three hours.

Sheriff Jack Gambill was at the Pine Bluff police department when appellant was brought in. He testified that he had in the past arrested people who were under the influence of drugs and alcohol and was aware of their mannerisms and expressions. He stated he smelled alcohol on appellant's breath but saw no evidence of intoxication in the manner in which appellant walked or in the way he spoke, that he was not intoxicated to the point that he could not understand the conversation he was involved in, and that when he administered the Miranda rights, appellant gave no indication that he did not understand his rights.

Tim Parker, a probation officer with the State of Arkansas, testified appellant could walk on his own and respond intelligently to the questions asked of him. He stated that appellant's manner of speech was fairly straightforward, and at times even detailed. He stated that during his confession to the police, appellant was detailing his escape and how he had gone down some roads to Fordyce; that the sheriff, listening to this account, got lost a couple of times and appellant went back and picked up the threads of the account.

Additionally, appellant's own testimony during the suppression hearing contradicts his position on appeal—testimony he gave that suggests he both remembered his rights being read to him and that he understood them. Furthermore, appellant was able to recall a number of other details surrounding the time of the interrogation, such as the events of his arrest, where he was taken, how long he was detained before interrogation, and a number of details of the interrogation such as initially denying he had any knowledge of the murder. And while appellant claims to have only a limited recollection of waiving any rights, he had amazing recall of the events two days prior and up to the time of his arrest. He testified in great detail, where he was, his movements from one friend's house to another, the times involved, who he was with, and particularly, how much and what kind of alcohol and drugs he had ingested during that time—up to the point of

arrest. There was no evidence, or even a claim by appellant that he was suffering in any way from delusions or hallucinations.

The evidence presented by the state was sufficient to support a finding that appellant was not seriously incapacitated and could understand and appreciate what he was saying and the proceedings around him, and under all the other additional circumstances affecting the confession, that it was given voluntarily. Given the test enunciated in *Kennedy, supra*, and considering the totality of the circumstances, *Douglas* v. *State*, 286 Ark. 296, 692 S.W.2d 217 (1985), we cannot say the trial court was clearly erroneous in finding the confession voluntary.

Confession Given in Exchange for a Promise or Reward

Appellant also argues his confession was involuntary because it was made as a result of a promise or reward. *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982). Sergeant Roy Ryan stated that he told appellant that two other people involved in the murder with appellant would probably be apprehended soon, that they would probably give a statement and it would be to appellant's benefit to give his statement first.[1]

We stated the rule in *Davis, supra*, that if a police official makes a false promise which misleads a prisoner and the prisoner gives a confession because of that false promise, the confession is not voluntary. We further stated that some statements were clearly promises of rewards and it was not necessary to look past the statements to decide the issue. In other cases, the remarks standing alone did not provide sufficient information to decide the question. In those latter cases, not only the statement made to a defendant must be considered, but also the defendant's vulnerability. In *Davis* we reviewed particular "promises" under

[1] Sheriff Jack Gambill testified he told appellant he would not hesitate to tell the court, the prosecuting attorney or anyone else about appellant's cooperation. This statement however was made to appellant after he had confessed, and Gambill stated that he had in fact done what he told appellant he would do. *See U.S.* v. *Shears*, 762 F.2d 397 (4th Cir. 1985), where the court found such statements about relaying fact of cooperation to other officials was entirely proper, citing the district court in that case which stated this was almost a given.

this rule against the background of several cases. The vulnerability of a defendant was examined not only in terms of such things as his age and intelligence, as we have already discussed, but also particular factual settings that render a defendant more vulnerable.

Ryan's remark to appellant that it would be to his benefit to talk in view of the other two accomplices' position, is not clearly a promise. See discussion of remarks in *Davis, supra.* It is necessary therefore to consider appellant's vulnerability to innuendo under the circumstances of this case.

This case is similar to *Tatum* v. *State*, 266 Ark. 506, 585 S.W.2d 957 (1974). In *Davis* we discussed *Tatum*, where we found that although the defendant in that case was a habitual offender and probably knew his rights, we found the statement, "I'll help you if I can" to be a promise and the resulting confession, involuntary. This we found because the defendant was the first of three persons arrested. In reliance on the police statement, he gave the accomplices' names and a confession. The accomplices were then allowed to plead guilty on negotiated pleas and the accomplices' testimony was used against the defendant.

Here, appellant was the first to be apprehended and he gave his statement after the exhortation that considering he was the first to be caught, it would be to his benefit to give a statement. One of the accomplices, John Sellars, was apprehended on the basis of appellant's information, and he testified against appellant at trial. *Tatum*, however, is distinguishable.

The rule in *Davis, supra*, considers not only the false promise of the police and the vulnerability of the defendant, but whether a confession was given *because* of that false promise. So, for example, when discussing the *Tatum* case in *Davis*, we found that confession had been given "in reliance" on the police officer's remark. *See also, Williams* v. *State*, 281 Ark. 91, 663 S.W.2d 700 (1983); 20 Am.Jur.2d *Evidence* § 559 (1967), "In order to make the confession involuntary . . . the promise must, of course, have induced or influenced the confession."

During the suppression hearing, the record reveals nothing said by appellant, either expressly or by implication, that indicates he gave his confession as a result of Ryan's remark. In fact,

appellant stated specifically in reference to Ryan's remark that he didn't know what benefit Ryan would have been referring to. Nowhere does appellant make any statement that he gave his confession because of Ryan's remark, and it appears from appellant's testimony that he did not even understand the remark to be a promise.

Under Ark. Code Ann. § 16-91-113 (1987) [Ark. Stat. Ann. § 43-2725 (Repl. 1977)], as put into effect by our Ark. Sup. Ct. R. 11(f), we consider all objections brought to our attention in the abstracts and briefs in appeals from a sentence of life imprisonment or death. In this case we find no prejudicial error in the points argued or in the other objections abstracted for review.

Finding no error, we affirm the judgment.

Josh L. BALDWIN, A Minor, by His Father and Next Friend Jerry Baldwin *v.* Curt MOSLEY

88-13 748 S.W.2d 146

Supreme Court of Arkansas
Opinion delivered April 25, 1988

Hickam & Williams, P.A., by: *D. Scott Hickam*; and *Lane, Muse, Arman & Pullen*, by: *R. Keith Arman*, for appellant.

Wright, Lindsey & Jennings, for appellee.

TOM GLAZE, Justice. This is a tort case in which this court is asked again to reject its adherence to the common-law distinction between a licensee and an invitee. Appellant, Josh Baldwin, was eleven years old and was undisputedly a licensee at the time of his injury. The trial court granted appellee's (Curt Mosley's) motion for summary judgment, finding (1) that the facts failed to show Mosley violated any duty owed to Josh as a licensee and (2) that, in any event, Josh's accident and injury occurred when he was in the presence of his mother and her presence negated any duty Mosley may have owed Josh. We hold the trial court was correct in granting the summary judgment and in applying the common law rule applicable to licensees. Therefore, we affirm.

In addressing the arguments advanced in Josh's behalf, we first recount the common-law rules to which Arkansas's courts have adhered when considering a dispute between a property owner and licensee. In *Webb* v. *Pearson*, 244 Ark. 109, 424 S.W.2d 145 (1968), this court said, quoting from *Knight* v. *Farmers' & Merchants Gin Co.*, 159 Ark. 423, 252 S.W. 30 (1923):

> In all of our decisions on the subject—and there are many—we have adhered to the rule that one who goes upon the premises of another as a mere licensee is in the same attitude as a trespasser so far as concerns the duty which the owner owes him for his protection; that he takes the license with its concomitant perils, and that *the owner owes*

> *him no duty of protection except to do no act to cause him injury after his presence there is discovered.* (Emphasis added.)

The *Webb* court further recited the following, more explicit rule on the subject, as it was set out in *Cato* v. *St. Louis Southwestern Ry. Co.*, 190 Ark. 231, 79 S.W. 62 (1935):

> Whether he be called a trespasser or licensee, the same rule of law applies, and that is that *the only duty owing him was not to willfully or wantonly injure him and to exercise ordinary care under the circumstances to avoid injury to him after discovering his peril.* (Emphasis added.)

Having reviewed the applicable rules that define the duties owed a licensee by a landowner, we now review the evidence in the case at hand in the light most favorable to Josh in order to determine whether the trial court correctly decided Mosley was entitled to a judgment as a matter of law. *See Township Builders, Inc.* v. *Kraus Constr. Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985). In examining the record, we have no doubt that the trial judge's decision, granting Mosley a summary judgment, was a correct one.

The uncontested facts reflect that, at the time of his injury, Josh was visiting his mother, who then was living with Mosley. Josh was sitting on a bar stool eating breakfast when the telephone rang; in answering the telephone, he stood on a rung of the stool and the rung broke, causing him to strike his head against the wall. Josh's injury later required surgery, but since the surgery, he has experienced no problems. Josh's mother owned the bar stool, which she previously had received in a divorce from Josh's father. The father, having prior knowledge that the screws, attaching the rungs, would sometimes come loose from the stool, had admonished Josh "not to stand on those rungs." Josh's mother testified that Mr. Mosley, prior to Josh's fall, had repaired the stool which was the one from which Josh had fallen; she stated, however, that "the spokes (on the stool) had never come loose from the center pole before." Also, of primary significance, the record shows that Josh's mother, and not Mosley, was present when Josh fell.

The foregoing facts offer not the slightest hint or inference

that Mosley willfully or wantonly injured Josh; and since he was not present when Josh stood on the stool, Mosley was obviously in no position to discover Josh's peril so as to act to protect Josh against any potential injury.

In fact, as the record reveals, Josh was under his mother's control when he fell. Thus, *if* anyone other than Josh were negligent under the circumstances described here, that person was Josh's mother because of her failure to properly supervise her son. The trial court reached such conclusion in its alternative reason for dismissing Josh's complaint. In support of that alternative holding, we note the following rule in *Laser* v. *Wilson*, 58 Md. App. 434, 473 A.2d 523 (1984):

> *[I]f a condition is open and obvious rather than latent or obscure, no greater duty is imposed upon a host of a child under parental supervision than would be owed to the parent. If the parent has either been warned, or if the condition is or should be obvious to the parent, the parents' failure properly to supervise its child is the proximate cause of a subsequent injury.* The host is not negligent because he has performed his duty of having the premises as safe for his guest as for his family and himself. (Emphasis added.)

See also Freeze v. *Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970); *cf. Pittsburg Reduction Co.* v. *Horton*, 87 Ark. 576, 113 S.W. 647 (1908) (court held that where a mother's permission was given to her child to take dynamite caps to school where the child gave the caps to the plaintiff, the mother's actions broke the causal connection between the defendant's negligence—in leaving the caps where the child could find them—and the plaintiff's later injury that resulted from the caps). In sum, we conclude that the trial court's decision granting Mosley summary judgment can, and must, be sustained under either of the two theories given by the court when dismissing this cause.

Concerning the appellant's argument that this court should eliminate the long-settled distinction between a licensee and invitee, we rejected that same suggestion in *Coleman* v. *United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984). Although a number of jurisdictions during the 1970's indicated a willingness to discard the legal distinctions between licensees and

invitees, that abolition movement has since lost its steam. *See* W. Prosser and W. Keeton, *The Law of Torts* § 62 (5th ed. 1984). From our research, our decision in *Coleman* to follow such common-law distinctions is clearly the prevailing view in our sister states, *see* Annot., *Landowner Liability—Injured Party Status*, 22 ALR 4th 294 (1983), and, in fact, since 1982, the great majority of decisions have continued to apply the conventional entrant classification rules. W. Prosser & W. Keeton, *The Law of Torts* § 62 (5th ed. Supp. 1988). We are presented no compelling reason why we should depart from our holding in *Coleman* to continue to follow the common-law distinctions as determinative of landowner liability.

We affirm.

PURTLE and HAYS, JJ., concur.

STEELE HAYS, Justice, concurring. While I concur in the result reached, I do not agree with the majority as to the substantive law applicable to licensees. The majority opinion fosters a misconception that the only duty owed to a licensee, as to a discovered trespasser, is a duty to refrain from injuring the licensee by willful or wanton conduct. That same misconception is implicit in the majority opinion in *Coleman* v. *United Fence Company*, 282 Ark. 344, 668 S.W.2d 536 (1984). The majority opinion quotes language from *Cato* v. *St. Louis Southwestern Ry. Co.*, 190 Ark. 231, 79 S.W.2d 62 (1935):

> Whether he be called a trespasser or licensee, the same rule of law applies, and that is that *the only duty owing him was not to willfully or wantonly injure him and to exercise ordinary care under the circumstances to avoid injury to him after discovering his peril.* [Emphasis added].

That declaration of the law omits an important distinction between the duty owed to licensees as opposed to trespassers. Licensees and trespassers alike are generally considered to take the premises as they find them, although the owner may not affirmatively create a risk of harm to either, once he is aware of their presence. As to licensees, an owner owes no corresponding duty, as in the case of invitees, to render the premises safe, nor any duty to warn them of dangers which should be obvious. But if the owner is aware of a danger on the premises which is latent, or one

the licensee might not be expected to recognize, the owner is under a duty to warn him. Prosser and Keeton on Torts, 5th Ed., § 60; *Restatement of Torts, Second*, § 342. An Annotation in 26 A.L.R.3d 317 summarizes this rule:

> [B]ut that where there is a known dangerous condition on the premises and the occupier can reasonably anticipate that his licensee will not discover or realize the danger, the occupier may be held liable for bodily harm caused to the licensee by the condition if he invites or permits the licensee to enter or remain upon the premises without exercising reasonable care either to give warning of the condition and the risk involved, or to make the condition reasonably safe, and the licensee does not know or have reason to know of the condition or risk involved.

An Annotation appearing at 55 A.L.R.2d 52, § 2, recognizes an ambiguity in the law:

> While in a number of cases general language may be found which seems to restrict a licensor's duty to a licensee to that of refraining from wilful or wanton misconduct, or, at most, active negligence, the cases which have explicitly considered the question have frequently recognized that a licensor-landowner may be under an obligation of exercising reasonable care to warn licensees of hidden dangers known to the licensor.

The citations which follow include cases from twenty-five American jurisdictions. Cases to the contrary are almost nonexistent. This is said to be the law "in most jurisdictions." Harper, James & Gray, *The Law of Torts*, 2d Ed., § 27.9.

Here there was evidence the appellee was aware of a defect in these stools, and therefore some basis exists for a dispute of fact as to a duty to warn. Were it not for the fact that this child was under the immediate supervision of his mother, who was also aware of the problem, it would be difficult to affirm a directed verdict.

PURTLE, J., joins.

Stephen WATKINS and Michael Watkins *v.* TAYLOR SEED FARMS, INC.

87-337 748 S.W.2d 143

Supreme Court of Arkansas
Opinion delivered April 25, 1988

Howard & Howard, by: *William B. Howard,* for appellant.

Barrett, Wheatley, Smith & Deacon, and *Butler & Hickey, Ltd.*, for appellee.

TOM GLAZE, Justice. This case arises from a jury verdict against the appellants in their suit against the appellee for causing appellants' crop failure. Appellants had alleged that the appellee negligently commingled and mislabeled appellants' seed with a late maturing variety of seed. Appellants' appeal is limited to the trial court's denial of their motion for a new trial, wherein they argue the trial judge erred in refusing to hear and consider testimony concerning certain disparaging remarks about appellants' attorney made by two jurors during deliberations. Although appellants set out three points on appeal, all three center on whether the trial court was required to consider such testimony pursuant to A.R.E. Rule 606(b). We find no error and therefore affirm.

In support of their offer of proof, appellants included an affidavit and testimony of a juror, John Seymour, who stated that two female jurors made the following comments in the presence of the entire jury: (1) The first woman said, "W.B. 'Tuffy' Howard, (appellants' attorney), got custody of some children for a man and after the man got custody of the children, he murdered them." (2) A second woman replied, "Yes, that's the kind of man he is." These two jurors, whom Seymour claimed had made the remarks, also testified as a part of appellants' offer of proof. The first one, Mary Seale, denied having made any statements about Howard, but did remember hearing someone make them. The second juror, Donna Cornelison, testified that the jurors had discussed the attorneys but that she did not make nor recall any remarks, as those described by Seymour, having been made in the presence of the jury.

Rule 606(b) provides that upon an inquiry into the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything on the juror's mind or emotions. However, the rule contains the following exception: "[B]ut a juror may testify on the questions whether the extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." A.R.E. Rule 606(b). We have

stated that the purpose of the rule is to attempt to balance the freedom of the secrecy of jury deliberations on the one hand with the ability to correct an irregularity in those deliberations on the other. *Borden* v. *St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985).

Appellants contend that the remarks attributed to the two jurors constituted extraneous prejudicial information and required the trial judge to receive and consider the proffered testimony. We disagree. Our provision is identical to Rule 606(b) of the Federal Rules of Evidence. In its Report on the Federal Rules of Evidence, the House Judiciary Committee referred to extraneous prejudicial information as being, for example, a radio newscast or a newspaper account. *See* Fed. Rules Evid. Rule 606; *B and J Byers Trucking Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984). The Committee's commentary implicitly reflects that extraneous prejudicial information is meant to encompass outside information being brought to the attention of the jurors concerning some issue or matter in the action pending before the court. Such a situation occurred in *Borden*, wherein we upheld the trial court's granting of a new trial and finding of extraneous-prejudicial information. 287 Ark. 316, 698 S.W.2d 795. In that case, jurors, despite contrary instructions by the court, went to the accident scene and reported their findings to fellow jurors. However, this court has shown a reluctance to invade the sanctity of the jury room in order to impeach a jury's verdict and has refused to do so even on facts similar to the ones in *Borden*. For example, in *Robinson*, we affirmed the trial court's denial of a new trial and finding of no extraneous-prejudicial information, when a juror, who had not been cautioned against visiting the accident scene, proceeded to visit the scene and reported his impression or opinion of what he saw to the other jurors. 281 Ark. 442, 665 S.W.2d 258. Because the accident scene was a public highway that was open to everyone's inspection and the juror had not talked to anyone when he went to the scene, this court agreed with the trial court that no extraneous information existed.

Appellants cite *Lewis* v. *Pearson*, 262 Ark. 350, 556 S.W.2d 661 (1977), which clearly involved a situation different from those posed in *Borden* and *Robinson*, as well as the one at hand. While *Lewis* involved an accident and a suit for personal injuries,

the issue involving Rule 606(b) arose because the action involved a white plaintiff and a defendant who was black. Sometime during the court's proceeding, the court's bailiff discussed his handling of eviction notices with one member of the all-white jury and was overheard to say, "Yes, most of them are black, it seems they all feel like the world owes them something." In reversing the trial court's failure to grant a new trial, this court concluded that because of the close relationship between the bailiff and the court itself, any action on the part of the bailiff concerning the jury should be subject to close scrutiny by the court.

In *Lewis*, the trial court's bailiff, an officer of the court, was the source of the outside or extraneous prejudicial information and that information was directed at one of the parties to the pending action. In the present case, the statements attributed to the two jurors were not directed at the appellants or the cause they championed. In fact, Seymour testified that the juror, who made the comment about Mr. Howard, "did not advance that as a reason not to find for plaintiffs [appellants]."

In conclusion, we note that, in their motion for a new trial, the appellants alleged not only that extraneous information prejudiced the jury but also that the jurors, making the remarks, were untruthful when failing on voir dire to respond to questions as to whether they knew the appellants' attorney or knew of any reason they could not give the appellants a fair and impartial trial. The fact that a juror may have *heard* of appellants' attorney and some case in which he may have been involved does not equate with the juror *knowing* the attorney. In this respect, it would be somewhat speculative to say that the jurors' silence on voir dire was due to untruthfulness on their part.

We can appreciate the appellants' and their attorney's concern when confronted with charges that suggest a juror or jurors could have harbored some hidden, personal bias or prejudice which had nothing to do with the actual merits of the cause to be decided. Nonetheless, Rule 606(b) ensures that jury deliberations should remain secret, unless it becomes clear that the jury's verdict was tainted by a showing of extraneous prejudicial information or some improper outside influence. The evidence the appellants proffer here is not included in the exception under Rule 606(b), and, therefore, allowing the testi-

mony, we believe, would violate the public policy that protects the privacy of the jury room.

Because we find no merit in appellants' argument, we affirm.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Although the facts of the case are not important to this dissent, I'm compelled to say that as I view the facts the case was almost open and shut against the appellee. The jury must have decided the case upon extraneous matters because there is no logical justification for the fact that the appellee sold the appellants LaBelle rice but the seed produced Star Bonnet plants. The latter brand matures much later than LaBelle. The jury's finding, which I consider to be completely contrary to the facts, lends credence to the argument that the verdict should be set aside because the jury considered extraneous prejudicial information.

The basis for this dissent is that there is clear evidence before this court that the verdict was not decided on the issues and evidence presented, but rather on the opinion of at least two jurors that W.B. "Tuffy" Howard was an unscrupulous and mean attorney. ARE Rule 606(b) provides that after a trial a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was brought to bear upon any juror. The juror's statement quoted in the majority opinion indicated that "Tuffy" Howard had helped a man get custody of his children for the purpose of murdering them. The second juror agreed with the first juror that Howard was that kind of a man. Most certainly such information was not properly before the jury. The primary issue to be decided was whether the rice seeds were LaBelle or Blue Bonnett. The expressed negative reputation of the attorney was unquestionably extraneous prejudicial information.

Even if "Tuffy" Howard had earned the reputation of being a rough and tough attorney, it was not evidence which should have been considered by the jury in deciding his client's case.

The analysis set forth in the majority opinion would probably go so far as to prohibit an inquiry into whether a juror had been bribed. I think the entire court would agree that there would not be a fair jury trial under such circumstances.

For the reasons stated above, I think the case should be reversed and remanded for a trial before a fair and impartial jury.

ARKANSAS POWER & LIGHT COMPANY *v.* Cecil Dwayne HOOKS

87-329 749 S.W.2d 291

Supreme Court of Arkansas
Opinion delivered May 2, 1988

House, Wallace & Jewell, P.A., by: *Philip E. Dixon*, for petitioner.

Pulliam, Davis & Wright, by: *Randall G. Wright*, for respondent.

DARRELL HICKMAN, Justice. We granted review of this case to consider the court of appeals' decision which indicates that misconduct of an employee leading to dismissal would not result in the denial of workers' compensation benefits. The court of appeals made the decision, on this question of first impression, in an unpublished opinion. We find after reviewing the case that it is unnecessary to reach the issue, and the Workers' Compensation Commission's decision simply should have been affirmed.

On June 13, 1982, Cecil Dwayne Hooks, an Arkansas Power and Light serviceman, suffered a fall of about 15 feet while on the job, injuring his back, neck, and legs. He returned to work for AP&L on August 3, 1982, and was assigned light duty. At that time his disability payments and payment of medical expenses ceased. It is undisputed that Hooks was fired for stealing electricity from AP&L and his dismissal was affirmed through the company's grievance procedure. He has not returned to the work force.

Hooks filed for temporary total disability benefits from the date he was fired, October 21, 1982, through the date of his back surgery, December 26, 1983. The administrative law judge found that he was entitled to benefits. The Workers' Compensation Commission found that Hooks was not totally disabled during this time and that in any event benefits should be denied because Hooks "was put out of work not because of his injury but because of his own willful conduct." The commission relied on the case of *Calvert* v. *General Motors Corp.*, 120 Mich. App. 635, 327 N.W.2d 542 (1982), for this finding. The court of appeals reversed the commission's decision, finding that Hooks was in fact disabled, and that the commission's reliance on *Calvert* was misplaced. Since we find the commission's determination that Hooks was not temporarily totally disabled should have been upheld, we need not consider the effect of his misconduct on his entitlement to benefits.

■ The established rule of review in workers' compensation cases is that the commission's findings must be upheld unless there is no substantial evidence to support them. *Osage Oil Company* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 86 (1985); *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Hooks was receiving the same wages he did before his injury, according to the testimony of his superior. There is every indication that he would have continued doing this light work until he was ready to return to his regular duties. His light work duties were those which a "journeyman lineman" might perform. Hooks' supervisor testified:

> He worked on a regular basis, he was on restricted duty and he was not assigned his usual . . . [w]hat we call single basket truck which is used by journeymen linemen, but instead given one of the smaller trucks about the size of a pickup truck and his work consisted of connecting meters, disconnecting meters, reading meters in and reading them out when a customer was moving or relocating. He did any work that a journeyman lineman could do from the ground, except lift, carry and stoop. He could not climb a pole.

The commission also relied on the following medical evidence in making its decision:

> The above named patient was seen in follow up today. He is now wearing a TENS unit and is obtaining some relief from the pain. The family situation has settled down somewhat. He could be returned to work on a limited basis so long as he did not do any heavy lifting, climbing, stooping or squatting. He is given a lumbosacral support which he is to wear when he is at work. He could do some limited driving so long as he works in the support. (Dr. Giller's letter to Dr. Moore 8-2-82.)

> The above named patient was seen in follow up today. He is getting some relief from his TENS unit and he is wearing a back brace. His only problem is keeping the TENS in place, especially when he drives in the truck. Driving also makes his back hurt. It is my impression that Mr. Hooks is making progress. This will be a slow process and it will take a minimum of three to four months before he begins to work back into his usual activities. Meanwhile, his same restrictions should stay in effect. (Dr. Giller—8-23-82)

> He is increasing his walking and is improving. Although he is improving the same restrictions should apply. He is not ready to return to his usual job. (Dr. Giller—10-11-82)

This last letter was written ten days before Hooks was dismissed. The commission found that Hooks was not disabled, stating:

> Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *See Arkansas State Highway Department* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1982). The testimony indicates that claimant was not totally disabled during this period . . . .

The commission is the fact-finding body in the administrative procedure of workers' compensation claims. *See Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984). On appellate review, the court is not to substitute its judgment for that of the commission regarding facts. The appellate role is only to see if there is substantial evidence to support the commission's findings. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). It seems the court of appeals reviewed this case *de novo*, which was error.

There was substantial evidence to support the commission's findings.

Reversed.

PURTLE, J., dissents.

NEWBERN, J., concurs.

DAVID NEWBERN, Justice, concurring. The majority opinion is correct. I write only to amplify upon the note taken in the opinion that the court of appeals purported to answer a question of first impression in the law of this state by an opinion which was not designated for publication.

For a time, this court decided cases by signed opinions not designated for publication. The practice was governed by Rule 21 of the Rules of the Arkansas Supreme Court and Court of Appeals. After the court of appeals was created, the rule was changed to provide that all signed opinions of the supreme court are to be designated for publication; however, the rule retained the practice for court of appeals opinions.

Everything I have to say about appellate courts deciding cases and not publishing their opinions is contained in D.

Newbern and D. Wilson, *Rule 21: Unprecedent and the Disappearing Court*, 32 Ark. L. Rev. 37 (1978). While that article was written with respect to the practice of the supreme court, the criticisms apply equally to our court of appeals.

This case points up the need to revise our entire appellate system. By dividing appellate jurisdiction, our Rule 29 makes the court of appeals a court of last resort in, for example, contracts cases and property disputes which are cases of at least equal dignity with those being decided, in many instances, by this court. Yet the court of appeals decides those cases, for the most part in panels of three judges, often by opinions not designated for publication, and sometimes on an "accelerated civil list." *See* Per Curiam Order, 16 Ark. App. 301, 700 S.W.2d 62 (1985). In the great majority of its cases the court of appeals is a court of last resort because there is no right of appeal from that court to this one. Rule 29 6. We decline to review court of appeals decisions on the ground of suggested error. *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979).

In some instances the rule works to assure that more important cases are decided in the supreme court. More often it does not. While the supreme court is deciding a fender bender torts case with only an issue of sufficiency of the evidence and writing a signed, published opinion for seven justices en banc, three court of appeals judges may be deciding what the property or contract law of this state is to be for years to come, assuming a decision is made to publish an opinion on a question of first impression. (The unpublished opinions do not count because they cannot be cited. *See* Rule 21.4.)

I can think of no way to divide the work of the supreme court and the court of appeals by assigning categories of cases in such a way that it would not produce the kind of uneven, unfair system we now have. In my view, the answer lies in making an enlarged court of appeals the first appellate resort in all cases with the right of appeal to this court in capital crimes cases and perhaps in those interpreting the Constitution of Arkansas. Provisions for bypassing the court of appeals could perhaps be retained for cases in which that court recognizes law-making potential. As the primary appellate court, the court of appeals should be required to publish its opinions in all cases so that it can be held accountable

for them, and this court should review the court of appeals decisions for error, when asked to do so by an aggrieved party, on a discretionary basis.

JOHN I. PURTLE, Justice, dissenting. I am glad this court did not reach the question whether workers' compensation benefits should be discontinued when the employee is subsequently discharged because of misconduct. Obviously the majority would have upheld the commission's erroneous ruling had it reached the merits. Now, I hope, time will allow for proper reflection and research before this court decides such an important issue. However, even after avoiding a decision on such an important issue, the majority is still in error. The opinion in effect holds that the appellant did not have any disability at the time he was discharged. The majority appears to be laboring under the same mistaken impression of the law as was the Workers' Compensation Commission.

After a hearing before an administrative law judge, it was determined that the appellant was entitled to temporary total disability benefits from the time of his discharge until the time of his back surgery. In a split decision the commission reversed the administrative law judge's order and dismissed the claim. The commission founded its opinion on public policy. I find no authority for the commission to make such sweeping determinations of public policy. Commissioner Melvin Farrar in his dissent stated: "I find that just cause to terminate a claimant's employment is not necessarily just cause for denial of worker's compensation benefits." Commissioner Farrar was right.

In a well reasoned unanimous opinion by the Arkansas Court of Appeals, Division I, the commission was reversed and the benefits restored to the appellant. I find the unpublished opinion of the Court of Appeals to be sound in all respects.

Before continuing with a discussion of the merits of the case, I wish to point out that an employee may be temporarily totally disabled or he may be temporarily partially disabled. The fact that an employee remains able to do some type of work for some period of time, as the appellant was in this case, does not necessarily demonstrate that he is not temporarily and totally disabled. *Mountain Valley Superette* v. *Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982). If, during the healing period, an

employee is unable to consistently perform remunerative labor, without pain and discomfort, he is temporarily totally disabled. *Pyles* v. *Triple F Feeds of Texas*, 270 Ark. 729, 606 S.W.2d 146 (Ark. App. 1980).

It is not the duty of the Workers' Compensation Commission, the Court of Appeals or this court to create new penalties under the law. The people, acting through the legislature, are the source of change in the law. The commission and this court have, in my opinion, attempted to amend an initiated act and change a statute by the decision in this case.

The appellant's treating physician's report of November 14, 1983, stated in part: "[That the appellant] is not able to engage in any work that would require lifting, bending, or prolonged sitting. For that reason he is most likely disabled from work." The physician's statement and the fact that the employer created a "soft" job for the appellant during the time he was unable to perform regular duties is heavy evidence that he was disabled from performing his regular duties. If the appellant was temporarily partially disabled, it was the duty of the employer to find work which the appellant could have done, or cause compensation benefits to be paid.

The main reason for this dissent is to wave a flag before the court, and the people, with the hope that we will not continue the "judicial legislating" business by creating a statutory type penalty for disabled workers who are subsequently discharged for misconduct. Adoption of such a "public policy" would obviously produce many complaints of misconduct in order to terminate the injured employee's benefits and lower the employer's rate of insurance. The people of the state of Arkansas through the legislature have spoken—employees who are injured on the job are entitled to receive disability benefits. It is not up to this court, or the Workers' Compensation Commission, to deny the rights which have been granted to injured employees. When people are entitled to benefits under the law they should receive those benefits.

An injured employee, of course, draws less compensation than he received while he was working. It's not inconceivable that a worker in such circumstances might be reduced to an income where he would have to steal a loaf of bread in order to feed his

hungry children. The fact that he stole a loaf of bread certainly doesn't remove his disabilities or restore his wages. That is the reason we have criminal law. When people violate criminal laws they should be punished.

Of course the "misconduct" may be only a violation of company policy or perhaps even "insubordination." It doesn't take much imagination to foresee trumped-up charges to simply get rid of an employee who has a lifetime disability of some type. The benefits to the employers and insurance companies would be substantial if the commission and the courts approved such tactics.

I conclude with a line from the opinion of the Court of Appeals: "We believe the question, involving as it does a matter of public policy, [is] one best resolved by the legislature." So do I.

Clarence McCLENDON *v.* STATE of Arkansas

CR 87-147 748 S.W.2d 641

Supreme Court of Arkansas
Opinion delivered May 2, 1988
[Rehearing denied May 31, 1988.]

Charles L. Carpenter, Jr., for appellant.

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

JOHN I. PURTLE, Justice. The appellant was convicted of one count of capital murder and one count of aggravated robbery. He was sentenced to life imprisonment without parole for capital murder and life imprisonment for aggravated robbery. The trial court withheld execution of the sentence for aggravated robbery unless the capital murder conviction was set aside. On appeal the appellant argues the following four points for reversal: (1) the trial court committed error by allowing an in-court identification of the appellant; (2) the trial court committed error by failing to grant a directed verdict on both charges; (3) the capital murder statute was unconstitutionally applied in the appellant's case; and (4) the trial court committed error by failing to dismiss the aggravated robbery conviction.

For reasons stated below we affirm the judgment of the trial court as modified to set aside the conviction for aggravated

robbery.

On April 13, 1986, at approximately 10:00 p.m., two armed men wearing masks entered the premises of a store on Confederate Boulevard in Little Rock. The owner of the store, who was shot shortly after the men entered, died a few days later. A clerk at the store testified that he had seen and talked to the appellant at the store twice on that same day. At approximately 10:00 p.m. when the clerk was leaving, he saw the appellant outside the store putting a stocking over his head. He also testified that the appellant had a gun in his trousers at that time. The clerk struggled with the appellant and an accomplice and then escaped and hid underneath a truck. When he re-entered the store a few minutes later he discovered that the owner had been shot in the head. He then took the owner to the hospital. The clerk also testified that four or five hundred dollars from the victim's front pocket and his billfold were missing. On April 21, 1986, the clerk identified the appellant in a police lineup. The state filed formal charges against the appellant on June 10, 1986.

The appellant argues that the in-court identification was improper because he was entitled to have counsel present at the police lineup conducted on April 21, 1986. The right to counsel of the Sixth Amendment, applicable to the states through the Fourteenth Amendment, operates to assure that the accused's right to a fair trial is protected. The United States Supreme Court has held that the accused's right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversary criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. See *Moore* v. *Illinois*, 434 U.S. 220 (1977).

This court has had the opportunity to consider this same issue on several occasions. See *Walters* v. *State*, 266 Ark. 699, 587 S.W.2d 831 (1979); and *Lewis* v. *State*, 281 Ark. 217, 663 S.W.2d 177 (1984). In each of these cases, as in the situation before us, the defendant participated in a lineup before formal charges had been filed. In each case we held that the accused was not entitled to the presence of counsel because adversary proceedings had not been initiated.

In the present case the appellant argues that we should hold that "criminal proceedings" had been initiated despite the

fact that no formal charges were filed until approximately two months after the lineup. This we cannot do. To do so would amount to overruling a line of cases based upon the decision of the United States Supreme Court on the same issue. Since no formal charges had been filed against the defendant we hold that the defendant was not entitled to counsel at his identification lineup.

The appellant also argues that the lineup conducted on April 21, 1986, was unduly suggestive. After careful consideration of the record we find nothing to indicate that the lineup violated the defendant's due process rights by being unduly suggestive. From the facts presented, there is substantial evidence to conclude that the in-court identification was not "tainted" by the identification in the lineup. The eyewitness' opportunity to observe the appellant was great and his testimony was clear and unequivocal.

The appellant's second point for reversal is that the trial court should have granted a directed verdict on both the aggravated robbery charge and the capital murder charge. He argues that there is insufficient evidence to support the conviction of capital felony murder or aggravated robbery.

In the present case there was testimony that the appellant was seen at the store several times on the day in question asking about the owner. At the time the employee left the store he observed the appellant with a gun and in the process of pulling a stocking over his head. Additionally, the store owner's billfold and approximately four or five hundred dollars which the owner had in his front pocket shortly before the shooting were missing. Unlike *Trotter* v. *State*, 290 Ark. 269, 719 S.W.2d 268 (1986), which is relied upon by the appellant, there is substantial corroborating evidence from which a jury could find that the shooting occurred during the course of a robbery.

The appellant's third point for reversal is that the capital murder statute was unconstitutionally applied. In support of this the appellant asserts that the underlying felony, aggravated robbery, is not one of the seven felonies that can support a charge of capital felony murder. This argument has been raised before. In *Simpson* v. *State*, 274 Ark. 188, 623 S.W.2d 200 (1981), we held that the General Assembly could not conceivably have intended that robbery, which may involve no force, would

support a charge of capital murder, while aggravated robbery, an inherently dangerous crime, would not. Aggravated robbery is still a robbery.

McClendon also contends that the first degree murder statute and the capital murder statute are unconstitutionally vague and overlap in such a way that he may be charged with either crime for the same conduct. This argument has also been raised before and we have decided that there is no constitutional infirmity in these statutes. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

However, we do find that appellant's final argument has merit. He insists the trial court should not have entered a judgment on his conviction for aggravated robbery. We agree. Aggravated robbery in this case was the underlying felony relied upon by the state to establish the crime of capital murder. The robbery was an essential element of the crime of capital murder. Therefore the appellant could not have been sentenced for aggravated robbery in this case. *Cozzaglio* v. *State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

Having no authority to do so, the trial court should not have sentenced the appellant for aggravated robbery. The sentence for aggravated robbery therefore should be set aside.

Accordingly the capital felony murder conviction of the appellant is affirmed and the aggravated robbery conviction is reversed and the case is remanded to the trial court with directions to vacate the sentence and dismiss the charge of aggravated robbery.

Affirmed in part; reversed and remanded in part.

Lenard CORAN and Bertha L. Coran *v.* Gary KELLER and wife, Vicky Keller

87-335 748 S.W.2d 349

Supreme Court of Arkansas
Opinion delivered May 2, 1988

Rose Law Firm, A Professional Association, by: *Herbert C. Rule III* and *Stephen N. Joiner*, for appellants.

Brazil, Clawson & Adlong, by: *Charles E. Clawson, Jr.*, for appellees.

ROBERT H. DUDLEY, Justice. The defendants, Lenard and Bertha Coran, constructed and sold a house to the plaintiffs, Gary and Vicky Keller, for $34,500.00. The plaintiffs moved into their home and soon discovered the septic tank did not function properly, that sewage backed into the house, that soap suds from the washing machine seeped into the bathroom, that sewage and other effluence stood in the backyard, and that water would not percolate in the ground around the house. The defendants made various attempts to correct the problems, but all were unsuccessful. Plaintiffs filed suit in circuit court for breach of warranty asking $37,500.00 damages. The defendants answered and admitted that the house had defects, but denied that the defects were the fault of the defendants. At trial, the jury returned a verdict as follows: "We the jury find for the plaintiffs, Gary Keller and wife Vicky Keller, and fix their damages at a sum of *$34,500.00. Noble L. Bowman*, Foreman. *With stipulation that Lenard Coran receives the deed to the house.*" (The italicized portions of the above were handwritten.) After hearing the verdict, neither party asked that the jury be polled nor questioned the verdict, and the jury was discharged. Eleven days later the plaintiffs filed a motion asking the trial court to modify the verdict. At the hearing on the motion the defendants asked the court to either enter a judgment on the verdict or else grant a new trial. The trial court ruled:

> I didn't make any inquiry of the jury, but two of them were in my office a week or two after this trial and said, "What did you think about our verdict in the" —what's this— "the Keller-Coran case?" I said, "Well, I think y'all made a big mistake in putting that stipulation on it." They said, "Now, Judge, if you had just sent us back into the jury room, we were prepared to remove that stipulation." But, nobody asked for 'em to be sent back in and I didn't send 'em back in. So, now, both sides come to me and want to correct the verdict rendered by the jury.

> So, my holding is going to be that the jury had no right to write any stipulation on this verdict form, that they went beyond their province, they went beyond the instructions of the Court, and I'm going to correct the verdict by removing the stipulation and leaving part of the verdict, "We, the jury, find for the plaintiffs, Gary Keller and wife, Vicky Keller, and fix their damages at a sum of thirty-four thousand five hundred dollars," as the verdict in this case, and see if the higher court will affirm or reverse. I know it's going to be a very interesting case for them to decide. It was a very interesting case to hear, and I don't really want to have to hear it again. It may be remanded down here for me to hear again, but that's the only way I'm going to hear it again. I'm not going to grant a new trial. I'm going to conform the verdict to what I consider it should have been, had the jury followed the instructions of the Court, which they apparently did not. They decided, on their own, to make an equity case out of it and try to do some kind of an equity in the matter, which was beyond their province.

The trial court then entered a judgment striking the handwritten stipulation as surplusage. The defendants appeal. We reverse and remand for a new trial.

In *Sanson* v. *Pullum*, 273 Ark. 325, 329, 619 S.W.2d 641, 644 (1981), we said:

> Uniform Evidence Rule 606(b) states plainly that a juror may not testify as to the effect of anything upon his mind as influencing him to assent to the verdict, nor may his affidavit be received concerning a matter about which he is precluded from testifying. We take this opportunity to state unequivocally, for the guidance of the bar, that in our opinion it is improper for a lawyer to interview jurors after a trial in an effort to obtain such inadmissible affidavits to impeach their own verdict.

Similarly, a trial judge, before ruling on a motion to modify the verdict, should not have an ex parte conversation with some of the jurors about anything which caused them to assent to the verdict. To do so is error.

In addition, the trial court erred in making a substan-

tive amendment to the verdict after the discharge of the jury. *Browne* v. *Dugan*, 189 Ark. 551, 556, 74 S.W.2d 640, 643 (1934); Ark. Code Ann. § 16-64-119(2) (1987).

The above two errors are errors of law and amount to sufficient reason to reverse this case. We need not discuss the appellants' other points which go to the jury's intent and involve alleged errors of fact.

In our decisional conference, the only part of this case which caused us any real difficulty was what to do with the case after we had reversed it. As a general rule, the failure to object to some irregularity in a verdict prior to the discharge of the jury constitutes a waiver of that irregularity. *Smith* v. *Perkins*, 246 Ark. 427, 429, 439 S.W.2d 275, 276 (1969); *Hodges* v. *Bayley*, 102 Ark. 200, 204, 143 S.W. 92, 93 (1912); Ark. Code Ann. § 16-64-119(2). *But see Martin* v. *Blackmon*, 277 Ark. 190, 193-94, 640 S.W.2d 435, 436 (1982); *Wharton* v. *Bray*, 250 Ark. 127, 131, 464 S.W.2d 554, 556 (1971) (these two cases distinguish the general rule). Since no objection was made to the jury's verdict, under normal circumstances we would remand with instruction to set aside the modification and enter the verdict returned by the jury. In this case, however, the verdict returned granted a relief, rescission, that was neither pleaded nor within the jurisdiction of the circuit court to grant. The circuit court does not have the affirmative power to transfer title from the plaintiffs, appellees, to the defendants, appellants. During oral argument of this case, the appellant referred to rescission at law. In rescission at law the tender of the property itself effectuates the rescission, and the law court only grants restitution. In rescission in equity the affirmative powers of the court of equity are used to rescind, or undo, the contract. *Brown* v. *Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977). The second type of rescission is the type ordered by the jury in the case at bar, and the law court does not have that subject matter jurisdiction. Since subject matter jurisdiction can be raised at any time, and is raised by this Court on its own motion, we deem it best to raise the issue of the lack of jurisdiction of the circuit court to give the relief awarded in the verdict, and accordingly, we remand the case for a complete new trial.

Reversed and remanded for a new trial.

Aubrey ELLISON d/b/a Ellison Refrigeration *v.* Bobby TUBB, Samuel A. Millican, Debra D. Millican and First National Bank of Magnolia

88-38 749 S.W.2d 650

Supreme Court of Arkansas
Opinion delivered May 2, 1988

Anderson, Crumpler & Bell, P.A., for appellant.

Chandler & Thomason, by: *Byron Thomason*, for appellees.

ROBERT H. DUDLEY, Justice. On April 6, 1979, the governor signed Act 746 of 1979, which modified the materialman's lien statute to provide that, effective October 1, 1979, notice must be given to a landowner before there is a delivery of materials in order for a materialman's lien to be perfected against the land. *See* Ark. Stat. Ann. §§ 51-608.1, -608.2, and -608.3 (Supp. 1985) and Ark. Code Ann. § 18-44-115 (1987). On April 23, 1979, after the passage of the act but before its effective date, the landowners, appellees Samuel and Debra Millican, entered into a contract with appellee Billy Tubb for construction of a home. Tubb, in turn, later entered into an oral subcontract with appellant Aubrey Ellison to install the heating and air conditioning unit in the home. On June 20, 1979, after passage of the act but still before its effective date, appellant Ellison furnished materials and labor. On October 16, and October 23, 1979, after the effective date of the act, he also furnished materials and labor. No materialman's notice was given to the landowners before the delivery of any materials. The landowners, the appellees, paid Tubb, the contractor, for the house but Tubb did not pay the subcontractor, appellant Ellison. Tubb was subsequently discharged in bankruptcy. The appellant filed suit to perfect his lien. The chancellor found the transaction between the contractor and subcontractor was a single contract to furnish the heating and cooling system. Therefore, the suit for the entire amount was filed within the

allowable 120 day period, *see* Ark. Code Ann. § 18-44-117 (1987). The chancellor further found that the appellant was entitled to a lien only for those materials and labor furnished before the effective date of the 1979 notice act. We affirm.

We first consider the issue raised on cross-appeal, whether the trial court erred in ruling that the transaction was a single contract. Whether a contract is entire or severable is determined from the intention of the parties. Intention may be ascertained from the subject matter of the contract, the circumstances of the transaction, and the language of the parties. *Jones* v. *Gregg*, 226 Ark. 595, 293 S.W.2d 545 (1956). When, as in this case, the parties probably never thought about whether their contract was entire or severable, and there were periodic payments, a court must determine whether there were periodic payments under one contract, or whether there were several different contracts with each contract calling for full payment at its completion.

17 Am. Jur. 2d, *Contracts* § 325 (1964) provides in pertinent part:

> As a means of ascertaining the intention of the parties, various tests have been adopted. According to some authorities, the criterion is to be found in the question whether the quantity, service, or thing as a whole is of the essence of the contract. If it appears that it is to be performed only as a whole, the contract is entire. Thus, the best test is said to be whether all of the things, as a whole, are of the essence of the contract: that is, if it appears that the purpose is to take the whole or none, the contract is entire; otherwise, it is severable. Another test supported by a number of authorities is that a contract is entire when, by its terms, nature, and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable, when, in its nature and purpose, it is susceptible of divisions and apportionment, and has two or more parts in respect to matters or things contemplated and embraced by the contract which are not necessarily dependent upon each other.

Determining the intention of the parties is an issue of

fact, and we affirm a chancellor's finding of fact unless it is clearly against the preponderance of the evidence. ARCP Rule 52(a). The facts reveal the following.

There was no written instrument to be construed, and the primary evidence regarding the nature of the agreement between appellant, the subcontractor, and Tubb, the contractor, came from the testimony of the appellant. Tubb did not testify. A part of appellant's testimony is fairly abstracted as follows:

> My deal with Bobby Tubb was that Tubb would call and tell me to air condition the house, usually if it was a heat pump or gas. If we had gas, we normally used gas. If we didn't have gas, we normally used a heat pump; but he would tell me what to use in each case. He didn't tell me what size to use. He would give me a set of plans. He didn't take bids with anybody else at this point. I don't know of any other bids. He didn't know what size unit I was going to put in there nor the exact price. He would give me the floor plan and tell me to put the job in. He asked that I bill him as I did the work. We stock equipment. At that time I was stocking heavier than I am now; usually in the neighborhood of $40,000.00 worth of equipment in the building so I took equipment out of my stock and put it on the job. I hadn't special ordered anything in all probability. He told me to do the whole job so when I went out there the first job and did the first part of it, I had already been asked to do the rest of it.

Some other parts of appellant's testimony seem contradictory to the concept that he and Tubb intended for him to do the whole job, but, taken as a whole, we cannot say the chancellor's ruling was clearly against the preponderance of the evidence. Therefore, we affirm the holding that the transaction was one entire contract, and the lien proceeding was timely filed.

On direct appeal the appellant argues that Act 746 of 1979, as applied by the chancellor, is a law which impairs the obligation of this contract in violation of article 2, section 17 of the Constitution of Arkansas and article 1, section 10 of the Constitution of the United States. The argument, in summary, is as follows:

a. The entire transaction was a single contract.

b. When the contract was entered into, which was before the effective date of the act, no preliminary notice was required for the remedy of perfecting a lien.

c. Before the contract was finished, but after the effective date of the act, Act 746 required a materialman to give the preliminary notice in order to perfect a lien.

d. The chancellor applied the act to that part of the contract which was performed after the effective date of the act.

e. Thus, the act, as applied, impaired vested rights under the contract in violation of the state and federal Constitutions.

In *Robards* v. *Brown*, 40 Ark. 423 (1883), in discussing the federal constitutional prohibition against passing laws which impair contractual obligations, we wrote:

> The laws which are in force at the time when, and the place where, a contract is made and to be performed, enter into and form part of it. This is only another mode of saying that parties are conclusively presumed to contract with reference to the existing law. The Constitution forbids all laws, alike, which affect the validity, construction, discharge and enforcement of contracts. The State may change legal remedies, forms of action, of pleading and of process, the times of holding courts, etc., and may shift jurisdiction from one court to another. And such changes may have the incidental effect of delaying the collection of debts. But the Legislature cannot, under the guise of legislating upon the remedy, in effect, impair the obligation of contracts. The idea of right and remedy are so intimately associated as often to be inseparable. Now any legislation which deprives a party of a remedy substantially as efficient as that which existed at the making of the contract, does impair its obligatory force.

In *Padgett* v. *Bank of Eureka Springs*, 279 Ark. 367, 651 S.W.2d 460 (1983), we quoted with approval the following paragraph from 16A Am. Jur. 2d *Constitutional Law* § 675

(1979), discussing the difference between the impairment of a vested right and a remedy or mode of procedure:

> Although the distinction between remedial procedures and impairment of vested rights is often difficult to draw, it has become firmly established that there is no vested right in any particular mode of procedure or remedy. Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedure, are not within the general rule against retrospective operation. In other words, statutes effecting changes in civil procedure or remedy may have valid retrospective application, and remedial legislation may, without violating constitutional guarantees, be construed . . . to apply to suits on causes of action which arose prior to the effective date of the statute . . . . A statute which merely provides a new remedy, enlarges an existing remedy, or substitutes a remedy is not unconstitutionally retrospective. . . .

At the time the parties entered this contract, Act 746 of 1979 was in existence and was to become effective October 1, 1979. The parties are "conclusively presumed" to have contracted with reference to the existing law. *Robards* v. *Brown*, 40 Ark. 423 (1883). Thus, it must be presumed that they contracted with reference to Act 746, and that the appellant was aware of the new procedure to perfect a lien.

In addition, the act did not impair the validity of vested rights in the contract itself. The contractual obligations were just as valid after the act became effective as they were before it became effective. The act merely substituted the procedure to be followed in perfecting the lien, and did not substantially deprive a materialman of the remedy of a materialman's lien.

Accordingly, the act did not unconstitutionally impair vested rights under the contract, and we affirm the trial court's ruling that the appellant had to give notice after the effective date of the act in order to perfect a lien.

NEWBERN, J., concurs.

DAVID NEWBERN, Justice, concurring. The majority opinion is correct in stating that the failure to comply with the notice requirement of Act 746 of 1979 had no effect on Mr. Ellison's

rights established in his contract with Mr. Tubb. There was no need for the trial court to consider whether the contract was severable, and thus there is no need for us to consider it. The issue the appellant should have addressed is whether any constitutional provision or other law prevents the notice requirement from taking effect with respect to materials furnished on a job begun before the law went into effect. To the extent Ellison may have a lien, it is created by statute and not by his contract with Tubb.

The basis of the materialman's lien claim is Ark. Code Ann. § 18-44-101(a) (1987). I find nothing in that statute indicating that a lien which may accrue at the beginning of any particular job, contract, or project, is "unseverable." In pertinent part the statute provides, "Every . . . person . . . who shall . . . furnish any material . . . for any building . . . under any . . . contract with the owner . . . or his . . . contractor . . . upon complying with the provisions of this subchapter, shall have, for his . . . materials . . . furnished, a lien upon the building . . . and upon the land belonging to the owner. . . ." The "provisions of this subchapter" were changed by Act 746, now codified at Ark. Code Ann. § 18-44-115(a) (1987), and thus, in my view, compliance with that section was necessary with respect to "any material" furnished after it became the law.

I fully concur in the result reached by the majority opinion, but I would delete the discussions of the singleness of the contract and impairment of contract, as I find them unnecessary.

OTTER CREEK DEVELOPMENT COMPANY,
an Arkansas Limited Partnership *v.* Vernon
C. FRIESENHAHN d/b/a Friesenhahn
Development Company

87-290 748 S.W.2d 344

Supreme Court of Arkansas
Opinion delivered May 2, 1988
[Supplemental Opinion on Denial of Rehearing June 6, 1988.*]

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* Hickman and Hays, JJ., would grant rehearing. Purtle, J., not participating.

Bridges, Young, Matthew, Holmes & Drake, by: *Jack A. McNulty*, and Of Counsel *Friday, Eldredge & Clark*, by: *Robert V. Light*, for appellant.

Griffin Smith and *Homer Tanner*, for appellee.

ROBERT H. DUDLEY, Justice. The only issue we need to decide is whether an option to purchase real estate violates the rule against perpetuities.

In 1971, the appellant, Otter Creek Development Company, a domestic limited partnership, was formed for the purpose of investing in and developing a tract of land at the then proposed junction of Interstate Highway 30 and Interstate Highway 430 in south Pulaski County. Otter Creek acquired a large tract of land and, on March 23, 1981, gave an option to purchase six of the

acres to appellee Vernon C. Friesenhahn d/b/a Friesenhahn Development Company. The option grants appellee one year in which to purchase the six acres, and the option is renewable annually by payment of a specified sum. There is no limit on the number of years the option can be renewed. The option further provides that it is binding on the heirs, successors, and assigns of the parties. The option provides that it will be terminated automatically if not exercised within 90 days from the date that appellee Friesenhahn receives notice from Otter Creek that a building permit is available from the City of Little Rock. The appellee has renewed the option each year and filed a declaratory judgment proceeding asking that his option be declared valid. The trial court declared the option valid. We reverse because the option violated the rule against perpetuities.

We have held that a repurchase option contained in a deed is subject to the rule against perpetuities, *Broach* v. *City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984), but we have never before decided whether an independent option to purchase is subject to the rule. We now hold that an independent option to purchase real estate is subject to the rule against perpetuities. One reason for the holding is that we look upon independent options to purchase real estate as creating future interests depending on the contingency of the exercise of the option. This position has been taken by all but one of the courts which considered the issue. *See* Annotation, *Independent Option to Purchase Real Estate as Violating Rule Against Perpetuities or Restraints on Alienation*, 66 A.L.R.3d 1294 (1975), and J. Gray, *The Rule Against Perpetuities* § 330 (4th ed. 1942).

The issue then becomes whether this independent option violates the rule against perpetuities. The Constitution of Arkansas forbids "perpetuities," but it does not describe them. Ark. Const. art. 2, § 19. The description comes from common law. *Broach* v. *City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984). Common law describes the rule against perpetuities as a rule which prohibits the creation of future interests or estates which by possibility may not become vested within the life or lives in being at the time of the effective date of the instrument and 21 years thereafter. *Id.* The agreement now before us provides that the appellee, the optionee, or his heirs or assigns can exercise the option over an unlimited number of years, subject only to

automatic termination if the option is not exercised within 90 days of the availability of a building permit, if ever that condition occurs. It is clear that on the date the instrument was signed there existed a distinct possibility that the specified contingency might not occur until after expiration of the life or lives in being plus 21 years.

By quoting one sentence from a federal district court case, the appellee argues that the rule is not violated when the contingency, as in this case, is capable of vesting in lives in being plus 21 years. The argument is clearly contrary to our settled law. In *Comstock* v. *Smith*, 255 Ark. 564, 566, 501 S.W.2d 617, 618 (1973), we wrote, "The interest *must* vest within the time allowed by the rule. If there is any possibility that the contingent event may happen beyond the limits of the rule, the transaction is void." In the case before us the contingent event may happen beyond the limits of the rule. Therefore, the option is void. The dissenting opinion would retroactively overrule *Comstock* v. *Smith* and decide this case on a basis neither pleaded nor asked below or in this Court. *Comstock* v. *Smith* was decided in 1973 and has now become a rule of property. This Court should rarely overrule an earlier decision when the decision has become a rule of property. *Gibson* v. *Talley*, 206 Ark. 1, 174 S.W.2d 551 (1943); *Fisher* v. *Cowan*, 205 Ark. 722, 170 S.W.2d 603 (1943); *Town of Pocahontas* v. *Central Power & Light Co.*, 152 Ark. 276, 239 S.W. 1 and 244 S.W. 712, *appeal dismissed*, 260 U.S. 755 (1922). Even if we should decide to overrule a rule of property, we could not do it retroactively, but could only give a caveat for the future. *O'Brien* v. *Atlas Finance Co.*, 223 Ark. 176, 264 S.W.2d 839 (1954). We choose not to overrule the rule of property.

Reversed and remanded for entry of a decree consistent with this opinion.

HICKMAN and HAYS, JJ., dissent.

PURTLE, J., not participating.

STEELE HAYS, Justice, dissenting. While I am tempted to join the majority and avoid the labyrinth of the Rule Against Perpetuities, I think it is a mistake to mechanically apply the Rule on the basis of a perfunctory examination of the option agreement to see if the magic words are there, i.e., "the interest will vest

within a life or lives in being plus twenty-one years." By so doing, the majority opinion ignores pronounced equities present in the case and misses the opportunity to review current trends in the law and, if warranted, adopt improvements to a Rule that has produced considerable criticism.[1]

Why should we think ourselves powerless to do that? As the majority concedes, we are not faced with a specific precedent. Nor are we bound by statutory restraints. The Rule was created by judges and judges have shaped it. Our legislature has never acted on perpetuities. It has been left to the judicial branch to hold the law of perpetuities within the framework of Article 2, § 19 of our Constitution: "Perpetuities . . . are contrary to the genius of a republic, and shall not be allowed. . . ." Thus we are free to apply it literally or modify it as common sense and justice dictate. We did exactly that in *Broach* v. *City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984), to which I will refer in a moment.

While there is, I concede, an aura surrounding the Rule Against Perpetuities that seems to render it immune from all but rigid application, it is not as though it has not come under fire, particularly in cases where it is applied blindly and irrespective of the equities. In *Haggerty* v. *City of Oakland*, 161 Cal. App. 2d 407, 326 P.2d 957 (1958), for example, a ten year lease to commence upon completion of a building on the premises was declared void under the Rule. The lessor, the City of Oakland, covenanted to proceed immediately with construction and the lease was to commence on the first day of the second month after completion of the building. The court held that completion of the building was uncertain and could conceivably occur later than twenty-one years after a life in being. Professor Barton Leach characterizes the decision as "absurd." "This result will be considered a reflection on the practical wisdom of courts by all laymen and also by lawyers whose thinking is not dominated by the mystique of the Rule.[2] Editorialists of the California Law

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[1] Leach, "*Perpetuities in Perspective: Ending the Rule's Reign of Terror*," 65 Harv. L. Rev. 721 (1952). See Boyer, *Perpetuities Trend: "Wait and See," "Cy Pres," and Other Modifications*, in 5A R. Powell, The Law of Real Property § 827G at 75A-40 (rev. P. Rohan 1987) (Bibliography).

[2] Leach, *supra* note 1, at 1318.

Review termed the decision "a startling precedent."[3]

We are not dealing here with a contingent interest arising gratuitously from a bequest or a testamentary trust, or as a rider to a conveyance of some kind. The option in this case was negotiated at arm's length between knowledgeable and experienced real estate developers. Both had the benefit of competent legal counsel. More importantly, the appellant corporation, which, by this decision, is now freed of its obligations under the option, sought out the appellee to bargain for the agreement. The appellee, we are told, had an option from Kerr Properties on six acres on U.S. Highway I-30, a quarter of a mile from the tract now involved, with a major bank as lead tenant for part of that development. The appellant, in order to develop its own holdings adjacent to I-30, needed to acquire the tract held by the appellee to meet certain requirements of the Arkansas Highway Department for the construction of an exit ramp, essential to the plans of the appellant. Appellant's general partner approached appellee to release the Kerr option in exchange for the option now before us. Appellee agreed after considerable negotiations and the option agreement was signed by the appellee and the appellant. It called for a purchase price of as much as $40,000 per acre, depending on when the option was exercised.[4] In addition to the surrender of the Kerr option, appellee has paid appellant a total of $20,000 ($5,000 annually for 1981, 1982, 1983 and 1984) and $100 for 1985. The $100 due for 1986 was refused by appellant and appellee filed this suit for declaratory judgment and specific performance.

The agreement provides that the option would terminate if not exercised within ninety days after receipt of notice from the appellant that a building permit was available from the City of Little Rock. It is clear these parties assumed the conditions of the option would occur within a reasonable time. Neither had any other thought in mind, and some indication of the immediacy with which both sides regarded the agreement is evidenced by the

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[3] Note, *Rule against Perpetuities: Application to a Lease to Commence Upon Completion of a Building*, 47 Calif. L. Rev. 197 (1959).

[4] $30,000 per acre if exercised during 1981, $35,000 if exercised during 1982, $40,000 if exercised during 1983 or thereafter.

fact that this suit had been pending for a full year before it occurred to appellant to raise the issue of perpetuities as a defense. The principle of estoppel ought to apply to this situation, though I confess I find no precedent for that view.

In *Broach* v. *City of Hampton, supra*, we upheld an option given to the City of Hampton by Charles and Ann Broach to purchase all or any part of some forty acres of land sold to the Broaches by the city. The option made no attempt to comply with the Rule Against Perpetuities.[5] We hadn't the faintest knowledge of what the parties intended beyond the naked language of the option, yet here there is a wealth of testimony as to what was intended.

Granted, in *Broach* there was no provision that the option ran to the heirs or assignees of the optionees, whereas here the agreement contains a clause binding the heirs, successors and assigns of the parties. But we can infer that the parties in this case intended that this option, if not sooner exercised, would lapse within twenty-one years from the death of the appellee. In reality it would have been exercised or lapsed long before that. Such an interpretation would be entirely consistent with what was done in *Broach*, and would be in harmony with the rule that we strive to interpret instruments so as to sustain their validity rather than to render them void. Interpretations which sustain the validity of instruments are preferred over those which cause them to fail. J. Gray, *The Rule Against Perpetuities*, § 633 (1915); Boyer, *supra* § 811[6] at 75-22; *Roemhield* v. *Jones*, 239 F.2d 492 (8th Cir. 1957); *Campbell* v. *Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950), cited with favor in *Broach*.

Furthermore, such an interpretation has support in a growing trend of cases to use less rigidity in the application of the Rule. A number of states, perhaps ten in all, in an effort to relieve the harsh effects of the Rule, have adopted a "wait-and-see" approach. Its policy is not to alter the length of the period of perpetuities, but to provide that the interest shall be valid if it does in fact vest within the Rule rather than be void if it *might* possibly

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[5] The option was given to the city without limitation to buy "all or any part of the above-described 43.15 acre tract that [it] might use *in the future* for the city sewer system." [Our italics].

vest outside the Rule. The Rule itself remains unchanged. *See* Dukeminier, *A Modern Guide to Perpetuities*, 74 Calif. L. Rev. 1867 (1986).

Another innovation employs the doctrine of cy pres, which authorizes judicial reform of an instrument that violates the Rule. *See* Boyer, *supra*, § 827 A. Some states use a combination of the two. *Id.* § 827 C. The American Law Institute in 1978 adopted a form of both. *Restatement (Second) of Property*, § 1.5 (1983); Jacobs, *Rule Against Perpetuities*, 19 Santa Clara L. Rev. 1063.

By whatever labels, or by none at all, other courts have followed the lead of California in *Wong* v. *DiGrazia*, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963), where the court was willing to look below the surface of an agreement such as the one before us, and determine from a considered, practical standpoint that today's sophisticated, arms-length commercial real estate transactions ought not to be examined vis-a-vis the Rule Against Perpetuities in the same light as family dispositions of property, which spawned the Rule. *See Rodin* v. *Merritt*, 48 N.C. App. 64, 268 S.E.2d 539 (1980); *Ryland Group, Inc.* v. *Wills*, 229 Va. 459, 331 S.E.2d 399 (1985). Still others have followed *Wong* in cases where there was *no* commercial setting, but rather, the courts made use of *Wong's* emphasis on the intent of the parties. *See, Byke Const. Co., Inc.* v. *Miller*, 140 Ariz. 57, 680 P.2d 193 (1984); *Smerchek* v. *Hamilton*, 4 Kan. App. 2d 346, 606 P.2d 491 (1980).

The case against applying the Rule to options was summed up recently by Prof. Dukeminier, Professor of Law at the University of California:

> Subjecting options to the Rule Against Perpetuities has been sharply criticized. Applying the Rule to options permits optionors to escape bad bargains when the land value rises by claiming a Rule violation, and subjects lawyers who draft options to malpractice claims if they do not limit the option's exercise to the perpetuities period. Because options are commercial transactions, they seldom endure, or are intended to endure, for many years. Options reasonably limited in time pose no threat to the public welfare; in fact, they are useful in facilitating the development of land. No good reason appears why a court should

> not save an unlimited option to purchase by holding that the parties intended the option to be exercised within a reasonable time, which is necessarily less than twenty-one years.
>
> Dukeminier, *supra*, at 1909.

We should, I believe, construe the agreement as the parties themselves undeniably contemplated and intended, that the option would either be exercised or would lapse within a reasonable time. By so doing we would effectuate the agreement and avoid a construction which violates the Rule.

The rule of property, cited by the majority, has little relevance to this case as I see it. It could hardly be supposed the rule of property gives a party the right to pursue and obtain an option agreement, reap the benefits derived from it, and then successfully repudiate it on the premise that the other party failed to include a provision on the Rule Against Perpetuities. For obvious reasons, the appellant made no such contention here or below.

HICKMAN, J., joins.

PURTLE, J., not participating.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING JUNE 6, 1988

750 S.W.2d 411

ROBERT H. DUDLEY, Justice. On rehearing, the petitioner contends that the respondent, Otter Creek Development Company, received payments under the terms of an option, and therefore, should not be allowed to assert that the option violated the rule against perpetuities. The contention is without merit. After the respondent refused to accept an option payment, the petitioner filed a suit seeking a judgment declaring that the option

was valid. The respondent answered that the option was void because it violated the rule against perpetuities. The respondent may properly assert such a defense. When a deed is invalid because it is contrary to public policy, and therefore void, the grantor is not estopped to assert its invalidity. *Chase* v. *Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890); 28 Am. Jur. 2d *Estoppel and Waiver* § 7 (1966).

Petition denied.

PURTLE, J., not participating.

HICKMAN and HAYS, JJ., would grant.

DARRELL HICKMAN, Justice, dissenting. This case was not about the rule against perpetuities. It was about the conduct of one of the partners and whether he could bind the other partners by his actions.

As a "throw away" argument, the appellant said the agreement violated the rule against perpetuities. Both parties treated this argument perfunctorily in their briefs. However, the majority found the technical legal argument appealing and went off down a false path, ignoring what this case was really about.

The trial court quickly saw through this legal smoke screen and held that the appellants were estopped to void this document, as they should be, having accepted the benefits from it.

The majority did not deal with the estoppel question in its first opinion and does so only indirectly on rehearing. We cannot reverse this trial court's finding regarding estoppel unless we find it was clearly wrong, because it entailed factual findings. *See* 31 C.J.S. *Estoppel* § 163 (1964); *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Jones* v. *Burks*, 110 Ark. 108, 161 S.W. 177 (1913); *Lary* v. *Young*, 13 Ark. 401 (1853); *see also* A.R.C.P. Rule 52(a).

The case of *Chase* v. *Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890), cited in the majority opinion on rehearing, is not on point or controlling.

This case was incorrectly decided and I would grant the rehearing.

Barbara McKENZIE *v.* TOM GIBSON FORD, INC.

87-363 749 S.W.2d 653

Supreme Court of Arkansas
Opinion delivered May 2, 1988

Jimmie G. Dunlap, for appellant.

Rieves & Mayton, by: *Elton A. Rieves IV*, for appellee.

STEELE HAYS, Justice. Barbara McKenzie filed this action for conversion against Tom Gibson Ford, Inc., claiming compensatory and punitive damages for the alleged conversion of a check for $500 intended as a down payment on the purchase of a truck. At the close of Ms. McKenzie's case, Gibson asked for a directed verdict on the grounds that Ms. McKenzie had failed to make a prima facie showing of conversion, had failed to prove conduct by

Gibson which would entitle her to punitive damages and had failed to show that she suffered compensatory damages. The motion was denied, but at the close of the case, Gibson renewed its motion, and a directed verdict for the defendant was granted.

Ms. McKenzie has appealed, alleging three points of error: 1) The trial court erred in directing a verdict in favor of Gibson on the issue of damages; 2) the trial court erred in directing a verdict on the issue of punitive damages; and 3) the trial court erred in denying a motion in limine. We agree with the first two points.

Stating the facts most favorably to Ms. McKenzie, against whom the verdict was directed, in January, 1986, she visited Tom Gibson Ford as a prospective purchaser. The truck she liked had been sold but a salesman, Mr. Graham, offered to find one to her liking and he took a credit application and a check for $500 as "earnest money" to serve as a down payment. The understanding was that Ms. McKenzie's check would be returned to her "if the deal fell through."

A few days later Mr. Graham called Ms. McKenzie to tell her she would need $1,500 rather than $500 as a down payment and after thinking it over a day or two she decided to look elsewhere. She asked that her check be returned and Mr. Graham promised to mail it that day.

When the check was not forthcoming Ms. McKenzie inquired at her bank and discovered that the check had been presented and paid to Ford Motor Credit Company and applied to an account of her son, whose note she had co-signed. One of the installments was some fourteen days delinquent at that point in time.

Ms. McKenzie testified she contacted Mr. Graham and Mr. Murray, the credit manager. She said she was treated rudely and her requests for assistance in recovering her $500 were rejected. She was told, she said, to get herself a lawyer and Mr. Murray suggested to her that her son had intercepted the check and delivered it to Ford Motor Credit. This testimony was disputed by Messrs. Graham and Murray. Mr. Graham insisted he mailed

the check to Ms. McKenzie. Neither witness had any explanation for how the check came into the hands of Ford Motor Credit. When Gibson refused to refund her deposit, Ms. McKenzie filed suit for conversion seeking compensatory and punitive damages.

I

The Directed Verdict on Compensatory Damages

Before dealing with the merits of Point I, we must dispense with a contention by Gibson that Ms. McKenzie has failed to assign error to the directed verdict on the issue of conversion. The problem exists, we believe, because it is not at all clear whether the trial court in the end was ruling that the plaintiff had failed to prove conversion or, having proved conversion, failed to prove that she was legally damaged as a result. At the close of the plaintiff's case the trial court properly denied a motion for a directed verdict on the issue of conversion and at the close of the defendant's case the motion was renewed. During a lengthy discussion the trial court clearly recognized that a factual issue existed as to conversion. He ruled unequivocally on the matter of punitive damages, but never clearly on conversion, and we resolve that doubt in favor of the party against whom the verdict was directed. There is no indication the appellee has been misled by the appellant's points of error and we are unwilling to rule on an ambiguous record that Ms. McKenzie has abandoned the issue of conversion, which would render the appeal meaningless.

The motion for a directed verdict was grounded on an absence of proof that Gibson converted Ms. McKenzie's funds to its own use. It is not essential to conversion that it be for the use of the alleged converter. Conversion is any distinct act of dominion wrongfully exerted over property in denial of, or inconsistent with, the owner's right. *First National Bank of Brinkley* v. *Frey*, 282 Ark. 339, 668 S.W.2d 533 (1984); *Thomas* v. *Westbrook*, 206 Ark. 841, 177 S.W.2d 931 (1949). "The conversion need not be a manual taking *or for the defendant's use*: if the defendant exercises control over the goods in exclusion, or defiance, of the

plaintiff's right, it is a conversion, *whether it is for his own use or another's use.*" (Our italics). *Big A Warehouse Distributors, Inc.* v. *Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986). "Perhaps the most common way in which conversion is committed is by an unauthorized transfer or disposal of possession of the goods to one who is not entitled to them." *Prosser and Keeton on the Law of Torts*, 5th Edition § 15 p. 92.

Gibson Ford maintains that because the $500 check was applied to the reduction of an indebtedness for which Ms. McKenzie was liable, she sustained no damage as a matter of law. We reject the proposition. Certainly, as the trial court observed, there was a factual dispute as to whether Gibson returned Ms. McKenzie's check to her or delivered it to Ford Motor Credit and that issue was for the jury to settle. We need not decide whether Ms. McKenzie's liability to Ford Motor Credit Company was as a borrower or a guarantor, as in either event, Gibson had no right to deliver her check to Ford Credit in direct violation of the understanding that the check would be returned to her. Gibson has produced no authority supporting the premise that a tortfeasor can escape liability as a converter because the proceeds of his conversion are disposed of in a manner that may ultimately benefit the owner.

We believe the weight of authority is to the contrary and is in accord with our holding in *Roach* v. *Rector*, 93 Ark. 521, 123 S.W. 399 (1909). There, Roach, a creditor of Rector, converted goods belonging to Rector, sold them and applied the proceeds to Rector's indebtedness. On appeal we affirmed a judgment for Rector for conversion, holding that the creditor's action was impermissible, her recourse being by legal process rather than the commission of a tort.

The exclusive right of an owner of property to decide how he will allocate his funds among obligees was expressed cogently in the early case of *Northrup* v. *McGill*, 27 Mich. 234 (1873), cited by *Roach* v. *Rector*, *supra*, and more recently by a California appellate court, *Dakota Gardens Apt. Investors* v. *Pudwill*, 142 Cal. Reptr. 126, 75 Cal. App. 3d 346 (1977):

> In general, when there is no fraud, and when the law does not forbid, a man may dispose of his own property according to his own ideas of propriety. If he is indebted by note to different parties, he may apply his property to the payment of one, and refuse to apply it to the payment of another, and he may lawfully discriminate in this way, though in doing so he ignores the stronger moral claim resting upon him. This results from the supreme dominion which is involved in the absolute ownership of property.

Nor do we regard *Roach* v. *Rector* and the case at bar as distinguishable because Roach was a creditor, whereas Gibson was not. If a creditor cannot escape liability for conversion by applying the proceeds to reduce the indebtedness of the owner, we can see no rational reason why Gibson is entitled to greater deference under the law than a creditor. For that matter, Gibson was not disinterested in the indebtedness to Ford Motor Credit involving Ms. McKenzie's son, as Ford Motor Credit had the right of recourse against Gibson in the event of default.

II

The Directed Verdict on Punitive Damages

Tom Gibson Ford submits that the recovery of punitive damages is dependent on proof that it intentionally converted Ms. McKenzie's money, and, it claims, the record is devoid of evidence that Gibson intentionally gave her check to Ford Motor Credit. *Oaklawn Bank* v. *Baldwin*, 289 Ark. 79, 709 S.W.2d 91 (1986). But there was evidence that a check in the possession of Tom Gibson Ford came into the hands of Ford Motor Credit Company and the jury could infer that the delivery to Ford Motor Credit was deliberate. That being so, it was for the jury to decide whether punitive damages should be awarded. *Shepherd* v. *Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987); *Williams* v. *O'Neal Ford, Inc.*, 282 Ark. 362, 668 S.W.2d 545 (1984); *Olson* v. *Riddle*, 280 Ark. 535, 659 S.W.2d 759 (1983). *Ford Motor Credit Company* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979). There was also testimony that Gibson refused Ms. McKenzie's request for assistance in recovering her money, which, if believed by the jury, would support a conclusion that the

check was deliberately delivered to Ford Motor Credit. It was, therefore, error to direct a verdict on the issue of punitive damages.

III

Motion In Limine

Finally, Ms. McKenzie relies on A.R.E. Rule 408 in contending it was error for the trial court to deny a motion in limine to prevent the introduction of proof that approximately five months after the complaint was filed, Tom Gibson Ford asked Ford Motor Credit to refund Ms. McKenzie's check for $500, that Ford Motor Credit sent Gibson a check for $500 which was forwarded to Ms. McKenzie's counsel but was refused. The trial court first upheld the motion but later denied it and permitted the proof to come in over objection.

The law generally permits the evidence of a return of the property to its owner in mitigation of damages for conversion, but only when certain circumstances are present. For one thing, the owner must have accepted the return of the goods [*Plummer* v. *Reevers*, 83 Ark. 10, 102 S.W. 376 (1907); *Norman* v. *Rogers*, 29 Ark. 365 (1874)], whereas the tender was rejected in this case. Also the original conversion must have occurred by mistake, (*Restatement of Torts*, 2d § 922) and the return must occur promptly after discovery of the mistake, (*id.*) and before the commencement of an action for conversion (18 Am.Jur.2d, *Conversion* § 126, p. 236).

Tom Gibson Ford argues such evidence is admissible under Rule 408 if offered "for another purpose, such as proving bias, or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Among the reasons given by Gibson to support introduction was that the evidence showed a lack of intentional, willful or wanton conduct, a factor relevant to the issue of punitive damages.

A.R.E. Rule 408 is not a blanket prohibition against the admission of all evidence concerning offers to compromise. The rule prohibits the introduction of such evidence when the evidence is offered to prove "liability for, invalidity of, or amount

of the claim or any other claim." It does not prohibit such evidence when introduced for any other reason. *Cf.* 2 D. Louisell & C. Mueller, *Federal Evidence* §§ 170, 172 (discussing Fed. R. Evid. 408, which contains language very similar to that of our rule). Since this evidence was offered for a purpose other than those prohibited, Rule 408 does bar its introduction. That does not mean that the evidence is automatically admissible. Relevance must still be determined under A.R.E. Rule 401 and admissibility under A.R.E. Rules 402 and 403. *Cf.* 2 D. Louisell & C. Mueller, *supra*, § 172 (discussing the similar federal rules). Here, as we have noted, the offer occurred after the institution of the suit, a factor which brings it under suspicion. If this were a review *de novo*, perhaps we should rule under these facts the probative value was so minimal that it was substantially outweighed by the danger of unfair prejudice, and the evidence should have been excluded under Rule 403. However, "[t]he balancing of probative value against prejudice is a matter left to the sound discretion of the trial judge and his decision on such a matter will not be reversed absent a manifest abuse of that discretion." *Wood* v. *State*, 20 Ark. App. 61, 65-66, 724 S.W.2d 183, 185 (1987).

REVERSED and REMANDED.

CITY OF BRYANT *v.* SPRINGHILL WATER AND SEWER SERVICES, INC., Randy Oberlag and Minanur Rahman and First Commercial Bank

87-251 749 S.W.2d 295

Supreme Court of Arkansas
Opinion delivered May 2, 1988
[Supplemental Opinion on Denial of Rehearing June 6, 1988.*]

*Holt, C.J., and Hickman, J., concur on rehearing.

Richard A. Garrett, for appellant.

Kaplan, Brewer & Miller, P.A., by: *Philip E. Kaplan* and *Silas H. Brewer, Jr.*, for appellee.

DAVID NEWBERN, Justice. The appellant, City of Bryant, brought a condemnation action to obtain a utility, appellee Springhill Water and Sewer Services, Inc., a water and sewer system operated in a city subdivision. The company was owned by appellees Randy Oberlag and Minanur Rahman. Appellee First Commercial Bank held a mortgage. Oberlag and Rahman purchased the utility in 1983 from a bankruptcy trustee for $80,000, some of which was refunded, making their effective cost $54,675. The city filed the action in July, 1986, and deposited $3,000 with the court as prospective compensation, later raising the amount to $10,000. The court entered an order putting the city in possession of the utility on July 17, 1986. The bank became a party, seeking foreclosure of its mortgage. The court then ordered the city to deposit $85,000. The money was not deposited. The parties stipulated that the bank was entitled to recover the mortgage obligation from the condemnation proceeds. The bank is thus not a party to the appeal. The city moved to dismiss the action on December 8, 1986, ten days before the compensation issue was to be tried. The motion was denied. The jury awarded Oberlag and Rahman $350,000 for the utility and $25,000 for accompanying real property which was taken. A judgment was entered in favor of Oberlag and Rahman for those amounts less the $10,000 on deposit and the bank's interest of $61,249.39. We reverse the judgment because the city's motion to dismiss should have been granted to the extent of allowing it to abandon the condemnation.

In *Selle* v. *City of Fayetteville*, 207 Ark. 966, 184 S.W.2d 58 (1944), we considered the questions whether, when, and upon

what conditions a condemnation proceeding may be abandoned. We held it was proper for the trial court to have dismissed the City of Fayetteville's proceeding to condemn land for use as an airport, recognizing the general rule that, absent a statute providing for abandonment, the condemning authority may withdraw anytime "before the rights of the parties have become reciprocally vested." According to a statute, now codified as Ark. Code Ann. § 14-360-102(b) (1987), the city was to use the procedure applicable to condemnations by railroad companies, now codified at Ark. Code Ann. §§ 18-15-1201 through 18-15-1207 (1987). Section 18-15-1207 provides that if payment has not been made for the condemned property within thirty days after assessment, the railroad company forfeits its rights in the premises. Based on that section, we held that the City of Fayetteville had an option to abandon its condemnation action anytime before it paid and up until thirty days after the court had assessed the value of the land to be taken.

Our holding in the *Selle* case does not apply here, as neither the statutes permitting the exercise of eminent domain by a municipality, Ark. Code Ann. §§ 18-15-301 through 18-15-308 (1987), nor the statutes specifically permitting a city waterworks authority to condemn a property for use as a waterworks, Ark. Code Ann. §§ 18-15-401 through 18-15-410 (1987), refer to the railroad condemnation statutes or any other procedure. We thus cannot apply the conclusion reached in the *Selle* case that the city has up until thirty days after the award to abandon the condemnation. Obiter dictum in the opinion is, however, persuasive and useful in deciding the case before us now.

Our discussion of the general "reciprocal vesting" rule in the *Selle* case included references to "the majority . . . holding that the rights of the parties are not vested until the amount of the award is paid, or the land is taken, while in some jurisdictions the confirmation of the award by the court vests the rights of the parties and precludes discontinuance." 207 Ark. at 970, 184 S.W.2d at 61. We held in *Rowley* v. *Arkansas State Highway Commission*, 242 Ark. 419, 413 S.W.2d 876 (1967), that the highway department could not amend its condemnation complaint to seek less land than originally sought because a statute, now codified as Ark. Code Ann. § 27-67-315 (1987), provided, "Immediately upon the making of the deposit provided for . . .

title to said lands in fee simple . . . *shall* vest in the persons entitled thereto. . . . (Emphasis by the court.)" Thus, as had been suggested in the *Selle* case, we regarded the title-vesting point as the point of no return.

The statute dealing with condemnation of waterworks property by a municipal authority, Ark. Code Ann. § 18-15-404 (1987), provides:

> (a) At the trial of the cause, a jury shall assess the amount of damages the applicant shall pay for the property taken in the proceedings.
>
> (b) Thereafter, a judgment shall be entered stating that *title* to the property *shall vest* in the applicant *upon payment* to the clerk of the court *of* the amount of *damages so assessed.* (Emphasis supplied.)

. . .

Given the fact that there had been no "reciprocal" or other vesting of title at the time the city sought to dismiss its condemnation proceeding, the dismissal of the city's condemnation claim should have been allowed, but the court should have retained jurisdiction of the matter to consider damages to compensate the appellees for the temporary deprivation of their property. In the *Selle* case we wrote:

> Now while the authority to dismiss such proceedings exists until the rights of the parties have reciprocally vested, . . . the condemnor is liable for any damages occasioned by the deprivation of any use of the land to which it would prudently have been put, . . . until the notice is given that it [the "option" to take] will not be exercised. [207 Ark. at 971, 184 S.W.2d at 61]

We remand the case to the trial court for orders consistent with this option.

Reversed and remanded.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I would reverse the

decision for other reasons, but I would not allow the city to dismiss its action after it had taken the property.

The power of eminent domain is awesome. Private property owners who have been subjected to the arbitrary and often abusive use of this power can attest to that. The courts have always liberally interpreted the law to favor the use of that power. Abuses of the power are often overlooked in the name of "progress," or some other misguided concept of our society. *Columbia County Rural Development Authority and the City of Magnolia, Arkansas* v. *Hudgens,* 283 Ark. 415, 678 S.W.2d 324 (1984); *Young* v. *Energy Transp. Systems Inc. of Ark.*, 278 Ark. 146, 644 S.W.2d 266 (1983); *Neisen* v. *Carroll Electric Corp.*, 264 Ark. 881, 575 S.W.2d 686 (1979).

Taking property is one thing. Now the majority has liberally interpreted the law to allow a government agency to cancel a taking of property after it has realized it might be costly and a jury of fairminded men would decide the value of the property. I would not liberally interpret the law to favor such an abusive use of the power.

Surely attorney's fees will be a part of the damages suffered by these property owners because of the wrongful use of the power of eminent domain.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING JUNE 6, 1988

750 S.W.2d 61

DAVID NEWBERN, Justice. The appellees seek rehearing on the ground that our opinion fails to follow *Missouri Pacific Ry. Co.* v. *Huggins*, 253 Ark. 309, 485 S.W.2d 723 (1972), which the appellees cited in their brief. They contend that we have overruled that case without citation or discussion of it.

In the *Huggins* case, the railroad instituted condemnation proceedings against land adjacent to its right-of-way for the purpose of removing a large protruding rock which threatened to fall on the right-of-way. After the order of entry, the railroad entered the land and removed the rock. It then sought to dismiss the condemnation proceedings subject to any damages the landowner had sustained. We wrote:

> We hold that when a railroad posts bond, obtains an order of taking, enters upon the property and completes its work, it is obligated to pay just compensation based upon the difference in fair market value before and after the taking. This is based on the rule that fundamental fairness dictates that there should be a point at which the railroad cannot turn back and escape the payment of full compensation based on a taking. [Citations omitted].

We did not cite the case because we regard it as unique and, like *Selle* v. *City of Fayetteville*, 207 Ark. 966, 184 S.W.2d 58 (1944), which we cited for general language but carefully distinguished, the *Huggins* case is one to which the railroad condemnation statutes would apply rather than the waterworks condemnation statutes. We noted in the *Huggins* case that the condemnation proceedings there were to add the land on which the rock was situated to the railroad right-of-way, and that the damages were to be "based upon" the difference in the value before and after the right-of-way taking as opposed to the market value of the land taken. The fee title to the land was apparently not to change hands. There was not to be a "reciprocal vesting" of fee title at any point. The railroad had entered the land and "complet[ed] its work." Unlike this case, there was nothing for the railroad to give back to the owner of the property upon the

abandonment of the condemnation proceeding. The railroad's purpose in obtaining right-of-way had been completely accomplished. Had the railroad succeeded in dismissing the condemnation proceeding, it would have, in effect, obtained its right-of-way, having to pay only the difference in the value of the land before and after removal of the rock rather than the difference in value "based on" a taking. The same "fundamental fairness" considerations would apply here, if the situation were the same, but it is not. The *Huggins* case has not been overruled.

Rehearing denied.

HOLT, C.J., and HICKMAN, J., concur.

DARRELL HICKMAN, Justice, concurring. The appellees on rehearing have prompted the majority to expand its decision justifying the city's action in withdrawing from its abusive use of the power of eminent domain.

Each generation of judges has taken the side of government over that of the individual owner of private property, forgetting that as time goes on exploitation of land and property by the government and its agencies should stop.

In this case the city took the water company, fired its employees, ran the water works for five months, and then walked out. Fairness under our decision in *Missouri Pacific Railroad Co. v. Huggins*, 253 Ark. 309, 485 S.W.2d 723 (1972), dictates that we not permit the city to cancel the taking.

HOLT, C.J., joins the concurrence.

James Dean GAGE *v.* STATE of Arkansas

CR 87-215 748 S.W.2d 351

Supreme Court of Arkansas
Opinion delivered May 2, 1988

Phil Barton, for appellant.

Steve Clark, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, James Dean Gage, was convicted on two counts of sale of marijuana and one count each of possession of marijuana with intent to deliver, possession of methamphetamine with intent to deliver, and being a felon in possession of a firearm. He was sentenced as an habitual offender to 37 years imprisonment. His sole argument is that a witness was allowed to give hearsay evidence against him. We conclude that even if the evidence in question were hearsay, it would not justify reversal of the conviction in view of the overwhelming evidence of guilt.

An undercover state police investigator testified he purchased marijuana from Gage on two occasions at Gage's residence. The Sevier County Sheriff testified he and other officers went to the Gage residence with a search warrant. They searched the house and found there the drugs and firearms which were seized. Gage and a woman were at the house when the search took place. The state produced some 74 exhibits including the drugs mentioned above, various containers and drug paraphernalia, weapons such as brass knuckles and numb chucks, and a number of rifles and pistols which, with the exception of one pistol, were loaded when found, and extra ammunition. Gage did not challenge the introduction of these exhibits except to ask chain of custody questions on cross-examination.

The alleged hearsay occurred when the sheriff testified on redirect examination that when the officers were on their way to Gage's house to execute the search warrant they stopped a truck and found a person in the truck in possession of drugs. The sheriff testified the occupants of the truck had been to Gage's house just

before the truck was stopped. On cross-examination, the sheriff was asked if he had learned the truck was coming from Gage's residence from someone other than Gage, and he said he had. Gage's counsel asked that this testimony of the sheriff be stricken as hearsay.

We will bypass the state's argument that the statement was not hearsay, that if error occurred it was invited, and that there was no timely objection. We need not consider these arguments because the other evidence against Gage was so overwhelming, and we have held that even an error of constitutional proportions will not require reversal if it is harmless beyond a reasonable doubt. *Thomas* v. *State*, 289 Ark. 72, 709 S.W.2d 83 (1986). Gage has not demonstrated that, given error in the admission of the testimony, prejudice resulted, in view of the overwhelming nature of the other evidence against him. *See Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied*, 108 S. Ct. 202 (1987); *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The recent cure-all theory that "the evidence of guilt is overwhelming" is a blight and parasite on the laws and the Constitution. In street language it is a "cop-out." It is a cancer which should be exorcised here and now. It is a step away from our traditional claim to be a nation of laws.

This dissent is not entirely triggered by this particular decision. In fact the majority opinion relies upon the case of *Thomas* v. *State*, 289 Ark. 72, 709 S.W.2d 83 (1986) stating: "We need not consider these arguments because the other evidence against Gage was so overwhelming, and we have held that even an error of constitutional proportions will not require reversal if it is harmless beyond a reasonable doubt." It is this cavalier attitude which troubles me. Somehow this attitude seems to ignore the constitutional and statutory rights of an accused.

I realize there is another side to every argument. In this case the other side, is no doubt, judicial economy and costs to the state. The simple answer to that argument is to do it right in the first place. If a trial is conducted correctly (I do not mean perfectly), there is no waste of taxpayers' money or judicial resources, and,

most importantly, no excuse to utter the hollow words — "the evidence of guilt is overwhelming."

An error as serious as a confession obtained by chicanery or even torture could be ignored under this theory. Constitutional rights are admittedly ignored by the courts if in the opinion of the court (serving as super-jurors) the accused is guilty. Indeed a society that trades a little liberty for a little order will deserve neither and will lose both.

I almost forgot to mention the point which I consider reversible error. The sheriff gave hearsay and conclusory testimony that the sheriff's department had found drugs in a vehicle which was coming from the appellant's house. The sheriff had no personal knowledge that the vehicle had in fact even been at the appellant's house. It was coming from the direction of the appellant's residence and the vehicle had drugs in it. That is all the sheriff should have been allowed to state. The testimony as given leads to but one conclusion — the sheriff, no doubt an influential man, believed the appellant sold these drugs.

How can anyone be so certain that the jury might not have reached a different result had they not had the sheriff's opinion before them that the appellant had indeed sold these drugs? Without this opinion the sheriff's testimony would have essentially been that he went directly to the appellant's residence where he found neither marijuana growing nor drugs being manufactured, and that he did not know if the vehicle in which the drugs were found had even been to the appellant's house. This latter version might have had a real impact on jury deliberation. Certainly the proper testimony would have been less harmful and would not have ignored the law.

So long as we label defects in trials as "harmless constitutional error," there is no incentive on the part of the state or the courts to follow the law or rules of evidence. Unless we insist on at least substantial compliance with the law and the rules, we might as well consider them to be mere guidelines which should be followed during the trial, unless the court or the state thinks it is too much trouble.

This case should be reversed and remanded for a trial which is conducted in accordance with the applicable law and rules.

Lonnie MITCHELL *v.* STATE of Arkansas

CR 87-155 750 S.W.2d 936

Supreme Court of Arkansas
Opinion delivered May 2, 1988

[redacted]

Shermer & Walker, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

DAVID NEWBERN, Justice. The appellant, Lonnie Mitchell, was convicted of kidnapping, rape, and battery resulting from a single incident. He received separate life sentences on the kidnapping and rape convictions and thirty years imprisonment on the battery conviction. We must reverse the convictions because of error which occurred in the selection of the jury. We will address some of the other points raised for reversal in case they arise upon retrial.

The victim was a young white female who testified that, while driving her car home from her boyfriend's apartment at 2:30 a.m. on June 4, 1986, she heard a call for help from the vicinity of a car that appeared to be stuck in a ditch. She stopped, thinking someone might have been hurt. A person she later identified as Mitchell, a black man eighteen years old at the time, approached her and asked her to use her car to pull his from the ditch. She declined but offered to take him to the police station. He refused that offer, but he got in her car, after reaching through the open window to unlock the door, and gave the victim directions supposedly to the place where he lived. They wound up in a cul-de-sac behind a grocery store where he asked her to engage in sexual intercourse with him. She refused, and he then brutally beat and raped her.

1. Jury selection

In the process of selecting the petit jury, the sole black venireman, Roger Petty, was questioned as follows:

> BY MR. BYNUM: Mr. Petty, my name is John Bynum and I'm the Prosecuting Attorney. Where are you employed, please sir?
>
> BY MR. PETTY: Arkansas Power and Light.
>
> BY MR. BYNUM: The Defendant in this case is charged with the crimes of rape, kidnapping and first

degree battery. The maximum punishment for rape is life in the penitentiary. Do you think that's too severe a punishment?

BY MR. PETTY: No.

BY MR. BYNUM: The maximum punishment for kidnapping is life in the penitentiary. Do you think that's too severe a punishment?

BY MR. PETTY: No.

BY MR. BYNUM: The punishment for first degree battery is a term of years in the penitentiary. Does that give you any problems?

BY MR. PETTY: Huh, um.

BY MR. BYNUM: Now, Mr. Petty, if you are selected as a member of this Jury and you are satisfied beyond a reasonable doubt that the Defendant committed one or more of these offenses, could you and would you find him guilty?

BY MR. PETTY: I could.

BY MR. BYNUM: Well, would you?

BY MR. PETTY: If I'm selected?

BY MR. BYNUM: And, you are satisfied beyond a reasonable doubt.

BY MR. PETTY: Without a reasonable doubt, yes, I could.

BY MR. BYNUM: And, having done that could you and would you consider sending him to the penitentiary?

BY MR. PETTY: Yes, I could.

BY MR. BYNUM: Well, would you consider that?

BY MR. PETTY: Yes.

BY MR. BYNUM: All right. Now, Mr. Petty, have you read anything in the newspaper or heard anything about this case on the radio?

BY MR. PETTY: No, I haven't.

BY MR. BYNUM: Do you know anything at all about it?

BY MR. PETTY: No, I don't because like I said I haven't read anything about it.

BY MR. BYNUM: Do you have an opinion at this point as to whether or not the Defendant is guilty or is your mind still open on that point?

BY MR. PETTY: My mind is open until I find out the facts.

BY MR. BYNUM: Now, Mr. Petty, if you are selected as a member of this Jury Panel, could you decide the case solely on the basis of the facts that you hear in the Courtroom and the law that the Judge instructs you?

BY MR. PETTY: Yes, I could do that.

BY MR. BYNUM: Okay. Do you think you could give the Defendant a fair trial?

BY MR. PETTY: Yes.

BY MR. BYNUM: Do you think you can give the State a fair trial?

BY MR. PETTY: Yes, I do.

At that point, the inquiry turned to racially oriented questions and was as follows:

BY MR. BYNUM: Now, it is obvious that the Defendant is black in this case and you are also black. Is that going to give you any problem sitting in judgment on a black man who is alleged to have had sexual intercourse with a white woman?

BY MR. PETTY: No.

BY MR. BYNUM: Do you think that will bother you any? Would there be any pressure on you to find this man not guilty because he's black and because you're black.

BY MR. PETTY: No.

BY MR. BYNUM: Do you know any reason why you can't serve as a member of this Jury Panel?

BY MR. PETTY: No.

BY MR. BYNUM: Pass the witness.

Thereafter, defense counsel asked some questions as follows:

BY THE COURT: Ms. Walker.

BY MS. WALKER: Mr. Petty, if you were on trial today and I was picking a jury for you, do you think you would have the frame of mind that you would want your Jury to have if you were in Lonnie's shoes? Do you understand what I am saying?

BY MR. PETTY: No.

BY MS. WALKER: Let me say it again. If you were on trial today, instead of Lonnie, and I was picking a jury for you, do you think you would have the openness or the frame of mind that you would want a Jury to have for your case?

BY MR. PETTY: Yes, I do.

. . .

BY MS. WALKER: I don't have any further questions.

Then the following occurred:

BY THE COURT: What says the State?

BY MR. BYNUM: The State will excuse Mr. Petty.

BY THE COURT: Mr. Petty, you've been excused. You're free to go. Thank you.

BY MR. BYNUM: Your Honor, may I state into the record the reason I excused Mr. Petty? I think it may be necessary to do that. I excused Mr. Petty because judging from his demeanor and the manner in which he answered the questions I'm convinced that he was not being truthful and candid in his responses to the questions that I asked him. That's the reason I excused him.

BY MS. WALKER: Your Honor, I would like in the record that I felt Mr. Bynum was harder on the Juror than he was the other Jurors in his questioning and in his demeanor and he perhaps made the Juror a little more defensive because of his demeanor.

BY MR. BYNUM: Well, that's my prerogative.

BY MR. SHERMER: [Defense counsel] Your Honor, we'd like to put in the record also that I believe it's error. I believe he's the only black on this Jury Panel and for the Prosecutor, for no better reason than that, to exclude him I think was improper.

BY THE COURT: I think it has to be shown that it was based solely on race and for no other reason; and Mr. Bynum has stated his reasons.

BY MR. BYNUM: I think my reason is perfectly justifiable, not being truthful and honest and not being candid in his answers that he gave.

BY MR. SHERMER: Just note our exceptions.

BY THE COURT: All right.

Mitchell contends that the exclusion of the only black juror, leaving an all-white panel, made a prima facie case of discrimination and that the action of the trial court did not rise to the level of a "sensitive inquiry" in these circumstances as is required by the Supreme Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and ours in *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987). In response, the state's brief argues that the trial judge was unconvinced there was discrimination and that the prosecutor "stated his reasons" for excusing Petty. *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984), is cited for the proposition that the trial judge is better able to weigh the demeanor of a prospective juror and thus may exercise his discretion in jury selection. While we agree with that general proposition and the applicability of it in cases like the *Linell* case where the question was whether a juror should have been dismissed for cause, the record here does not show that the trial court made the kind of evaluation, required by the *Batson* and *Ward* cases, of the prosecution's use of its peremptory challenge.

In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the Supreme Court held that, to succeed, an allegation of racial discrimination in jury selection must be based upon a "pattern" of discriminatory use of peremptory challenges established by reference to several cases. That holding was superseded by the decision in the *Batson* case in which the Supreme Court found that the old test placed a "crippling burden of proof" on a defendant, thus effectively placing the prosecution's peremptory challenges beyond scrutiny. The Supreme Court recognized that "[a] single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions," quoting from *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, at 266, n. 15 (1977), which involved selection of the venire.

In the *Ward* case we summarized the constitutional test applied in the *Batson* decision as follows:

> In *Batson*, the court held that a defendant who could make a *prima facie* case of purposeful discrimination shifts the burden to the state to prove the exclusion of jurors is not based on race. This *prima facie* case may be made by "showing that the totality of the relevent facts gives rise to an inference of discriminatory purpose." Another way is to demonstrate 'total or seriously disproportionate exclusion of Negroes from jury venires.' Another example for making a *prima facie* case is by showing a "pattern" of strikes, or questions and statements by a prosecuting attorney during *voir dire*. [293 at 92-93, 733 S.W.2d at 730]

Mitchell made a prima facie case of discrimination in the prosecution's use of its peremptory challenge to remove the only black prospective juror after questioning him closely on whether his race would affect his vote. Absent inquiry by the court, we have before us no factual determination whether the prosecutor was assuming Mr. Petty could not withstand the racial pressures and thus assuming he could not have been answering truthfully on that subject. The court has a duty to go beyond the prosecutor's explanation and make a "sincere and reasoned" effort to evaluate its genuineness and sufficiency "in the light of all the circumstances of the trial." *People* v. *Turner*, 230 Cal.

Rptr. 656, 726 P.2d 102, 112 (1986).

As was recently noted in *Florida* v. *Slappy*, No. 70,331 (Fla. Sup. Ct., March 10, 1988), the trial judge is not bound by the prosecutor's statement of reasons, and "[w]hile the reasons need not rise to the level justifying a challenge for cause, they nevertheless must consist of more than the assumption that [the venireman] would be partial to the defendant because of their shared race . . . ," quoting *Batson* v. *Kentucky, supra*, at 97.

Because the trial court accepted the prosecutor's explanation at face value and made no inquiry, we need not consider the explanation's validity to decide this case. We must note, however, that the explanation was one which could have been given with respect to any venire person and could be used to screen improper motive. An example of the kind of inquiry and further explanation needed when such a universal reason is given can be found in *People* v. *Charron*, 238 Cal. Rptr. 660 (Cal. App. 1987).

We have been concerned with the argument that the peremptory challenge of one potential juror cannot possibly demonstrate a prima facie case of discrimination in the sense of showing a "pattern" of discrimination, not as that term was used in *Swain* v. *Alabama, supra*, but as it was used in the *Batson* case. In *United States* v. *Chalan*, 812 F.2d 1302 (10th Cir. 1987), the accused was an American Indian. There were two American Indian venire members and each was peremptorily challenged by the government. The court concluded that one of them was subject to challenge for cause because of a language problem. That left the question whether the peremptory challenge of a single prospective juror of the same minority race as the defendant could violate the standards imposed by the *Batson* case. The court's opinion stated the following:

> The striking of a single juror of defendant's race may not always be sufficient to establish a prima facie case. However, using the reasoning as articulated in *Batson* "that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*," we hold this was done in the instant case even though we are here concerned with only a single juror. Our conclusion comports with the notion that peremptory

> challenges constitute a practice particularly susceptible to racial discrimination. Such challenges are subject to abuse in part because normally the Government need not state the reasons for its action. If all of the jurors of defendant's race are excluded from the jury, we believe that there is a substantial risk that the Government excluded the jurors because of their race. Our holding helps to avert that risk by requiring the Government to explain the reasons for its challenges when no members of a defendant's race are left on the jury. [812 F.2d at 1314. Citations omitted.]

In *Pearson* v. *State*, 514 So.2d 374 (Fla. App. 1987), a peremptory challenge had been used to remove the only black member of a jury venire, and no inquiry was conducted or explanation made. The case was remanded for the holding of a hearing to determine whether there was a racially neutral explanation for the exercise of the challenge. The court stated:

> Applying *Batson*, as we must, we recognize that in this case there was only one black member of the jury venire and thus only one prospective black juror was removed by the state. Both *Batson* and *Griffith* [*Griffith* v. *Kentucky*, ___ U.S.___, 107 S.Ct. 708 (1987)] speak of plural challenges. In one of the cases decided in *Griffith*, however, there were only two black jurors removed. We see no difference, in terms of the equal protection clause, between the striking of the only one black juror and the striking of the only two black jurors—or the striking of the only three black jurors, or more. As observed by the court in the only case we have found dealing with the striking of the only member of the defendant's race from the jury, the result is the same regardless of number—no members of the defendant's race are left on the jury, and the prosecution should be required to explain the reasons for its peremptory challenge when that result occurs. *United States* v. *Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987). [514 So.2d at 376]

We agree with the apparent conclusion of these two courts that, where the use of a peremptory challenge results in exclusion from the jury of all members of the defendant's minority race, it is not necessary to show exclusion of more than

one minority juror of the same race as the defendant to make a prima facie case of discriminatory use of a peremptory challenge, and thus to invoke the "sensitive inquiry" requirement.

The evidence of Lonnie Mitchell's guilt is overwhelming. He was identified by the victim who described the clothing he was wearing at the time of the assault. The clothing was found in the house where Lonnie Mitchell lived, and he made a statement amounting to a confession. In some such instances we are able to put aside "technical" error by the court and affirm the conviction because, given the overwhelming evidence of guilt, the error was harmless and thus the accused was not prejudiced by the mistake. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). In this situation, however, the guilt or innocence of Lonnie Mitchell and whether his defense was prejudiced is not the sole issue. We are concerned here with prejudice to the system of justice. The possibility that a juror was struck for racially discriminatory reasons is the possibility that the prospective juror concerned, all citizens, and the very system of justice have been deprived of fundamental constitutional protection to which they are entitled.

In *Gray* v. *Mississippi*, 107 S. Ct. 2045 (1987), the Supreme Court held that it was improper to have allowed the prosecution to strike for cause a prospective juror who was qualified. The Mississippi Supreme Court had affirmed the conviction because the trial judge had admitted he had required the prosecution to use peremptory challenges against jurors subject to challenge for cause due to their opposition to the death penalty, and thus he was only correcting his previous mistake. In response to the argument that the error was harmless, the Supreme Court stated that "because the impartiality of the adjudicator goes to the very integrity of the legal system, the . . . harmless error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' " The same rationale applies here. The right to a jury selected free of the taint of racial discrimination is so fundamental that it cannot be described as harmless error.

2. Inflammatory photographs

The defense moved to suppress introduction of twenty-one photographs of the victim depicting her injuries. The state introduced only three. One of them was an enlargement showing the swelling of and wounds to the victim's face. The contention here is that the inflammatory nature of the photographs exceeded their evidentiary value.

While the discretion of the trial judge is not absolute, and we will reverse if large numbers of gory pictures which are only cumulative are introduced, *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986), we find no abuse of discretion here. We know that virtually all photographs are enlargements to some degree. We have examined the one enlargement complained of. It has not been shown that it accentuated the injuries of the victim in any prejudicial way.

3. Mitchell's statement

Lonnie Mitchell was taken into custody shortly after the victim had described him and his automobile to the police. While in custody he made a highly prejudicial statement admitting much of that with which he ultimately was charged. He contends that the statement was not voluntarily given and that the warning he was given was inadequate to inform him of his rights. He also contends the statement was inadmissible because the tape recording from which the transcription was introduced at the trial was not made available to him.

a. Voluntariness

In determining whether the state has shown that a statement taken from an accused in custody was voluntary, we consider the totality of the circumstances including the age, education, and intelligence of the accused, the advice or lack of advice of his constitutional rights, the length of dentention, the repeated or prolonged nature of the questioning, and the use of physical or mental punishment. *Hatley* v. *State*, 289 Ark. 130, 709 S.W.2d 812 (1986). We do not reverse the trial court's determination of voluntariness unless it was clearly against the preponderance of the evidence. *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784

(1986).

Mitchell's argument is that he had an I.Q. of only 81, that he had low verbal skills, that his personality was susceptible to manipulation, and that he was isolated from his grandmother, with whom he lived, and from his attorney who was representing him on other charges. A low I.Q., standing alone, will not render the waiver of the right to remain silent invalid, *Hignite* v. *State*, 265 Ark. 866, 581 S.W.2d 552 (1979); nor will low verbal skills. *White* v. *State, supra; Hatley* v. *State, supra.* Mitchell had completed the ninth grade and could read.

The record contains a statement by a psychologist that Mitchell is a fearful person subject to having his will overcome during interrogation. Two other psychologists stated that he was faking mental illness and thus skewing his test scores.

There is no showing that Mitchell was deprived of access to means to communicate with his grandmother or with an attorney. Nor is there any showing whatever of coercion or physical abuse during this detention. While he complains he was kept two hours and not offered food, there is no showing that he was unduly hungry or that he was promised food in return for a confession.

While Mitchell was young, he was not a juvenile. His argument that he was represented by attorneys on other charges reveals that he had been in this situation at least twice before and was thus not a novice in the police station. We find the trial judge's determination that the statement was voluntary not clearly against the preponderance of the evidence.

b. The rights form

The rights form used by the Russellville Police Department was deficient in its failure to mention the fact that a lawyer would be appointed even if the accused could not afford one; however, the deficiency was cured by the testimony of Officer McMillan who informed Mitchell of his rights, took his statement, and testified that he told Mitchell that if he could not afford a lawyer one would be appointed for him. *Mayfield* v. *State*, 293 Ark. 216, 736 S.W.2d 12 (1987).

c. The tape recording

Five days after Mitchell's statement was taken he filed a discovery request for all relevant evidence. The state did not produce the tape recording from which his statement had been transcribed because it was a tape which had been returned to a "pool" of tapes used by the police department and it had been reused and thus no longer contained Mitchell's statement.

Arkansas R. Crim. P. 17.1 provides that the prosecutor shall disclose any written or recorded statement and the substance of any oral statement made by the defendant. In *Williamson* v. *State*, 263 Ark. 401, 565 S.W.2d 415 (1978), we held a defendant is entitled to the tape from which a written statement was transcribed. We pointed out that the tape represents the best evidence and without it the defendant has no way of determining if the transcript was a correct reproduction of the recording.

The state's argument is that the *Williamson* case is distinguishable because in this case the tape is not available, and there it was available, but simply not supplied. Such a distinction should not have the effect the state would have us ascribe to it, for that would deprive the *Williamson* case of its meaning. The authorities could, with impunity, simply destroy the best evidence of what was said by the accused, and then assert its unavailability in every case.

We do not count this a reversible error here because of the overwhelming evidence of guilt of the accused, *see Berna* v. *State, supra*, and the lack of any showing that the police department acted in bad faith in destroying the tape recording. However, we caution prosecutors to see to it that such a recording is kept available for a reasonable time after a statement has been transcribed, as its "unavailability" may not save a transcription from inadmissibility in another case.

4. The arrest warrant

Mitchell argues that the warrant for his arrest was invalid because it was issued by the clerk of the court without authorization from the judge and was thus in violation of Ark. R. Crim. P. 7.1(c). The technical invalidity of an arrest warrant is irrelevant when the arrest has been made upon probable cause.

Davis v. *State*, 293 Ark. 472, 739 S.W.2d 150 (1987). There is no question but that the police had probable cause to arrest Mitchell.

Reversed and remanded.

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

JACK HOLT, JR., Chief Justice, dissenting. Though the Supreme Court's decision in *Batson* and this court's opinion in *Ward* lend some support to the majority's holding that Mitchell made a prima facie case of discrimination after the prosecution questioned Petty closely on whether his race would affect his vote, I find myself unable to accept the majority's subsequent conclusion that, standing alone:

> where the use of a peremptory challenge results in exclusion from the jury of all members of the defendant's minority race, it is not necessary to show exclusion of *more than one minority juror of the same race as the defendant to make a prima facie case* of discriminatory use of a peremptory challenge, and thus invoke the "sensitive inquiry" requirement. [Emphasis mine.]

I feel today's decision is in direct conflict with our recent decision in *Smith* v. *State*, 294 Ark. 357, 742 S.W.2d 936 (1988), and places an unwarranted burden upon the prosecution never contemplated by either *Batson* or *Ward*. Therefore, I dissent.

In one fell swoop, and without saying so, this court has overruled our decision in *Smith, supra*, in which we held that the striking of two jurors, standing alone, is not sufficient to constitute a *Batson* "pattern" which would give rise to the inference of discrimination necessary to establish a prima facie case. The result of today's decision is to ignore the delicate balance struck by the United States Supreme Court between "the prosecutor's historical privilege of peremptory challenge free of judicial control . . . and the constitutional prohibition on exclusion of persons from jury service on account of race . . . ." *Batson* v. *Kentucky*, 476 U.S. 79, 91 (1986).

What the majority holds is that in cases where there is only one juror of the same minority race as the defendant on a panel of perhaps fifty potential jurors, absent any other factors the striking of that particular juror automatically creates a prima

facie case of *purposeful* discrimination by the State which shifts the burden to the prosecution to give a sufficiently neutral explanation for the strike, all in the context of a "sensitive inquiry" by the court. Our comments in cases on this issue which have come before us vividly demonstrate the likelihood of success judges and prosecutors will have in clearly meeting their respective obligations in that regard. Today's decision will do more than merely chill the use of peremptory challenges by the prosecution, it effectively shackles the ability to exercise a method of challenge traditionally "viewed as one means of assuring the selection of a qualified and unbiased jury . . . ." *Id.*

While I wholeheartedly support the proposition set forth in *Batson* that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause and that the prosecutor therefore cannot challenge potential jurors solely on account of their race on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant, the majority's holding that a prima facie case of discrimination can be made by the striking of a single juror of the same minority race as the defendant, without more, flatly contradicts the notion that it is a " 'pattern' of strikes against black jurors included in the particular venire [which] might give rise to an inference of discrimination." *Id.* at 97.

I cannot accept the fact that Mitchell made a prima facie case of discrimination based solely on the strike of venireman Petty. Likewise, I cannot agree that a prima facie case was made out simply by virtue of the fact that two of the prosecutor's eighteen questions were race related, unless the evidence was convincing that the prosecutor's subsequent explanation concerning Petty's honesty was linked to Petty's responses on the issue of race. This, however, is not the case.

The record clearly shows what can best be described as "dissatisfaction" on the part of the prosecutor with Petty's demeanor when answering other questions, particularly whether Petty would find Mitchell guilty if satisfied beyond a reasonable doubt that Mitchell had committed the offenses charged, and whether Petty would consider sending Mitchell to the penitentiary. Pursuant to AMCI 104, jurors are instructed that in

determining the credibility of any witness, it is proper to take into consideration the demeanor of the witness while on the stand. I find nothing in the law indicating that prospective jurors cannot be judged in like manner.

Although capable of dual interpretation, I attach little significance to the prosecutor's side bar remark that it was his prerogative to be harder on Petty in his questioning than on other jurors. At no time during the questioning of Petty did Mitchell's counsel object to the manner in which the prosecutor was questioning Petty, and the remark by the prosecutor is at most indicative of his dissatisfaction with Petty's demeanor in responding to the prosecutor's other questions.

Even if I were convinced that Mitchell established a prima facie case of purposeful discrimination, I find that while the trial court can only barely be said to have conducted the "sensitive inquiry" discussed in *Ward*, the prosecutor's explanation for the challenge satisfied the State's burden that it "articulate a neutral explanation related to the particular case to be tried." I therefore respectfully dissent. Hays, J., joins in the dissent.

Neil S. FINLEY *v.* STATE of Arkansas

CR 87-200 748 S.W.2d 643

Supreme Court of Arkansas
Opinion delivered May 2, 1988

Larry Dean Kissee, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. This appeal arises from appellant's request for post-conviction relief from a jury verdict on July 18, 1984, finding him guilty of burglary and theft charges, and another conviction judgment dated September 7, 1984, which resulted from appellant's pleas of guilty to four additional counts of burglary and theft charges. The trial court rejected appellant's contentions that he had been wrongfully denied the procedural safeguards of the Interstate Agreement on Detainers Act (IAD Act) and that his counsel had been ineffective by failing to invoke the IAD Act before and at the time of his convictions. Because the law and the record support the trial court's holding, we affirm.

Appellant argues that Article IV of the IAD Act became applicable when the Izard County Circuit Court lodged detainers against him while in the custody of federal authorities on bank robbery charges. In this respect, appellant points to the court's order dated March 29, 1984, directing him to be transferred from federal detention to Izard County for arraignment and trial settings.[1] On April 3, 1984, the court's bench warrant was served on appellant who, sometime in April 1984, appeared before the Izard County Circuit Court. Appellant pled innocent to all charges and then moved that the charges be severed.[2] The trial court granted appellant's severance motion and set July 16, 1984, as the first trial date. After his arraignment, appellant was returned to federal custody. He later was returned to Izard County for the July 16, 1984 trial and was convicted by a jury on one count of burglary and theft of property and given consecutive sentences of twenty years imprisonment on each crime. On September 7, 1984, appellant pled guilty to the remaining counts of burglary and theft of property.

In citing Article IV(c) and (e) of Ark. Code Ann. § 16-95-101 (1987), the appellant's argument is two-fold: (1) Once the state gained custody of appellant, the court was required, under subsection (e), to try the criminal charges pending against him prior to his being returned to the federal authorities, or dismiss all of the charges with prejudice; (2) alternatively, even though the July 16, 1984 trial was held within the 120-day requirement set out in subsection (c), the September 7, 1984 hearing and conviction judgment on the remaining charges were beyond the 120-day period and should, as a consequence, be set aside and the charges dismissed.

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[1] The court issued a similar order dated April 27, 1984.

[2] The various dates of court appearances and transfers are not clear from the record, but for the purpose of applying the IAD Act, it appears the state first received appellant at least by April 3, 1984, when he was arrested pursuant to the court's bench warrant. Although unnecessary for purposes of determining the legal issues here, the other background events and dates leading to the appellant's conviction commenced in November 1983, when appellant was arrested and incarcerated in Izard County on burglary and theft charges. He subsequently escaped and fled the state, but in January 1984, he was arrested in California on an outstanding fugitive warrant from Arkansas. Appellant was later transferred to the federal authorities in Arkansas, where he pled guilty to a federal bank robbery charge on April 23, 1984.

The state responds by first arguing that the IAD Act never came into play since no detainer, as that term is used under the Act, had ever been lodged against the appellant. Second, even if the Act applies, the state urges that the appellant was required to object to his retransfer to the federal authorities, in order to raise the issue that, pursuant to the speedy trial provisions of the Act, the state charges must be concluded prior to his return.

In addressing the parties' respective contentions, we first must disagree with the state's argument that a detainer was never filed in this cause so as to permit the appellant to invoke the provisions of the IAD Act. While the Act itself contains no definition of the word "detainer," the Supreme Court noted in *United States* v. *Mauro*, 436 U.S. 340 (1978), that the House and Senate Reports explained that "a detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." In addition to the explanation given the term "detainer" in *Mauro*, we note Article IV(a) of the Act which provides as follows:

> The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon *presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated* . . . . (Emphasis added.)

Here, the Izard County Circuit Court issued a clear directive providing that the sheriff make arrangements for the transfer of the appellant to state custody so proceedings could go forward on the state charges pending against him. That order further provided for appellant's return to federal custody after the state proceedings. We have no hesitation in characterizing the Izard court's order a detainer, as that term is used and understood under the Act.

Although we agree with the appellant that a detainer was lodged against him which would have invoked the speedy trial provisions under the IAD Act, we cannot agree that the

state's actions, contravening the Act's provisions, require a dismissal of his charges. As we noted earlier, the appellant urges that the state violated Article IV(e) of the Act by returning him to the federal authorities sometime in April 1984, without fully trying him on any of the charges pending against him.[3] However, even assuming the state's action was contrary to Article IV(e), such a violation is a non-jurisdictional error and is therefore waivable by a criminal defendant. *Camp* v. *United States*, 587 F.2d 397 (8th Cir. 1978). In rendering such a holding in *Camp*, the 8th Circuit Court of Appeals held that the violation of Article IV(e) did not deny the court jurisdiction to entertain a guilty plea when the defendant failed to raise the issue in a timely manner. *See also United States* v. *Palmer*, 574 F.2d 164, 167 (3d Cir.), *cert. denied*, 437 U.S. 907 (1978), and *United States* v. *Ford*, 550 F.2d 732, 742 (2d Cir. 1977), *aff'd sub nom. United States* v. *Mauro*, 436 U.S. 340 (1978) ("The provision [Art. IV(e)], . . . which is intended to avoid the disruption in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable"). In the instant case, appellant neither requested a speedy trial, nor mentioned the IAD Act.

This brings us to appellant's final argument, *viz.*, that he was burdened with ineffective assistance of counsel. On this point, appellant argues that, if his counsel had raised the speedy trial provisions of the IAD Act after having been transferred to the federal authorities and prior to appellant's trial and convictions, the state's charges against him would have been dismissed with prejudice. We reject appellant's contention for a number of reasons.

First, this court has routinely held that Rule 37 is not available as a direct challenge to the admissibility of evidence or to raise questions of trial error. Questions of constitutional dimension must even be raised in the trial court in accordance with the controlling rules of procedure, or else the issues are

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[3] Article IV(e) provides: "If a trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

waived, unless they are so fundamental as to void the judgment absolutely. *Howard* v. *State*, 291 Ark. 633, 727 S.W.2d 830 (1987).

Second, we again look to the *Camp* decision wherein the defendant maintained that he could not be said to have waived a right of which he was not aware. In response, the *Camp* court relied on *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), setting forth the following excerpt from that case:

> Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.

The court in *Camp* followed the foregoing by stating that the IAD Act amounts to nothing more than a statutory set of procedural rules which clearly does not raise it to the level of constitutionally guaranteed rights. The court explained further that the sanctions in Article IV(e) of the IAD Act have nothing to do with preserving a fair trial, but are instead intended only to prevent excessive interference with a prisoner's rehabilitation in the state prison system. *Id.*; *Camp*, 587 F.2d at 400. We agree with the rationale and holding in *Camp*, and, accordingly, conclude that the failure of appellant's counsel to raise the IAD Act below did not involve the waiver of such a fundamental right that would void a judgment.

Other reasons exist as to why appellant cannot prevail on his claim of ineffective assistance of counsel. We have held that counsel is presumed competent, and the burden of overcoming that presumption rests on the petitioner. *Franklin* v. *State*, 293 Ark. 225, 736 S.W.2d 16 (1987). We have also held that a petitioner having entered a guilty plea normally will have difficulty in proving any prejudice since his plea rests upon his admission in open court that he did the act with which he is charged. *Id.* Additionally, to prove ineffective assistance of counsel under the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984), a petitioner must show that (1) 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 to the Constitution; and (2) the deficient performance must have resulted in prejudice so

pronounced as to have *deprived* the petitioner *of a fair trial* whose outcome can be relied on as just.

In view of the foregoing standards of review, we first point out that appellant's conviction judgments entered on September 7, 1984, resulted from his guilty pleas, reflecting an admission in open court of the criminal acts of burglary and theft of property with which he was charged. In this same regard, we also note the settled law that a valid guilty plea operates as a waiver of all non-jurisdictional defects or errors. *Id.*, *Camp* at 399. As we discussed earlier, the speedy trial provisions in the IAD Act are non-jurisdictional and waivable; nor do those provisions rise to the level of constitutionally guaranteed rights that are necessary in order to preserve the appellant a fair trial, as is required under the *Strickland* test. In sum, failure of appellant's counsel to raise the provisions of the IAD Act is not such deficient performance as to warrant the setting aside of appellant's conviction judgments.

We note, in conclusion, that appellant now complains that, if his counsel had been more knowledgeable about the IAD Act and had informed appellant of his rights, appellant would have chosen to invoke the Act, thus requiring the dismissal of all the charges against him. Appellant ignores the substantial testimony reflecting that his counsel discussed the speedy trial issue during trial preparation and in the later proceeding when he entered guilty pleas, but that appellant opted not to raise the issue. Counsel explained that appellant "wanted to go ahead and get the thing over with, one way or other and he wanted to go ahead and have the trial or enter a guilty plea . . . ." Appellant's counsel further testified that their primary concern, in negotiating the charges remaining against the appellant after the July 18, 1984 conviction, was to obtain concurrent sentences with the sentences already imposed. Thus, the record shows the appellant made an informed and strategic decision not to pursue the speedy-trial issue.

For the reasons set out above, we hold that the trial court was correct in denying appellant's request for post-conviction relief. Therefore, we affirm.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I think the counsel for the appellant was ineffective with respect to his failure to require the state to comply with the Interstate Agreement on Detainers Act (I.A.D.). He may have foreseen that the Arkansas courts would not force the state to comply with the I.A.D.; nevertheless, to preclude a claim of ineffective assistance of counsel, the attorney should have asserted the statutory right to a speedy trial. At the very least he should have explained the right to a speedy trial to his client and made a record for the trial judge and for appellate review. It now appears that perhaps counsel did not know the law himself. This is no disgrace; most lawyers are not familiar with many of the laws in connection with a case when the case commences. However, he should have found the answers and protected his client to the best of his ability. At the same time the performance of the attorney's obligations would have reduced the chances of a claim of ineffective assistance.

Article IV, sections (c) and (e) of the I.A.D. read as follows:

> (c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> . . .
>
> (e) *If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.* [Emphasis added]

The state initiated this procedure and was bound to try the appellant within 120 days. It did not do so. Without objection the appellant was returned to the "sending state" (the United States) without being tried by the state of Arkansas. The consequences to the appellant in this case were exactly what the I.A.D. intended to prevent.

The majority opinion is part of a familiar pattern of judicial encroachment upon legislative and executive powers. No matter how clear and unambiguous a statute may be, the judiciary often bends the words into what the courts believe the law ought to be. There is no need to cite precedent in this dissent. Neither precedent nor the separation of powers doctrine seem to deter this court from making new law every Monday morning.

Leslie ANDERSON *v.* SHARP COUNTY, ARKANSAS

87-342 749 S.W.2d 306

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Ponder & Jarboe, by: *Harry L. Ponder*, for appellant.

Jim Stallcup, Prosecuting Att'y, *Stewart K. Lambert*,

Deputy Prosecuting Att'y, for appellee.

JACK HOLT, JR., Chief Justice. The appellee, Sharp County, Arkansas, brought this cause of action in replevin to obtain title to items of jewelry which the appellant, former County Judge Leslie Anderson, received as a bribe. The case was presented to the Sharp County Circuit Court on the following agreed statement of facts:

> Stewart Lambert, Deputy Prosecuting Attorney, and Harry L. Ponder, attorneys respectively for plaintiff, Sharp County, Arkansas, and defendant, Leslie Anderson, hereby agree that the following is a statement of the facts in this cause, and that the case should be tried on said agreed statement of facts:
>
> 1.
>
> Defendant, Leslie Anderson, was County Judge of Sharp County, Arkansas, duly qualified and acting, during the years 1977 and 1978.
>
> 2.
>
> Sometime in 1978 defendant received from one Ralph Shaddox certain jewelry as a reward for permitting Ralph Shaddox to do business with Sharp County, Arkansas . . . . [List omitted.]
>
> 3.
>
> Sometime in 1978 the jewelry listed above was found by Oklahoma State Trooper Choate in the trunk of a car driven by Anderson, after being impounded by the Oklahoma State Police on a traffic charge.
>
> 4.
>
> On being questioned by Oklahoma Prosecutor Frank Rayhall and Oklahoma State Trooper Jack Choate, Anderson said that he received the jewelry listed above because Sharp County did business with Ralph Shaddox. He further said that "kickbacks" had to be in money and he only took jewelry.

5.

When applied to public servants the terms "bribe" and "kickback" are synonymous.

6.

The jewelry described above constituted a bribe given to, and accepted as such, by Anderson and resulted in Sharp County, Arkansas, having to pay more than the fair market price for goods and services and so was detrimental to Sharp County, Arkansas.

7.

Because Anderson accepted the jewelry described above he was charged with Public Servant Bribery in case number CR-79-1 filed in the Circuit Court for Sharp County, Arkansas.

8.

The jewelry described above was impounded as evidence in case number CR-79-1, Circuit Court for Sharp County, Arkansas.

9.

In case number CR-79-1 an Order of Nolle Proseque was entered August 21, 1985. Part of that Order provided that the evidence impounded should remain in the joint custody of Sharp County Judge, Frank Arnold, and Deputy Prosecuting Attorney, Stewart Lambert, until determination of a replevin action which Sharp County, Arkansas, was ordered to file, but if said action was not filed within ten days from August 21, 1985, the jewelry described above was to be returned to Anderson.

10.

This cause, CIV-85-111, Circuit Court, Sharp County, Arkansas is the replevin action filed in compliance with the Court's Order in case CR-70-1, Circuit Court,

Sharp County, Arkansas.

The trial court accepted the stipulated facts as evidence and ordered possession of the property be delivered to the lawful custodian of Sharp County. It found that (1) "it is the intent of said statute [Ark. Code Ann. § 14-14-1102(b)(7) (1987), formerly Ark. Stat. Ann. § 17-3901(B)(7) (Repl. 1980)] to require that any property received by a County Judge, while serving as County Judge, is accepted and can only be accepted in behalf of the County" and that (2) "the County Judge obtaining such illegal gifts or bribes should not be allowed to retain such property as his own property." We agree with the trial court that a county judge should not be able to retain illegal gifts or bribes as his own property, however, the court was incorrect in finding under Ark. Code Ann. § 14-14-1102(b)(7) that the jewelry accepted as a bribe belonged to the county.

Section 14-14-1102(b)(7) provides in pertinent part:

> ACCEPTING GIFTS, GRANTS, AND DONATIONS FROM FEDERAL, PUBLIC, OR PRIVATE SOURCES. (A) The county judge, as the chief executive officer, is authorized to accept, in behalf of the county, gifts, grants, and donations of real or personal property for use of the county.

This statute does not apply to bribes received by a county judge. The property in question was not a gift, grant, or donation, but rather was contraband. Ark. Code Ann. § 5-5-101 (1987), formerly Ark. Stat. Ann. § 41-1401 (Repl. 1977), defines contraband to include "[a]ny article possessed under circumstances prohibited by law." The jewelry found in Anderson's possession clearly meets this definition.

Although the circuit court directed Sharp County to obtain the property by an action in replevin, we cannot approve this procedure as Sharp County was not the owner entitled to possession of the property. *Williams* v. *Harrell*, 226 Ark. 115, 288 S.W.2d 321 (1956). A replevin action can be maintained only by one who has a general or special property interest in a thing taken or detained at the commencement of the action. 66 Am. Jur. 2d *Replevin* § 16 (1973). "Such right of possession or ownership must be one by a title recognized at law, as distin-

guished from one recognized only in courts of equity." *Id.*

The trial court was correct that Anderson should not be able to retain illegal gifts or bribes. In *Womack* v. *Maner*, 227 Ark. 786, 301 S.W.2d 438 (1957), we noted that there is no statute authorizing the recovery of money alleged to have been paid as a bribe and aptly stated that "[i]t is firmly established that in a situation such as is set out in the complaint the law will not aid either party to the illegal or void contract." Likewise, we will not aid a party who attempts to recover property obtained as a result of a bribe.

We dismiss this suit because Sharp County is not entitled to replevin. We take no position on title to the property, noting that it is still in the joint custody of the Sharp County Judge and the Deputy Prosecuting Attorney by virtue of the trial court's previous order.

Reversed and dismissed.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I agree with the majority but wish to make it clear that, as the majority points out, the jewelry items involved here are contraband and, in my opinion, subject to the disposition procedures set forth in Ark. Code Ann. § 5-5-101 (1987). While eventually the county's general fund may well receive the proceeds from a sale of the jewelry, I agree, too, with the majority that this case must be reversed and dismissed. In other words, the trial judge's decision cannot be sustained as a correct one even though based on an erroneous reason. *See Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984); *Simmons First Nat'l Bank* v. *Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983). In this case, the appellee proceeded under the wrong law as well as an erroneous legal theory. The correct procedure concerning the disposition of contraband under § 5-5-101 is entirely different from a holding, as the trial court did here, that the county should recover the jewelry for the use and benefit of the county's citizens.

For these reasons, and those given in the majority's opinion, I agree to reverse and dismiss.

John GIPSON, Bill Hefley, M.D., Coolidge Faulkner, Richard Conder, James Dixon, A.J. Tomme, and Jack Case *v.* Joe BROWN, Bob Scott, and Tip Nelms, D.D.S.

87-253 749 S.W.2d 297

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Friday, Eldredge & Clark, by: *William H. Sutton* and *Diane S. Mackey*, for appellants.

Joe Brown, Pro Se, *Tip Nelms, D.D.S.*, Pro Se, and *Cliff Jackson, P.A.*, for appellee Bob Scott.

JACK HOLT, JR., Chief Justice. This is the second time we consider whether there is a conflict between the requirements of our code provisions on nonprofit corporations and the tenets of the Sixth and Izard Church of Christ, of which appellees are members and appellants are elders. The dispute concerns appellees' efforts to obtain various financial records of the church by virtue of its status as a nonprofit corporation and to secure an election of directors by the church membership. The elders, with the apparent support of other members within the church, resist appellees' efforts on the grounds that application of our state nonprofit corporation laws would interfere with the religious doctrine and practice of the church in violation of the first and

fourteenth amendments to the United States Constitution and art. 2, §§ 24 and 25 of the Arkansas Constitution.

When the case was first before us, *Gipson* v. *Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986), we granted relief from an interlocutory order of the chancery court compelling discovery of the records and financial information which had been the object of the suit. We remanded to the chancellor with instructions to conduct a hearing to determine whether application of Ark. Code Ann. § 4-28-218 (1987), formerly Ark. Stat. Ann. § 64-1913 (Repl. 1980), would override the religious doctrine, polity or practice of the church as protected by the federal and state constitutions. On remand, the chancellor entered an order appointing a special master "to investigate and [make] findings of fact and conclusions of law over all relevant matters pertaining to this action." The chancellor entered an order adopting the report and recommendations of the master by which the elders were required to conduct an election and "make available . . . all financial and business records of the corporation." From that order comes this appeal.

While the chancellor was proceeding beyond his authority when he appointed the special master, and in some cases we have held that this mandates that the appeal be dismissed as premature, *State* v. *Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969), this court generally reviews matters appealed from chancery court on a *de novo* basis, *Lynch* v. *Brunner*, 294 Ark. 515, 745 S.W.2d 115 (1988). In addition, there is a policy in favor of bringing litigated matters to an end. *Taggart* v. *Moore*, 292 Ark. 168, 729 S.W.2d 7 (1987). On that basis we proceed with the merits of this appeal.

In *Gipson I* we stated that it was a close question whether this action could be maintained at all. In view of the record before us, we now conclude that the appeal should be dismissed. The underlying dispute between the elders and the members of the church is essentially religious in nature, and its resolution is more properly reserved to the church. The evidence of record clearly shows that the code provisions governing nonprofit corporations interfere with the doctrine and polity of the church and infringe upon its guaranteed religious liberties — while at the same time the record fails to reveal a compelling state

interest which would justify application of our laws in light of the constitutional proscriptions against interference with the free exercise of religion. In that setting we find that our examination of the issues before us results in the impermissible entanglement of this court in ecclesiastical matters.

USE OF A SPECIAL MASTER

In *Nelson, supra*, this court's discussion of the appointment of a special master was as follows:

> [T]he chancellor appointed a Special Master, and instructed him to prescribe rules for the expeditious and orderly progress of the tasks with which he was charged, and to proceed with hearing of evidence and ruling *upon all matters of fact and law incident thereto*. . . . In this respect, the trial court was proceeding illegally. . . . *[T]he chancellor* should hear the cause upon the pleadings and such evidence as may enable him to determine the principles to be applied in adjusting the equities of the parties *and then make a reference to a master for such special inquiries or statements of accounts as may aid the court in making a definite decree*. . . . [T]he United States Supreme Court [has] stated that the use of masters was to aid judges in the performance of specific judicial duties as they arise and not to displace the court. [The Court] held that the appointment of a master and a reference at the inception of the case to take evidence and to report the same to the court with his findings of fact and conclusions of law was an action beyond the court's powers. [Emphasis added.]

We stated in *Nelson* that to support the reference by reason of anticipation of a lengthy trial, complexity of the issues and congestion of the court's calendar does not constitute sufficient grounds for the virtual displacement of the court by a special master.

> While we can conceive of situations in which a reference of particular matters may be made to a master during the course of litigation, a reference as broad as the one involved here is clearly in excess of the court's jurisdiction and in that respect the court proceeded without authority of law.

Id. at 219-220.

Rule 53(b) of the Arkansas Rules of Civil Procedure specifies that the reference to a master shall be the exception and not the rule and, except in matters of accounting and difficult computation of damages, the reference shall be made only upon a showing that some exceptional condition requires it. No such showing was made here.

While we reaffirm our position in *Nelson*, the result reached in that case — dismissal of the appeal as "premature" — is not appropriate here in light of our policy in favor of bringing litigated matters to an end and our ability to review matters appealed from chancery court on a *de novo* basis.

CHURCH VS. STATE

One proposition is clear and certain — courts, absent fraud or collusion, do not interfere in purely ecclesiastical matters. As early as *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), the United States Supreme Court stated that when civil courts get involved in matters of church discipline or ecclesiastical government, it requires looking into the customs, usages, written laws, and the fundamental organization of religious denominations, which deprives these bodies of the right to interpret their own church laws and opens the door to all sorts of evils.

The rule requiring deference to decisions of ecclesiastical bodies on matters of internal church governance is stated in *Gonzales* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), where Justice Brandeis wrote for the majority:

> In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive . . . .

In *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), the later in *Jones* v. *Wolf*, 443 U.S. 595 (1979), the Supreme Court recognized that when religious organizations establish rules for their internal governance, and tribunals for adjudicating disputes over such matters, "the constitution requires that civil courts accept their decisions as binding upon

them." In *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952), the Supreme Court said that religious freedom encompasses the power of religious bodies:

> [T]o decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

In *Gipson I* we emphasized that "internal church disputes relating to the disclosure of church business should not be subject to the legal concern of this court" and that "state courts can only become involved in church disputes when 'neutral principles' of law can be applied to resolve the dispute." Here, the underlying dispute between the appellee members and the elders is of a long-standing, ongoing, heated nature extending beyond application of our code provisions to an explicit attempt by appellees to convince the church membership that they have a biblically based right to access the records of the church and to determine who the elders of the church will be. To achieve this end, incorporation of the church was accomplished through the services of one of the appellees.

It does not take much to see that incorporation greatly facilitated appellees' efforts to access church records, while at the same time it had little to do with anything which might implicate state interests or warrant intervention in the dispute under the guise of determining whether our laws on nonprofit corporations apply to the church. As such, and in light of the proscriptions against interference in ecclesiastical matters, interference which is necessarily implicated by the facts and issues before us, we find the appropriate course to be dismissal.

That result finds additional support. In *Gipson I* we emphasized that the religious beliefs of all citizens are zealously protected from government interference under both the state and federal constitutions. Article 2, § 24 of the Arkansas Constitution expressly provides that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences" absent interference with the right of conscience by any human authority. Remand was specifically for the purpose of conducting a hearing on the "claim of first amendment protection versus the disclosure requirements of corporations" because without the benefit of such a hearing we could not "weigh

the sensitive overlap between church and state" presented by the facts of this case. Although considerable testimony was introduced on the doctrine and polity of the church, no evidence was offered as to a compelling state interest which would justify application of our code provisions in the event it was determined that our laws actually infringed upon religious liberties. That fact compounds the extent to which we would be required to delve into the ecclesiastical aspects of the case before us.

The failure to adduce such evidence was apparently due to the conclusion of the special master that application of our laws did not in fact interfere with the doctrine and polity of the church; a conclusion we find unsupported. The appellees' suit was based upon that part of section 4-28-218 which provides: "All books and records of a corporation may be inspected by any member for any proper purpose at any reasonable time." Section 4-28-212 provides: "Each member shall be entitled to one (1) vote in the election of the board of directors." It is with respect to the application of these provisions to the church as a corporation that the elders seek an exemption because, according to the elders, these provisions are in direct conflict with the scriptural duties of the elders as overseers of the flock responsible for harmony within the church.

We find that the record reveals substantial evidence to the effect that the elders' claim of an exemption is in fact tied to established doctrine within the church: (1) the New Testament places within the hands of a select group of elders the sole responsibility for overseeing the affairs of the church and its congregation; (2) the scriptural duty extends to all aspects of administration within the church with the elders being accountable to God for the execution of their responsibility in a manner consistent with the Bible; (3) the scriptural purpose behind the doctrine is the mandate that there be harmony and unity within the flock; and (4) the execution of the responsibility is a matter left to the scripturally guided discretion of the elders as evidenced by biblical admonitions to the flock to obey and submit to them that have rule over the flock. In light of the above, application of our state corporation laws would almost certainly infringe upon the doctrine of the church.

Under those circumstances, we would generally be

required to engage in a balancing process. Our initial inquiry would be strictly limited to whether the disinclination of the elders to comply with certain statutory requirements has at its roots actual religious beliefs in the form of doctrine, polity, or practice of the church. On that issue, our responsibility would be directed not to a determination of what exactly the Bible teaches; rather, we consider whether the evidence supports the conclusion that the elders believe the tenets of the church to be as described and whether those beliefs serve as the basis of appellants' claim to an exemption from the code provisions governing nonprofit corporations. That requirement is satisfied by the facts of this case.

Once that requirement has been met, "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Because there is substantial evidence indicating that our laws infringe upon appellants' free exercise of religion, the lack of any evidence on the existence of a compelling state interest mandates the conclusion that, in light of the extent to which the facts before us implicate purely ecclesiastical concerns, the appeal should be dismissed.

In conclusion, we note that the dissent takes refuge under the decision of the Supreme Court of Louisiana in *Bourgeois* v. *Landrum*, 396 So. 2d 1275 (La. 1981), cited in *Gipson I*. That case is simply not controlling as to our decision to dismiss rather than proceed to resolve this church dispute for, as we stated in our former opinion, here the appellant elders "assert the very entanglement in questions of religious doctrine *that the court found absent in the Louisiana cases*." (Emphasis added.)

Appeal dismissed.

PURTLE, DUDLEY and NEWBERN, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. This is the second time this case has come before the court. The issues in each case concern the appellees' rights under Arkansas' corporation laws to examine various financial transactions of the church and to

require an election of the board of directors by the church membership. The appellants, elders of the church, rejected these demands and argue that application of the state nonprofit corporation laws interfere with the religious doctrine and practice of the church in violation of the First and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 24 and 25 of the Arkansas Constitution.

When the case was first before us (see *Gipson* v. *Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986)), we granted relief from an interlocutory order and held that an evidentiary hearing was necessary to determine the merits of appellants' claims of constitutional protection against ordered disclosure of church information. We remanded the case to the chancellor with the specific purpose "to conduct a hearing on the claim of first amendment protection versus the disclosure requirements of corporations."

On remand the chancellor, pursuant to ARCP Rule 53, appointed a master "to investigate and [make] findings of fact and conclusions of law over all relevant matters pertaining to this action." The master conducted six days of evidentiary hearings during which testimony and exhibits were considered.

Upon conclusion of the hearings the master filed his report and submitted his recommendations to the chancellor who adopted the report in toto. Among other things the master recommended:

> 1. That the Defendants be required to answer the Interrogatories and Request for Admissions, except those relating to or concerning the selection of elders.
>
> 2. That the Defendants be required to conduct an election of the Board of Directors of the Sixth and Izard Church of Christ, Inc., pursuant to Ark. Stat. Ann. § 64-1910 (Ark. Code Ann. § 4-28-211 (1987)).
>
> 3. That the Defendants be required to make available to plaintiff and intervenors, at a reasonable time during regular office hours, all financial and business records of the corporation as provided in Ark. Stat. Ann. § 64-1913 (Ark. Code Ann. § 4-28-211 (1987)). However, no records concerning selection of elders or contributions of members

or others are to be furnished.

4. That the court reserve jurisdiction of the cause for the entry of such orders as may be necessary to determine and enforce the rights of the parties hereto.

The majority has now done an "about face" and evaded the basic issue before us. Hereafter, a nonprofit corporation may decide it does not agree with the laws under which it is incorporated and simply refuse to abide by the law under the pretext of "religious freedom."

The parties to the litigation are all members of the Sixth and Izard Church of Christ, Inc., located in Little Rock, Arkansas. The church was originally organized as an unincorporated association and operated as such until April 14, 1975, at which time it incorporated under Ark. Stat. Ann. § 64-1905 (Ark. Code Ann. § 4-28-205 (1987)) as a nonprofit corporation. The appellants are presently serving as elders of the church and as members of the board of directors of the corporation. I have no interest in the church-related responsibilities of the elders. However, the responsibilities of the elders in their capacity as members of the board of directors of a corporation created and organized pursuant to the laws of this state is quite a different matter. Had the church not chosen the elders to also serve as directors we likely would not have this problem before us.

The appellees, as members of both the nonprofit corporation and the church congregation, have repeatedly demanded access to the church financial records and election of the board of directors by the church membership. These demands arise out of allegations of discrepancies and inconsistencies in church financial records kept by the elders. The elders have consistently refused to render a full accounting to the appellees setting forth in detail the purposes for which church funds have been expended.

The appellees rely upon the provisions of the nonprofit corporation law which provide that the members of the corporation have the right to inspect the financial records of the corporation. The appellants maintain that the tenets of the Church of Christ religion place authority for church administration solely in the hands of the elders, and therefore the elders cannot be required to share any of this information with the

appellees. In support of this view the appellants argue that it is the longstanding religious belief, polity and practice of the church that the elders have the absolute and final authority over all church matters, including all financial matters.

In *Gipson I*, we emphasized, and I re-emphasize now, that the religious beliefs of all citizens are zealously protected from governmental interference under both the state and federal constitutions. The Arkansas Constitution recognizes that its people have a natural and indefeasible right to worship God according to the dictates of their own consciences and that no human authority can control or interfere with the right of conscience or give preference by law to any religious establishment or mode of worship. The church voluntarily incorporated itself under the secular laws. When the church decided to incorporate, it submitted itself to certain state laws governing corporations, thus opening the door to examination in a legal setting of the dispute within the church concerning adherence to those state laws.

There is no doubt as to the power of the state of Arkansas to impose reasonable laws and regulations governing the operations of corporations within this state. Corporations are entities controlled by the board of directors and officers and are owned by the stockholders and members. The stockholders and members of a corporation are usually so far withdrawn from the everyday business affairs of the corporation that it is impossible for them to have knowledge of the management and finances of the corporation. The Arkansas legislature has wisely provided stockholders and members the right to inspect corporate books and records upon request, at a reasonable time, provided there is a valid reason for such a request. After all, the owners of a corporation are obviously entitled to know what their employees are doing with their money.

Under the circumstances of this case, the Constitution requires a balancing process. If the statute impinges on fundamental rights that are specifically protected by the Free Exercise Clause of the First Amendment, the statute does not control. The state's authority to impose reasonable laws and regulations upon corporations is sufficient to uphold the rights of the appellees in this case. No one can seriously argue that the Arkansas statute at

issue here was in any manner intended to regulate, control or influence the religious belief or practice of any person.

The United States Supreme Court has decided a line of cases recognizing that under some circumstances civil court review of ecclesiastical actions is appropriate. See *Gonzalez* v. *Archbishop*, 280 U.S. 1 (1929): the claim of right to be appointed to a vacant collative chaplaincy and the right to receive the accrued income during the vacancy; *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952): the right to the use and occupancy of church property where a state legislature had transferred control of church property from one rival group of members to another; *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972): a state's interest in imposing reasonable regulations for the control of basic education; *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969): a state court's interest in resolving disputes over church property; *The Serbian Eastern Orthodox Diocese for the United States of America and Canada, et al.* v. *Milivojivich*, 426 U.S. 696 (1976): a dispute over the control of the property and assets of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

The Louisiana Supreme Court, in *Bourgeois* v. *Landrum*, 393 So. 2d 1275 (1981), addressed the issue of whether church members have a right to examine the financial books and records of the church under the provisions of the Louisiana nonprofit corporation law. The church had organized pursuant to the state's nonprofit corporation laws. The court, holding that the church members had such a right, observed: "the underlying First Amendment principles, which protect against the entanglement of civil courts in questions of religious doctrine, polity or practice, are not offended by the judicial enforcement of a statute requiring a church, as a non-profit corporation, to keep at its registered office, corporate records for examination by its voting members."

The Louisiana Supreme Court, quoting from *Presbyterian Church* v. *Hull Church*, 393 U.S. 40 (1976), observed:

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such contro-

> versies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. The First Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.

The Louisiana Supreme Court held that "First Amendment values are plainly not jeopardized by a civil court's enforcement of a voting member's right to examine these records."

Prior to incorporating on April 14, 1975, the Sixth and Izard Church of Christ had, as is traditional with churches in Arkansas, operated as an unincorporated association. The church designated the elders as the first board of directors. They are to hold office until their successors have been elected and qualified. The elders are serving as elders of the church and directors of the corporation at the same time. The duties of the board of directors of a corporation are prescribed by statute. However as elders of the church their responsibilities and duties are purely ecclesiastical in nature. The issue in the present case is almost identical with the issue considered by the Louisiana court in the *Bourgeois* case. I believe that the First Amendment permits civil courts to decide church disputes involving secular matters without resolving the underlying controversies over religious doctrine.

I find no interference by the state in any religious matters by permitting the voluntary incorporation of groups or associations in the manner utilized by this church. The statute providing for incorporation is completely void of any reference to religion. The members of the Sixth and Izard Church of Christ voluntarily incorporated pursuant to this statute. Their purpose in doing so is of no concern to this court. The state did not in any manner attempt to control or influence the religious beliefs of the people of the state of Arkansas. Neither did the state encourage the church to abandon its cloak of nondisclosure and voluntarily incorporate.

It is my opinion that the chancellor acted within the bounds of our mandate in appointing a master and adopting the master's findings of fact and recommendations. For clarification I note that the chancellor's order does not require the appellants to respond to interrogatories and requests for admissions relating to

the selection of elders; nor does it require them to furnish records concerning contributions of members or others. I find nothing in this decree that would interfere with the First Amendment rights of the appellants. I think our first decision in this case was correct and we ought to abide by it.

I would affirm the decision of the trial court requiring the appellants to follow the mandates of the law and our prior opinion in this case.

DUDLEY and NEWBERN, JJ., join in this dissent.

Richard Orville GOODEN *v.* STATE of Arkansas

CR 87-224 749 S.W.2d 657

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Kenneth George Fuchs and *Fredye L. Eckhart*, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, Richard Orville Gooden, was convicted of conspiracy to manufacture marijuana, manufacture of marijuana, and possession of marijuana with intent to deliver. On appeal Gooden argues: (1) he was denied a speedy trial; (2) the trial court should have suppressed evidence obtained pursuant to an unlawful search; (3) the court should have enforced the terms of a plea agreement not adhered to by the State or, in the alternative, should have suppressed a statement made in connection with the plea agreement; and (4) as a matter of law Gooden could only be convicted of the manufacturing charge.

This case was certified to us by the court of appeals pursuant to Rules 29(1)(a) and (c) and 29(4)(b) of the Rules of the Supreme Court and the Court of Appeals. We find that Gooden's third argument pertaining to suppression of his incriminating statement has merit and therefore reverse.

On February 19, 1985, Louisiana officials arrested Gooden and his cousin, Howard Parette, Jr., for possession with intent to deliver approximately 227 pounds of marijuana. Pursuant to information that the marijuana confiscated in Louisiana might have come from Arkansas and that Parette owned land in Faulkner County, officers in Arkansas conducted an investigation which led to the issuance of a search warrant for the Parette property. That search led to the discovery of marijuana, a marijuana manufacturing operation, and certain items implicating Gooden in the manufacturing operation. Gooden, who was out on bond in Louisiana, was again arrested and confined in that state on February 22 pursuant to charges filed in Arkansas.

On February 27 the deputy prosecuting attorney for Faulkner County went to Louisiana accompanied by Arkansas and federal law enforcement officers who wanted to question Gooden. After a plea agreement was negotiated between Gooden, his Louisiana attorney, and the deputy prosecutor, Gooden made an incriminating statement which was later transcribed by one of the officers. The plea agreement was never adhered to, and extradition proceedings were initiated sometime in September of 1985. An order for Gooden's extradition was entered in Louisiana in June of 1986, and Gooden was returned to Arkansas on June 23 and brought to trial on September 4.

I. *SPEEDY TRIAL*

On the day of trial Gooden moved to dismiss for lack of a speedy trial pursuant to Rule 28.1(c) of the Arkansas Rules of Criminal Procedure, which in relevant part provides:

> Any defendant charged with an offense in circuit court . . . shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within eighteen (18) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

Approximately eighteen months and thirteen days had expired between the filing of charges on February 22, 1985, and the trial date of September 4, 1986. Once it was shown that trial was to be held after the speedy trial period had expired, the State had the burden of showing that any delay was the result of Gooden's conduct or was otherwise legally justified. *Harwood* v. *Lofton*, 288 Ark. 173, 702 S.W.2d 805 (1986); *Walker* v. *State*, 288 Ark. 52, 701 S.W.2d 372 (1986); *Williams* v. *State*, 275 Ark. 8, 627 S.W.2d 4 (1982).

In response to Gooden's motion the State introduced extradition materials which indicated that Gooden had refused to sign a waiver of extradition in Louisiana on April 10, 1986, which resulted in additional court proceedings in that state. The extradition issue was not resolved until the Louisiana court order of June 3, 1986, directing that Gooden be extradited to this state. Gooden argues that the materials were not properly received into evidence and were not certified. However, the record shows that the materials were marked and received into evidence, and the objection as to certification did not come until after the evidence was received (Gooden never obtained a ruling on his objection). See *Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). The trial court denied the speedy trial motion on the basis of Gooden's absence from the state and on the grounds that the motion was not timely.

The speedy trial motion, which can be made at any time before trial, was clearly timely. *Duncan* v. *State*, 294 Ark. 105, 740 S.W.2d 923 (1987); *Garrison* v. *State*, 270 Ark. 426, 605 S.W.2d 467 (Ark. App. 1980); Ark. R. Crim. P. 30.2. However, the trial court was otherwise correct in denying the motion.

Rule 28.3(e) specifically excludes from the 18 month time limit those periods of delay resulting from the absence or unavailability of the defendant whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial. It is clear that a delay of 54 days was attributable to Gooden's conduct in fighting extradition which constitutes resisting return within the meaning of Rule 28.3(e). *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988); *O'Riordan* v. *State*, 281 Ark. 424, 665 S.W.2d 255 (1984). The trial court was therefore correct in holding that the speedy trial

period had not expired.

Citing *Shaw* v. *State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986), Gooden makes the additional argument that the trial court erred in failing to set forth the number of excludable days in a written order or docket entry as required by Rule 28.3(i), which provides:

> All excluded periods shall be set forth by the court in a written order or docket entry. The number of days of the excluded period or periods shall be added to the number of months applicable to the defendant as set forth in Rule 28.1(a), (b) and (c) to determine the limitations and consequences applicable to the defendant.

Granted the trial court did not adhere to the requirements of the rule, the issue was never presented at the trial level. This court does not consider arguments made for the first time on appeal. *Allen, supra; Stephens* v. *State*, 293 Ark. 366, 738 S.W.2d 91 (1987).

II. *UNLAWFUL SEARCH*

Gooden next argues that the court erred in denying his motion to suppress evidence obtained as the result of an unlawful search. He raises numerous points challenging the warrant authorizing the search, the finding of probable cause to issue the warrant, the affidavit in support of the warrant, and the scope of the search. The State's response is that Gooden does not have standing to challenge the search as all evidence was seized on property belonging to Parette, not Gooden. The deplorable state of the record on the issue of standing is such that it is difficult if not impossible to determine from the briefs whether Gooden resided on the Parette property so that he might be said to have had an expectation of privacy sufficient to give him the standing necessary to challenge the search.

At various times before the trial Gooden maintained a position entirely inconsistent with the claim that he resided on the Parette property and that he had a possessory interest in hundreds of items seized during the search. During the suppression hearing, the State maintained that Gooden did not have standing to object to the search. Gooden then asserted for the first time that

he actually lived on the property, after which the court permitted him to raise his objections to the search based upon that assertion. However, the matter was never developed at trial nor did the trial court ever resolve the issue by formally ruling on whether Gooden had standing. Our review of the record reveals little if any actual evidence that Gooden did more than frequent the property and possibly manage the manufacturing operation.

In *State* v. *Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (1986), this court stated that the doctrine of standing to invoke the Fourth Amendment's exclusionary rule had evolved to focus on *the defendant's* substantive Fourth Amendment rights. Courts should not exclude evidence under the Fourth Amendment unless it is determined that an unlawful search violated the defendant's own constitutional rights. Those rights are so violated only if the challenged conduct invaded the defendant's legitimate expectation of privacy. In *Hamzy*, we quoted extensively from *Rakas* v. *Illinois*, 439 U.S. 128 (1978), and noted that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." *Hamzy*, at 565. That same rationale is expressed in *Koonce* v. *State*, 269 Ark. 96, 598 S.W.2d 741 (1980).

While testimony of one of the witnesses indicates that an expired driver's license belonging to Gooden was found in the house on the Parette property, and parts of the typed summary of Gooden's oral confession suggest that Gooden was responsible for the overall manufacturing operation on the property, these facts do not establish that Gooden lawfully possessed or controlled the property or that he resided thereon. Though not abstracted, we find testimony by a witness residing on land adjoining the Parette property that a "neighbor" (Gooden) drove back and forth on the road leading to the property. Taken as a whole, however, the evidence of record is simply not such that this court is in a position to make a meaningful determination on the issue of standing which under the facts of this case is a necessary prerequisite to our consideration of Gooden's challenges to the warrant, the underlying affidavit, and the subsequent search. Since we are reversing on other grounds, we do not find it necessary to labor through the record in search of a final answer on the issue of standing as it is certain of examination in the event of retrial.

III. *PLEA AGREEMENT AND INCRIMINATING STATEMENT*

Gooden argues that the court erred in failing to enforce the terms of his plea agreement entered into with his Louisiana attorney and the deputy prosecuting attorney for Faulkner County. In the alternative, Gooden argues that the court committed reversible error in denying his motion to suppress a written summary of his incriminating statement made in connection with the plea agreement and in allowing the interrogating officer, Ron Lewis, to testify as to the contents of the statement. In support of the latter argument, Gooden cites Rule 25.4 of the Rules of Criminal Procedure, which provides:

> No evidence of any discussion between the parties, of any statement made by the defendant, or of the fact that the parties engaged in plea discussions shall be admissible in any criminal . . . proceeding [with exceptions not applicable].
>
> . . . .
>
> Irrespective of whether a plea of guilty . . . is the result of a plea agreement, if it is not accepted or is withdrawn . . . neither the plea . . . nor any statement by the defendant *in connection with the making or acceptance of the plea* . . . is admissible in evidence against the defendant in any criminal [proceeding]. [Emphasis ours.]

Rule 410 of the Arkansas Rules of Evidence is essentially the same in purpose and effect. Although the written summary of Gooden's incriminating statement was not introduced at trial, it is obvious to us that Officer Lewis should not have been permitted to testify as to the contents of the statement. As such, we do not reach the contention that the court erred in failing to enforce the terms of the plea agreement.

In reviewing the admissibility of Gooden's statement, either as to the written summary or the testimony by Officer Lewis, this court makes an independent determination based upon the totality of the circumstances and reverses the actions of the trial judge only if it is found that the court's finding was clearly against a preponderance of the evidence. *Smith* v. *State*,

286 Ark. 247, 691 S.W.2d 154 (1985).

Gooden's motion sought suppression of the "introduction of *any* . . . custodial statements" made in connection with his plea agreement. (Emphasis ours.) During the hearing on the motion, the State tendered Officer Lewis' written summary of Gooden's incriminating statement, which the court ruled admissible in evidence. Gooden's counsel responded, "Your Honor, that's over my objection." Rather than introduce the written summary at trial, the State presented the statement through testimony by Lewis. We see no difference in the admissibility of the written summary as opposed to Lewis' testimony. Both are inadmissible under Rule 25.4 since Gooden's incriminating statement was made in connection with his plea agreement. Gooden's motion to suppress *any* statements should have been granted. The trial court committed reversible error in not doing so.

The State argues that the trial court's determination should be upheld because Gooden failed to present the Rule 25.4 argument to the trial court, he did not abstract the incriminating statement in his brief on appeal, and the incriminating statement was not made in reliance upon the plea negotiations. We disagree.

In support of Gooden's motion to suppress, it was specified that the statement was given in reliance upon and induced by the plea agreement entered into between Gooden and the prosecuting attorney, the details of which were included in the motion. Our general rule is that we do not consider issues raised for the first time on appeal, *Stephens, supra*, and objections at the trial court level must be sufficiently specific to apprise the court of the nature of the error complained of. *Cobbs* v. *State*, 292 Ark. 188, 728 S.W.2d 957 (1987). While Gooden may not have cited Rule 25.4 in his motion, our review of the proceedings and the underlying motion convinces us that the issue has been preserved for appellate review.

We are equally convinced that the incriminating statement was made in connection with the plea negotiations. At the suppression hearing Gooden stated that while in Louisiana on February 27 he refused to make a statement to officers until he had something "in writing." Gooden further stated that he did not give the officers his statement until his attorney indicated that

he had something in writing and Gooden could give a statement. It was conceded by the officers that Gooden's attorney was conferring with the prosecuting attorney as to the details of the plea agreement in the hall outside the room where Gooden was being detained for questioning. The officer who eventually took Gooden's statement admitted he knew negotiations were going on and that at one point Gooden's attorney came into the room and gave the "go ahead" for a statement from Gooden. Our review of the record convinces us that the evidence clearly preponderates in favor of a finding that the statement was made in connection with and in reliance upon the plea agreement.

The State's argument as to Gooden's failure to abstract the statement in his brief on appeal is misplaced, as is its reliance upon *Sutherland* v. *State*, 292 Ark. 103, 728 S.W.2d 496 (1987). The written statement was never introduced; rather, the State substituted the testimony of Officer Lewis, which was abstracted. In any event, we stated in *Sutherland* that any defect caused by failure to abstract an allegedly incriminating statement could be cured if the contents of the statement and its incriminating nature could be derived from other parts of the abstract.

In sum, Gooden's objection to the trial court's denial of his motion to suppress any custodial statements was sufficient to protect him at trial from Officer Lewis' testimony. His incriminating statement was made in connection with the plea agreement and, while the written summary of the statement was not introduced, the State was nonetheless able to place the contents of the statement before the jury through Lewis' testimony. We find this to be reversible error under Rule 25.4.

IV. *CONVICTION OF CONSPIRACY TO MANUFACTURE, MANUFACTURE, AND POSSESSION WITH INTENT TO DELIVER*

Gooden argues that he could not be convicted of conspiracy to manufacture marijuana and the actual manufacturing of marijuana in light of Ark. Code Ann. § 5-1-110 (1987), formerly Ark. Stat. Ann. § 41-105 (Repl. 1977), which in part provides:

> (a) When the same conduct of a defendant may establish the commission of more than one offense, the

> defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (2) one offense consists only of a conspiracy, solicitation, or attempt to commit the other . . . .

Citing section 5-1-110(a)(1), Gooden also argues that he could not be convicted of manufacturing marijuana and possession of marijuana with intent to deliver as the same conduct establishes the commission of both offenses and, when one offense is included in the other, conviction may not be had for both. Because the facts as to the various charges may develop differently at the next trial, we do not reach these arguments at this time.

Reversed and remanded.

HICKMAN, HAYS and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. I dissent. In my view, the majority makes a much better case than the appellant made for himself in this matter. The reason the appellant had difficulty in presenting a proper record on appeal is that the positions he took below were often inconsistent. For instance, the majority refers to the deplorable state of the record on the issue of standing in connection with appellant's argument that the court erred in denying his motion to suppress evidence obtained as a result of the unlawful search. This court's response to appellant's argument on this issue should be simple: Appellant presented *no* testimony at the suppression hearing by any witness that the appellant either owned, or was a tenant of, the Mayflower property, which was searched. In fact, the evidence presented is undisputed that this property was owned by Howard Phillip Parette, Jr. Appellant's counsel is the only person who made any statement (albeit unsupported), indicating the appellant lived on the Mayflower property. Actually, the majority court agrees that the appellant failed in any way to establish standing by the record before this court in this appeal and suggests that this issue will surely be reexamined at retrial.

As I see the standing issue, the appellant at both the pretrial and the trial on the merits made every effort to claim certain personal properties which were found on the Mayflower farm but in every other way chose not to be identified with the Mayflower property. Simply put, the truth is that, except for the personalty

he claimed that was found in the house at Mayflower, the appellant, for trial-strategy purposes, never claimed an interest, ownership or tenancy in the Mayflower property where the marijuana was found. Basically, the legal issue at trial became a factual one, and the trial judge decided it by ruling the appellant had no standing to challenge the search because he was not an owner or tenant. Even if the appellant changes his trial strategy on the retrial of this cause, the standing issue remains a factual one to be decided by the trial judge.

The majority court actually reverses this case holding that the trial court erred in admitting into evidence the appellant's incriminating statements which he claims were made in reliance upon a plea agreement entered into between him and the state. Again, appellant's point narrows itself to a factual issue which I believe was one correctly made by the trial judge. Instead, the majority court rejects the trial judge's ruling and holds that it is convinced that the appellant's incriminating statement was made in connection with the plea negotiations.

In making its factual decision, the majority points mainly to testimony given by the appellant. It is true that the appellant testified, at the suppression hearing, that, on the day he gave his statement, he refused to make any statement to officers until he had something in writing. However, contrary testimony was given by Officer Ron Lewis, who was the officer who took the appellant's incriminating statements. Lewis testified that he was never aware that the appellant made his statements based upon any sort of promise of a plea agreement and, in fact, said he believed the appellant made his statements because the appellant was "trying to take all of the responsibility for the marijuana operation in [Arkansas], rather than to incriminate his cousin, Dr. Phillip Parette, Jr."

Admittedly, the appellant's and the state's evidence on this issue was in conflict, concerning how and why the appellant gave his incriminating statements, but that was an issue the trial judge was required to, and did, make. The judge obviously did not believe the appellant's testimony and ruled in favor of the state. The majority, in my opinion, is wrong in reversing the trial judge on the fact question. I would affirm.

HICKMAN and HAYS, JJ., join this dissent.

Lillie HILTON, Jerusha Hobbs, Verna Scrubbs, Shirley Kearney, and Geneva Eatmon *v.* PINE BLUFF PUBLIC SCHOOLS

87-334 748 S.W.2d 648

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Mitchell and Roachell, by: *Marcia Barnes*, for appellants.

Mitchell, Williams, Selig & Tucker, by: *Jeffrey H. Thomas*, and *Ramsey, Cox, Bridgforth, Gilbert, Harrelson & Starling*, by: *Spencer F. Robinson*, for appellee.

JACK HOLT, JR., Chief Justice. This case involves the responsibility of a school district, when merging with another

district, to honor the teaching contracts of the dissolved district. Jurisdiction is pursuant to Ark. Sup. Ct. R. 29(1)(c).

Appellants Lillie Hilton and Geneva Eatmon, nonprobationary teachers in the Linwood School District, and appellants Jerusha Hobbs, Shirley Kearney, and Verna Scrubbs, probationary teachers in the district, contracted to teach in the district for the 1983-1984 school year. In the 1983-1984 school year, Linwood and the appellee, the Pine Bluff School District (Pine Bluff Public Schools), negotiated a merger of the two districts for the 1984-1985 school year. Sometime in May of 1984, Superintendent Daniels of the Linwood District mailed an undated letter to the district's teachers informing them of the potential merger and requesting that they waive their statutory right to notice of nonrenewal guaranteed by Ark. Code Ann. § 6-17-1506 (1987), formerly Ark. Stat. Ann. § 80-1266.3 (Supp. 1985), of the Teacher Fair Dismissal Act of 1983 [Ark. Code Ann. §§ 6-17-1501—6-17-1510 (1987), formerly Ark. Stat. Ann. §§ 80-1266—80-1266.10 (Supp. 1985)]. All of the appellants refused to waive this statutory right.

Linwood did not give the appellants notice of nonrenewal by May 1, 1984, as required by § 6-17-1506. On July 1, 1984, the Pine Bluff and Linwood School Districts merged. Subsequently, the Pine Bluff School District refused to honor the appellants' contracts for the 1984-85 school year. In addition, it denied their applications for teaching positions for the 1984-1985 school year.

Appellants then filed an action in federal district court alleging violations of their fifth and fourteenth amendment due process rights and of the Arkansas Teacher Fair Dismissal Act. The district court dismissed the complaint for lack of subject matter jurisdiction. The Eighth Circuit Court of Appeals affirmed the district court.

On October 3, 1986, the appellants filed a breach of contract suit in Jefferson County Chancery Court seeking reinstatement and backpay. Appellees filed an answer and motion for summary judgment. Thereafter, the case was transferred to circuit court. Based upon our holding in *Woodard* v. *Wabbaseka-Tucker Public School Dist.*, 286 Ark. 110, 689 S.W.2d 546 (1985), the trial court granted the appellee's motion for summary judgment.

In so doing, it found that the Teacher Fair Dismissal Act did not apply and that the appellants never had a contract to teach in the Pine Bluff School District. We disagree.

Summary judgment is an extreme remedy which will be granted only when there is no genuine issue of material fact left to be litigated. *Ford* v. *Cunningham*, 291 Ark. 56, 722 S.W.2d 567 (1987). Consequently, all proof submitted must be viewed most favorably to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.*

In *Woodard, supra*, the appellant was employed as a teacher by the Plum Bayou-Tucker School District for the 1982-1983 school year. In 1983, the Plum Bayou-Tucker District was dissolved and merged with the Wabbaseka District. At the time of the merger, Plum Bayou-Tucker had not entered into contracts with its teachers. The Wabbaseka District refused to employ appellant for the 1983-1984 school year. The appellant then filed a breach of contract action against the Wabbaseka District. In holding for the school district, we stated as follows:

> Appellant's argument is that the appellee violated the Teacher Fair Dismissal Act of 1979 [Ark. Stat. Ann. §§ 80-1264—80-1264.10 (Supp. 1980)]. We cannot agree that the Act is controlling under the circumstances of this case. The Act protects the right of renewal of a contract between a teacher and the Board of Directors of a school district. The Act does not attempt to define the rights of teachers and districts to enter into an initial contract. In the present case the appellant's employing district no longer exists. Therefore, he is applying to a new or different district and is not seeking renewal of his contract. He did not have a contract with the Wabbaseka District. Even if appellant were covered by the Act he does not have an absolute right to the job. He has the right not to be treated arbitrarily or capriciously, or discriminated against because of race, religion, sex, age, or national origin. If the School Board action is supported by rational reasons and does not discriminate for the foregoing reasons the appellant's rights are not violated . . . .

This case is not controlling. In the present case, the appel-

lants had contracts with the Linwood School District for the 1983-1984 school year at the time of the merger with the Pine Bluff School District by virtue of Ark. Code Ann. § 6-17-1506 (1987), which provides in pertinent part as follows:

> Automatic contract renewal—Notice of nonrenewal.
>
> (a) Every contract of employment made between a teacher and the board of directors of a school district shall be renewed in writing on the same terms and for the same salary, unless increased or decreased by law, for the next school year succeeding the date of termination fixed therein, which renewal may be made by an endorsement on the existing contract instrument, unless by May 1 of the contract year, the teacher is notified by the school superintendent that the superintendent is recommending that the teacher's contract not be renewed or, unless during the period of the contract or within ten (10) days after the end of the school year, the teacher shall deliver or mail by registered mail to the board of directors her resignation as a teacher, or unless such contract is superseded by another contract between the parties.

When the appellants did not receive notice of recommended nonrenewal by May 1, 1984, their contracts with the Linwood School District were automatically renewed for 1984-1985 school year. *See Marion County Rural School Dist. No. 1* v. *Rastle*, 265 Ark. 33, 576 S.W.2d 502 (1979); *see also Western Grove School Dist.* v. *Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986). Furthermore, the Pine Bluff School District, as a district to which new territory had been annexed, was bound to honor these contracts pursuant to Ark. Code Ann. § 6-13-220 (1987), formerly Ark. Stat. Ann. §§ 80-419 and 80-422 (Repl. 1980). *See Nicholson* v. *Ash Flat School Dist. No. 4*, 220 Ark. 787, 249 S.W.2d 983 (1952); *Chidester School Dist. No. 50* v. *Faulkner*, 218 Ark. 239, 235 S.W.2d 870 (1951); *Horsman* v. *Tokio School Dist. No. 82*, 210 Ark. 225, 195 S.W.2d 51 (1946). This statute provides in pertinent part as follows:

> (a) Any new school district which is created or district to which new territory is annexed shall succeed to the

property of the district dissolved, shall become liable for its contracts and debts, and may sue and be sued therefor.

In light of the foregoing, we conclude that the trial court erred in granting summary judgment. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

Robert Lee BURNETT *v.* STATE of Arkansas

CR 87-93 749 S.W.2d 308

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Sherman & James, by: *Anthony J. Sherman*, for appellant.

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

DARRELL HICKMAN, Justice. This is a capital felony murder case. Robert Lee Burnett was convicted of murdering Rhonda Dobson, a clerk at the Super Stop in Brinkley, Arkansas. He received the death penalty. The victim was bludgeoned and stabbed repeatedly. The crime occurred in the early morning hours of July 10, 1986. We reverse the conviction because Burnett was unlawfully seized at his home in violation of the Fourth Amendment to the United States Constitution and evidence obtained as a result of that seizure was used against him.

A police officer drove by the Super Stop just after the crime occurred. He saw a black man run from the store but was unable to identify him; he searched but couldn't find him. Several people, who were traveling together in a truck which had stopped at the store, also witnessed the same man run from the store and jump a nearby fence. One of the people, Barbara Kuykendall, was taken to the police station, given a book of photographs, and asked if she could identify the man she saw. She testified at the pretrial suppression hearing that she could not identify the man. She said he was not included in the photographs. However, a police officer

testified Mrs. Kuykendall kept coming back to one picture and commenting there was a similarity between this photograph and the man she had seen. The photograph was one of Burnett, taken a few years earlier.

On this information alone, several police officers went to Burnett's house about 6 a.m., awakened him, and told him to come to the police station. One of the officers testified that Burnett was told Chief Storey wanted to talk to him. He was not arrested; but neither was he told he had any choice; he put on his trousers and accompanied the officers. When Burnett arrived at the station, he was promptly advised of his rights by Deputy Sheriff James Nolen. Nolen turned him over to Bill Gage, an investigator with the Arkansas State Police. Gage questioned Burnett, and Burnett denied killing anyone. However, Burnett did make a statement in which he admitted he had gone, in the early morning hours, to another store and to the Super Stop to obtain some mosquito repellant. He said he finally found the repellant at an Exxon station and returned home. This statement was made at 7:40 a.m.

About 10:30 a.m. a lineup was conducted. Barbara Kuykendall identified Burnett from the lineup. None of the participants had shirts on and two of them did not have shoes on. Burnett was not wearing shoes. There was evidence that the man running from the station did not have a shirt on, wore shorts or similar apparel, and wore no shoes.

About noon Burnett was turned over to an officer of the Arkansas State Police for a polygraph examination. The officer said he advised Burnett of his rights, conducted a polygraph examination, told Burnett he flunked the test, and he was lying about his participation in the murder. Burnett was again questioned by Officer Gage. This time a part of the interrogation was recorded. Burnett admitted he killed Rhonda Dobson. He said he had found a shotgun and a shaving kit and had gone to the store. "I took the shotgun up to the Super Stop. I went inside the Super Stop and sat the gun down just inside the door. I ask the girl who was working about the spray and she said, 'Nigger find it yourself or get out.' She was drinking pop or something and she threw it in my face. We got to fighting and that is the last thing I remember. I remember knocking her down." Burnett was arrested about 3:30

p.m. by Officer Gage after making a second incriminating statement.

A pretrial suppression hearing was held to determine if the statements and the identification should be excluded because of the unlawful arrest or seizure of Burnett at his home. The trial judge ruled that the officers had "probable cause to ask the defendant to come to the station, whether he was arrested or not." He found Burnett's rights had been protected and the statements and identification were valid. We agree with the appellant's argument that the trial court erred.

[redacted] There is no doubt that the officers did not have probable cause to arrest Burnett for the crime when he was picked up. The only evidence they had was the information supplied by Kuykendall. She testified at the suppression hearing that Burnett was not in the photographs she was shown. An officer testified she kept "coming back" to Burnett's picture, but she did not identify Burnett from the photograph. Later during the trial Kuykendall elaborated on her testimony and said there was indeed a picture which looked like the man she had seen running from the store, but the man she had seen had a much thinner face.

[redacted] The law is clear that a person cannot be arrested in his own house without a warrant absent exigent circumstances. *Payton* v. *New York*, 445 U.S. 573 (1980). If such an illegal arrest is made, any evidence obtained as a result of the arrest will be suppressed. *Wong Sun* v. *U.S.*, 371 U.S. 471 (1963). Also a person cannot be "seized" at his house without probable cause. Both acts are in violation of the Fourth Amendment to the United States Constitution. *See Dunaway* v. *New York*, 442 U.S. 200 (1979). The test for whether one has been seized was announced in *United States* v. *Mendenhall*, 446 U.S. 544 (1980), which provided:

> We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person

> of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

In a case almost identical to the present case, the United States Supreme Court held there was a seizure. *Dunaway* v. *New York, supra.* A police sergeant, questioning a jail inmate about Dunaway, learned nothing that would warrant obtaining an arrest warrant. Nevertheless, he ordered other officers to "pick up" Dunaway and bring him in. Dunaway was taken into custody by three officers and, although he was not told he was under arrest, he would have been restrained if he had attempted to leave. He was given his *Miranda* rights, questioned and evidently made an incriminating statement. The court had little doubt that Dunaway was "seized." The state argued the detention did not amount to an arrest and was a permissible detention under *Terry* v. *Ohio*, 392 U.S. 1 (1968), because the police had a "reasonable suspicion" that Dunaway possessed "intimate knowledge about a serious and unsolved crime." The court rejected the argument:

> In contrast to the brief and narrowly circumscribed intrusions involved in those cases [*Terry* v. *Ohio, supra*, and similar decisions], the detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, [cite omitted] obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the

> general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause.
>
> The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. 'The requirement of probable cause has roots that are deep in our history.' [cite omitted]. Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.' [cite omitted] The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.

The court concluded:

> [D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation.

In *Hayes* v. *Florida*, 470 U.S. 811 (1985), the police went to the home of a principal suspect in a burglary and rape case. The officers spoke to him on his front porch. When he was reluctant to go to the station voluntarily, an officer said he would arrest him. The suspect "blurted out" he would rather go than be arrested. The suspect was taken to the police station without a warrant and fingerprinted. The court held that there was no probable cause to arrest the suspect, no consent to the journey to the police station, no prior judicial authorization for detainment, and the investigation and detention at the police station for fingerprinting violated

the Fourth Amendment. The fingerprints were suppressed as evidence. The court said:

> And our view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.

In the present case the trial judge did not rule the officers had probable cause. He ruled they had enough information to detain Burnett for investigative purposes. The appellant says seven officers picked him up; the state concedes four or five were present. The record reflects, by those officers who testified, that at least six policemen were present when Burnett was picked up. Burnett was not arrested; he was simply told to get his clothes on and come to the station. He was not told he could stay home. Although the officers were armed, there is no evidence, other than the appellant's testimony, that any of them held their weapons on Burnett.

Considering the totality of the circumstances, we conclude that Burnett was seized at his home in violation of the Fourth Amendment. The officers did not comply with our rules of criminal procedure, which require that an officer inform a person he is free not to accompany the officer if the officer does not have a warrant. *See* A.R.Cr.P. Rule 2.3. A reasonable person in Burnett's position would have thought that he had no choice except to accompany the officers to the police station. There is no real difference in this case and *Rose* v. *State*, 294 Ark. 279, 742 S.W.2d 901 (1988), where the defendant was picked up, detained and interrogated without probable cause.

The state argues that other independent evidence was discovered during the day which would provide the necessary probable cause. One officer testified that on the morning of the murder they found a trail of money from the Super Stop to Burnett's house. However, the evidence only showed that the trail was a few feet long leading in the general direction of Burnett's

house. About 10 a.m. that morning, a consent search of Burnett's residence was conducted and a sock was found in a garbage sack. Evidently it matched one found at the scene of the crime. (Officer Nolen testified that Burnett told him on August 13, 1986, that he had socks on his hands at the time of the robbery.)

An unusual development did take place during the trial about a piece of evidence. Two months after the crime, on September 11, 1986, Officer Nolen took a statement from Earnie Pye, which stated that Pye had seen Burnett leave the Super Stop just before Pye discovered the body. This evidence, if credible, undoubtedly, would have made the state's case; it would have given the state the probable cause it needed to arrest Burnett. But the state chose not to offer this evidence at the pretrial hearing nor during the trial. The same day this statement was taken by Nolen, Pye wrote a handwritten statement for the deputy prosecuting attorney denying the truth of the statement. Pye was in the county jail at the time, and he said Officer Nolen made him sign the statement by threatening him with more time for his offense. At the pretrial hearing held on January 5, 1987, the state did not ask Officer Nolen about this information. In fact the deputy prosecuting attorney indicated to Nolen at one point not to repeat any hearsay he may have obtained from Pye.

The defense called Officer Nolen as a hostile defense witness, and Nolen testified that Pye told him early that morning before Burnett was picked up that the man leaving the station looked like Burnett. The September statement given to Nolen and the letter from Pye to the deputy prosecuting attorney were offered to impeach Officer Nolen and to show a witness was coerced to say something he did not want to say, and to show there was a pattern that the state was trying to "prove up more of a case than they had at the time." The defense called an auxillary police officer who testified that he was asked to go to the Exxon station and review surveillance tapes from a camera to see if Pye was on the tape. He could not recall if he was asked to view the tapes on July 10 or July 11.

The officer, immediately on the scene, related that Pye and another person came up after the man had run from the Super Stop and that Pye could not have seen the man exit the station.

The state in this case simply failed to prove that the seizure

without a warrant was with probable cause and that the detention was lawful under the Fourteenth Amendment. Evidence accumulated during the day did not bolster the state's case nor alter the fact that it had no probable cause to seize, detain, and interrogate Burnett.

We hold the statements and lineup identification were taken in violation of the Fourth and Fourteenth Amendments of the United States Constitution and must be suppressed. *Hayes* v. *Florida, supra.*

The lineup was not suggestive in our judgment although Burnett, who is 5'4", was shorter than any of the other participants. Kuykendall did not say the man was short. She said the man jumping the fence was about the height of her husband who is 5'11". This discrepancy would go to the weight of her testimony, not the correctness of the lineup. Sergeant Gage testified that the participants were sitting and that he had them stand one at a time so the difference in height would not be noticeable. But Kuykendall testified that the participants were all standing when she saw the lineup. Burnett testified that all the participants were standing the first time they were viewed for identification and that the second time they were all sitting and stood one at a time. Kuykendall testified that the reason she recognized Burnett was because of his slim, pointed face. While the lineup itself was not suggestive, it was the result of the illegal seizure of Burnett and the lineup identification cannot be used as evidence against him. *Hayes* v. *Florida, supra.*

That does not mean the in-court identification by Kuykendall is automatically excluded.

The United States Supreme Court has defined the standard for admitting an in-court identification after an illegal arrest. In *United States* v. *Wade*, 388 U.S. 218 (1967), the court held that the admissibility of an in-court identification requires consideration of various factors:

> [T]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the

> lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

In *United States* v. *Crews*, 445 U.S. 463 (1980), the witness viewed photographs at the police station and later made an in-court identification. The court said:

> A victim's in-court identification of the accused has three distinct elements. First, the victim is present at trial to testify as to what transpired between her and the offender, and to identify the defendant as the culprit. Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender.

We cannot conclude from this record whether the in-court identification should be suppressed. The question addressed at the trial was whether the lineup was proper—not whether Kuykendall's in-court identification was tainted by the illegal arrest and detention. On remand the court will conduct a pretrial hearing to determine whether the in-court identification was tainted by the illegal seizure. *See Wright* v. *State*, 258 Ark. 652, 528 S.W.2d 905 (1975).

We now address the other issues which may arise again at a retrial. Objection was made to the admissibility of the photographs. We have repeatedly held that photographs, even though inflammatory, are admissible to illustrate the savagery of the attack, prove an element of the offense or assist the jury in understanding the testimony. *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987). We find no abuse of discretion in this case.

It is argued that Arkansas' capital murder law does not require an intent to kill and is unconstitutional. We have held "[t]he working of the statute, i.e., conduct manifesting extreme indifference to human life, indicates that the perpetrator of capital murder must act with deliberate conduct which culminates in the death of some person." *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985). We find the constitutional require-

ments are satisfied. *See Tison* v. *Arizona*, ___ U.S. ___, 107 S. Ct. 1676 (1987).

The argument is made it is unconstitutional to seek the death penalty when a black defendant is tried for the murder of a white victim. This argument was rejected in *McCleskey* v. *Kemp*, ___ U.S. ___, 107 S. Ct. 3199 (1987).

Appellant also argues that Arkansas' capital felony murder statute amounts to a mandatory death sentence because the jury cannot show mercy regardless of its findings. This argument was rejected in *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1987).

Reversed and remanded.

Shirley DUVALL, Administratrix of the Estate of Ricky Duvall *v.* MASSACHUSETTS INDEMNITY AND LIFE INSURANCE COMPANY

87-288 748 S.W.2d 650

Supreme Court of Arkansas
Opinion delivered May 9, 1988
[Rehearing denied June 6, 1988.*]

*Purtle, J., would grant rehearing.

Young & Finley, for appellant.

Gardner, Gardner & Hardin, by: *Richard E. Gardner, Jr.*, for appellee.

DARRELL HICKMAN, Justice. The legal question in this case is whether or not Ricky Duvall's death was accidental. He was a 26 year old pulpwood cutter. After going to work on November 5, 1983, he was found lying on the ground. He was taken to a nearby hospital where he was declared dead. It is undisputed that the cause of death was Marfan's syndrome, a congenital disease affecting the connective tissue of the body.

The appellee insurance company had an accidental death and injury policy on Duvall. The insurance company denied coverage and Duvall's wife filed suit against the policy. The insurance company filed a motion for summary judgment, and the appellant also moved for summary judgment. The trial court found no substantial factual dispute and granted the motion for summary judgment in favor of the insurance company. We agree that the death was not accidental and affirm the judgment.

Appellant first argues that the trial court erred in granting summary judgment because the question of accidental death is a question of fact for the jury. The argument has no merit. Appellant and appellee agreed on all of the facts surrounding the insured's death. During oral arguments to this court, appellant's counsel conceded that no additional material facts could be developed at a trial on the matter. The construction and legal effect of a written contract are to be determined by the court as a question of law except where the meaning of the language depends upon disputed extrinsic evidence. *Arkansas Rock & Gravel Co.* v. *Chris-T-Emulsion Co.*, 259 Ark. 807, 536 S.W.2d 724 (1976); *C. & A. Constr. Co.* v. *Benning Const. Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974).

There were no witnesses to Duvall's collapse; we have only the undisputed testimony of Dr. Allan Rozzell, a board certified

pathologist who performed an autopsy on Duvall. In his opinion, the strenuous work of woodcutting caused Duvall's heart rate to increase and his blood pressure to rise, which in turn caused his aorta to rupture. According to Dr. Rozzell, the cause of Duvall's death was Marfan's syndrome.

Once again we are faced with the difficult legal question of what is an "accidental" death or injury. Our experience has been similar to that of other courts, groping for a simple definition of accident, or accidental means, and deciding cases on the basis of facts. *See* Reid, *Insurance Accident Policies — "Accident or Accidental Means,"* 10 Ark. L. Rev. 226 (1955-56); Eckert, *Sickness and Accident Insurance*, 11 Ark. L. Rev. 1 (1956-57); Annotation, *Insurance: "accidental means" as distinguishable from "accident," "accidental result," "accidental death," "accidental injury," etc.*, 166 A.L.R. 469 (1947). We have held that "accident" and "accidental means" are synonymous. *Travelers Ins. Co.* v. *Johnston*, 204 Ark. 307, 162 S.W.2d 480 (1942).

Appleman, a leading authority on insurance law, discusses the subject at length and recognizes the difficulty courts have had in defining accident and accidental means. 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 360 (1981). First, he points out that the medical and legal definition of an accident differ:

> From the point of view of the physician, anything which occurs suddenly may be considered an accident. Therefore, if a particle in a blood stream floats and lodges in a lung or in a coronary artery, that is an accident; the development of a thrombosis in place is not. The bursting of a blood vessel in the brain is a cerebral accident, an occlusion resulting from atherosclerosis or its inadequacy from arteriosclerosis is not. None of these things constitute a legal accident unless trauma causes the clot to float or acts upon a predisposing medical condition so as to produce disability or death.

Appleman also discusses the reasons for extended litigation on this question:

> Since the ingenuity of attorneys, and the sympathies of courts, have made great strides into attempting to bring unexpected occurrence within the coverage of accident policies, insurers have resorted to stringent language to

> attempt to prevent overliberal results. That is why such terms as 'external' and 'violent' have come to have a place in such contracts, and why many insurers employ a phrase such as 'accidental means'. The difficulty is that the companies have become entranced by the language they employ, extending it to situations not originally intended to be excluded, and unnecessary for the purpose of distinguishing between medical and legal causation or, in addition, to prevent fraudulent acts designed for the purpose of collecting policy benefits. With the companies reaching too far, and the courts desiring to narrow such constructions, there is a never ending contest apparent in litigation over such policies. If we bear in mind the legitimate purpose intended to be served both by the insuring agreements and the proper exceptions, the lines of demarcation can be drawn with some degree of fairness.

The appellant argues that according to our definition of accident, Duvall's death was accidental and that she should recover under the policy. The policy language in this case reads:

> The term 'injury' as used in this policy shall mean accidental bodily injuries from which loss results directly and independently of all other causes, provided such injuries are sustained by an Insured Person while this policy is in force with respect to such person.

The parties agree that this language is not ambiguous. In fact, the language in this policy is fairly typical policy language. *See Hartford Life Ins. Co.* v. *Catterson*, 247 Ark. 263, 445 S.W.2d 109 (1969). There is no doubt that we should interpret the policy by construing the words in a plain and ordinary manner. 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 360 (1981). We have adopted the generally accepted definition of the term "accident" or "accidental," which is "something happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected." *See Continental Casualty Co.* v. *Bruden*, 178 Ark. 683, 11 S.W.2d 493 (1928); *Aetna Life Ins. Co.* v. *Little*, 146 Ark. 70, 225 S.W. 298 (1920). Duvall argues that her husband's death was sudden and unexpected and the result of strenuous work and therefore accidental. Not every death that is sudden or unexpected is an accidental death, as

our cases and the authorities demonstrate. According to American Jurisprudence, the words "bodily injury" are commonly and ordinarily used to designate an injury caused by external violence, and not to indicate disease. 43 Am. Jur. 2d *Insurance* § 563 (1982).

In some cases the decision has been easy. In *Hartford Life Ins. Co.* v. *Catterson, supra*, we held that death from exposure was an accident. We compared it to death from heat prostration, which we held to be accidental in *Continental Casualty Co.* v. *Bruden, supra.*

But other cases reflect the difficulty we have had in dealing with the question. In *Fidelity & Casualty Co.* v. *Myer*, 106 Ark. 91, 152 S.W. 995 (1912), the insured was standing in a wagon when he was thrown backwards by the sudden and unexpected movement of the horse. A few days later he began hemorrhaging from the mouth and bowels, dying several weeks later. An autopsy revealed a tumerous growth on the pancreas. A jury verdict holding that Myer died of accidental means was upheld.

In *Travelers Ins. Co.* v. *Johnston, supra*, we upheld a jury finding that Johnston could recover under two accident policies. Johnston was seriously injured when he fell out of a taxicab. His left hip was broken and he became totally disabled. It was discovered that Johnston had Paget's disease, a chronic degenerative condition of the bones. In support of our decision that his injury was accidental, we said:

> So, here, we think the testimony warranted the giving of the instructions herein set out and the finding of the jury, based thereon, that appellee's fall from the cab was an accident for the consequences of which the insurer was liable; and this is true although the jury might have found that appellee's hip would not have been fractured if he had not been afflicted with Paget's disease. However, the testimony of the surgeon who attended appellee is to the effect that a fall such as appellee sustained might have broken the hip even though appellee had not been afflicted with Paget's disease.

In *Metropolitan Casualty Ins. Co.* v. *Fairchild*, 215 Ark. 416, 220 S.W.2d 803 (1949), the insured was disabled because of a heart attack. The doctor testified that it was caused by the

unusual physical stress he was under at the time it occurred. We upheld an award by the judge, sitting as a jury, for a disabling body injury sustained through external, violent and accidental means, according to the language of the policy. We did point out that it was the doctor's undisputed testimony that Fairchild did not suffer from heart disease before the accident.

In these and other decisions we have struggled with the question of whether the injury or death was caused by an accident or through accidental means. Justice Cardozo tried to set us straight on this question in his famous "Serbonian Bog" dissent in *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 (1934). The insured died from sunstroke while playing golf. The policy insured against death resulting from "external, violent and accidental means." The court held that the result was accidental but the means producing it were not accidental. Dissenting, Justice Cardozo said:

> The insured did not do anything which in its ordinary consequences was fraught with danger. The allegations of the complaint show that he was playing golf in the same conditions in which he had often played before. The heat was not extraordinary; the exertion not unusual. By misadventure or accident, an external force which had hitherto been beneficent, was transformed into a force of violence, as much so as a stroke of lightning. The opinion of the court concedes that death 'from sunstroke, when resulting from voluntary exposure to the sun's rays,' is 'an accident.' Why? To be sure the death is not intentional, but that does not make it an 'accident,' as the word is commonly understood, any more than death from indigestion or pneumonia. If there was no accident in the means, there was none in the result, for the two were inseparable. No cause that reasonably can be styled an accident intervened between them. The process of causation was unbroken from exposure up to death. There was an accident throughout, or there was no accident at all.
>
> . . . .
>
> Sunstroke, though it may be a disease according to the classification of physicians, is none the less an accident in

the common speech of men.

. . . .

When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.

. . . .

The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog. 'Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident.' [cites omitted] On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company.

In this case, there was a disease and nothing out of the ordinary that intervened to cause Duvall's death. It is undisputed that Duvall, while engaged in his regular employment, died from Marfan's syndrome, a disease; therefore, his death was not accidental under the policy. The trial court was correct in granting summary judgment in favor of the insurance company.

Affirmed.

PURTLE and DUDLEY, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I agree with the majority that there is no factual dispute in this case. However, I differ with the result reached by the opinion. I would reverse the trial court's decision granting summary judgment to the appellee and direct the court to enter a summary judgment for the appellant.

Whether a death is accidental is ordinarily a jury question. However, the uncontradicted evidence in this case leads me to believe the trial court erred in granting the summary judgment to appellee rather than to the appellant.

I disagree with the majority interpretation of the testimony of Doctor Rozzell. The doctor first described Marfan's Syndrome, a condition which Duvall had, as an inherited condition of which Duvall was not aware. The doctor explained that persons suffering from this condition should avoid doing things which elevate their blood pressure or increase the heartbeat. The doctor stated:

> Mr. Duvall's activity was directly related to his death because that is what initiated the rapid pulse and elevated blood pressure which sets the condition in motion. . . . The result [death] was totally unexpected. I think anybody would be an idiot to be out there chopping wood if he knew that he had Marfan's Syndrome. Again, the thing which caused the death was the strenuous activity.

There is no other testimony on the cause of death.

It is somewhat a mystery to me why the majority made the decision to affirm when all of the cases cited in the majority opinion clearly require reversal. In *Continental Casualty Co.* v. *Bruden*, 178 Ark. 683, 11 S.W.2d 493 (1928), we held that death by heat prostration was an accidental death. In *Hartford Ins. Co.* v. *Catterson*, 247 Ark. 263, 445 S.W.2d 109 (1969), we held that death from exposure to cold weather was accidental. We cited *Bruden* as supporting precedent. In *Fidelity and Casualty Co.* v. *Myer*, 106 Ark. 91, 152 S.W. 995 (1912), the insured fell out of a wagon and died a few days later from a hemorrhage resulting from the rupture of a tumerous growth in the pancreas. This court upheld the jury verdict deciding that Myer died from accidental means.

A case almost on direct point with the case before us is *Travelers Ins. Co.* v. *Johnston*, 204 Ark. 307, 162 S.W.2d 480 (1942). Johnston had Paget's disease which was not discovered until he fell out of a taxicab. Paget's disease is a degenerative condition of the bones which renders them more susceptible to breakage from trauma. Johnston became disabled from his injury. The physician testified that a fall such as Johnston sustained might have broken his hip even though he was not affected by Paget's disease. We upheld the jury finding that the disability was accidental.

The final authority cited in the majority opinion is *Metropolitan Casualty Ins. Co.* v. *Fairchild*, 215 Ark. 416, 220 S.W.2d 803 (1949). Fairchild became disabled because of a heart attack. The doctor testified the attack was caused by the unusual physical stress Fairchild was under at the time of the occurrence. We upheld the trial court's finding that the heart attack which rendered Fairchild disabled was brought about through "external, violent and accidental means, according to the language of the policy."

The only basis supporting the decision of the majority is the fifty-four year old "Serbonian Bog" dissent in *Landress* v. *Phoenix Mutual Life Ins. Co.*, 131 U.S. 100 (1934). Ordinarily this court does not base its decisions upon dissents. So far as I am concerned the majority is no more persuasive than Justice Cardozo was in his dissent.

Therefore, I would reverse the trial court and direct that a judgment be entered in favor of the appellant.

ROBERT H. DUDLEY, Justice, dissenting. I dissent from that part of the majority opinion which holds that the insured's death was not accidental under the language of the insurance policy. The majority opinion is based upon the single idea that because the death was caused in part by a pre-existing disease, it could not be "accidental" under the policy. Such an approach not only oversimplifies the issue, but also is clearly wrong in light of previous cases decided by this Court.

The overwhelming majority of our cases dealing with accident insurance claims have been concerned with policy language which limited recovery to injuries brought about by "accidental *means*." The term "accidental means" is not used in the policy at issue. It is important, however, to discuss the term in its historical context in order to understand the language in the policy before us. The term "accidental means" was almost universally used in accident insurance policies during the first half of the century. Eckert, *Sickness and Accident Insurance*, 11 Ark. L. Rev. 1 (1957). Judicial construction of the term "accidental means" resulted in a clear split of authority in various jurisdictions. Some courts refused to draw a distinction between loss due to "accidental means" and loss due to "accident," holding that if the result was unusual, unforeseen, and unexpected, the requirement of

"accidental means" was satisfied, as was that of simple "accident." 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 360 (rev. ed. 1981). Other courts, however, took the approach that if the policy was written in terms of "accidental means," then it was necessary that the *acts* or *means* themselves, rather than the *result*, be "accidental," or "unexpected," "unforeseen," "not according to the usual course of events." *Id.*

The rules enunciated in our Arkansas cases appear to fall in the latter category, with attention focused on the act rather than the result. Absolute certainty in categorizing our cases is difficult because in applying the law to the facts of some cases it seems that if the result, rather than the means, was unforeseen, we still allowed recovery. *See, e.g., Union Life Ins. Co.* v. *Epperson*, 221 Ark. 522, 254 S.W.2d 311 (1953). *Metropolitan Casualty Ins. Co.* v. *Fairchild*, 215 Ark. 416, 220 S.W.2d 803 (1949).

Apparently, we were not alone having difficulty in interpreting "accidental means," and the insurance industry began to stop using the term.

> The insurance industry has recognized that the "accidental means" clause, once universally used, has several disadvantages, and, therefore, since the 1940's the trend is away from its use and toward the more liberal "accidental bodily injury" wording. According to a recent insurance publication, this trend is an attempt to build better public relations since the distinction is highly technical and not readily understood by the insuring public or even by courts. The writer parenthetically states that claims relation suffered from "accidental means" specifications, and furthermore the courts ignored the distinction anyway.

Eckert, *supra*, at 5 (footnote omitted).

Regardless of how we construed the term "accidental means" in the past, however, the language of the policy now before us does not employ that term. Rather, it uses the more liberal term "accidental bodily injuries":

> INJURY DEFINED AND SCOPE OF COVERAGE
>
> The term "injury" as used in this policy shall mean accidental bodily injuries from which loss results directly

> and independently of all other causes, provided such injuries are sustained by an Insured Person while this policy is in force with respect to such person.

Thus, this Court is first presented with the question of whether the insured's death falls within the policy language, "accidental bodily injury." In my opinion, it does. The language of an insurance contract must be construed according to the ordinary understanding and common usage of people generally. 10 G. Couch, *Cyclopedia of Insurance Law* § 41:8 (rev. ed. 1982); 43 Am. Jur. 2d *Insurance* § 559 (1982). "Generally, accident policies should be so interpreted that provisions of the policies effectuate the reasonable expectations of the purchaser. An average person buying a personal accident policy assumes that he is covered for any fortuitous and undesigned injury." 1A J. Appleman & J. Appleman, *supra*, § 360.

In applying the law to the facts now before us, the rupture of the insured's aorta was the "bodily injury." In addition, the terms "accident" and "accidental" have never acquired a technical meaning in the law. 10 G. Couch, *supra*, § 41:8; 43 Am. Jur. 2d, *supra*, § 559. Courts have almost universally construed the terms to mean something unforeseen, unexpected, fortuitous, unusual; something which does not occur in the usual course of things; an event such as would not reasonably be anticipated by a person situated as the one to whom the event occurred. *See generally* 1A J. Appleman & J. Appleman, *supra*, § 360; 10 G. Couch, *supra*, §§ 41:8-9; 43 Am. Jur. 2d, *supra*, § 559.

Our own cases, in discussing "accidental means," have defined "accidental" as happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected. *E.g., Continental Casualty Co.* v. *Bruden*, 178 Ark. 683, 11 S.W.2d 493 (1928). Further, "[i]n construing whether or not a certain result is accidental, it is customary to look at the casualty from the point of view of the insured, to see whether or not, from his point of view, it was unexpected, unusual, and unforeseen." 1A J. Appleman & J. Appleman, *supra*, § 360. Under these circumstances, the rupture of the aorta, caused by the physical exertion of the job, and the resulting death were completely unexpected and unforeseen by the insured. Therefore, his death falls clearly within the policy language, "accidental

bodily injury."

The next question confronting this Court under the language in this policy is whether the "loss result[ed] directly and independently of all other causes." Again, I have no difficulty in finding that it did. However, the majority opinion, in reaching its result, completely ignores a long line of Arkansas precedent.

It is unquestioned that an insurer has the right to limit or restrict the coverage of its policy. It is also true, however, that an insurer is charged with the knowledge of how certain language has been judicially construed within the jurisdiction where the policy is issued. *See Clay County Cotton Co.* v. *Home Life Ins. Co.*, 113 F.2d 856 (1940); 1A J. Appleman & J. Appleman, *supra*, § 360. Arkansas has a rather long line of cases, dating back to 1912, in which we have consistently held that

> [w]hen an accident insurance policy limits liability to "bodily injuries sustained through accidental means resulting directly, independently and exclusively of all other causes of death," and it *appears that death resulted from an aggravation of a latent disease to which the deceased was subject*, an instruction is correct to the effect that the defendant insurance company is liable, under the contract, *if death resulted when it did on account of the aggravation of the disease from the accidental injury, even though death from the disease might have resulted at a later period, regardless of the injury.*

Union Life Ins. Co. v. *Epperson*, 221 Ark. at 525, 254 S.W.2d at 313 (emphasis added). "In other words, if death would not have occurred when it did but for the injury resulting from the accident, it was the direct, independent and exclusive cause of death at that time, even though the death was hastened by the diseased condition." *Fidelity & Casualty Co.* v. *Meyer*, 106 Ark. 91, 96, 152 S.W. 995, 997 (1912); *see also Metropolitan Casualty Ins. Co.* v. *Fairchild*, 215 Ark. 416, 220 S.W.2d 803 (1949); *National Life & Accident Ins. Co.* v. *Shibley*, 192 Ark. 53, 90 S.W.2d 766 (1936). Dr. Rozzell testified in his deposition that the strenuous activity of the insured's job was directly related to his death because it initiated the rapid pulse and the elevated blood pressure, setting in motion the rupture of the aorta. Clearly, the insured's death resulted when it did on account of the

aggravation of a latent disease to which he was subject.

In summary, our case law on the policy language before us is in favor of the insured and against the insurance company. Yet, the majority rules in favor of the insurance company and against the insured. Such a ruling is doubly unfair. Obviously, it does not follow our precedent, and more importantly, it rewrites an insurance policy in favor of the insurance company which originally wrote the policy. I dissent.

SUNLAND ENTERPRISES, INC., et al. *v.* Thomas E. McGUCKIN, et al.

87-359 749 S.W.2d 304

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Vaughan & Bamburg, by: *Keith Vaughan*, for appellant.

William C. Frye, for appellee.

DARRELL HICKMAN, Justice. This is an appeal of a trespass case tried to a jury. The appellees sued Bob Tasler and Sunland Enterprises, Inc., for trespass for digging a ditch across his residential lot, damaging the land and trees. The appellees bought this lot from Sunland, which is a company owned by Tasler and his wife. The jury returned a verdict for the appellees for almost $5,000. We affirm.

On appeal, five issues are raised; all are meritless.

The motion for a directed verdict filed by the appellants was properly denied. The argument is made that the proper measure of damages is either the value of the damaged timber or the difference between the market value of the land before and after the trespass. The record reflects that the appellants made no such argument at trial. Further, there was sufficient evidence of damages to support the verdict in the testimony of a landscaper, who viewed the premises and gave his opinion that the damages were $4,935. *See Foran* v. *Ford*, 279 Ark. 121, 649 S.W.2d 177 (1983).

The appellants filed a flurry of post trial motions: a motion for judgment n.o.v., a motion for a new trial, and a motion to reduce the judgment. The appellants have failed to demonstrate that the trial court was wrong in denying the motions.

No objection was made during the trial to submitting the issue of Bob Tasler's individual liability to the jury. There was substantial evidence that the appellants committed the trespass. Furthermore, as already stated, there was sufficient evidence of damages to support the jury's verdict. A trial court may grant a judgment n.o.v. only if there is no substantial evidence to support the verdict. *Sullivan* v. *Employers Equitable Life Ins. Co.*, 287 Ark. 310, 698 S.W.2d 510 (1985). Thus, the trial court did not abuse its discretion in refusing to set aside the verdict.

We find no basis for overruling the court's denial of a new trial on any of the five grounds asserted by appellants. The granting of a new trial is left to the sound discretion of the trial court and its decision will not be reversed unless there is an abuse

of that discretion. *Smith* v. *Villarreal*, 253 Ark. 482, 486 S.W.2d 671 (1972). We have no basis for finding that the trial court abused its discretion or committed error in this regard.

The appellants have failed to demonstrate any reason or cite any authority for overruling the judge's denial of the motion to reduce the judgment. *See Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 605 (1977).

Finally, appellants argue that the trial court erred in not giving a proper instruction to the jury on the measure of damages. We find that no objection was made to the instruction given, nor was a proper instruction offered by appellants, so any argument on appeal is pointless. ARCP Rule 51.

In summary, the jury found against the appellants, and the trial was fair and free of error.

Affirmed.

PURTLE, J., not participating.

Ben GRIMES, Jr. *v.* STATE of Arkansas

CR 87-220 748 S.W.2d 657

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Baim, Gunti, Mouser, DeSimone, & Robinson, by: *Greg Robinson*, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

ROBERT H. DUDLEY, Justice. The appellant was convicted of first degree murder. On appeal, he argues that the evidence was insufficient to sustain the conviction. The argument is without merit, and we affirm the conviction.

Various witnesses established that the murder victim, Tondaleyo Hilton, had a date with appellant on May 30, 1986. That night they were seen together at different places in Pine Bluff. The victim did not return home and was never seen alive again. A little over two weeks later, on June 17, 1986, her body was found in the Arkansas River. The medical examiner found the cause of death was a five inch cut across the neck that was so deep it reached the spine. He did not find any semen in the victim's body, but he testified that could have been because the body was in the river for two weeks and any semen could have been washed away. The appellant left the State after the victim's disappearance but was found and arrested in Virginia Beach, Virginia, on July 24, 1986. He confessed to the murder at that time. He changed the details of his story several times but the final version was as follows: He and the victim were on a date and ended up in Townsend Park in Pine Bluff. While there, they got out of the car, and he forced her to have sexual intercourse with him twice. She told him she was going to tell her family or call the police. He panicked and cut her in the chest or neck area, although he was not sure how many times he stabbed her or to what extent. He then put her body into the trunk of the car, drove to the Arkansas River, threw her body into the river, and

discarded her clothes into a dumpster.

The day after he gave the confession to the Virginia authorities, he gave a second confession to some Pine Bluff police officers. The second confession was consistent with the first one except that he said the murder took place inside rather than outside the car and that in her threat to expose him she did not mention the police but mentioned only her family.

"An accused's confession, along with other evidence, is sufficient to support a conviction." *Fitzhugh* v. *State*, 293 Ark. 315, 318, 737 S.W.2d 638, 640 (1987). This "other evidence" requirement is based on Ark. Code Ann. § 16-89-111(d) (1987), which provides, "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed." We have written, "The State need only prove, however, the crime was committed by someone." *McQueen* v. *State*, 283 Ark. 232, 234, 675 S.W.2d 358, 360 (1984). In this case, there is no question that the victim was killed; her body was found in the Arkansas River and the evidence showed that her throat had been slit. In addition, the last time she was seen alive was when she was on a date with appellant. There was sufficient evidence to support the verdict.

Appellant next argues that some of the state's evidence contradicts his confessions, and therefore, the confessions are not corroborated; from that basis, he argues the evidence is insufficient to support the verdict. The argument is without merit for two reasons. First, his initial conclusion is fallacious. He contends that the medical examiner testified that the victim's throat was cut while the appellant said he stabbed her in the neck and chest. In fact, in the confessions, appellant said he could not remember exactly how the knifing took place. Also, the failure of the medical examiner to find semen is understandable. Second, and more importantly, the statute does not require that the confession be completely corroborated. It merely provides that there be other proof the offense was committed.

In compliance with Rule 11(f) of the Rules of the Supreme Court and Court of Appeals, we have examined all of the objections which were decided adversely to appellant and find none that involve prejudicial error.

Affirmed.

Milton LUBIN, M.D. *v.* CRITTENDEN HOSPITAL ASSOCIATION, A Corporation, R.F. Scruggs, Hugh B. Chalmers, et al.

87-355 748 S.W.2d 663

Supreme Court of Arkansas
Opinion delivered May 9, 1988

N. Alan Lubin, and *Fletcher Long, Jr.*, for appellant.

James A. Johnson, Jr., John C. Deacon, and *Gerald A. Coleman*, for appellees.

ROBERT H. DUDLEY, Justice. Appellant, Milton Lubin, a medical doctor, has been a member of the medical staff of Crittenden Memorial Hospital in West Memphis since 1953. In 1980, complaints were made to hospital authorities about some of appellant's comments made in the presence of nurses and other hospital employees. The hospital's board of trustees notified appellant that a hearing would be held to determine if he had violated the by-laws of the hospital association. After a hearing the board placed appellant on unsupervised probation for one year with no restrictions on his hospital privileges. Appellant responded by filing a civil rights action in federal court against the hospital and its trustees alleging that the disciplinary action deprived him of due process. The federal district court held that the action of the hospital was a purely private action, not a state action, and 42 U.S.C. § 1983 did not afford a basis for federal subject matter jurisdiction. The Eighth Circuit Court of Appeals affirmed in *Lubin* v. *Crittenden Hosp. Ass'n*, 713 F.2d 414 (1983), *cert. denied*, 465 U.S. 1025 (1984). Appellant then filed this suit in state court. The trial court held the state action was not timely filed and dismissed the complaint. We reversed and remanded. *Lubin* v. *Crittenden Memorial Hosp.*, 288 Ark. 370, 705 S.W.2d 872 (1986). Upon remand, the defendants, appellees, filed a motion for summary judgment with affidavits and supporting documents. The appellant filed a counter-affidavit. The trial court granted the summary judgment. We affirm.

The appellant argues that the complaint contains allegations that appellees denied him due process; that appellees entered into a civil conspiracy to harm his reputation as a medical doctor; that the hospital association breached a contract between the association and appellant; and that genuine issues of material fact remain to be decided on each count.

In *Brandt* v. *St. Vincent Infirmary*, 287 Ark. 431, 701 S.W.2d 103 (1985), we decided that a private hospital, in an internal administrative proceeding, is not subject to the reasonableness standards of the equal protection clause and due process clause of the fourteenth amendment to the United States Constitution or under Ark. Const. art. 2, §§ 2 and 3. The appellee hospital is a private hospital. *Lubin* v. *Crittenden Hosp. Ass'n*, 713 F.2d 414 (8th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). Thus, it was not necessary for the appellees to afford the appellant

due process in deciding whether to discipline him. The due process allegation of the complaint therefore could not state a claim for relief, and this is a valid basis for granting summary judgment. *Joey Brown Interest, Inc.* v. *Merchants Nat'l Bank*, 284 Ark. 418, 683 S.W.2d 601 (1985). The trial court ruled correctly in granting summary judgment on this count of the complaint.

In the argument section of his brief the appellant does not favor us with the specific reason he contends the trial court erred in ruling that the appellees were entitled to a summary judgment on the count involving the alleged conspiracy. He only gives us general conclusions.

The complaint on the point, as abstracted by appellant is as follows:

> Appellant, Milton Lubin, filed his Complaint at Law (T.01-09) alleging the following:
>
> A. Civil conspiracy between Appellee to injury his professional reputation and damage to his medical practice by misuse of hospital By-Laws and disciplinary procedure to attempt to discipline him.

The appellees denied this allegation in their answer. In appellant's deposition, which was attached to appellee's motion for summary judgment as a supporting document, the appellant admitted that he had no evidence of conspiracy against eight of the board members. In affidavits also attached to the motion as a supporting document, five of the appellees state that they did not conspire with anyone to harm the appellant. In his counter-affidavit, the appellant did not go forward and meet the above proof with proof of his own. Instead, he again denied the allegations and termed them conclusory. He further affirmed "that his investigation had now revealed evidence which confirms his allegations of conspiracy," but he did not state what his investigation consisted of, what new proof he had, or what the conspiracy was. Our summary judgment rule requires that an affidavit in response to a motion for summary judgment be made on personal knowledge and set forth specific facts showing there is a genuine issue for trial. *Hughes Western World, Inc.* v. *Westmoor Mfg. Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980).

Here, there was no positive statement based upon personal knowledge to show that the appellees attempted to do an unlawful act, or achieve some unlawful purpose through a series of lawful acts.

Finally, the appellant complains that the trial court dismissed the count alleging breach of contract. The count is abstracted by appellant as follows: "His contract with Crittenden Hospital was tortiously breached by the actions of the Appellees." The appellees argued, and the trial court apparently agreed that the above count was an allegation based upon the by-laws of the hospital association. Appellant does not favor us with a specific statement about the basis of the count, and we can only assume that the trial court's assessment of the complaint was correct since, in his counter-affidavit the appellant stated the by-laws were not followed.

The appellees attached supporting documents indicating compliance with the by-laws. The appellant, in his counter-affidavit stated the by-laws were not complied with, but did not state specifically how the appellees failed to comply with the by-laws. Again, there was no positive statement based upon personal knowledge to show that appellees breached an implied contract which was created by the by-laws.

In brief, ARCP Rule 56(e) provides that when a motion for summary judgment is made and supported by affidavits and other documents, the adverse party may not rest upon mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial.

Affirmed.

Christine SWOFFORD and Harold Swofford *v.* Mark STAFFORD and Bobby Ward

87-325 748 S.W.2d 660

Supreme Court of Arkansas
Opinion delivered May 9, 1988

John Wesley Hall, Jr., for appellant.

Mark Stodola, City Att'y, by: *Victra L. Fewell*, Asst. City Att'y, for appellee Mark Stafford; *Jim Hamilton* and *Francis D. Crumpler, Jr.*, by: *Francis D. Crumpler, Jr.*, for appellee Bobby Ward.

ROBERT H. DUDLEY, Justice. In 1984, in a prior case, the appellant, through other counsel, filed a replevin action against

the appellees and the Cities of Little Rock and North Little Rock. The complaint alleged that in 1984 appellees Stafford and Ward "arrested plaintiffs and transported them to the North Little Rock Police Department and placed them in jail and proceeded to interrogate them and to insist upon searching plaintiffs' residence premises." The appellants sought the recovery of the property seized and damages for the wrongful detention of the property. The trial court found that the appellees and the two cities had no right, title, or interest in the property and ordered it delivered to appellants. The order of delivery neither awarded damages nor reserved the issue of damages for future determination. At a later date the trial court, apparently on its own motion under Rule 10 of the Rules of Circuit and Chancery Courts, entered an order of dismissal for failure to prosecute. Still later, in 1987, with present counsel, the appellants filed the case at bar against the appellees. They restate, with more particularity, the circumstances surrounding their 1984 arrest, detention, and interrogation. In addition, appellants aver that appellees Stafford and Ward acted to cause a second and third arrest of appellant Harold Swofford on related charges. They seek damages against the two appellee police officers under 42 U.S.C. § 1983 and under state law for false arrest and illegal search, malicious prosecution, and intentional infliction of emotional distress. The trial court held that the prior action precludes the claim in this action. We affirm that holding.

The claim preclusion part of the doctrine of res judicata bars relitigation of a subsequent suit when (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action which was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies. *Bailey* v. *Harris Brake Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 916 (1985). Appellants argue on appeal that the trial court erred because factors numbered (1) and (4), a final order and same cause of action, are not present. The arguments are without merit.

Appellants first argue that the claim in the case at bar should not be precluded because there was no final judgment in the first suit. Appellants' abstract does not reflect that this issue was raised below or ruled upon by the trial court. We will not

consider issues raised for the first time on appeal. *Griffin-Payne, Inc.* v. *Union Bank*, 289 Ark. 182, 710 S.W.2d 201 (1986). Accordingly, we do not consider this point of appeal.

Appellants' next point is that the facts and issues between the two cases are different and that the trial court erred in applying the doctrine of claim preclusion. The trial court ruled correctly.

The complaint in the replevin action recited the operative facts of the arrest of the appellants, their transportation to and interrogation at the North Little Rock Police Department, their incarceration, and the search of their home. The case at bar is based on the same events and subject matter. It only raises new legal issues and seeks additional remedies.

Issues and remedies raised in the subsequent suit do not have to be identical to those raised in the initial suit in order for the claim preclusion part of res judicata to apply. In *Benedict* v. *Arbor Acres Farm, Inc.*, 265 Ark. 574, 577, 579 S.W.2d 605, 607 (1979), we wrote:

> The law of *res judicata* provides that a prior decree bars a subsequent suit when the subsequent cause involves the same subject matters as that determined or which could have been determined in the former suit between the same parties; the bar extends to those questions of law and fact which "might [well] have been but were not presented."

In *Taggart v. Moore*, 292 Ark. 168, 171, 729 S.W.2d 7, 9 (1987) (citations omitted), we wrote:

> 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. . . . Res judicata applies even if the issue was not litigated in the first trial if it should have been included in the former trial.

Accordingly, we affirm the ruling of the trial court that the case at bar is barred by the claim preclusion part of the doctrine of res judicata. Because we affirm the ruling of the trial court on this point, we need not discuss the other point of appeal,

which concerns an alternative reason to dismiss this case.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I think the majority is wrong in ruling that the doctrine of res judicata bars this lawsuit and that the issue concerning a final order is not properly before this court. Res judicata precludes parties from drawing the same controversy into issue a second time. However, the doctrine applies only if there is a final judgment after a hearing on the merits. The general rule in Arkansas is that before a judgment is final and appealable the order must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Corning Bank* v. *Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984). There was no final judgment in this case.

The first action between the parties was a replevin action. The circuit court dismissed this action for a failure to prosecute. The appellants and appellees both agree that a dismissal for want of prosecution is not a final judgment. The majority, however, relies on the claim preclusion doctrine as barring any further litigation between these parties. The claim preclusion doctrine is the heart of res judicata. There can be no claim preclusion without res judicata, and there can be no res judicata without a final judgment. As this court stated in *Fawcett* v. *Rhyne*, 187 Ark. 940, 63 S.W.2d 349 (1933):

> The doctrine of res judicata does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried — that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. [Citation omitted.]
>
> If a particular point was not in issue in the suit — either in the technical sense of an issue framed by the pleadings, or in the sense of being the decisive question in the case and the one actually litigated and determining the result — it is not conclusively established by the judgment therein, for

> the purposes of a subsequent suit upon a different cause of action . . . . [Citation omitted.]

It is clear that the civil rights and tort claims raised by the present action were not at issue in the replevin action.

The former action brought by the appellants was to recover certain items of personal property seized by the appellees. The question of damages in the replevin action was never resolved. The case was dismissed without a final judgment. Without a final judgment in the replevin action the doctrine of res judicata simply does not apply. The majority applies the claim preclusion doctrine of res judicata, and yet it is clear that all of the necessary factors to invoke the doctrine are not present. It is undisputed that there is no final judgment in the replevin action. Without a final judgment, there can be no claim preclusion.

The doctrine of res judicata applies only when there has been a final judgment. The majority relies upon *Bailey* v. *Harris Break Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 1916 (1985), for the five (5) factors necessary to invoke the claim preclusion doctrine. However, the very first requirement for claim preclusion is missing in the present case. All parties agree there has never been a judgment on the merits in the original suit. Why this court cannot accept that fact is beyond my comprehension.

Whether the appellants specifically argued in the trial court that there is no final judgment should not control the outcome of this litigation because the application of the doctrine of res judicata is undeniably what this appeal is all about. The question of a final judgment is simply one factor to be considered in the resolution of the ultimate issue — whether res judicata bars the present action.

The conclusions reached by the majority are supported neither by the law nor the facts. Therefore, I would reverse and send this case back for a trial on the merits.

Josie WEBB *v.* Jean LAMBERT, Individually and as Surviving Heir of Charles Lambert

87-256 748 S.W.2d 658

Supreme Court of Arkansas
Opinion delivered May 9, 1988
[Rehearing denied June 6, 1988.*]

Grisham A. Phillips, for appellant.

C. Scott Clark, for appellee.

ROBERT H. DUDLEY, Justice. The defendant did not file an answer within 20 days following service of summons, but, instead, filed an answer on the 28th day. The defendant did not offer any evidence of excusable neglect, unavoidable casualty, or other just cause for the late answer, but, even so, the trial court refused to grant a default judgment. We reverse and remand.

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*Hays, J., would grant rehearing.

The plaintiff filed suit, and the defendant was personally served on October 29, 1985. The defendant, a resident of Arkansas, employed an attorney who mailed an answer to the plaintiff's attorney on November 15, 1985, which was within 20 days of the date of service. The plaintiff's attorney quite naturally assumed that the answer had been filed with the clerk of the court, but, in fact, the defendant's attorney had not filed an answer with the clerk, and did not do so until November 26, 1985, which was 28 days after service. The defendant's attorney did not disclose the late filing to the plaintiff's attorney. On May 14, 1987, just before the trial was scheduled to begin, the plaintiff's attorney examined the court file and found the out-of-date answer. He immediately moved to strike the answer and also moved for a default judgment. Still before the trial began, the Chancellor had a hearing on both of the motions. At that hearing, the defendant did not offer any evidence of excusable neglect, unavoidable casualty, or other just cause. The Chancellor took the motions under advisement and went ahead with the trial. Later, the Chancellor denied the motion to strike the answer, denied the motion for a default judgment, and ruled against the plaintiff on the merits of this equitable lien case. The plaintiff appeals from the trial court's refusal to strike the answer and enter a default judgment.

Under ARCP Rule 12(a), a resident defendant is required to file an answer within 20 days of the date of service. To "file" an answer means that the answer "shall be filed with the clerk of the court" Rule 5(c), or with the judge, Rule 5(d). Neither was done. Upon failure of a resident defendant to file an answer within 20 days the court "shall" grant a default judgment under Rule 55(a), unless there is excusable neglect, unavoidable casualty, or other just cause as provided in Rule 6(b). In the absence of excusable neglect, unavoidable casualty, or other just cause, it is an abuse of discretion for the trial judge to refuse to grant a default judgment. *DeClerk* v. *Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982). Here, there was no showing of excusable neglect, unavoidable casualty, or other just cause. Therefore, the trial court abused its discretion in refusing to strike the answer and in refusing to grant the default judgment.

We reverse and remand for proceedings consistent with this opinion.

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

STEELE HAYS, Justice, dissenting. In reversing this case the majority views it from the narrow perspective of ARCP Rule 12(a), requiring that an answer be filed within twenty days after service, and from the absence of any evidence that the eight day delay in filing the original answer was attributable to excusable neglect, unavoidable casualty or other just cause. But the situation presented is more complex than that and because I believe the trial court ruled correctly, I respectfully dissent.

The majority observes that counsel for the appellee did not disclose to opposing counsel that the answer was filed late, which suggests that counsel was knowledgeable of that fact. While that may be an accurate assumption, it is an assumption nonetheless. As the record tells us nothing either way, and since lawyers often leave such routine tasks to others, counsel for appellee may not have been aware of when the original pleading was actually filed. It is clear that that unknown factor had no bearing on the trial court's decision and by our own rules this court should not draw an inference from a silent record which is adverse to the appellee.

The majority relies entirely on the case of *DeClerk* v. *Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982), where we held, correctly I think, that it was not excusable neglect where counsel dictated an answer within the twenty days, but after it was prepared a secretary laid it aside where it stayed unnoticed until four days after the due date. We pointed out if such carelessness were excusable, then responsibility for timely filing of pleadings could be easily shifted from the attorney to his staff. That case bears little resemblance to the case before us.

Here, the copy of the answer was mailed to opposing counsel and received within the twenty days. Thereafter the case proceeded routinely for eighteen months during which the appellant served interrogatories on the appellee, obtained one continuance, agreed to another continuance requested by appellee, and not until the very hour of trial did counsel for appellant raise any issue over the belated filing of the answer.

Certainly ARCP Rule 5(c) is relevant, but other considerations are equally relevant. Even Rule 5(c) suggests that where an answer is served upon opposing counsel within time, the filing of

the original with the clerk may occur within a reasonable time. The rule states that "all papers *after the complaint* shall be filed with the clerk either before service or within a reasonable time thereafter.

But other rules offer greater sanction. Rule 55(a) provides that when a party has failed to appear "or otherwise defend," judgment by default shall be entered by the court. Section (b) provides that if the party has appeared in the action, "he" shall be served with written notice of the application for default judgment "at least three days prior to a hearing on such application."

In this case, appellee obviously did not fail to appear or otherwise defend, nor was appellee served with written notice or even oral notice three days prior to a hearing on the default judgment motion. In such circumstances, where the issue is not raised until the hour of trial, I believe the trial court's discretion is clearly paramount and we have recognized that fact in cases with less merit than this one. *Cammack* v. *Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984); *Burns* v. *Shamrock Club*, 271 Ark. 572, 609 S.W.2d 55 (1980), where we said:

> It is within the sound discretion of the trial court to grant or deny a motion to set aside a default judgment, and the question on appeal is whether there has been an abuse of that discretion. Default judgments are not favorites of the law and should be avoided when possible. [Citations omitted.]

Moreover, in *Cammack* v. *Chalmers*, we pointed out that Ark. Stat. Ann. § 27-1160 (Repl. 1979), incorporated in ARCP Rule 61, provides:

> The court must in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be revised or affected by reason of such error or defect.

We have held that a party who does not object to a late answer before trial has waived an objection. *St. Louis & So. Ry. Co.* v. *Faist & Co.*, 99 Ark. 61, 137 S.W. 815 (1911); *Updegraff* v. *Marked Tree Lumber Company*, 83 Ark. 154, 103 S.W. 606 (1907). We have also said repeatedly that default judgments are

not favored by the courts and should be avoided when possible. *Tapp* v. *Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987); *A.O. Smith Harvester Products, Inc.* v. *Burnside*, 282 Ark. 27, 665 S.W.2d 288 (1984).

I would affirm the trial court.

HOLT, C.J., and GLAZE, J., join this dissent.

HOLIDAY ISLAND SUBURBAN IMPROVEMENT DISTRICT #1 of Carroll County, Arkansas *v.* Carolyn WILLIAMS, Tax Assessor, Carroll County, Arkansas, et al.

88-61 749 S.W.2d 314

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Kenneth H. Castleberry, for appellant.

Terri L. Harris, Deputy Prosecuting Att'y, for appellees.

STEELE HAYS, Justice. The issue is whether the facilities of the Holiday Island Suburban Improvement District are exempted from general property taxes under Article 16 of the Arkansas Constitution. The trial court held that while some of the facilities were exempt, some were not, and the District has appealed from the adverse ruling. There is no.cross-appeal. We affirm the decree.

The District, Holiday Island Improvement District No. 1 of Carroll County, Arkansas, was formed in 1970 pursuant to Ark. Code Ann. §§ 14-92-201 et seq. (1987) [Ark. Stat. Ann. §§ 20-701 et seq. (Supp. 1985)]. The District issued bonds to construct a water system, sewage treatment plant, roads and recreational facilities. In 1970 the developer of the project, MCO Properties, transferred to the District the ownership of golf courses, tennis

courts, and other recreational facilities, as well as buffer zones and an administration building formerly used as a sales office.

In 1985 appellee Carroll Williams, Tax Assessor of Carroll County, placed the District's real property on the tax rolls of the county. The District sued for a declaratory judgment that its property was exempt from taxation. The chancellor held the district was a government entity and that its fire stations, water system, sewage treatment plant, and administration building were exempt but its two golf courses, boat dock, maintenance shop, recreational center and camp grounds were not, because they were not used exclusively for public purposes. The District argues on appeal that the chancellor erred in ruling that the facilities were not exempt under Article 16, § 5(b) of the Arkansas Constitution. The provision reads in part:

> The following property shall be exempt from taxation: public property used exclusively for public purposes . . .

The District points out that the appellee informed the trial court she considered these facilities to be taxable because the District was not a governmental entity whereas the chancellor reached a contrary decision on that issue, but held certain of the facilities were not used exclusively for public purposes. We need not decide whether the facilities of this suburban improvement district constitute "public property" within the meaning of Article 16, because it is clear the other part of the equation—"used exclusively for public purpose"—is lacking. The chancellor so found and we agree. While that issue was mildly disputed below, in that the District attempted to prove the facilities were available to the public, there was persuasive evidence that the facilities were restricted to property owners of Holiday Island, membership being conditional on owning property in the District. We cannot say the chancellor's finding that the facilities were not used exclusively for public purposes was clearly against the preponderance of the evidence. ARCP Rule 52(a). In fact, he could hardly have held otherwise in view of the proof that signs were prominently displayed declaring "Property Owners Only" and "Members and Guests Only."

The District maintains there are 4,000 owners of lots in the improvement district residing in all fifty states and these individuals, and not just the general public, should be regarded as

"the public"; that anyone can become eligible by purchasing property in the District. We are unwilling to adopt that interpretation. The requirement that someone make a substantial investment in real property before becoming eligible to use "public" facilities, whether they be a park, a zoo, a golf course, campgrounds, or otherwise, is foreign to the generally accepted concept of "public" usage. We do not regard the price of a lot, whatever it may be, in Holiday Island subdivision as the equivalent of reasonable fees to help defray the cost of public facilities. Moreover, when the remaining lots are sold even that option will be removed and eligibility will be restricted to a fixed membership.

While we find authority for the view that reasonable fees may be charged for use by the public, *Yoes* v. *City of Ft. Smith*, 207 Ark. 694, 182 S.W.2d 683 (1944), and that reasonable classifications of persons can be established, *Hogue* v. *Housing Authority of North Little Rock*, 201 Ark. 263, 144 S.W.2d 49 (1940), the law almost uniformly is to the effect that a "public purpose" contemplates that the use must be common to all and not to a particular group. *See Lott* v. *City of Orlando*, 142 Fla. 338, 196 So. 313 (1940); *United Community Services* v. *Omaha National Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956); *United States* v. *120,000 Acres of Land*, 50 F. Supp. 754 (D.C. Texas 1943); *Platte Valley Public Power & Irrigation District* v. *Lincoln County*, 144 Neb. 584, 14 N.W.2d 202 (1944); *Briggs* v. *City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928); *City of Jefferson* v. *Smith*, 348 Mo. 554, 154 S.W.2d 101 (1941). While we find no case of our own squarely on point, dictum in two opinions involving public purpose notes that the facilities in those cases were available to the general public. In *City of Hope* v. *Dodson*, 166 Ark. 236, 266 S.W.2d 68 (1924), we reversed a lower court ruling that a fairground on land belonging to the City of Hope was not exempt under Article 16 § 5, noting the park was available to the general public. Similarly, in *Yoes* v. *City of Ft. Smith, supra*, we rejected a challenge to the public purpose of recreational facilities belonging to Ft. Smith, observing that the facilities were "open to the public at large."

The District has provided us with no authority, and our own research has uncovered none, holding that the use of property may be restricted to certain members of the public and still retain

a "public purpose" exemption from taxation. Public housing may be an exception, in that usage is generally restricted to individuals earning below a certain median income (*See Hogue* v. *Housing Authority of North Little Rock, supra*), but that situation is readily distinguishable for reasons that are self-evident.

The District contends there is a distinction between a public use and a public purpose, proposing that the Article 16 exemption rests not upon *usage* by the public but upon a public purpose as that term is used in connection with tax exempt revenue bonds. The District submits that "retirement" is an industry and Holiday Island promotes employment and other economic benefits to northern Arkansas. No doubt that is true, and if the issue here were tax exemption for the income from improvement district bonds, the public purpose requirement might be satisfied. But that is not the issue and it is clear the phrase "public purpose" is not an exact term, susceptible of a static definition [*City of Glendale* v. *White*, 67 Ariz. 231, 194 P.2d 435 (1948)], but has various shades depending on whether the context is eminent domain, revenue bonds, lending the credit of a political subdivision, or tax exemption under § 5(b) of Article 16. Thus, our decision here deals only with a public purpose within the context of Article 16 § 5(b).

Just as it is clear that ad valorem taxes could not be lawfully imposed upon the general public to maintain the cost of construction or maintenance of facilities used for private purposes, we can conceive of no valid reason why facilities restricted to private use should be exempted from the payment of taxes assessed against other properties of a similar character.

AFFIRMED.

ARKANSAS STATE HIGHWAY COMMISSION
v. Honorable Lee A. MUNSON, Chancellor

87-323 749 S.W.2d 317

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Thomas B. Keys and *Philip N. Gowen*, for appellant.

Mike Wilson and *Kenneth C. Coffelt*, for appellee.

DAVID NEWBERN, Justice. The petitioner, Arkansas State Highway Commission, closed a road crossing a four-lane highway. The road which was closed was known as Coffelt Road. It connected two parcels of land owned by Mr. and Mrs. Kenneth Coffelt. The value to the Coffelts of the crossing became the subject of litigation. In a condemnation proceeding, Mrs. Coffelt was awarded $40,000. That judgment was reversed and remanded for a new trial. *Coffelt* v. *Arkansas State Highway*

Commission, 285 Ark. 314, 686 S.W.2d 786 (1985). The jury in the second trial returned a verdict in favor of Mrs. Coffelt but awarded her no damages. The commission had deposited $25,000 in the registry of the court as estimated compensation which had been drawn down by Mrs. Coffelt. Thus the court entered a judgment against Mrs. Coffelt and in favor of the commission for the deposit amount plus interest. The record showed that there was a motion to set aside the judgment on the ground, among others, that it amounted to an unconstitutional taking of Mrs. Coffelt's property without compensation. The trial court denied the motion. That judgment was affirmed. *Coffelt* v. *Arkansas Highway Commission*, 289 Ark. 348, 712 S.W.2d 283 (1986), *cert. denied*, 107 S. Ct. 1298 (1987). The case before us now has come about because Mr. and Mrs. Coffelt have obtained a temporary stay of execution to prevent collection of the judgment in favor of the commission. The commission seeks a writ of prohibition to prevent the chancellor proceeding further in the matter claiming that jurisdiction is lacking because the Coffelts' claim is barred by res judicata and their remedy at law. We deny the writ because we do not find that the chancellor lacks jurisdiction.

1. Res judicata

Res judicata is an affirmative defense. Ark. R. Civ. P. 8(c). The petitioner has presented no case in which it has been held that the bar of res judicata is "jurisdictional" and thus that a writ of prohibition should be entered because the doctrine may apply. We know of no such case.

2. Adequate remedy at law

The commission argues that there was an adequate remedy at law. It is true that Mrs. Coffelt had the right to, and indeed did, raise her constitutional argument in the circuit court. However the contention made to the chancellor is that the circuit court's order is void. The petitioner's brief does not deny that the chancery court has the power to enjoin enforcement of a void order. Rather, it cites *Anthony & Brodie* v. *Shannon*, 8 Ark. 52 (1847), and *Watkins* v. *Merchants' Bank of Vandervoort*, 96 Ark. 465, 132 S.W. 218 (1910), which were cases in which we held, on appeal rather than in response to a request for a writ of

prohibition, that the chancery court lacked jurisdiction to interfere in the execution of judgments reached by courts of law where there was an adequate remedy at law. In neither case was there an allegation made that the order of the circuit court was void.

A void order is subject to collateral attack, *Sanders* v. *Killebrew*, 233 Ark. 965, 349 S.W.2d 808 (1961); *Bragg* v. *Thompson*, 177 Ark. 870, 9 S.W.2d 24 (1928), and a court of equity, acting in personam, may enjoin enforcement of the order of even another "superior" court. *Sanders* v. *Killebrew, supra; American Ins. Co.* v. *McGehee Liquor Co.*, 113 Ark. 486, 169 S.W. 251 (1914). We have, however, said that equity will not enjoin the enforcement of an order merely because it is void in cases where the party seeking equitable relief had an adequate remedy at law. *Fuller* v. *Townsly-Myrick Dry Goods Co.*, 58 Ark. 314, 24 S.W. 635 (1893); *Wingfield* v. *McLure*, 48 Ark. 510, 3 S.W. 439 (1886). In those cases, however, the chancery court first determined its own jurisdiction, and our resolution of the issue came on appeal rather than in response to a request for a writ of prohibition. We have been cited to no case in which it has been held that a writ of prohibition should issue to a chancery court because it is proceeding in a matter where there is an adequate remedy at law.

The Coffelts argue they have exhausted their remedies at law by seeking relief in the circuit court, appealing to this court, and seeking certiorari in the United States Supreme Court to no avail. They contend there is no other thing they can do before a law court to seek relief from the order they contend is void. The answer to this contention may well be that the matter is thus res judicata, as even constitutional issues may be precluded by that doctrine. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). *See Johnson* v. *Muelberger*, 340 U.S. 581 (1951). As noted above, however, the question of res judicata is a defense to be raised in the chancery court and does not present a question of jurisdiction.

Writ denied.

HICKMAN, J., not participating.

HAYS and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. The respondent chancel-

lor enjoined the sheriff from efforts to execute a judgment of the Pulaski Circuit Court against Mrs. Bessie Coffelt. The majority declines to prohibit the chancellor from proceeding because Mrs. Coffelt has alleged that the circuit court judgment is void, thereby invoking the chancellor's jurisdiction.

If this case were new to us and there was any doubt about the validity of the judgment, that might be the proper course. But this litigation and this court are no strangers to each other. It has now been before us five times: *Arkansas State Highway Department* v. *Coffelt*, 257 Ark. 770, 520 S.W.2d 294 (1975); *Coffelt* v. *Arkansas State Highway Department*, 285 Ark. 314, 686 S.W.2d 786 (1985); *Arkansas State Highway Department* v. *Coffelt*, 285 Ark. 431, 688 S.W.2d 282 (1985); *Coffelt* v. *Arkansas State Highway Department*, 289 Ark. 348, 712 S.W.2d 283 (1986) and *Arkansas State Highway Department* v. *Munson*, CR87-323.

It is fair to say we are thoroughly familiar with every aspect of this case. Mrs. Coffelt's argument is that a taking of private property for public use without compensation violates the state and federal constitutions, therefore, a judgment which awards no damages is void on its face. Certainly this judgment is not void on its face and Mrs. Coffelt has advanced no argument as to why it would be void on other grounds.

I will not repeat the long involved history of the case, it's all there in the cited opinions, except to note that Mrs. Coffelt acquired this property in 1955, a few months after the owners had bargained and sold a perpetual easement for the interstate highway. That conveyance purported to transfer the entire interest of the owners, reserving only the right of access to the frontage roads.[1] Mrs. Coffelt acquired her fee expressly subject to the perpetual easement.

The first phase of this litigation determined that Mrs. Coffelt still owned the fee beneath the easement where Coffelt Road crossed the interstate. (*Arkansas State Highway Department* v.

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[1] Mrs. Coffelt contended that the Highway Department promised to put an overpass at what later became known as Coffelt Road, but that issue was abandoned some years ago.

Coffelt, 257 Ark. 770, *supra*). In a later phase, that interest, arguably a theoretical one at best, was determined by a jury to have no value, resulting in the circuit court judgment now challenged. Mrs. Coffelt appealed and the judgment was affirmed (*Coffelt* v. *Arkansas State Highway Department*, 289 Ark. 348, supra), as the majority concedes. Rehearing was denied by this court and certiorari was denied by the United States Supreme Court. 107 S. Ct. 1298 (1987). Thus, the case has been decided along with all the issues now argued, as well as any that could have been argued, and res judicata applies.

Clearly, this dispute, having spanned two decades, has reached finality and nothing remains to be litigated. It should not be allowed to continue to no good purpose, purely for the sake of form. I respectfully suggest a writ of prohibition is warranted on the circumstances of this case, as it was in *Fore* v. *Circuit Court of Izard County*, 292 Ark. 13, 727 S.W.2d 840 (1987).

GLAZE, J., joins this dissent.

TOM GLAZE, Justice, dissenting. I would grant the writ. This court has long recognized that a court has *power* over its own process. *American Ins. Co.* v. *McGehee Liquor Co.*, 113 Ark. 486, 169 S.W. 251 (1914). Here, the Coffelts filed a motion in the circuit court requesting an order to stay execution on that court's judgment. The court, exercising its continuing original jurisdiction, denied the Coffelts' motion. Instead of appealing the circuit court's ruling, contending the court's judgment was void and its order was for naught, the Coffelts petitioned the chancery court, requesting the same relief that they were denied in the circuit action.

In my opinion, the chancery court has no power whatsoever to decide whether the circuit court should or should not allow process, *viz.*, a writ of execution, to issue in connection with one of its judgments. The Coffelts' remedy, if any, was one of appeal from the circuit court's order, denying their request to stay any execution. This case has existed for over a decade, and while I admire the ingenious tenacity with which both sides have pursued their respective claims, this matter should eventually come to an end. The court's decision today, I respectfully submit, is a wrong one and serves only to continue this lawsuit's indeterminate existence.

HAYS, J., joins this dissent.

RIVERSIDE FURNITURE CORPORATION
and Arkansas Best Corporation *v.* Floyd G. ROGERS,
Circuit Judge

87-361 749 S.W.2d 664

Supreme Court of Arkansas
Opinion delivered May 9, 1988
[Rehearing denied June 6, 1988.*]

Harper, Young, Smith & Maurras, by: *Tom Harper, Jr.*, for appellant.

Frank W. Booth, for appellee.

DAVID NEWBERN, Justice. Lannie R. Blasingame is employed by petitioner Riverside Furniture Corporation which is a subsidiary of the other petitioner, Arkansas Best Corporation. The petitioners contend that Blasingame has filed a complaint against them in Sebastian County Circuit Court of which the court lacks jurisdiction because jurisdiction resides exclusively in

*Hays, J., would grant rehearing.

the Arkansas Workers' Compensation Commission. We deny the petition because it is at best premature.

Blasingame suffered an admittedly compensable job-related knee injury in 1985 for which he received workers' compensation benefits. He thereafter complained of a back injury and received benefits from Riverside's group medical self-insurance coverage. Still later, he filed for further workers' compensation benefits on the ground that the back injury stemmed from his earlier compensable injury. Riverside refused further medical insurance benefits on the ground that they were not available to Blasingame if his injury was job related. Riverside defended the workers' compensation claim on the ground that Blasingame had an unauthorized change of physician and that the back injury was not job-related.

The petitioners have abstracted their responses to requests for admissions in which they admit that Blasingame's back problems are not related to any on-the-job injury and that "[t]he workers' compensation opinion . . . specifically found: '5. The claimant has failed to prove a causal relationship between any present back complaints he may have and his compensable injury.' "

Blasingame's complaint alleged (1) fraud on the ground that the company handbook said he would be covered either by the group medical insurance or workers' compensation for any injury or sickness occurring during his employment, (2) breach of contract based on the handbook provisions as well as the express promise of a Riverside employee that Blasingame would be covered by the medical insurance even though the other employee knew Blasingame thought his back problems were job-related, (3) intentional infliction of emotional distress for malicious withholding of medical insurance benefits, and (4) violation of the federal Employees Retirement Income Security Act, 29 U.S.C. §§ 1001 through 1461 (1982), which provides, at § 1132 (a)(1)(B) and (e), that a state court may hear a claim of an employee seeking to recover benefits due under medical and disability insurance plans.

The trial court denied the petitioners' motion to dismiss the complaint because of the allegation of the express promise to pay medical insurance benefits. The brief of the petitioners states

Blasingame's claim is still pending before the workers' compensation commission. Apparently the decision of an administrative law judge that the injury is not job-related has been appealed to the full commission. Clearly, if Blasingame should prevail before the commission some, if not all, of his contentions before the circuit court would be lost because of Ark. Code Ann. § 11-9-105(a) (1987) which provides that the workers' compensation remedies are "exclusive of all other rights and remedies of such employee . . . on account of such injury or death," *See White* v. *Appollo-Lakewood, Inc.*, 290 Ark. 421, 720 S.W.2d 702 (1986); *Cain* v. *National Union Life Ins. Co.*, 290 Ark. 240, 718 S.W.2d 444 (1986); *Sontag* v. *Orbit Valve Co., Inc.*, 283 Ark. 191, 672 S.W.2d 50 (1984).

Should the decision of the administrative law judge be affirmed, it would be clear that Blasingame's alleged injury would not be covered by the workers' compensation law. The petitioners argue that in that event Blasingame would have elected the workers' compensation remedy to the exclusion of any other, citing *Sontag* v. *Orbit Valve Co., Inc., supra.* That case is distinguishable, as there the employee received workers' compensation benefits for the alleged injury, and the injury thus obviously was covered by the workers' compensation law and the exclusivity statutory provision applied. Here we do not yet have a final determination whether the workers' compensation law applied to the injury in question. Under these circumstances we decline to hold that Blasingame has made an election such that he is barred from any of the relief he has sought in the event it is ultimately determined that his injury was not job-related and thus not covered by the Workers' Compensation Law. *See* 2A A. Larson, *Workmen's Compensation Law*, § 67.30 (1987).

Petition denied.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. It is not an overstatement to say that if this decision stands as a precedent, the rule that the Workers' Compensation Commission has exclusive jurisdiction over workers' compensation claims no longer exists. No matter how it is examined, the complaint filed by Mr. Lannie Blasingame against his employer and its parent company is bottomed on a workers' compensation claim for an injury occurring in Novem-

ber, 1985. The complaint charges the employer with wrongfully refusing to pay group insurance benefits and workers' compensation benefits, alleging conduct described as "willful, wanton, outrageous," causing emotional distress for which the plaintiff seeks compensatory damages of $500,000 and punitive damages of $10,000,000.

By permitting this claim to proceed at law the majority is allowing an employee to sue his employer for the alleged wrongful denial of workers' compensation benefits and overturning decades of statutory and case law to the contrary. Since the adoption of the workers' compensation law fifty years ago this court has unfailingly, and wisely I think, rejected various, even ingenious, attempts to impose tort liability on employers by employees. *Fore* v. *Circuit Court of Izard County*, 292 Ark. 13, 722 S.W.2d 840 (1987); *White* v. *Appollo-Lakewood, Inc.*, 290 Ark. 421, 720 S.W.2d 702 (1986); *Simmons* v. *First National Bank*, 285 Ark. 275, 686 S.W.2d 415 (1985); *Oliver* v. *Bluegrass Resources Corp.*, 284 Ark. 1, 678 S.W.2d 769 (1984); *Sontag* v. *Orbit Valve Co., Inc.*, 283 Ark. 191, 672 S.W.2d 50 (1984); *Pyle* v. *Dow Chemical Company*, 728 F.2d 1129 (8th Cir. 1984); *Vann* v. *Dow Chemical Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Emerson Electric* v. *Cargile*, 5 Ark. App. 92, 661 S.W.2d 433 (1983); *W.M. Bashlin* v. *Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982); *Seawright* v. *USF & G Co.*, 275 Ark. 96, 627 S.W.2d 557 (1982); *Daniels, Adm'r.* v. *Commercial Union Insurance*, 5 Ark. App. 142, 633 S.W.2d 396 (1982); *Moss* v. *Southern Excavation, Inc.*, 271 Ark. 781, 611 S.W.2d 178 (1981); *Woodall* v. *Brown & Root, Inc.*, 2 Ark. App. 106, 616 S.W.2d 781 (1981); *Pheifer* v. *Union Carbide Corp.*, 492 F. Supp. 483 (E.D. Ark. 1980); *Lewis* v. *Gardner Engineering Corp.*, 254 Ark. 17, 491 S.W.2d 778 (1973); Larson, *Workmen's Compensation Law*, Vol. 2A, § 66.00, pp. 12-20. Ark. Code Ann. § 11-9-105 (1987) [Ark. Stat. Ann. § 81-1304 (Supp. 1985)].

In *Cain* v. *National Union Fire Insurance Company*, 290 Ark. 240, 718 S.W.2d 444 (1986), we dealt with a comparable situation:

> We have previously ruled on this issue. In *Johnson* v. *Houston General Insurance Company*, 259 Ark. 724, 536 S.W.2d 121 (1976), we held that the benefits payable

> pursuant to the Workers' Compensation Act and the procedure set out in that act for obtaining those benefits, constitute an exclusive remedy, and that remedy precludes an action at law, *even for an intentional tort arising out of the non-payment of benefits.* [Emphasis in original text.]

I do not imply that Mr. Lannie Blasingame may not have a potential claim against someone, perhaps against Riverside, more likely I should think against the insurer itself, for medical expenses payable under a group coverage plan. But it is obvious, or should be, that a claim for group benefits may not be used to circumvent the workers' compensation statutes and to seriously undermine a sound principle of law that such claims belong *exclusively* to workers' compensation rather than to the common law. Besides, Mr. Blasingame claims these medical expenses are compensable under workers' compensation, so even that claim, at least for now, belongs to the commission. I respectfully suggest the requested writ of prohibition should issue, and promptly.

Gratton HARRIS *v.* STATE of Arkansas

CR 88-33 748 S.W.2d 666

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Parker Law Firm, by: *Kyle D. Parker*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant appeals from his conviction of second degree battery which resulted from a jury finding that he intentionally or knowingly, without justification, caused injury to Anthony Ward, the six-year-old son of appellant's girlfriend. Appellant raises five points for reversal, four of which involve either the constitutionality, construction or application of A.R.E. Rule 803(25). His remaining point involves the trial court's denial of appellant's mistrial motion regarding certain remarks made by the prosecutor in his opening argument. We affirm the trial court's ruling on all points.

Because the state intended to offer witnesses who would testify concerning statements made by Anthony about the origin

and nature of his injuries, the trial judge conducted a pretrial hearing to determine the admissibility of such hearsay testimony under the requirements of A.R.E. Rule 803(25). We first note that appellant's objection at the pretrial hearing was based on appellant's claim that the hearsay testimony to be given by the state's witnesses would be cumulative and its probative value would be outweighed by the prejudice it would cause. On appeal, the appellant, by different counsel, argues for the first time on appeal that Rule 803(25) violates the Confrontation Clause of the sixth and fourteenth amendments; and citing *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986), he further argues the rule was illegally enacted by the Arkansas General Assembly, instead of being properly adopted by this court under its rule-making power. We have long held that a party cannot change the grounds for an objection on appeal, *Vasquez* v. *State*, 287 Ark. 473-A, 702 S.W.2d 411 (Supplemental Opinion) (1986). Therefore, we do not address appellant's two issues that pertain to the validity and constitutionality of Rule 803(25).

We may, however, consider appellant's contention that the hearsay statements, heard and considered by the trial court at the 803(25) hearing, should have been excluded at trial as cumulative and prejudicial. Appellant does not question the relevancy of such testimonial evidence. Our court has held that the mere fact that evidence is cumulative may be a ground for its exclusion, in the sound discretion of the trial judge, but it is hardly a basis for holding that its admission, otherwise proper, constitutes an abuse of discretion. *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980). The question of weighing the prejudicial effect of cumulative evidence against its probative value is a matter of balancing which is primarily the function of the trial judge in the exercise of his discretion and which should not be interfered with on appeal in the absence of manifest abuse. *Id.*

Here, Anthony testified at trial that the appellant "whipped me because I had an accident in my britches." Anthony claimed the appellant kicked him, beat him with a belt and fly swatter wire, held his head under the water in the bath tub, ran hot water on his feet and put feces in his mouth. Appellant categorically denied such allegations, claiming he had not even seen Anthony on the evening the bruises and injuries appeared on Anthony's face and body. Appellant's testimony conflicted in

meaningful respects with that offered by state witnesses, who gave a different account than appellant's concerning his whereabouts on the night Anthony sustained his injuries. In terms of A.R.E. Rule 403, we cannot say the "probative value" of the testimony presented by the state "was substantially outweighed by the danger of unfair prejudice." Accordingly, we hold the trial judge did not abuse his discretion in admitting the testimony offered by the state under Rule 803(25).

Appellant also argues that the trial court erred in failing to admonish (instruct) the jury, as directed under Rule 803(25)(A)(3), after each state witness testifying as to Anthony's out-of-court statements. The record shows that the trial judge, at the appellant's request, did instruct the jury after each witness *until* the appellant specifically withdrew that request. He asked the trial judge to terminate such limiting instruction before the state had called all of its witnesses — three had not yet testified. The easy answer to appellant's argument here is that he cannot now complain of error that he was responsible for inviting. *Strode* v. *State*, 259 Ark. 859, 537 S.W.2d 162 (1976).[1]

Finally, appellant contends that the trial court erred in failing to grant a mistrial because of the prosecutor's opening remarks that the state's expert witness, Dr. Tom C. Jefferson, would testify that this case involved the severest case of child abuse that he had ever seen. Appellant apparently interposed an objection to this effect during opening argument since such an objection has been abstracted even though the prosecutor's opening argument or comments cannot be found in the abstract or in the transcript lodged in this appeal. Dr. Jefferson's actual trial testimony was that, in terms of severity, he would rate the injuries to Anthony as "much more than usual severity."

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. *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987); *see also* A.R.E. Rule 702. An

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[1] In so holding, we do not imply (as appellant suggests here) that a limiting instruction must be given the jury immediately at the end of any witness's testimony that is admitted into evidence pursuant to Rule 803(25). *See specifically* Rule 803(25)(A)(3).

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 conclusion. *Id.* at 640, 732 S.W.2d at 821. Here, Dr. Jefferson described the marks and deep bruises he had found when he first examined Anthony, and said the marks and imprints were compatible with hand prints, a wire or cord and a belt. He testified that there were many deep bruises about Anthony's face, an ear and his neck, back and arms, and he found "terrible thick" bruises around Anthony's buttocks area and in front of his groin. Photographs had been taken at the time of Anthony's examination and they were introduced at trial. However, Dr. Jefferson explained that Anthony, at the time of his examination, looked worse in person than the photographs depicted. We believe that Dr. Jefferson's testimony that described Anthony at the time Jefferson examined him, aided the jury in determining both the origin, nature and extent of the physical injuries sustained by Anthony. Because Dr. Jefferson's testimony was admissible, the prosecutor was entitled to refer to it in his opening statement. *Ricarte*, 290 Ark. 100, 717 S.W.2d 488.

Because we find no merit in any of the points raised by appellant, we affirm.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I think we should consider the validity and constitutionality of A.R.E. Rule 803 (25) on the merits. At every stage of the proceedings the appellant has protested the violation of his constitutional right of confrontation. A person ought not to be put to considerable trouble and expense in claiming what the United States Constitution already guarantees him. The price of such rights was paid when this Republic was established. Why then should any person be required to pay for these rights again?

For reasons stated in my dissent in *Hughes* v. *State*, 292 Ark. 619, 732 S.W.2d 829 (1987), and in my concurring opinion and the concurring opinion of Justice Dudley in *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987), I must dissent in this case. See also my concurring opinion in *Cogburn* v. *State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

Jim MORRIS, et al. *v.* TORCH CLUB, INC. et al.
Intervenors, Steve Clark, et al.

87-135 749 S.W.2d 319

Supreme Court of Arkansas
Opinion delivered May 9, 1988
[Rehearing denied June 20, 1988.*]

*Purtle, Dudley, and Hays, JJ., not participating.

Frank Lady, for appellants.

Friday Eldredge & Clark, by: *William M. Griffin III*, for appellee Red Apple Country Club.

Donald R. Bennett, for appellee Alcoholic Beverage Control Division.

Ike Allen Laws, P.A.; James B. Blair; Hal Kemp; Bob Keeter; William M. Griffin III; Ponder & Jarboe; Huey & Vittitow; Mark Stodola; Marshall Carlisle; and *Rose Law Firm, A Professional Association*, by: *Herbert C. Rule III*, for appellees and intervenors.

Steve Clark, Att'y Gen., by: *Jeffrey A. Bell*, Deputy Att'y Gen., for intervenor *Steve Clark*, Att'y Gen.

HUGH R. KINCAID, Special Justice. This case is before the court again, following reversal and remand in *Morris* v. *Torch Club, Inc.*, 278 Ark. 285, 645 S.W.2d 938 (1983). The appellants, as citizens and taxpayers of a dry county, seek a determination by declaratory judgment that Section 10 of Act 132 of 1969 (Ark. Stat. Ann. § 48-1410 (Repl. 1977)), which regulates the serving of alcoholic beverages in private clubs in "dry" counties, is invalid on the theory that it in effect unconstitutionally amended an Initiated Act (Ark. Stat. Ann. § 48-803 (Repl. 1977)) prohibiting the sale of liquor in a dry county, without receiving the requisite two-thirds legislative vote required by Ark. Const. amend. 7. The majority of the court in our previous remand felt that evidence should be taken as to the true meaning and practical effect of the private club statute in order to determine "whether the statute, as interpreted pursuant to the legislature's directive, is in practice an amendment of the Initiated Act."

The trial court has now taken evidence in accordance with our remand, and has concluded that neither Act 132 of 1969 (Ark. Stat. Ann. § 48-1410), nor the regulations adopted thereunder by the Alcoholic Beverage Control Board, operate in violation of or amendment to Initiated Act No. 1 of 1942 (Ark. Stat. Ann. § 48-803), except for Arkansas Beverage Control Regulation 5.45 (formerly ABC Reg. 5.50[a]), which the trial court found to be in violation of the legislative intent of Act 132 of

1969.[1]

Appellants now seek to reverse the decision of the trial court.

Appellants contend that the trial court erred in finding that Act 132 of 1969 did not amend Initiated Act No. 1 of 1942, as it relates to dry counties and dry subdivisions. As we understand the thrust of appellants' argument, it is basically that a comparison of the two Acts on their face requires the conclusion that activities regulated and permitted under Act 132 are prohibited under the Initiated Act No. 1, and that therefore Act 132 is an unconstitutional attempt to amend Act 1, since the passage of Act 132 did not involve the necessary two-thirds vote required by Ark. Const. amend. 7 to amend an initiated act.[2] We believe that our prior decision is dispositive of that issue, for we there recognized at page 939:

> It is possible that private clubs may operate within the law, for the Initiated Act does not prohibit the possession or consumption of intoxicating liquor in a dry county.
>
> * * *
>
> We are merely seeking to determine whether the Alcohol Beverage Control Board, by the issuance of private club permits, is giving the appearance of legality to establishments that are not *within the permissible scope of the 1969 statute.* [Emphasis added.]

Thus, our previous holding in this case, recognized that Act 132 of 1969 did not by its own terms violate Initiated Act 1 of 1942. Were it otherwise, there would have been no point in remanding to the trial court to take evidence on the operable effect of the Act — we should merely have reversed in favor of appellants. We reaffirm that holding here. The Initiated Act does

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[1] The offending regulation (ABC Reg. 5.45) permitted persons to be automatically admitted to a private club as guests or special members merely by virtue of their registration at a hotel or motel or being a patron in a restaurant located on the same premises as a private club.

[2] This constitutional argument may now be moot, since the pertinent section of Act 132 was reenacted into law as a part of the Arkansas Code Annotated of 1987 (§ 3-9-221), by Act 267 of 1987. However, since the mootness issue has not been previously raised, we proceed to address the case on the merits.

not prohibit possession or consumption of alcoholic beverages, nor does it prohibit sharing in the possession or consumption of alcoholic beverages, as one would do with a guest or family member. A reasonable concomitant of the privilege of possession and consumption is, it seems to us, the privilege to share with others in that possession or consumption, whether such occurs in one's home with one's spouse or some other family member, or in one's private club.

The Initiated Act provides in part, "It shall be unlawful for any person, firm or corporation, to manufacture, sell, barter, loan or give away intoxicating liquor" in a dry county. The Act does not define the terms so used. The Act by Section 6 is made cumulative to the existing liquor laws, but neither does the predecessor statute, Act 108 of 1935, the Thorn Act, define such terms. However, appellants argue that when one provides a mixed drink at a private club for a guest, this amounts to a "gift" and is therefore prohibited by the Initiated Act. If this be true, then it is equally true that if one provides a mixed drink in the privacy of one's home to a family member or a guest, this too is a "gift" in violation of the Act.

We cannot accept this strained interpretation of the Initiated Act. First, contrary to our customs and traditions,[3] it would relegate the relationship of the host and his or her guest or family member to that of donor and donee. We have not been cited to any precedents compelling the conclusion that a host who shares food or drink with a guest or family member is thereby making a "gift" in the legal sense of the word.

Secondly, we believe that such a construction is inconsistent with the intent of the Initiated Act. The obvious intent of the Act was to prohibit sale of liquor in a commercial sense in a dry county, in whatever guise it might be attempted, be it sale, barter, loan or gift.[4] As such, the Act should be strictly enforced

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[3] Where words are not defined by the statute, Section 7 of the Thorn Act refers us to the "custom and usage of the people of Arkansas" for definition.

[4] Section 3 of Initiated Act No. 1 specifically provides:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, barter, loan or give away intoxicating liquor in any county, township, municipality, ward or precinct *in which the manufacture or sale of intoxicating liquor is or*

consistent with the expressed will of the voters in passing the Initiated Act. However, it makes no effort to regulate possession or consumption which is what we believe is involved when one shares intoxicating liquor with a member of his or her family or with a guest, whether in the privacy of one's home or in one's private club.

Equally unavailing is appellants' argument, that when a club member orders a drink for himself or his guest at the member's private club, there is a sale, because the member is assessed for the expense of replenishing the club's stock of liquor for the drink so obtained by the member or his guest. We do not view such as a "sale" within the meaning and intent of the Initiated Act. The member is merely partaking of or sharing with his guest that which he as a member of the club and owner in common of the alcoholic beverage is entitled to possess. We have previously recognized the differentiation between a "sale" of intoxicating liquor and the dispensing of alcoholic beverages by private clubs to their members and guests. See *Faull* v. *Heath*, 259 Ark. 145, 532 S.W.2d 164 (1976). Moreover, it has long been recognized that one or more persons may purchase alcoholic beverages through an agent acting in their behalf, and that such is not a "sale" by the agent. *Whitmore* v. *State*, 72 Ark. 14, 77 S.W. 598 (1903); *see Hunter* v. *State*, 60 Ark. 312, 30 S.W. 42, 44 (1895). (The court specifically noted the example of an employee of a club purchasing for the members, resulting in common ownership). Hence, when the member is assessed to replenish that which he and his guest have lawfully consumed, and the club acting as his agent utilizes the funds so assessed to replenish the stock of liquor, there is not a sale.

Appellants argue that it is impossible for private clubs to operate under the "pool" or "revolving fund" system prescribed by Act 132 of 1969 without violating Initiated Act No. 1. The circuit judge below, sitting without a jury, found otherwise on the basis of the evidence, and from examination of the record we cannot say that his finding is unsupported by substantial

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shall be prohibited under the provisions of this Act . . . . (Ark. Stat. Ann. § 48-803). [Emphasis added.]

The commercial thrust of the statute is clearly suggested by the italicized language.

evidence or contrary to law. As will be seen from our preceding discussion, Initiated Act No. 1 did not by its own terms attempt to regulate the possession and consumption of alcoholic beverages by a person or his guest either in the privacy of a person's home or in his or her private club. There was therefore a long history, both pre-dating and post-dating Initiated Act No. 1, of relatively unregulated possession and consumption in private clubs. To be sure, there had been abuses. *See Fraternal Order of Eagles* v. *State*, 246 Ark. 568, 439 S.W.2d 36 (1969). It was into this regulatory void that the Legislature moved to establish a comprehensive regulatory scheme for private clubs by enacting Act 132. In doing so, the Legislature expressly reaffirmed the policy of the state for strict enforcement of Initiated Act No. 1 (Ark. Stat. Ann. § 48-1401 (Repl. 1977)) and expressly provided that no private club shall sell alcoholic beverages by the package or drink (§ 48-1410(a)(2)).

Section 10 of Act 132 provides that the preparation and serving of alcoholic beverages in a private club, "furnished or drawn from private stocks thereof belonging to such members, individually or in common under a so-called 'locker', 'pool', or 'revolving fund' system and . . . replenished only at the expense of such members", shall not be deemed a sale or in violation of the law. Ark. Stat. Ann. § 48-1410(a). Section 2(j) of Act 132 establishes strict requirements for a private club to operate under section 10: a club must be non-profit, in existence one year before applying for permit, have at least 100 members regularly paying annual dues of $5.00, and conduct some common "recreational, social, patriotic, political, national, benevolent, athletic or other non-profit object or purpose other than the consumption of alcoholic beverages." (Ark. Stat. Ann. § 48-1402(j) (Repl. 1977)) The only charges to a member, authorized by the Act, are for preparation, mixing and serving the drink, and for replenishment of the stock. § 48-1410(a). Section 10 provides for the issuance of private club permits and for promulgation of Rules and Regulations by the Arkansas Beverage Control Board. Except for ABC Reg. 5.45, which the trial court has invalidated, these regulations mirror the statute, and further require at least 100 voting members, a membership committee comprised of at least three voting members, approval of a new member by at least three membership committee members, maintenance of mem-

bership books, and require a guest to be introduced to the club by a host who is a bona fide member. (ABC Reg. §§ 5.19-5.22, 5.30). The record supports the conclusion that the statute and regulations are interpreted and enforced by the Beverage Control Board as written. The fact that some clubs may violate the statute and regulations is a matter for law enforcement agencies, but does not render the statute or regulations invalid.

We do not agree that to operate under the "pool" or "revolving fund" system is to violate Initiated Act No. 1. It is no more than a method for joint private acquisition through an agent, in common ownership and consumption, long recognized as a permissible legal relationship under Arkansas law (*e.g., Whitmore*, 72 Ark. 14, 77 S.W. 598, and *see Hunter*, 60 Ark. 312, 30 S.W. 43, 44), and a relationship not reached by the provisions of Initiated Act No. 1. Appellants cite cases from other jurisdictions in support of their contention. *See e.g., State* v. *Livingston*, 159 Fla. 63, 30 So.2d 740 (1947). However, it appears to us that the better reasoned cases, probably representing the majority rule, are to the contrary. Typical of these cases is *Tri-State Hotel* v. *Linderholm*, 195 Kan. 748, 408 P.2d 877 (1965), where consumption by members in a private club under a liquor pool arrangement similar to that authorized by Act 132 was attacked as a "sale" in violation of a constitutional provision; the club or its agent purchased the liquor for use by the club members. The Kansas Court upheld the power of the Legislature "to define what is not a sale," ruling that the club acted as agent and bailee for the benefit of the member in procuring the liquor, and that therefore no "sale" of alcoholic liquor occurred when served from the club's liquor pool at the member's order or directive. *Id.* at 885-886. Similarly, *see Moriarty* v. *State*, 122 Tenn. 440, 124 S.W. 1016 (1909) (social club dispensing intoxicants to its members, where liquors were held in common, was not a sale); *State* v. *Mountain City Club*, 136 Tenn. 102, 188 S.W. 579 (1916) (dispensing liquor to members and guests, a method of distribution of common property among members of a social club, held not a sale); *Cuzner* v. *California Club*, 155 Cal. 303, 100 P. 868 (1909) (a non-profit social club where liquor was owned in common by members — not a sale when liquor served to members and guests and member was charged therefor). *See also, City and County of Denver* v. *Protocrats*, 136 Colo. 384, 318 P.2d 600 (1957).

Appellants argue that in any event when a new member pays his membership fee and joins the club, he is either sold or given alcoholic beverages owned in common by the other club members. However, we do not view such as either a sale or gift to him of intoxicating liquor, just as it cannot be reasonably said that there is a sale or gift to him of the furniture of the club or the paper towels in the restroom. He merely acquires a membership in the club which affords him the privilege of using and enjoying its facilities and the privilege to possess and consume intoxicating liquors which through the "locker," "pool" or "revolving fund" system the club members own in common, subject to the obligation on the member's part to be assessed for the cost to replenish that consumed. When he is assessed and pays the assessments, and the funds are used by the club or its manager acting as agent of the members to purchase and replenish the stock of liquors, he acquires in common ownership in the liquor so purchased.

For the reason stated we conclude that Act 132 does not either expressly, by implication or by operable effect, amend or violate Initiated Act No. 1 of 1942.

Appellants contend that the lower court erred in denying appellants' motion to pursue the case as a class action. Our decision on the other points raised by this appeal makes it unnecessary to reach this question.

Finally, appellants contend that the lower court committed error in allowing the appellee clubs to introduce into evidence the balance of their Answers to Interrogatories and Requests for Admissions. The court received this evidence upon motions by the respective appellees, after appellants had first offered portions of these answers into evidence. Our rules of evidence provide, "Whenever a writing or recorded statement or part thereof is introduced in evidence by a party, an adverse party may request him at the time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it." A.R.E. Rule 106. Answers to Interrogatories "may be used to the extent permitted by the Rules of Evidence." ARCP Rule 33(b) and *see* ARCP Rule 32(a)(4). It is not suggested that the balance of the answers contained information that was irrelevant or which in fairness

ought not to have been considered along with the portions of the answers offered by appellants. The admission of the balance of the answers was therefore proper under these rules. Moreover, it is clear from the record that the information contained in the answers was already before the lower court; the trial judge, hearing the case without a jury, had reviewed the answers extensively in order to rule on numerous motions during the course of pre-trial discovery. Finally, appellants point to no prejudice to them from the admission of this evidence.

TOM B. SMITH, Special Justice, joins.

AFFIRMED.

DUDLEY, HAYS and PURTLE, JJ., not participating.

HOLT, C.J. and HICKMAN, J., and JAMES V. SPENCER III, Special Justice, dissent.

DARRELL HICKMAN, Justice, dissenting. The question which is finally before us is whether private clubs, which dispense intoxicating liquor in dry counties, violate Initiated Act I of 1942 which prohibits the "manufacture, sale, barter, loan or giving away" of any intoxicating liquor in dry counties. In 1969 the Arkansas legislature passed Act 132 which provided that private clubs which dispense intoxicating liquors to its members from a "locker pool" or revolving fund "shall not be deemed to be . . . [selling] or be in violation of any law of this state prohibiting the manufacture, sale, barter, loan or giving away of intoxicating liquor . . . ." Act 132 was not passed by a two/thirds vote which is required to change an initiated act.

In *Morris* v. *Torch Club*, 278 Ark. 285, 645 S.W.2d 938 (1983), we remanded this case to the trial court to hear evidence and determine what the facts were regarding private clubs in dry counties; what, indeed, was the practice in the various types of private clubs regarding the common ownership of intoxicating liquors, how the members paid for their drinks and what was the practice regarding guests. The majority has read our decision to be an abandonment of any intention to enforce Initiated Act I of 1942.

The majority tries to finesse the tough question and that is what about the liquor dispensed by these clubs to guests, who are

either given a drink or pay for it. Such a practice clearly violates the law, and it is a general practice in all the clubs. Every time a guest is served, the law is violated. The majority has no answer to this question except to say it cannot read the law that way, while it does read that way.

There is no doubt private clubs can exist, and possession and consumption of intoxicating liquors are not prohibited, but sales are. While it might be impractical to have a private club whose members can drink their own liquor, it can be done. It is just not done. The facts are that all the clubs violate the law in letter and in spirit. The so-called revolving fund is a charade. The clubs sell their "members" drinks. So what we have are a multitude of clubs that exist that sell intoxicating liquor in violation of Initiated Act I.

I notice the majority does not discuss the trial court's ruling regarding those private clubs that may be "joined" simply by registration at a motel or hotel. The judgment reads:

> The court further finds that it is contrary to the legislative intent expressed in Act 312 of 1969 for persons to be automatically admitted to a private club as guests or special members pursuant to ABC Reg. 5.50(a) (now numbered ABC Reg. 5.45), merely by virtue of their registration at a hotel or (2R 910) motel or being a patron in a restaurant located on the same premises as a private club. Such violations as may exist should be prosecuted by local authorities.

The trial court correctly ruled this arrangement is a phony way to circumvent the law. We are affirming this decision. Actually, there is no difference between this practice and allowing a person to join a service club or veteran's club for $15.00 which simply operates a beer joint.

The country clubs and other more exclusive clubs have other reasons to exist than to serve intoxicating liquor, but they will not cease the practice of serving liquor in violation of the law so long as convoluted regulations and laws condone that practice. New clubs will no doubt join the existing clubs. It seems the ABC board promotes the creation of private clubs in dry counties. It was their regulation which spawned many of the phony clubs run

by hotels and motels. It would be best to simply follow Initiated Act I of 1942. If counties want to permit liquor sales, they can; if not, they would remain dry - not partly dry. The hypocrisy of the present system can only erode respect for the law and the agencies that are charged with enforcement.

I would reverse the trial judge and hold that, on the facts developed, Initiated Act I is being violated by private clubs.

HOLT, C.J., and Special Justice J. V. SPENCER III, join the dissent.

George S. BENNETT and Everett Shelton *v.* STATE of Arkansas

86-38 748 S.W.2d 668

Supreme Court of Arkansas
Opinion delivered May 9, 1988

Thomas M.Carpenter, for appellant.

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

PER CURIAM. The Attorney General filed suit seeking reimbursement for the State for maintaining appellants who were inmates in the Department of Corrections. The trial court held that the State was entitled to reimbursement from the inmates' social security and veterans' benefits. We affirmed, Purtle J., dissenting, and issued our mandate. 290 Ark. 47, 716 S.W.2d 755 (1986). The Supreme Court of the United States reversed and remanded back to this Court (Slip opinion, March 29, 1988). We accordingly reverse our prior holding and remand to the trial court for proceedings not inconsistent with the opinion of the Supreme Court of the United States.

Roderick PATRICK *v.* STATE of Arkansas

CR 87-223 750 S.W.2d 391

Supreme Court of Arkansas
Opinion delivered May 16, 1988
[Rehearing denied June 20, 1988.]

David H. Williams, for appellant.

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

DARRELL HICKMAN, Justice. The legal question in this case is whether the results of a portable breath test, or what is sometimes called a roadside sobriety test, which are not admissible to prove a person is guilty of driving while intoxicated, are admissible when they would indicate a person is not guilty. In this case the answer is yes because the evidence is exculpatory, was crucial to the defense, and sufficiently reliable to warrant admission.

Roderick Patrick, a resident of Louisiana and a student at Louisiana State University, was in Arkansas working on a family farm near Arkadelphia. It was the middle of July. According to Patrick and his witnesses, he had spent the day working on some acreage planted in Christmas trees. About 5 p.m. he left his grandmother's house in Arkadelphia to return to Shreveport. He was wearing shorts, a T-shirt, and a sweat band around his head. He carried a small hatchet in a scabbard at his waist; he had a .22 rifle in his car, which was a brown Chrysler New Yorker. About 6:00 or 6:30 p.m. a report came over the Arkansas State Police

radio that the driver of a brown Chrysler New Yorker was harassing truck drivers on the highway and the driver might have a machine gun. The location and the license number of the vehicle were provided.

Two police vehicles responded. One was an Arkansas State Police vehicle driven by Trooper Jimmy Dale Danley, who had Deputy Sheriff Red Jones with him. The other car was driven by Sam Pearson, Chief of Police of Lewisville, Arkansas. The Chrysler was located on Highway 29 and stopped. Chief Pearson had followed the vehicle for a short distance and said the driver touched the center line several times. He said as soon as he stopped the vehicle, Patrick "jumped out" of the car and staggered somewhat. Danley testified that Patrick was sweating "real bad, his eyes were bloodshot, and his clothes were soiled and disarranged." He wore a headband, had the hatchet at his waist and there was a "dagger" and a .22 caliber Ruger, model 1022, semi-automatic rifle in the vehicle. Danley said he told Patrick he was under arrest for carrying certain weapons and for DWI. No bottles or cans containing intoxicating liquor were found in the vehicle. Danley and the other officers said Patrick smelled of an alcoholic beverage.

Patrick was taken to the police station in Lewisville. He was not given a breathalizer test because there is not a certified machine in the county. Trooper Danley gave him three "field" tests for sobriety. They were the balance test, the finger to nose test, and the ABC test. He said Patrick did not perform the tests as instructed. According to Danley, Patrick could not perform the balance test, said at one point he could not remember which finger was the index finger, and counted in French. In fact, Danley said Patrick "gave the finger to" the officers.

Officer Danley gave Patrick the portable breathalizer test (PBT), which had been provided by his supervisor. It is called an Alco-Analizer II. According to Officer Danley, Patrick did not properly blow into the machine. He said Patrick blew "real quick" and not steadily; he said Patrick blew to the side of the mouthpiece, and that he did not get a reading on the machine. Based on his observation and the tests he performed, Danley concluded that Patrick was intoxicated. The other officers essentially corroborated Officer Danley's statement about smelling

alcohol and Patrick's behavior.

Patrick testified that he had not been drinking alcohol at all. He explained his dress by saying he had been doing hot, dirty work at the farm; he needed a gun for killing snakes, and the hatchet for trimming the Christmas trees. He used the knife to trim cord from a weed eater. He admitted he had a run-in with some truckers on the highway and that he did make an obscene gesture to them several times. He also admitted that he counted in French to the officers. He denied that he was told he was under arrest for DWI or anything until the next morning. He said he asked for permission to make a phone call and was denied that right until the next morning. He said that after he took the portable breath test he asked the officers for the results and the officers were simply silent. He said he still assumed that they were looking for someone else and simply had the wrong person. Patrick admitted that he did not ask to see a lawyer or ask for an independent blood test.

The radio dispatcher testified that Patrick began banging on the cell after midnight, asking for the right to make a phone call; he had not asked for permission before. She said she could not let him out since she was alone at the jail and policy prevented her from making calls for prisoners.

This was the testimony at the pretrial hearing and at the jury trial.

On the state's motion, the case was transferred from municipal court to circuit court because of the seriousness of the charges. The charge of carrying weapons was dropped, and Patrick was tried on the DWI charge. The state made a pretrial motion to prevent any reference to the PBT or its results. At the hearing on the motion, the appellant called Dr. Roger Hawk, an assistant professor at U.A.L.R., as an expert on breathalizers. His testimony was proffered on the reliability of the PBT, the results of a test he conducted, and his opinion on the results of the test Patrick took. The judge granted the motion and prohibited any reference to the test, its results, or any testimony by Dr. Hawk. The jury subsequently convicted Patrick.

The jury conviction must be reversed because Patrick was denied the right to use evidence that he was not guilty. The exclusion was, in this case, a denial of due process of law in

violation of the United States Constitution.

The state's argument is that because the results of such a test are not admissible against a defendant in Arkansas, they likewise cannot be used by a defendant to prove his innocence. This argument overlooks the decision of the United States Supreme Court in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). Chambers was charged with murder, and he was denied the right to cross-examine a man named McDonald who had admitted several times that he had committed the murder Chambers was accused of. A Mississippi rule of evidence prohibited the cross-examination of McDonald to elicit this evidence. The court held the "exclusion of this critical evidence, coupled with the state's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." "[Q]uite simply . . . the rulings of the trial court deprived Chambers of a fair trial." The court emphasized that it was establishing no new principle of constitutional law. The court found that considerable assurance existed that the statements excluded were reliable.

Before *Chambers*, in the case of *Washington* v. *Texas*, 388 U.S. 14 (1967), the court held that a Texas law prohibiting coparticipants in a crime from testifying for each other deprived the defendant Washington of his right to compulsory process under the Sixth Amendment to the Constitution. Washington was denied the right to put on the witness stand and examine a person who saw what happened and could have told that to the jury.

The response by state and federal courts to the *Washington* and *Chambers* decisions have been mixed. Some courts have limited *Chambers* to its facts. *Grochulski* v. *Henderson*, 637 F.2d 50 (2d Cir. 1980). One court said: "If the Supreme Court cases of *Washington* v. *Texas, supra* and *Chambers* v. *Mississippi, supra* mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury." *Pettijohn* v. *Hall*, 599 F.2d 476 (1st Cir. 1979). *See also* Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers* v. *Mississippi*, 19 Crim. L. Bull. 131 (1983); Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711 (1976); Note, *Compulsory*

Process and Polygraph Evidence: Does Exclusion Violate a Criminal Defendant's Due Process Rights?, 12 Conn. L. Rev. 324 (1980).

Relying on *Chambers*, the New Mexico Court of Appeals, in *State* v. *Dorsey*, 87 N.M. 323, 532 P.2d 912, *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975), found that the results of a polygraph test, taken at the insistence of the defendant, should have been admitted as relevant evidence. The court ruled, in effect, that the test was conducted properly and the results were admissible, except that the state's attorney would not stipulate to the admission, a requirement of New Mexico law. The appeals court found the evidence was critical to the defense and that it should have been admitted. The court relied in part on *Chambers*. *See* Clinton, *supra*.

In *Rock* v. *Arkansas*, ___ U.S. ___, 107 S. Ct. 2704 (1987), the Supreme Court held that Arkansas's *per se* rule excluding all hypnotically refreshed testimony violated a defendant's right to testify on her own behalf. The court had this to say about its decision in *Chambers* v. *Mississippi, supra*:

> This Court reversed the judgment of conviction [in *Chambers*], holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but must meet the fundamental standards of due process. . . . In the Court's view, *the State in Chambers did not demonstrate that the hearsay testimony in that case, which bore 'assurances of trustworthiness' including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony.* [Italics supplied.]

When we examine the evidence excluded in this case, in the light of *Chambers*, we see immediately that the results of the PBT were critical to the defense. The officers testified they smelled alcohol, but Patrick denied he was drinking. No liquor was found in his vehicle. He was not given a breathalizer test nor offered a chance for a blood test. While he may not have requested a phone call until later that night, the fact remains he was in jail incommunicado until the next morning. So the results of the test, which were negative, and would have shown he was not drinking,

were critical to his defense and a fair trial.

But the results of such tests are not admissible in Arkansas. *See* Ark. Code Ann. §§ 5-65-201 to -207 (1987). In order for test results to be admissible under this statute, the test instrument must be certified by the Arkansas State Board of Health. Ark. Code Ann. § 5-65-206(c) and (d) (1987). *See Wells* v. *State*, 285 Ark. 9, 684 S.W.2d 248 (1985). The portable breath test is not one certified by the Department of Health and is therefore not admissible under this statute. *See Arkansas Regulations for Blood Alcohol Testing* (2nd Ref. 1984) (pp. 4-5). The trial court was right in this regard. But, according to *Chambers*, such evidence should be admitted if it is reliable. How reliable is the PBT? In *Boyd* v. *City of Montgomery*, 472 So. 2d 694 (Ala. Crim. App. 1985), the Alabama court held that the results of a PBT were admissible for the limited purpose of showing probable cause to make an arrest. The court emphasized that the test results are *not* admissible by the state to prove the charge of DWI. (We agree with the statement that under the existing law the test results cannot be used by the state against a defendant to prove a charge of DWI.)

Dr. Roger Hawk, an assistant professor at the University of Arkansas at Little Rock and an expert in breathalizers in criminal cases, testified at the pre-trial hearing that the portable breathalizer is commonly used by law enforcement officers; it is an electrochemical instrument that measures alcohol in the breath. He testified that the instrument is generally accepted as reliable in detecting the presence or absence of alcohol, although not the exact quantity. Based on his experience with the machine, he found it was sensitive to the presence of alcohol in the atmosphere around the machine; one did not have to blow directly into it for the machine to register. He said he merely took a drink of scotch and breathed toward the machine and it registered .14; ten minutes later, he took another sip, the PBT was held two feet from him and he blew as hard as he could, and it registered .06; three or four minutes later the mouthpiece was held two or three inches from his mouth and with Hawk merely talking, it registered .06. Hawk related a professional independent study that had been performed regarding the reliability of the Alco-Analizer II. It showed that the chances of a negative reading being wrong were 1 in 10,000.

We are convinced that the evidence is not so inherently unreliable that a jury cannot rationally evaluate it. *See* P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 1-7 (1986). *See also* Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 73 (1974-75). This, together with the fact that the test results were necessary for Patrick to receive a fair trial, leads us to conclude that the trial court should have admitted the test results into evidence; it should have allowed the officers to be cross-examined about the test results; and the relevant admissible testimony of Dr. Hawk should have been admitted.

The question of whether Patrick followed the officers' instructions as to the correct procedure would go to the weight of the evidence, not the admissibility of it. *See* P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 1-8(B) (1986).

We hold that Patrick was not denied due process of law because he was not informed of his right to an independent test for intoxication. There is no such requirement unless he is given a test at the direction of a law enforcement officer. *See* Ark. Code Ann. § 5-65-204(e) (1987); *Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985); *Fletcher* v. *City of Newport*, 260 Ark. 476, 541 S.W.2d 681 (1976).

We also decline to hold that Patrick was denied due process of law or that the charge must be dismissed because he was not allowed to make a phone call. The facts are sharply disputed in this regard, and we cannot say the trial court was clearly wrong in denying a motion to dismiss the charge.

Reversed and remanded.

William G. WYLIE and Carolyn S. Wylie *v.* Gene B. TULL and Helen C. Tull

88-11 749 S.W.2d 325

Supreme Court of Arkansas
Opinion delivered May 16, 1988

Robert M. Abney, for appellants.

Randall L. Gammill, and *Green & Henry*, by: *David G. Henry*, for appellees.

JOHN I. PURTLE, Justice. This is an appeal from an order of the chancellor quieting title in some of the several tracts of land which are involved in this lawsuit. There are many parties and several important legal questions involved in this case. Out of eight groups or classifications of property owners, the court made a final determination on five of the groups, quieting title in those appellees. However, the court did not render a final judgment on the remaining claims. With respect to these claims, the decree stated:

> That the property claimed by [one] plaintiff . . . is the subject of conflicting chains of title . . . ; that the Court must hear evidence to determine the effective chain of title . . . ; and that the question as to whether this Plaintiff has a claim to this property by adverse possession is not before this Court at this time and the Court does not rule on that issue . . . .
>
> That the property claimed by [another plaintiff] was granted to defendant's predecessors in title . . . ; and that the question of the Plaintiff's interest in said property created by adverse possession is not before this Court and is not the subject of this ruling.

> That a part of the property claimed by [another plaintiff] was granted to the Defendant's predecessors in title . . . . The issue of any interest that the plaintiff may have in this property created by adverse possession is not at issue before this Court and this Court's ruling does not address this issue.

The concluding sentence of the decree states: "That this Court retains jurisdiction over the parties and the subject matter of this cause for such further orders [as are] necessary . . . ."

This is yet another case where ARCP Rule 54(b) requires the dismissal of this appeal. The rule reads as follows:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Several of the claims in this litigation are still pending before the court. The last part of Rule 54(b) states that an order adjudicating fewer than all the claims shall not terminate the action as to any of the claims or parties because the decision is subject to revision "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

In *Arkhola Sand and Gravel Co.* v. *Hutchinson*, 289 Ark. 313, 711 S.W.2d 474 (1986), we stated:

> A number of recent cases have pointed out that when multiple claims or multiple parties are involved in a case the trial court may direct the entry of a final judgment as to

> one or more (but less than all) of the parties or claims *only* upon an express determination that there is no just reason for delay and upon the express direction for the entry of the judgment. [Emphasis in original.]

The chancellor in this case did not designate the judgment as a final and appealable order. Since the order did not dispose of all of the claims of all of the parties, the order appealed from is not appealable.

Appeal dismissed.

DUNHALL PHARMACEUTICALS, INC. *v.* STATE of Arkansas, Department of Finance and Administration, et al.

88-16 749 S.W.2d 666

Supreme Court of Arkansas
Opinion delivered May 16, 1988
[Rehearing denied June 13, 1988.]

Bassett Law Firm, by: *Wm. Robert Still, Jr.*, and *Angela M. Doss*, for appellant/cross-appellee.

Kelly S. Jennings, Revenue Legal Counsel, for appellee/cross-appellant.

ROBERT H. DUDLEY, Justice. This is a sales tax case. The appellant, Dunhall Pharmaceuticals, Inc., is an Arkansas corporation engaged in the manufacture and distribution of controlled substances and legend drugs pursuant to a license issued by the Arkansas State Board of Pharmacy. A Revenue Department auditor completed an audit of the appellant for the period of November 1, 1982, through January 31, 1986, which resulted in a gross receipts tax assessment of $15,170.94 plus penalty and interest. The assessment was based in part on the recorded but unreported sales of Omni Gel and Omni Mouth Rinse, as well as on samples of prescription drugs withdrawn from stock for free distribution to physicians and dentists. The appellant protested the described assessment. The assessment was sustained in its entirety in administrative court. On review in chancery court, the Chancellor affirmed the tax assessment on the sales of the Omni products but reversed the assessment on the samples withdrawn from stock for free distribution to physicians and dentists. We affirm the Chancellor on direct appeal and on cross-appeal.

The appellant appeals on the ground that the sales of the Omni products should be tax exempt under Ark. Stat. Ann. § 84-1904.3. Two versions of this statute were in effect during the

period covered by the audit:

> Effective July 1, 1979, the gross receipts or gross proceeds derived from the sale of prescription drugs by licensed pharmacists for human use and from the sale of oxygen sold for human use on prescription of a licensed physician shall be exempt from the Arkansas gross receipts tax levied by Act 386 of 1941 [§§ 84-1901—84-1919], as amended.

Ark. Stat. Ann. § 84-1904.3 (Repl. 1980).

> Effective July 1, 1985, the gross receipts or gross proceeds derived from the sale, purchase or use of prescription drugs by licensed pharmacists, hospitals or dispensing physicians registered under the provisions of Act 515 of 1983 (Ark. Stat. 72-638 et seq.) for human use and from the sale of oxygen sold for human use on prescription of a licensed physician shall be exempt from the Arkansas Gross Receipts Tax levied by Act 386 of 1941 [§§ 84-1901—84-1909, 84-1913—84-1919], as amended and the Arkansas Compensating Use Tax levied by Act 487 of 1949 [§§ 84-3101—84-3111, 84-3128], as amended.

Ark. Stat. Ann. § 84-1904.3 (Supp. 1985).

The appellant, Dunhall Pharmaceuticals, contends that it fits within the exemption contained in both versions of the statute. The argument is without merit. The appellant's license is one issued for drug manufacturers and wholesalers under Ark. Stat. Ann. §§ 82-2114 & -2115 (Supp. 1985). A licensed pharmacist, on the other hand, is licensed under Ark. Stat. Ann. § 72-1007 (Repl. 1979), and that statute limits pharmacists to "persons" who prove their competency either by taking an examination or by completing a school of pharmacy. *See* Ark. Stat. Ann. §§ 72-1007 to -1007.2 (Repl. 1979 & Supp. 1985). A pharmacist, in the ordinary sense of the word, is "a *person* licensed to prepare and dispense drugs and medicines; druggist; apothecary; pharmaceutical chemist." Random House Dictionary of the English Language 1451 (2d ed. 1983) (emphasis added). The appellant could not qualify as a "licensed pharmacist" under the statute which was effective July 1, 1979, and therefore, did not come within the exemption provision of Ark. Stat. Ann. § 84-1904.3 for that period. However, as noted above,

a new version of the statute became effective on July 1, 1985. Under it, the exemption was broadened and applied if the transaction involved a "sale, *purchase* or use of prescription drugs by licensed pharmacists, hospitals or other dispensing physicians registered under the provision of Act 515 of 1983 (Ark. Stat. Ann. § 72-638 et seq.) for human use." Ark. Stat. Ann. § 84-1904.3 (Supp. 1985). The appellant does not question the Chancellor's finding of fact that all of its sales were to dentists. Dentists are not physicians. Ark. Stat. Ann. § 72-604(2)(b) (Supp. 1985). Purchases by dentists are not excluded from taxation by the language of the above quoted 1985 exemption. The exemption provision must be strictly construed against the exemption. *Arkansas Beverage Co.* v. *Heath*, 257 Ark. 991, 521 S.W.2d 835 (1975). Therefore, the Chancellor correctly ruled that the appellant was not entitled to claim an exemption from gross receipts for the period from November 1, 1982, through January 31, 1986.

As noted above, the audit of the appellant also resulted in a gross receipts tax assessment which in part included unreported taxable sales of sample prescription drugs withdrawn from inventory by the appellant and distributed to its salesmen and subsequently to physicians and dentists at no charge. The assessment was upheld by the administrative court but reversed in chancery court. The Chancellor found that the State did not prove the value of the samples to appellant and held this to be insufficient under *State* v. *Dunhall Pharmaceuticals, Inc.*, 288 Ark. 16, 702 S.W.2d 402 (1986). The appellee brings a cross-appeal from this finding.

Ark. Stat. Ann. § 84-1903(a) (Repl. 1980) provides, "There is hereby levied an excise tax of three per centum (3%) upon the gross proceeds or gross receipts derived from all sales to any person subsequent to the effective date [July 1, 1941] of this Act, of the following: (a) Tangible personal property." Ark. Stat. Ann. § 84-1902(d) (Repl. 1980) (emphasis added) in part provides:

> The term "gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction therefrom on account of the cost of the properties sold, labor service performed,

interest paid, losses or any expenses whatsoever . . . .

The term "gross proceeds" or "gross receipts" shall include the *value* of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person.

The same parties that are in this case were before this Court two years ago, and we held that the cross-appellant, the Revenue Division of the Department of Finance and Administration, had to prove the value of free samples of prescription products which cross-appellee gave away before the value of the samples was subject to taxation. *State* v. *Dunhall Pharmaceuticals, Inc.*, 288 Ark. 16, 702 S.W.2d 402 (1986). The cross-appellant contends that our decision does not comport with legislative intent and asks us to reverse the decision. We decline to do so. Here, we are not deciding a question involving an exemption of the tax which is always strictly construed against the taxpayer. Instead, we are deciding an issue involving the levy of a tax and in deciding that issue, we resolve any doubt or ambiguity in favor of the taxpayer. *Faull* v. *Heath*, 259 Ark. 145, 532 S.W.2d 164 (1976). If the legislature had intended to fix some predetermined value, such as cost of manufacture, to apply to goods, wares, or merchandise withdrawn from stock, it could have easily said so. The legislature knows how to set a predetermined value. For example, complimentary tickets to places of amusement are determined to have a value equal to the sales price of similar tickets. Ark. Stat. Ann. § 84-1903(e) (Repl. 1980).

We decline to overrule our earlier decision, and, accordingly, affirm the Chancellor on cross-appeal. Affirmed on direct and on cross-appeal.

Shirley LASTER *v.* Sharon TILLEY

88-62 749 S.W.2d 326

Supreme Court of Arkansas
Opinion delivered May 16, 1988

G. Randolph Satterfield, for appellant.

Lovell, Arnold & Nolley, by: *Gary M. Arnold*, for appellee.

DAVID NEWBERN, Justice. The appellant, Shirley Laster, sued her next door neighbor, the appellee Sharon Tilley, for battery. Tilley counterclaimed for trespass and battery. The jury awarded damages to Tilley, and Laster appealed the judgment. Laster claimed Tilley ran her down with her riding lawnmower, and Tilley claimed Laster attacked her while she was on the lawnmower. Laster contends the evidence was insufficient to support the verdict against her and that the court erred in admitting into evidence a tape recording of a telephone conversation in which she made profane and unflattering threats to Tilley.

1. Sufficiency of the evidence

Although motions for directed verdict were made at the conclusion of Laster's case, none was made by Laster at the close of Tilley's case. Laster's failure to move for directed verdict at the close of Tilley's case constituted a waiver of the issue of sufficiency of the evidence. Ark. R. Civ. P. 50(e); *Copelin* v. *Corter*, 291 Ark. 218, 724 S.W.2d 146 (1987).

2. Admissibility of the tape recording

Laster contends the recording was inadmissible because she did not know her conversation with Tilley was being recorded. She cites no authority whatever for her position. In the absence of citation of authority or convincing argument we decline to address the point. *Reed* v. *Alcoholic Beverage Control Division*, 295 Ark. 9, 746 S.W.2d 368 (1988); *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Affirmed.

John W. SELLERS *v.* STATE of Arkansas

CR 87-198 749 S.W.2d 669

Supreme Court of Arkansas
Opinion delivered May 16, 1988
[Rehearing denied June 13, 1988.]

Thomas E. Brown and *Arthur L. Allen*, for appellant.

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, John W. Sellers, was convicted of capital felony murder and sentenced to life imprisonment without parole. He confessed his participation in the crime after his arrest. He contends his statement should have been suppressed because it was taken while he was in custody and after he had requested but not been furnished counsel. The original information charged that Sellers participated in robbery and burglary in furtherance of which William Byrd was murdered. The information was amended to remove the robbery charge. Apparently the state planned to seek the death penalty and wished to use pecuniary gain as an aggravating circumstance in accordance with Ark. Code Ann. § 5-4-604(6) (1987), but avoid application of *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 546 (1985), in which it was held that one convicted of an offense of which pecuniary gain was an element could not have that same element used against him as an aggravating circumstance in determining applicability of the death penalty. *Cf. O'Rourke* v. *State*, 295 Ark. 57, 746 S.W.2d 53 (1988), in which we discussed *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S. Ct. 546 (1988), and its effect on *Collins* v. *Lockhart, supra*. The jury was not allowed to consider robbery as the offense underlying the burglary but was instructed it could find Sellers guilty of capital murder if it was committed to facilitate a burglary, the underlying purpose of which was to commit assault and battery.

While we find Sellers' statement was admissible because he waived his right to counsel and was not coerced, we must agree with Sellers' argument that the murder was not done in further-

ance of assault and battery on the victim. Therefore the conviction must be reversed.

William Byrd was an elderly man who lived alone and was known to carry large sums of money on his person. According to Sellers' statement, he and Sam Angle and Donald McDougald had been drinking and decided to rob Mr. Byrd. McDougald procured an axe handle, and they went to Byrd's house late at night. Sellers' "job" was to knock Mr. Byrd out with his fist, and they would then take the money. Although Sellers professed their plan was only that he would hit Mr. Byrd with his fist, he knew McDougald had procured the axe handle. Other evidence showed that Mr. Byrd was killed in a brutal beating with a blunt instrument. Evidence of a statement of McDougald was admitted in which he accused Sellers of hitting Byrd "some more" while McDougald was holding Byrd's mouth to keep him quiet.

Sellers was arrested in Las Vegas, Nevada. Sheriff Gambill of Bradley County had travelled there to apprehend Sellers. After Nevada officers had arrested Sellers and brought him to the Las Vegas police station, Sheriff Gambill interviewed him. He informed Sellers of his rights, including the right to have counsel present, and Sellers said he would prefer not to talk until he had consulted counsel. The sheriff terminated the interview at that point and left the room after telling Sellers he did not want to violate any of Sellers' rights. Detective Remlinger of the Las Vegas Police Department remained in the room with Sellers and was completing routine booking documents when Sellers asked him, "What is going on?" According to Remlinger's testimony he then told Sellers that the sheriff "must know something" because he had come all the way out there to get him. He told Sellers that his friends were in jail and that is how it became known that he was in Las Vegas. Remlinger disputed Sellers' testimony that he told Sellers it would go easier on him if he made a statement. After this conversation between Sellers and Remlinger, Sellers asked Remlinger to have the sheriff return to the room because he wanted to talk to him. The sheriff returned, and Sellers made a statement, the transcription of which contains these words: "I have been advised of my rights and signed them. I have expressed to you that I want to make a statement to you."

1. The information

Capital murder is defined in Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1987) to include causing the death of any person while committing, among other felonies, robbery or burglary "under circumstances manifesting extreme indifference to the value of human life." Burglary is described in Ark. Code Ann. § 5-39-201(a) (1987) as follows: "A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment."

Sellers contends that by declining to permit the jury to consider robbery as the underlying "offense punishable by imprisonment" and limiting them to consideration of the assault and battery, the court's instruction has run afoul of our decision in *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987), in which we held that one could not be convicted of capital murder where the underlying felony was burglary if the intent of the perpetrator, upon entering the dwelling, was to commit the murder. We wrote:

> 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.

The state argues that this case is distinguishable from the *Parker* case because Sellers' intent upon entering Mr. Byrd's home was to assault and batter him rather than to murder him, thus there was an objective of the burglary, independent of the murder, as our decision in the *Parker* case requires. Sellers argues that the assault and battery were merged with the killing and thus cannot be considered to be independent of it, citing *People* v. *Wilson*, 82 Cal. Rptr. 494, 462 P.2d 22 (1970), in which it was held that, "a burglary based on intent to assault with a deadly weapon is included in fact within a charge of murder, and cannot support a felony-murder instruction." 462 P.2d at 29. The only response

made by the state to the citation of the *Wilson* case is that the California Supreme Court refused to apply the same rationale in *People* v. *Burton*, 99 Cal. Rptr. 1, 491 P.2d 793 (1971). In the *Burton* case the court held that aggravated robbery did not merge with the murder. Obviously aggravated robbery involves robbery which is an offense independent of the use of deadly force and independent of the ensuing homicide, and that is what the court held.

While we can appreciate the state's argument that intent to commit assault and battery differs from intent to commit murder, we cannot find a way to say that the murder facilitated the burglary if the assault and battery were the underlying offenses. We cannot say that the murder facilitated the assault and battery as it was the very culmination of them. It was, therefore, error to have permitted the jury to find Sellers guilty of capital murder on the basis that it was committed in the course of burglary because the jury was not allowed to consider the robbery or any purpose for the entry of Mr. Byrd's home independent of the acts which resulted in his death.

2. The statement

We address this point for guidance in the event of a retrial. Sellers contends that the comments of Detective Remlinger, in response to his question, "What is going on?" after Sheriff Gambill left the interrogation room violated the requirement of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), that questioning cease after the right to counsel is invoked, and amounted to coercion.

While Sellers' statement did not state specifically that he waived his right to counsel, it seems quite clear that he was completely aware of it and yet chose to make a statement in which he specifically said he wished to talk to Sheriff Gambill. The sheriff had previously complied with *Edwards* v. *Arizona, supra*, by leaving the interrogation room after stating he did not wish to violate any of Sellers' rights. Remlinger's remarks were in response to Sellers' question. It is not contended that Remlinger resumed the interrogation; rather, the contention is that by telling Sellers that the sheriff must know something and that Sellers' friends were in jail Remlinger coerced Sellers into foregoing his right to counsel and making a statement.

In determining the voluntariness of a statement, we consider the totality of the circumstances in which it is made. *Smith* v. *State*, 292 Ark. 162, 729 S.W.2d 5 (1987). Given the strong evidence that Sellers knew of his right to remain silent and to have counsel present and yet chose to discuss the case, we find the statement was voluntarily given. Remlinger's remarks might have been construed to mean that Sellers had better talk because his accomplices had implicated him, but that is only conjecture, and in the circumstances presented here we cannot hold that Remlinger's conduct was coercive.

Reversed and remanded.

HICKMAN and GLAZE, JJ., concur.

TOM GLAZE, Justice, concurring. I concur. I agree with the majority but write to be sure that the majority's reference to our recent holding in *O'Rourke* v. *State*, 295 Ark. 57, 746 S.W.2d 53 (1988), does not go unnoticed. The case of *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), has been troublesome in murder trials where the death penalty has been sought — as was the situation in the instant case. As noted in the majority opinion, *Collins* held that a person convicted of an offense of which pecuniary gain was an element could not have that same element used against him as an aggravating circumstance in determining the applicability of the death penalty. In other words, under *Collins*, an element of the underlying offense of murder could not also be used at the penalty stage to show an aggravating circumstance. The Supreme Court, in *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S. Ct. 546 (1988), held contrary to the *Collins* decision. We compared and analyzed those two holdings in *O'Rourke*, so it is unnecessary for me to repeat that analysis here except to emphasize that part of *Lowenfield* that holds, "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." The *Lowenfield* and *O'Rourke* decisions remove the "double-counting" issue raised in the *Collins* holding and thus prevent the type of difficulties faced by the prosecutor in this case.

HICKMAN, J., joins in this concurrence.

BIG ROCK, INC., d/b/a Criss & Shaver Ready Mix Concrete *v.* MISSOURI PACIFIC RAILROAD Company and Robert Eubanks, Arkansas Insurance Commissioner

88-1 749 S.W.2d 675

Supreme Court of Arkansas
Opinion delivered May 16, 1988

Catlett, Stubblefield, Bonds & Fleming, by: *Victor A. Fleming*, for appellant.

Herschel H. Friday, Michael G. Thompson, and *James C. Baker, Jr.*, for appellees.

TOM GLAZE, Justice. The appellee, Arkansas Insurance Commissioner (Commissioner), initiated this delinquency proceeding in the Pulaski County Circuit Court pursuant to Ark. Code Ann. § 23-68-103 (1987), requesting that the Commissioner be appointed ancillary receiver for the purpose of liquidating Northeastern Fire Insurance Company's (Northeastern's) business in Arkansas. Northeastern was a Pennsylvania com-

pany, and its sole asset in this state was a qualifying bond in the amount of $100,000.00. The appellant, Big Rock, Inc., and appellee, Missouri Pacific Railroad Company (MoPac), filed the only claims against Northeastern in the respective amounts of $47,500.00 and $147,738.62. Big Rock's claim was later reduced to $37,500.00, based on the fact that its policy coverage with Northeastern contained "retained limit" provision in the sum of $10,000.00.

Big Rock's and MoPac's claims were apportioned, upon a percentage basis, against the amount of Northeastern's total bond amount, Big Rock receiving $20,427.44 and MoPac getting $80,698.51.[1] By court order dated August 27, 1986, the parties were awarded their respective proportionate shares, exhausting all of Northeastern's funds in Arkansas. The court's order also terminated the ancillary receivership. On April 3, 1987, Big Rock filed its motion to modify the court's order, claiming Big Rock had obtained newly discovered evidence that showed it was entitled to $4,136.00 more than the trial court awarded. The trial court denied Big Rock's motion. On appeal, Big Rock argues two points, but we find neither requires reversal. Therefore, we affirm.

Big Rock cites ARCP Rule 60(c)(1) and (4), and argues that because it had discovered new evidence and had learned the Commissioner had committed constructive fraud, the trial court's order should be modified to direct an increase in Big Rock's award by the sum of $4,136.00 or, in the alternative, to grant Big Rock a new trial.

In support of its arguments, Big Rock submits that, after it filed its claim against Northeastern in proceedings in both Pennsylvania and Arkansas, Arkansas's Commissioner advised Big Rock that the "retained-limit" provision in its Northeastern policy was the equivalent of a "deductible," and relying on that representation, Big Rock believed its claim was worth only $37,500.00, rather than the $47,500.00 it originally claimed. The Pennsylvania Insurance Department also corrected its original

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[1] The bond amount included accrued interest and the total amount was reduced by the Commissioner's expenses of $2,513.24 before determining MoPac's and Big Rock's shares. The percentage basis was calculated by determining the ratio of the claim of each party to the total of their claims.

evaluation of Big Rock's claim by reducing the amount to $37,500.00, and this reduced amount was subsequently accepted by Big Rock as its proportionate share of Northeastern's bond funds. Big Rock further argues that it did not possess a copy of the Northeastern policy at the time of the Commissioner's advice, and instead, had only a certificate of insurance, which only contained information reflecting the policy period, the liability limits and a reference that the limits were subject to a $10,000.00 "retained-limit" provision. Big Rock contends it never saw the actual insurance policy, which defined the meaning of "retained limit," until after the court issued its order in this cause. Big Rock asserts that it obtained a copy of the policy in discovery proceedings during a lawsuit Big Rock had filed against its insurance agent and broker. In that litigation, Big Rock alleged its broker had procured the Northeastern policy without notifying Big Rock that Northeastern was insolvent.

Big Rock's arguments fail for several reasons. First, Big Rock failed to show that it could not have discovered with reasonable diligence a copy of its Northeastern policy before or at the time of the trial. *See* ARCP Rule 60(c)(1). *See also Liggett* v. *Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987); *Ark. State Highway Comm.* v. *Owen*, 241 Ark. 1012, 411 S.W.2d 304 (1967) (wherein this court construed the meaning of newly discovered evidence under ARCP Rule 59(a)(7) and its predecessor law). Here, Big Rock acquired its policy in 1979, and the claim it asserts arose on or about January 10, 1985. Arkansas's Commissioner commenced these delinquency proceedings in November 1985, and Big Rock filed its claim in February 1986, more than six months before the trial court entered its order disbursing Northeastern's bond funds. The record is silent concerning when Big Rock initiated suit against its insurance broker and why Big Rock could not have obtained its policy from the broker before the trial court's August 27, 1986 order, which allowed the parties' claims. Based upon the facts before us, we are unable to say the trial court abused its discretion in denying Big Rock's motion based on its claim of newly discovered evidence under Rule 60(c)(1).

Nor can we agree that the trial court's August 27th order should be modified or set aside because of some claim of misrepresentation and constructive fraud on the part of Arkan-

sas's Commissioner. In its motion to modify, Big Rock never alleged that the Commissioner committed constructive fraud, nor did it specifically aver that the Commissioner made a misrepresentation upon which Big Rock reasonably relied and was misled. *See Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985); *Arkansas Valley Compress & Warehouse Co.* v. *Morgan*, 217 Ark. 161, 229 S.W.2d 133 (1950); ARCP Rule 9(b). Big Rock's failure to plead and to obtain the court's ruling on constructive fraud is, alone, sufficient reason that Big Rock cannot prevail on that theory on appeal. *See Ferguson* v. *City of Mountain Pine*, 278 Ark. 575, 647 S.W.2d 460 (1983); *Routen* v. *Van Duyse*, 240 Ark. 825, 402 S.W.2d 411 (1966).

Another reason Big Rock cannot prevail on this point is that it has failed to demonstrate that the Commissioner's advice, concerning the meaning of the term "retained limit," was either erroneous or actionable as fraud.[2] In this respect, Big Rock stated in its motion below that the Commissioner told Big Rock that a "retained limit" was "in the nature of a deductible." While the "retained-limit" provision in Northeastern's policy was not effectuated under the circumstances in this case, we find nothing wrong with the Commissioner's statement. Big Rock's claim against Northeastern arose because of a property-damage judgment obtained against Big Rock in the sum of $155,000.00. Hartford Insurance Company was Big Rock's primary carrier on this property-damage claim, but its policy limit was $100,000.00. Northeastern insured Big Rock for coverage in excess of the amount insured by Hartford. Northeastern's liability, under its policy terms, was limited to the net loss in excess of the coverage provided by Hartford, but if Hartford did not pay the limit of its policy, Northeastern was required to pay only that loss in excess of its "retained-limit" amount of $10,000.00. In other words, Northeastern would not be liable for the $10,000.00 amount, which would be in form and in fact a deductible amount.

In the situation here, Hartford did pay its policy limit, and as

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[2] No one argues whether the alleged constructive fraud on the Commissioner's part was the type practiced by a party to obtain the judgment. *See* ARCP Rule 60(c)(4); *Davis* v. *Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987). Because we uphold the trial court's ruling on other grounds, we deem it unnecessary to reach or discuss this issue.

a consequence, the "retained-limit" provision in Northeastern's policy was never effectuated. Even so, we find nothing in the record that contradicts the Commissioner's view that a "retained limit" was in the nature of a deductible — which, we add, was also the view shared by the Pennsylvania Insurance Department.

Because we believe the trial court was correct in denying Big Rock's motion to modify, we affirm.

Kenneth L. LEWIS and Karl D. Lewis *v.* STATE of Arkansas

CR 87-204 749 S.W.2d 672

Supreme Court of Arkansas
Opinion delivered May 16, 1988

William R. Simpson, Jr., Public Defender, *Thomas B. Devine III*, Deputy Public Defender, by: *Thomas B. Devine III*, Deputy Public Defender, for appellants.

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

TOM GLAZE, Justice. Appellants Kenneth L. Lewis and Karl D. Lewis were convicted of rape and aggravated robbery. In addition, Karl Lewis was convicted of kidnapping and Kenneth Lewis had his probated sentence revoked. On appeal, appellants argue that (1) there was insufficient evidence to support the convictions; (2) the probated sentence of Kenneth L. Lewis was improperly revoked; and (3) the aggravated robbery and kidnapping charges should be dismissed because the prosecutor unlawfully added those charges in response to their request for a jury trial. We find no merit to any of appellants' arguments, and accordingly affirm.

The prosecutrix testified that in the early morning hours of December 22, 1985, she was walking down a street in North Little Rock when two men — one she later identified as Karl Lewis — got out of a car that had been following her. She went to the nearest house and rang the doorbell, but no one answered. Karl approached her, grabbed her by the arm and forced her into

the car. She attempted to exit the car several times, but Karl kept locking the door. The men then drove to an apartment where others, including Kenneth Lewis, were present. At the apartment, one of the men took her to a bedroom and made sexual advances. She resisted, but he forced himself on her and had intercourse. During this act, other individuals came into the room, two of whom she identified as Kenneth and Karl. After the first individual finished having intercourse with the prosecutrix, others, including Kenneth and Karl, proceeded in turn to do the same while one of them held her arms. After this incident was over, she was taken to another room where she requested that they let her go. Instead, she was taken back to the bedroom where she was again forced to have intercourse with numerous individuals. After this second incident, Kenneth pulled out a large knife and said that "they might have to kill her because they wouldn't want her to tell the police or anything like that." They then went through her personal belongings, took $10 from her purse and took her watch — which was kept by Karl. Afterwards, she was taken to a gravel lot where she was released.

We view the evidence in the light most favorable to the state and affirm if there is substantial evidence to support the conviction. *Ellis* v. *State*, 279 Ark. 430, 652 S.W.2d 35 (1983). Substantial evidence is that which is forceful enough to compel a conclusion one way or another. *Williams* v. *State*, 281 Ark. 387, 663 S.W.2d 928 (1984).

1. Sufficiency of the evidence

Kenneth Lewis argues there is insufficient evidence to support his conviction of rape for two reasons: (1) the serologist excluded him from the group that had intercourse with the victim because an element of his blood type was not present; (2) witnesses testified that Kenneth was with them in another part of town when the alleged rape was taking place.

Under Ark. Code Ann. § 5-14-103 (1987), a person commits rape if he engages in sexual intercourse with another person by forcible compulsion. Sexual intercourse is defined by the code as the "penetration, however slight, of a vagina by a penis." For several reasons, we find substantial evidence to support a charge of rape. First, the medical examination conducted after the night in question revealed evidence of forced

intercourse. Kenneth was positively identified as one of the perpetrators by the prosecutrix — first from a photo spread and later in court. At trial, she testified unequivocally that Kenneth was among the group who had vaginal intercourse with her. We have consistently held that the requirement of substantial evidence is satisfied by the rape victim's testimony. *Houston* v. *State*, 293 Ark. 492, 739 S.W.2d 154 (1987). Second, even though the serologist excluded Kenneth from the group because an element of his blood was not present, it was acknowledged that the test is not conclusive if ejaculation did not take place. In any event, the jury is not required to accept expert testimony as conclusive, nor is it required to give expert testimony any more weight than it would give other witness testimony. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979); *Mutual Benefit Health & Accident Ass'n* v. *Moore*, 196 Ark. 667, 119 S.W.2d 499 (1938). Third, even though Kenneth had alibi witnesses, the jury obviously chose not to believe them. It is the jury's province to judge the credibility of witnesses, and we will not disturb their judgment. *Ellis* v. *State*, 279 Ark. 430, 652 S.W.2d 35 (1983); *Riddick* v. *State*, 271 Ark. 203, 607 S.W.2d 671 (1980).

■ Regarding Karl's conviction on charges of kidnapping, Ark. Code Ann. § 5-11-102 (1987), provides that the crime of kidnapping is complete upon a showing that the appellant restrained the victim without her consent so as to substantially interfere with her liberty with the purpose of engaging in other specified criminal activity — here theft or rape. Clearly, there is substantial evidence to support such a charge. The prosecutrix testified that Karl grabbed her by the arm and put her into the car. She tried to get out, but Karl kept locking the door. She was then taken to an apartment where she was raped once by Karl, and twice by the others. Then, the victim's money and watch were taken. The record clearly reflects that the prosecutrix gave no consent to being placed and locked in these men's car and the evidence further shows that there was much more interference with her liberty than the minimal restraint which normally accompanies the crime of rape. *See Jones* v. *State*, 290 Ark. 113, 717 S.W.2d 200 (1986); *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

■ Both Kenneth and Karl contend that there was insufficient evidence to support their convictions on charges of aggra-

vated robbery, arguing there was no evidence that they were armed with a deadly weapon in the course of a robbery. Under Ark. Code Ann. § 5-12-103(a)(1) (1987), a person commits aggravated robbery if he commits robbery and is armed with a deadly weapon, or represents by word or conduct that he is so armed. A person commits robbery if, with the purpose of committing a theft, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102 (1987). The prosecutrix testified that immediately after the second rape, Kenneth pulled a knife and threatened her with death. Contemporaneously with or immediately after the threat, the men pilfered her purse. Karl took her watch.

We have held that substantial evidence existed to sustain a conviction for aggravated robbery when the defendant pulled a gun on the victim, threatened her several times, but before actually taking her property, he told her he would not kill her. *Beed*, 271 Ark. 526, 609 S.W.2d 898. In *Beed*, we concluded that there was an immediate threat of death or serious harm to the victim, notwithstanding the defendant's assurances to the contrary. Here, we hold there was substantial evidence to support a finding that the prosecutrix was faced with an immediate threat of death or harm if she refused to surrender her watch and money.

2. Sentence revocation

Regarding Kenneth's revocation, the court may revoke a probated sentence if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with the conditions of his or her probation. We affirm unless the court's order was clearly against the preponderance of the evidence. *Standridge* v. *State*, 290 Ark. 150, 717 S.W.2d 795 (1986). We need only point out that there was sufficient evidence to convict Kenneth of several felonies, a clear violation of the "no crimes" condition of his probated sentence. Accordingly, the court's order revoking Kenneth's probation must be affirmed.

3. Prosecutorial misconduct

For appellants' last point of error, the argument is made that the kidnapping and aggravating robbery charges should be dismissed for prosecutorial vindictiveness because the prosecutor only added these charges as punishment for their decision to

proceed to trial. In January of 1986, Kenneth was charged with rape, and in September of that same year, the information was amended to include Karl on that same charge. The prosecutor again amended the information in both January and February of 1987, in order to include a kidnapping charge against Karl Lewis and aggravated robbery charges against both appellants. The prosecutor had previously informed the appellants, during a pretrial hearing at which they requested a continuance, that he would join in their continuance request and would add the aggravated robbery charges against them. Appellants seem to argue that because the prosecutor filed the additional charges after they requested a continuance and trial, the prosecutor's actions show the new charges were the result of his vindictiveness.

In *United States* v. *Goodwin*, 457 U.S. 368 (1982), the Supreme Court held that a prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution and that an initial decision should not freeze his future conduct. Although the Court held that a presumption of vindictiveness is not warranted in cases where additional charges are added after a defendant requests a jury trial, the Court did note that the defendant may prove by objective evidence that the additional charges were not in the public interest and were retaliatory in nature. Here, appellants have made bald assertions of prosecutorial vindictiveness, and have not supported their assertions with objective evidence.

Because we find no error, we affirm.

Pat REEVES *v.* J. Randy YOUNG, Executive Director and Secretary of the Arkansas Soil and Water Conservation Commission, et al.

88-15 749 S.W.2d 327

Supreme Court of Arkansas
Opinion delivered May 16, 1988

Darling & Graves, by: *Peter R. Darling*, for appellant.

Rose Law Firm, A Professional Association, by: *George E. Campbell* and *David L. Williams; Steve Clark*, Att'y Gen., by: *Blake Hendrix*, Asst. Att'y Gen., for appellees.

TOM GLAZE, Justice. This case involves state general obligation bonds to be issued under Act 496 of 1981, as amended, for the purpose of developing water-resource projects.[1] Act 496 authorized the appellee, Arkansas Soil and Water Commission, to issue up to $100,000,000 in such bonds. The Commission was required, under the Act, to be the project owner and developer. Later, Act 280 of 1985 was enacted, amending Act 496 by removing the requirement that the Commission be the owner and allowing the Commission to make loans and grants to local governments to finance the construction of water-resource projects. Act 280 permits municipalities or water users' associations to own the project, rather than the Commission. Furthermore, while the parties never mentioned it in their arguments, we note that Act 280 also removed the condition found in Act 496 that no bonds issued could bear interest at a rate in excess of ten percent per annum.

Appellant brought this illegal taxation lawsuit, contending that Act 280 violates amendment 20 of the Arkansas Constitution and that the Commission should be enjoined from issuing any bond proceeds for loans or grants for water-resource projects not owned by the Commission. The Commission, in turn, argues that Act 280 complies with the requirements of amendment 20, since the Act did not enlarge the Commission's authority beyond that which the voters approved in 1982, and will not result in an

[1] Act 496 of 1981 is referred to as the "Arkansas Water Resources Development Act of 1981" and is compiled, as amended by Act 280 of 1985, in Ark. Code Ann. §§ 15-22-601 to -622 (1987). To facilitate discussion, we refer in our opinion only to the acts and not to the statutory codifications.

additional burden upon the taxpayers. The trial court ruled in the Commission's favor, but we reverse on appeal.

Citing amendment 20, appellant argues that the state can issue no bonds for any purpose whatsoever except by the consent of the electorate voting on the question at a general election or a special election called for that purpose. Here, appellant continues, Act 496 bonds were approved by the voters in 1982, but that Act 280 subsequently changed the purpose for which such bonds would issue by giving the Commission additional and broader authority than it was granted under Act 496. Appellant suggests the Commission's extended authority under Act 280 may well result in a greater burden upon the taxpayers.

Appellee counters appellant's arguments, claiming the purpose of Act 496 was not changed by Act 280, since the purpose of the bonds, their amount and the fact state revenues are pledged to repay the bonds were properly presented to and approved by the voters in the 1982 general election. Appellee further reasons that there is little, if any, difference between (1) the Commission owning a water-treatment plant which is leased to the local government and (2) the local government constructing the plant with a loan from the Commission, which is secured by revenue bonds issued by the local government. Appellee contends that in both instances the construction costs of the water-treatment facility will be repaid primarily with the revenues the facility generates.

The Commission cites *Garner* v. *Lowrey*, 221 Ark. 571, 254 S.W.2d 680 (1953), in support of its argument. While the factual issues in *Garner* deal with general obligation bonds issued under the terms contained in amendment 17 of the Arkansas Constitution, we agree with the Commission that the following proposition enunciated in *Garner* controls here: When voting on general obligation debt issues, voters are primarily concerned with the future potential tax burden that they may be assuming. We disagree, however, with the Commission's conclusion that Act 280 neither alters nor adds to the taxpayers' burden. Neither do we agree that Act 280 did not change the purpose of the bonds issued under Act 496.

In its argument, the Commission mainly discusses its authority, under Act 280, to make *loans* to local governments for

the building of such water-resource projects, but, in making this argument, the Commission generally ignores the fact that the Act also empowers it to give *grants* for such construction. While it is true that the state's bonded indebtedness for these projects cannot exceed the $100,000,000 limit the voters approved in 1982, the voters, in approving Act 496, never intended that the Commission grant, or bestow, bond proceeds to local government without some requirement that those proceeds be repaid. Such a grant, as the term implies, requires no repayment obligation on the part of the local government, and, without such obligation, the bonded indebtedness, evidencing that grant, would be paid directly from general revenues. In addition, because the municipality purchased, owned and constructed the facility, by the use of a grant, the state not only would have no recourse against the municipality, but it also would be unable to offset its losses by a foreclosure sale of the project.

Finally, we refer to Section 4(c) of Act 496 which, prior to Act 280, provided that no bonds could bear interest at a rate in excess of ten percent per annum. That interest rate limitation was removed by the enactment of Act 280. *See* Section 3 of Act 280 of 1985. Quite obviously, the voters' future potential tax burden could be increased if the Commission ever issued bonds in excess of the ten percent rate established in Act 496.[2]

For the reasons stated above, we hold Act 280 of 1985 is unconstitutional and the trial court's decision to the contrary is reversed.

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[2] The Commission cites a Michigan case styled *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich. 49, 340 N.W.2d 817 (1983), which we do not find persuasive or controlling here. As the Commission points out, the Michigan Supreme Court determined that it was constitutional for the legislature to amend the interest rate for voter-authorized general obligation bonds without a vote of the people. The court relied, in part, on the fact the ballot reflected only a three-part question concerning the issuance of general obligation bonds and nothing contained in the question pertained to the maximum interest rate that such bonds could bear. We do not read our law so narrowly as to limit the requirements contained in an act, which authorizes the issuance of bonded indebtedness, only to those particulars set out in the ballot title and approved by the voters. *See Garner* v. *Lowery*, 221 Ark. at 574, 254 S.W.2d at 681-682. The language used here in Act 496 dictates a contrary result, providing that if issuance of the bonds is approved by a majority of the voters, the Commission shall proceed with the sale and issuance of the bonds as provided in this Act. *See* § 17 of Act 496 of 1981.

HICKMAN, J., concurs, HAYS, J., dissents.

DARRELL HICKMAN, Justice, concurring. My remarks are in no way intended to cast any shadow on the reputation of counsel for the appellees or any other lawyer or firm for that matter.

I believe this is a test case. If it is not, then I apologize. It is not an uncommon practice, especially in cases concerning government bonds, for counsel, as a condition of approving a bond issue, to seek a court decision on the legality of the bond issue. Two recent bond issue cases were undoubtedly test cases. *See Cortez* v. *Independence County*, 287 Ark. 517, 678 S.W.2d 291 (1985); *Murphy* v. *Epes*, 283 Ark. 517, 678 S.W.2d 352 (1984). In *Murphy*, counsel for the appellant announced that he was pleased he "lost" the case. Test cases are also filed on other financial legal questions. *See Winkle* v. *Grand National Bank*, 267 Ark. 123, 601 S.W.2d 559 (1980).

Speaking from what I have heard, or what is common knowledge, in a test case, a party and a lawyer are found who are willing to cooperate as "adversaries." Sometimes the suit is called a "friendly" lawsuit. I cannot say whether it is a common practice for the legal briefs of both sides to be prepared by one lawyer or not (the one bringing the test case), nor can I say whether the other lawyer is paid for his work. The practice probably varies. In this case both briefs are identical and appear to have been printed or typed at the same place.

We do not give advisory opinions as some states do, so test cases and friendly lawsuits have become a way to get a court decision in Arkansas before action is taken by interested parties. I have no particular quarrel with the practice.

Our legal system is based on the advocacy system where each party employs an attorney to present his case in the best possible light, the result hopefully being a fair resolution of the question. A test case is different; it invariably seeks a favorable predetermined answer to a question. Both sides are not independent and one side stands to lose nothing.

All the bond decisions that led to the abusive issuance of revenue bonds were probably test cases. Our decisions, which until *Purvis* v. *Hubbell*, 273 Ark. 330, 620 S.W.2d 282 (1981), went along with every deviation from the Arkansas Constitution,

might not have been the same if both this court and the public were fully aware of the circumstances of the test cases.

What should we do? Try to prevent the practice? Probably not. We could, as an ethical and procedural consideration, require the lawyers to divulge whether or not the case is a test case. It might be we would not consider such cases *res judicata. See Bailey* v. *Harris Brake Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 916 (1985). At the very least test cases need to come out of the closet so we can see them for what they are.

STEELE HAYS, Justice, dissenting. On the basis of what is presented by this appeal, I would affirm the Chancellor, as the appellant has failed to overcome the strong presumption of constitutionality due legislative enactments. I believe the Chancellor was right to hold that changes effected by Act 280 of 1985, are not so substantial as to require another vote by the general public.

I do not know what to make of the change in the ceiling on the interest rate purportedly provided in Act 280, as neither side has discussed it. I would ask the parties to brief that point or would limit our holding to the issues presented.

Walt PATTERSON, et al. *v.* Hon. John B. ROBBINS

88-108 749 S.W.2d 330

Supreme Court of Arkansas
Opinion delivered May 16, 1988

Claudia Driver, Asst. General Counsel, for appellant Dep't of Human Services; and *Robert Depper*, for appellants Robert E. Smith and Verdia Smith.

No response.

PER CURIAM. The petitioners contend that the Probate Court of Garland County lacks jurisdiction of an adoption petition because the persons seeking to adopt are foster parents who lack standing. Although the petitioners are correct in noting that Ark. Code Ann. § 9-9-210(a)(3) (1987) provides that a petition for adoption shall state "the date the petitioner acquired custody of the minor and of placement of the minor and the name of the person placing the minor; and a statement as to how petitioner acquired custody of the minor," we do not interpret that language having to do with the contents of the petition as meaning that a person who does not have custody and with whom the child has not been "placed" has no standing. Standing to adopt is conferred by Ark. Code Ann. § 9-9-204 (1987), and that statute does not exclude persons who have served as foster parents of the minor to be adopted.

In addition, Ark. Code Ann. § 9-9-207 (1987) gives the probate court authority to decide the issue raised by the foster parents whether the Department of Human Services, as legal guardian of the minor, has unreasonably withheld its consent to adopt. The foster parents' rights in that respect are not subject exclusively to the department's policies, the Arkansas Administrative Procedure Act, Ark. Code Ann. §§ 25-15-201 through 25-15-214 (1987), and circuit court review.

Petition for writ of prohibition denied.

Dan PLUGGE *v.* STATE of Arkansas

RC 88-21 750 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered May 16, 1988

Q. Byrum Hurst, Jr., for appellant.

No response.

PER CURIAM. Appellant, Dan W. Plugge, through his counsel, has petitioned for a rule on the clerk to file the record on appeal from his conviction of driving while intoxicated, a misdemeanor.

Appellant's counsel asserts that after entry of the judgment he ordered the transcript promptly and paid the requested deposit of $100. Counsel further informs us that a number of letters were

sent by him to appellant at a Florida address informing him of the progress of the appeal and urging the timely payment of the costs of the appeal. The letters went unanswered although counsel reports that appellant now claims the letters were never received. After the time for appeal had expired counsel made a refund to appellant and informed him that the time for appeal had run. Counsel states that appellant now insists the appeal be prosecuted.

While the petition contains an assertion that counsel assumes responsibility for the failure to file the record, which would bring the case within the ambit of our Per Curiam in *In Re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979), we find that the allegations of the petition reflect that the failure was not the fault of counsel, but was entirely attributable to the appellant. That being so, our Per Curiam has no application and the motion for a rule on the clerk is denied.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the result reached in this case because it is obvious that the responsibility for failure to perfect the appeal lies entirely with the appellant. However, I concur in order to prevent a misunderstanding of the opinion of the court.

An attorney of record desiring to withdraw from a case, or failing to perfect an appeal, must follow the provisions of A.R.Cr.P. Rule 36.26 and Ark. Sup. Ct. Rule 11(h) as explained in *Finnie* v. *State*, 265 Ark. 941, 582 S.W.2d 19 (1979). An attorney of record who fails to perfect an appeal must obtain permission to withdraw from the case or he will face a substantial risk of subsequently being held ineffective.

Donald YORK *v.* STATE of Arkansas

RC 88-25 749 S.W.2d 330

Supreme Court of Arkansas
Opinion delivered May 16, 1988

Donald R. Huffman, Benton County Public Defender, by: *C.J. Hardcastle*, for appellant.

No objection.

PER CURIAM. Petitioner, Donald York, by his attorney, C.J. Hardcastle, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry* v. *State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

A copy of this opinion will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

Michael SMITH *v.* STATE of Arkansas

CR 87-123 749 S.W.2d 678

Supreme Court of Arkansas
Opinion delivered May 17, 1988

Roger T. Jeremiah, for appellant.

PER CURIAM. The record in this matter was filed on June 19, 1987, and appellant's brief was originally due on July 29. On July 27, appellant's counsel, Roger T. Jeremiah, filed a motion to extend the brief time due to his considerable case load. That motion was granted, and appellant was given until August 31 to file his brief. Between August 1987 and January 1, 1988, counsel filed a total of eight motions to extend brief time. Each was granted.

Thereafter, between January and April 1988, counsel filed eight additional motions to extend. (See attachment) Due to counsel's failure to file the brief, appellant filed a pro se motion to dismiss counsel as ineffective and for discretionary review of the appeal. Before that motion was filed, this court entered an order on April 27, 1988, granting a "final" extension until May 9, 1988. Counsel was informed of this court's order by letter from the clerk of the court. (See attachment) On May 9 counsel responded by filing another motion to extend. As of this date a brief has not been filed.

Counsel has ignored this court's directive that the brief on appeal would be due on May 9 and that our extension of April 27 would be the last. It is therefore ordered that counsel Roger T. Jeremiah appear before this court on Tuesday, May 31, 1988, at 9:00 a.m. and show cause why he should not be held in contempt.

CR87-123

Michael Smith

v. Crawford Circuit, Don Langston, J.

State of Arkansas

6-19-87. Record filed. Appellant's brief due 7-29-87.
6-25-87. Petition for Writ of Habeas Corpus. Served.
6-29-87. Pro se petition for Writ of Habeas Corpus is denied. See per curiam this date.
7-8-87. Appellant's pro se petition for Wrif of Habeas Corpus. Served.
7-13-87. Pro se petition for Writ of Habeas Corpus is denied. See per curiam this date.
7-27-87. Appellant's motion for extension of time. Served.
7-27-87. Appellant to 8-31-87 for brief. Court.
8-18-87. Appellant's pro se motion for trial transcript. Served.
8-28-87. Appellee's response to motion for trial transcript. Served.
8-31-87. Appellant's motion for extension of time. Served.
9-1-87. Pro se motion for trial transcript is denied. Court.
9-2-87. Appellant to 9-30-87 for brief time. Court.
9-30-87. Appellant's motion for brief time. Served.
10-5-87. Appellant to 10-21-87 for brief time. Court.
10-21-87. Appellant motion for brief time. Served.
10-23-87. Appellant to 11-4-87 for brief time. Court.
10-28-87. Motion for bail reduction or, in the alternative motion for release on own recognizance. Served.
11-3-87. Appellant's motion for brief time. Served.
11-3-87. Appellant to 11-18-87 for brief time. Court.
11-9-87. Response to motion for bail reduction or, release on own recognizance. Served.
11-17-87. Appellant's motion for brief time. Served.
11-17-87. Appellant to 12-2-87 for brief time. Court.
11-23-87. Pro se motion for reduction of bond pending appeal is denied. See per curiam this date. Purtle, J., would grant.
11-23-87. Letter to appellant.
12-2-87. Appellant's motion for brief time. Served.
12-3-87. Appellant to 12-16-87 for brief time. Court.
12-11-87. Appellant's pro se motion to expedite appeal process. Served.
12-15-87. Appellant's motion for brief time. Served.
12-17-87. Appellant to 12-30-87 for brief time. Court.

12-21-87. Response to motion to expedite appeal. Served.
12-30-87. Appellant's motion for brief time. Served.
12-31-87. Appellant to 1-13-88 for brief time. Court.
1-13-88. Appellant's motion for brief time. Served.
1-14-88. Appellant to 1-27-88 for brief time. Court.
1-27-88. Appellant's motion for brief time. Served.
1-27-88. Appellant to 2-10-88 for brief time. Court.
2-10-88. Appellant's motion for brief time. Served.
2-10-88. Appellant to 2-24-88 for brief time. Court.
2-24-88. Appellant's motion for brief time. Served.
2-26-88. Appellant to 3-9-88 for brief. Court.
3-8-88. Appellant's motion for brief time. Served.
3-9-88. Appellant to 3-23-88 for brief time. Court.
3-23-88. Appellant's motion for brief time. Served.
3-24-88. Appellant to 4-6-88 for brief time. Court.
4-5-88. Appellant's motion for brief time. Served.
4-11-88. Appellant to 4-27-88 for brief time. Court.
4-26-88. Appellant's motion for brief time. Served.
4-27-88. Appellant's motion for extension of time to file brief is granted. Brief due May 9, 1988. Final extension.
4-28-88. Appellant's pro se motion to dismiss court appointed attorney for the reason of ineffective assistance of counsel. Served.
4-28-88. Appellant's pro se motion of extraordinary circumstances seeking discretionary review of appellate procedure. Served.
5-5-88. Response to motion to dismiss counsel. Served.
5-5-88. Response to motion of extraordinary circumstances seeking discretionary review of appellate procedure. Served.
5-9-88. Appellant's motion for brief time. Served.

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
Little Rock, AR 72201

Leslie W. Steen
Clerk

Robin Henthorne
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Melissa Fuller
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Janie Owen
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Deputy

Kit Acklin
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Rae M. Millard
Deputy

Greta Bibens
Deputy

Allen Waters
Deputy

April 27, 1988

Roger T. Jeremiah
Attorney at Law
1109 S. 16th St.
Fort Smith, AR 72901

Re: CR87-123 Michael Smith v. State of Arkansas

Dear Mr. Jeremiah:

The Court made the following order in the above styled case today:

"Appellant's motion for extension of time to file brief is granted. Brief due May 9, 1988. Final extension."

Sincerely yours,

Leslie W. Steen, Clerk

LWS/rh

cc: Theodore Holder

ALL CITY GLASS AND MIRROR, INC. *v.* McGRAW HILL INFORMATION SYSTEMS COMPANY, A Division of McGraw Hill, Inc.

88-103 750 S.W.2d 395

Supreme Court of Arkansas
Opinion delivered May 23, 1988

The Cortinez Law Firm, by: *Robert R. Cortinez*, for appellant.

No brief filed.

DARRELL HICKMAN, Justice. The trial court ruled that the appellant corporation had to be represented by an attorney and would not allow the corporation's president, a non-lawyer, to appear on behalf of the corporation. We find no error in the court's decision and affirm the judgment.

The appellee sued the appellant on the balance of an account, asking for $597.50. Jimmy Overton, the corporation's president, filed an answer on behalf of the corporation and appeared at a hearing before the court. The trial judge struck the answer and would not allow Overton to act as counsel; the judge ruled that Ark. Stat. Ann. § 25-205 (Repl. 1962), now codified at Ark. Code Ann. § 16-22-211(a) (1987), requires that a corporation be represented by an attorney. When the trial judge struck the answer, he offered the appellant a continuance to obtain an attorney. The appellant rejected the offer and the judge proceeded to hear the merits of the case and finally entered judgment for the appellee.

The appellant makes several arguments on appeal. However, it is only necessary to address the first argument. Appellant argues it was not practicing law to sign and file the pleading. The trial judge reached the right result but for the wrong reason. *Dale* v. *Sutton*, 273 Ark. 396, 620 S.W.2d 293 (1981). Ark. Code Ann. § 16-22-211(a) is not controlling in this case.

It is illegal to practice law in Arkansas without a license. *See* Ark. Code Ann. § 16-22-206 (1987). Although we allow individuals to represent themselves, we have held that corporations must be represented by licensed attorneys. *See Ark. Bar Assn.* v. *Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954), where we said:

> A corporation may also represent itself in connection with its own business or affairs in the courts of this state provided it does so through a licensed attorney.

We also said in *Union Nat'l Bank* that filing an answer is practicing law. We held:

> [W]hen one appears before a court of record for the purpose of transacting business with the court in connection with any pending litigation or when any person seeks to invoke the processes of the court in any matter pending before it, that person is engaging in the practice of law.

The judge was within his power in striking the answer of the president of the corporation who was not authorized to practice law.

In *McKenzie* v. *Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), we said:

> It is widely held in other jurisdictions that proceedings in a suit instituted or conducted by one not entitled to practice are a nullity, and if appropriate steps are timely taken the suit may be dismissed, a judgment in the cause reversed, or the steps of the unauthorized practitioner disregarded.

See also 7 C.J.S. *Attorney & Client* § 31 (1980).

Other arguments were raised, but the errors were not preserved for appeal.

Affirmed.

Larry D. CENTER, and Barbara Center, Husband and Wife *v.* Neil JOHNSON

87-366 750 S.W.2d 396

Supreme Court of Arkansas
Opinion delivered May 23, 1988
[Rehearing denied June 20, 1988.]

Williams & Brinton, by: *Charles N. Williams*, for appellants.

Mashburn & Taylor, by: *W.H. Taylor* and *Jenniffer Morris Horan*, for appellee.

JOHN I. PURTLE, Justice. This appeal presents the question whether a trial court may inquire into and modify a jury verdict after the jury has been discharged. We hold that the trial court did not have authority to change the verdict by allowing the ninth juror to sign the verdict eleven (11) days after the jury had been discharged.

The appellants sued the appellee for breach of express and implied warranties in constructing a house for the appellants. The case was tried to a jury and a verdict was returned by the jury in open court on May 22, 1987. At that time the court announced that the verdict was for the defendant and had been signed by nine (9) of the jurors. Upon inquiry by the trial court, the foreman of the jury confirmed that the verdict had been signed by nine jurors. The trial judge then inquired of counsel whether the jury should be polled. Neither lawyer requested the jury be polled. The

verdict was accepted by the court and the jury was discharged.

Several days later it was discovered that only eight (8) jurors had signed the verdict. The trial court then inquired of the foreman of the jury concerning the jury's decision. In this ex parte communication, the foreman informed the judge that in fact he had thought nine (9) jurors had signed the verdict because nine (9) had agreed with it.

On June 2, 1987, eleven (11) days after the jury had been discharged, the court convened a hearing to inquire into the irregularity in the verdict. At the beginning of the hearing the court announced to the parties present that he had spoken to the foreman of the jury and had learned that nine of the jurors had indeed intended to sign the verdict for the defendant. The foreman then testified at this hearing as follows:

> We returned a verdict for the defendant, and as I recall, nine jurors voted for that verdict. I think I can explain what happened. I believe the problem arose because certain of the people who needed to sign the interrogatory did not vote, or were not supposed to sign the verdict. We were all in a hurry, it was getting late. It was my recollection that Mr. Faddis was the one who didn't sign.

During this hearing it was determined that it was Mr. Faddis who had intended to sign the verdict but did not do so because they were "in a hurry to get out." The trial judge then allowed Mr. Faddis to add his signature to the verdict form at the conclusion of the hearing.

The Constitution of the State of Arkansas, Article 2, Section 7, provides that "in all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same." Also pertinent to this appeal is Arkansas Rules of Evidence, Rule 606(b), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or

> emotions as influencing him to asset [assent] to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

The Constitution requires that at least nine (9) jurors sign a verdict, if it is less than unanimous. If it is unanimous, only the foreman must sign. Only eight (8) signed the verdict here in question.

The issue presented in this case is whether the appellant waived the irregularity when the verdict was announced in open court. An early case concerning waiver of irregularities in the verdict is *Hodges* v. *Bayley*, 102 Ark. 200, 143 S.W. 92 (1912). This court affirmed the trial court in entering a verdict for the plaintiff. The *Hodges* opinion relied upon the case of *Northern Pacific Railroad Company* v. *Urlin*, 158 U.S. 271 (1895). In *Urlin* the jury had returned a verdict which was not signed by the foreman as was required by Montana law. When the verdict was rendered the defendant requested that the jury be polled. Each juror responded that the verdict as read was theirs. After the jury was polled and all confirmed that the verdict returned was that intended, the judgment was entered of record. No further objection was made. We agree with both the *Urlin* and *Hodges* decisions. However, neither control the present case.

A jury verdict should in all cases reflect the actual final conclusion of the jury on the matter being tried before them. However, if before the jury is discharged it is made known to the court that the jury misunderstood the instructions, it is not error for the court to permit the jury to further consider their verdict, after the instructions are again read to them. *Clift* v. *Jordan, Administrator*, 207 Ark. 66, 178 S.W.2d 1009 (1944). The time to correct or clarify a verdict is before the jury is discharged. *Barham* v. *Rupert Crafton Commission Company*, 290 Ark. 211, 718 S.W.2d 432 (1986).

In *Williams* v. *State*, 264 Ark. 77, 568 S.W.2d 30 (1978),

the trial court convened a hearing after the jury had been discharged, for the purpose of inquiring into their deliberations. In reversing we stated:

> [W]e have disregarded the testimony of the individual jurors, as to their deliberations, statements made during the deliberation, matters considered, the votes taken, the votes of the individual jurors and other such matters admitted into evidence over the strenuous and repeated objection of the prosecuting attorney. . . . [T]his testimony was inadmissible . . . .

We have found it to be improper for plaintiff's attorney to question members of the jury after the verdict has been read and the jury dismissed. *Stull* v. *Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981). We likewise have refused to allow questioning of jurors concerning unsubstantiated allegations of "extra-judicial communications" during the trial. *Pride* v. *State*, 285 Ark. 89, 694 S.W.2d 819 (1985). Even an affidavit of a juror describing the discussions during deliberations has been held inadmissible as evidence of juror misconduct. *Waterfield* v. *Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982). We recently discussed A.R.E. 606(b) and noted that the only issues which may be inquired into concerning the jury's deliberations are extraneous prejudicial information or improper outside influence. *Watkins* v. *Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988).

In the very recent case of *Coran* v. *Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988), we considered the question whether it was proper for a trial judge to engage in an ex parte conversation with a juror concerning the deliberations and the meaning of the verdict. The verdict was announced in open court and neither party requested that the jury be polled or otherwise questioned the verdict. In *Coran* we stated: "Similarly, a trial judge, before ruling on a motion to modify the verdict, should not have an ex parte conversation with some of the jurors about anything which caused them to assent to the verdict. To do so is error."

The cases allowing incomplete verdicts to stand are based upon waiver or failure to object at the time the verdict is presented in open court. We recognize the general rule that failure to object to an irregularity in a verdict prior to discharge of the jury constitutes a waiver of the irregularity. *Coran* v. *Keller*,

supra. However, in the present case the trial judge and the foreman both announced in open court that the verdict has been signed by nine (9) jurors. Under these circumstances the attorneys had no reason to object to the irregularity because they did not know about it until after the jury had been discharged. Therefore, the irregularity was not waived.

Appellants also submit it was error for the trial court to refuse to give their instruction No. 1, clarifying the definition of ordinary care by a building contractor. Appellants contend the instruction is based on *Dixon* v. *Ledbetter*, 262 Ark. 758, 561 S.W.2d 294 (1978), and reads: "That a contractor uses customary methods is a matter to be considered, but that standard does not necessarily meet the test of ordinary care."

The trial court was right. It refused the instruction tendered by the appellants because the Arkansas Model Jury Instructions—Civil contains an instruction (AMI 1204) dealing with ordinary care by a contractor, and the jury was instructed accordingly. Appellants argue that the trial court gave "a modified version of AMI 1204." But the instruction appearing on page fourteen of the record conforms exactly to AMI, Civil 2d, 1204. The AMI instruction covered the issue of the degree of care required of a contractor and it was not error for the court to refuse to instruct differently. Instructions which do not conform to AMI should be given only when the trial judge finds the AMI instruction does not accurately state the law or the AMI does not contain a necessary instruction on the issue. *Henderson* v. *State*, 284 Ark. 493, 684 S.W.2d 231 (1985); *Beaumont* v. *Robinson*, 282 Ark. 181, 668 S.W.2d 514 (1984); *Blaney* v. *State*, 280 Ark. 253, 657 S.W.2d 531 (1983).

The irregularity in the verdict in this case was sufficient to render the verdict void because it did not conform to the constitutional requirement that at least nine (9) jurors sign the verdict in civil cases. The defect was not waived because the announcement in open court that the verdict had been signed by nine (9) jurors relieved counsel of responsibility to inquire. Therefore, the constitutional deficiency of the jury verdict requires that the decision be reversed and remanded.

Reversed and remanded.

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

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I concur. As pointed out in the majority opinion, amendment 16 to article 2, § 7 of the Arkansas Constitution provides that in civil cases a verdict may be returned where as many as nine jurors agree. However, amendment 16 continues as follows:

> [P]rovided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict *shall* sign the same. (Emphasis added.)

The dissenters rely on Ark. Code Ann. § 16-64-119 (1987) [formerly Ark. Stat. Ann. §§ 27-1737—1738 (Repl. 1979)] which was enacted prior to amendment 16 and was operative when all twelve jurors were required to agree when returning a verdict; even if one juror, when polled, disagreed with the verdict, § 16-64-119 required the jury to be sent out again. It is fundamental law that an existing statute is superseded by a subsequent constitutional amendment only when there is an irreconcilable conflict or the statute is necessarily repugnant to the new constitutional provision. *See, e.g., McKenzie* v. *Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973). Obviously, the statutory provisions of § 16-64-119 are necessarily repugnant to the provisions of amendment 16, since the amendment allows nine, rather than all twelve jurors, to return a final verdict.

The narrowed question then becomes whether the remains of § 16-64-119 (i.e., the parts not in direct conflict with amendment 16) are sufficient to support the dissenters' reliance on the statute and the case they cite in construing it.

While there may be some merit to the argument that a party should raise his or her objection to the verdict at the time it is rendered, the threshold issue is: whose burden is it to question the verdict? If a verdict fails to reflect at least nine signatures, a mistrial results. In my view, unless a party, before the jury is discharged, can establish that the verdict was actually properly returned with sufficient signatures so as to support a judgment, that party waives any right to raise the issue later. Amendment 16 requires this conclusion by mandating that, when a verdict is less than unanimous, all jurors consenting to the verdict *shall* sign it.

Thus, without nine-juror signatures, the verdict fails to support a final judgment. In fact, this court has stated that a verdict signed by only eight jurors would render the verdict and consequent judgment of no effect. *See Cartwright* v. *Barnett*, 192 Ark. 206, 90 S.W.2d 485 (1936) (wherein this court found that the lower court's verdict was valid because it reflected nine, not eight, jurors signed).

No ambiguity exists in the use of the constitutional terms found in amendment 16, and their clear meaning should be followed.

I agree with the majority that a trial court may not conduct a later hearing — as was done here — to correct a verdict that fails to meet the dictates of amendment 16. Jury deliberations should remain secret, unless it becomes clear that the jury's verdict was tainted by a showing of extraneous prejudicial information or some improper outside influence. *Watkins* v. *Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988); *see also*, A.R.E. Rule 606(b).

The present case did not pose a situation that justified the calling of a juror to testify about the jury's verdict or to relate his best recollections of how the jury reached its vote. If the jurors were to be polled regarding their votes, it should have been done at trial before the jury was discharged. Because the jury's verdict at trial reflected a mistrial, I believe the burden was the appellee's to raise the issue since he was, and is now, the one who claims the verdict and judgment were properly rendered.

For the foregoing reasons, I concur.

STEELE HAYS, Justice, dissenting. Following a two day trial this case was submitted to the jury upon an interrogatory and two verdict forms, one finding for the defendant, the other finding for the plaintiffs. The jury deliberated and nine jurors voted to find for the defendant, with one undecided and two voting for the plaintiffs. Nine jurors signed the interrogatory for the defendant, but through oversight only eight signed the verdict form.

The majority opinion states that because the trial judge and jury foreman both announced in open court that the verdict had been signed by nine jurors, appellants' counsel had no reason to poll the jury. But that is not what the record tells us. When the

jury announced that it had reached a verdict the following occurred:

> THE COURT: If you would, please pass the Verdict and Interrogatory to the bailiff, please.
>
> (The Verdict form and Interrogatory is handed to the bailiff, who in turn hands it to Judge Smith.)
>
> THE COURT: First, the Interrogatory. "Do you find that the defendant, Neil Johnson, insisted or promised that the house or footing could be repaired and that the defendant, Neil Johnson, continued to attempt to repair the house or footing after substantial completion of the house on April 5th, 1979?" That is checked "Yes", and signed by eleven (11) of the twelve (12) jurors?
>
> MR. HOLLADAY: It's supposed to be nine (9). Some of us printed. There should be nine (9) signatures.
>
> THE COURT: I'm sorry. I can't count the lines. It's signed by nine (9) of the jurors; is that correct, Mr. Foreman?
>
> MR. HOLLADAY: Yes, Your Honor.
>
> THE COURT: The Verdict, "We, the jury, find for the defendant, Neil Johnson"; signed by nine (9) of the jurors?
>
> MR. HOLLADAY: That is correct.
>
> THE COURT: Does either side wish the jury polled?
>
> MR. TAYLOR: No, Your Honor.
>
> MR. WILLIAMS: No, Your Honor.
>
> THE COURT: Ladies and gentlemen, we appreciate your time. Everyone please remain in the courtroom and let the jury have an opportunity to leave. Court will be adjourned.

Thus it is clear the trial judge never announced that nine jurors had signed the verdict, rather, he *asked* if nine had signed the interrogatory and the verdict. The foreman's response, after indicating that there "should be nine signatures," was "That is

correct."

Determining the number of signatures on a verdict form should not present a difficulty. It was complicated in this instance by the fact that the jurors had both printed and signed, resulting in this array of names:

(Interrogatory)

Foreman JAMES O. HOLLOWAY
William F. Hardin
Lonnie Faddis
Jamia Fields
June Lewis
JOSEPH W. GARDNER
Robonda Collins
WAYNE GLASS

When a precedent for judgment was presented several days later for the signature of the trial judge, it was discovered that only eight jurors had actually signed the verdict form. Evidently the trial judge asked the jury foreman if the verdict had been agreed to by nine jurors and when told that it had, he notified counsel and a hearing was conducted. The foreman and a juror, Lonnie Faddis, testified that nine jurors voted to render a verdict for the defendant, that the interrogatory was signed by all nine jurors, including Mr. Faddis, but in the confusion Mr. Faddis neglected to sign the verdict form. Mr. Faddis testified his failure to sign was merely an oversight, that he had voted for a verdict for the defendant and that was still his verdict. The trial court asked Mr. Faddis to sign and date the original verdict and the judgment for the defendant was entered.

It is undisputed that the verdict represented the vote of nine jurors and was, in fact, signed by them before the judgment was formally entered. The fact that all nine had not signed the verdict when it was returned could have been detected simply by examining the verdict. That, I believe, was the duty of the party against whom the verdict was rendered, in order to preserve the right to complain. Appellants could have polled the jury when the verdict was announced and they declined that opportunity.

Having failed to do so, they should not be permitted to obtain a new trial because of an inadvertent omission that was readily discoverable. Ark. Code Ann. § 16-64-119 (1987) [Ark. Stat. Ann. §§ 27-1737 and -1738 (Repl. 1979)] deals with verdicts:

> (a) When the jury has agreed upon its verdict, they must be conducted into court, their names called by the clerk and the verdict rendered by their foreman.
>
> (b) When the verdict is announced either party may require the jury to be polled, which is done by the clerk or court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out for further deliberation.
>
> (c) The verdict shall be written, signed by the foreman, and read by the court or clerk to the jury, and the inquiry made whether it is their verdict.
>
> (d)(1) If any juror disagrees, the jury must be sent out again.
>
> (2) If no disagreement is expressed, *and neither party requires the jury to be polled*, the verdict is complete and the jury discharged from the case. [My emphasis].

When the verdict was accepted in open court without objection and the jury was not polled, the omission was waived, as I see it. In *Hodges* v. *Bayley*, 102 Ark. 200, 143 S.W. 92 (1912), a jury trial ended in a plaintiff's verdict. Neither party asked that the jury be polled. On appeal the defendant argued that the verdict was not signed by the foreman, as required by subsection (c), quoted above. In *Hodges*, the court held the requirement that the verdict be in writing and signed by the foreman is waived when rendered in open court "and duly received without objection by either party." *Hodges* v. *Bayley* was decided before Amendment 16 was adopted, but the reasoning remains sound. By not objecting to the verdict as rendered, nor requesting that the jury be polled, the appellants waived the irregularity of the verdict.

The majority relies in part on A.R.E. Rule 606(b), which protects the confidentiality of the jury's deliberations. But nothing in that rule prevents a juror being asked whether he or she

agreed with the verdict as rendered. Under the circumstances of this case it was entirely proper for the trial court to conduct a hearing to inquire into the discrepancy in the number of signatures.

This case is now being tried a second time at the expense of the court, the parties, and the system itself, not because of some material error in the proceedings, but because of a simple oversight which could have and should have been corrected at the time of occurrence. The failure ought to rest with the party against whom the verdict was rendered. I respectfully disagree with the majority and dissent to the reversal of the trial court.

HOLT, C.J., and HICKMAN, J., join this dissent.

Vernon DAMRON and Betty Damron *v.* UNIVERSITY ESTATES, PHASE II, INC.

88-43 750 S.W.2d 402

Supreme Court of Arkansas
Opinion delivered May 23, 1988
[Rehearing denied June 20, 1988.*]

* Glaze, J., would grant rehearing.

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

Sanford, Pate & Gunn, by: *Jon R. Sanford*, for appellee.

JOHN I. PURTLE, Justice. The chancellor awarded appellee a judgment on its complaint to collect charges from the appellant for services rendered in maintaining the common areas on property within a horizontal property regime. Additionally, the chancellor ordered appellant to pay attorney's fees. This appeal is from that part of the decree only. We hold that the chancellor was correct in awarding attorney's fees.

The appellee, University Estates, Phase II, Inc., is an Arkansas non-profit corporation with the purpose of, among other things, maintaining common areas in a horizontal property

regime. The appellee collects from the individual property owners an amount sufficient to pay the costs of care and maintenance for the common areas in the regime.

The appellants own a residence within University Estates, and were assessed the sum of $526.50 for their share of the cost of maintaining the common areas. They denied owing said sum. The appellee brought suit to collect this sum, plus interest at the rate of 10%, and for costs and attorney's fees. The complaint also sought to have the judgment declared a lien upon the property owned by the appellants and for foreclosure if said judgment was not timely satisfied.

On the 10th day of February, 1987, a decree was entered awarding the appellee judgment against the appellants for their pro rata charges for maintenance of the common areas. The court also entered judgment for costs and attorney's fees in the amount of $919.87. The total judgment was decreed a lien against appellants' property. The court declared the judgment prior to all liens except the first mortgage.

The appellants had purchased property within a horizontal property regime already in existence. The regime had filed a "Declaration of Covenants, Conditions and Restrictions" in the Office of the Circuit Clerk of Pope County, Arkansas, the county where the property is situated. This document contained a provision which stated:

> The annual and special assessments, together with interest, costs and reasonable attorney's fees shall be a continuing lien upon property against which each such assessment is made. Each such assessment, together with reasonable attorney's fees, shall also be the personal obligation of the person who was the owner of such property at the time assessment fell due.

[The Horizontal Property Act is codified at Ark. Code Ann. § 18-13-101 et seq. (1987), and provides for mandatory pro rata contributions from property owners within a horizontal property regime for "the expenses of administration and of maintenance and repair of the general common elements . . . ." (§ 18-13-116). The act also provides that the administration of every building constituted into horizontal property shall be

governed by the bylaws which shall be recorded with the master deed at the county courthouse. (§ 18-13-108(a)). Arkansas Code Ann. § 18-13-108(b) sets out the minimum provisions of the bylaws, and subsection (b)(4) specifically requires the bylaws to provide for the manner of collecting from the "co-owners" for the costs of the common expenses. The act further provides that the "co-owners" of the apartments are bound to contribute "toward any other expense lawfully agreed upon." (§ 18-13-116).

The only question to be answered by this opinion is whether the chancellor erred in awarding attorney's fees to the appellee for the attorney's services in collecting the charges from the appellants for maintenance of the common areas in the regime.

Our general rule relating to attorney's fees is well established and is that attorney's fees are not allowed except when expressly provided for by statute. *Harper* v. *Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982). *Harper* cited with approval our holding to the same effect in *Brady* v. *Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 358 (1981). This line of cases was followed by the Arkansas Court of Appeals in *White* v. *Associates Commercial Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987), in which the court stated: "Notwithstanding that the parties have contracted for recovery of attorney's fees, the Arkansas Supreme Court has consistently held that a party cannot recover attorney's fees unless such fees are expressly provided for by statute." See also *Millsap* v. *Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986), where we discussed the American rule concerning attorney's fees and the "common fund" exception.

Arkansas Code Ann. § 4-56-101 (1987) provides that "a provision in a promissory note for the payment of reasonable attorney's fees . . . is enforceable as a contract of indemnity." In *Geyer* v. *First Arkansas Development Finance Corp.*, 245 Ark. 694, 434 S.W.2d 301 (1968), we held that attorney's fees were expressly provided for by this statute, where the promissory note incorporated by reference the mortgage, which provided for the payment of reasonable attorney's fees. See also *In Re Morris*, 602 F.2d 826 (8th Cir. 1979), applying Arkansas law. Arkansas Code Ann. § 4-9-504(1)(a) (1987) (a provision of the Uniform Commercial Code), which concerns the disposition of collateral involving secured transactions for the sale of goods, authorizes an

award of attorney's fees "to the extent provided for in the agreement and not prohibited by law." A very recent statute, Ark. Code Ann. § 16-22-308 (Supp. 1987) (effective April 6, 1987), which will no doubt have a considerable impact on this area of the law provides:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

Our decisions concerning attorney's fees under the UCC appear somewhat conflicting. See *Svestka* v. *First National Bank in Stuttgart*, 269 Ark. 237, 602 S.W.2d 604 (1980); and *Harper* v. *Wheatley*, supra. These two opinions seem to take opposite positions on the question whether a secured creditor is entitled to recover reasonable attorney's fees for services rendered in obtaining possession of collateral after default and in disposing of the collateral.

This court has recognized the right of parties under certain circumstances to contract for the collection of attorney's fees. In *Abrego* v. *United Peoples Federal Savings and Loan*, 281 Ark. 308, 664 S.W.2d 858 (1984), we held that indemnity agreements, which included a promise to indemnify for reasonable attorney's fees, were enforceable. In *Abrego I*, we remanded the case to the trial court with instructions to award attorney's fees and other costs "which were reasonable, proper, necessary, and incurred in good faith and with due diligence." The same case was again before us in *Warner Holdings, Ltd.* v. *Mary Ann Abrego, et al.*, 285 Ark. 434, 688 S.W.2d 724 (1985). In *Abrego II* we stated that Arkansas still follows the general rule that when a party agrees to indemnify another against losses, attorney's fees incurred in the enforcement of the indemnity agreement are not recoverable. We noted, however, that the rule developed in cases in which the indemnity agreement contained no specific promise to pay attorney's fees. The agreement between the parties in that case contained a specific promise to pay attorney's fees which

might be incurred in enforcing the indemnity agreement. The *Abrego II* opinion concluded:

> We cannot end this opinion without noting we have not been asked to address instances in which attorney's fees may be allowed as a general proposition. The appellant has not argued that attorney's fees may not be awarded unless specifically authorized by statute, or that an agreement permitting recovery of such fees constitutes an unlawful penalty. [Citation omitted.] We recognized that our decisions in this area are not clear, and, when presented with a case raising the issue properly, we will address squarely the question whether a clause permitting recovery of reasonable attorney's fees incurred in enforcement of the agreement containing the clause is enforceable.

Although that precise question is not before us, we must answer the question whether attorney's fees, although not specifically authorized by statute, are nevertheless recoverable under the circumstances of this case. The Horizontal Property Act does not specifically mention attorney's fees. However, it does clearly authorize the collection of common expenses and "*any other expense lawfully agreed upon.*" (Emphasis added.) The act further requires that the bylaws, which are binding upon the purchasers of property within the regime, be filed of record. The "Declaration of Covenants, Conditions and Restrictions" was recorded on the property records of Pope County at the time the appellants purchased property in the regime. These bylaws provide for the collection of reasonable attorney's fees. By the act of purchasing property in the regime, the appellants agreed to abide by the terms of these bylaws. This agreement was clearly authorized by the legislature in the Horizontal Property Act.

Contrary to the assertion of the dissent, we do not categorize the attorney's fees authorized by the statute as "expenses" or "costs" as those terms are generally recognized in the context of the expenses of litigation. Rather, under the circumstances of this case, we think the appellants clearly agreed to be obligated to pay reasonable attorney's fees incurred in collecting the common expenses of the regime. Although not doing so expressly, the legislature authorized horizontal property regimes to collect attorney's fees under the circumstances by

authorizing the collection of "any other expense lawfully agreed upon." Certainly the recovery of attorney's fees in this case was an "expense lawfully agreed upon." Therefore we hold that the chancellor was correct in entering judgment for the attorney's fees.

Affirmed.

DUDLEY and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. The majority opinion contradicts this court's long-settled rule that attorneys' fees are not charged as costs in litigation unless specifically permitted by statute. *See Millsap* v. *Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986). Here, the majority uses "bootstrap logic" in holding that Arkansas's Horizontal Property Act authorizes attorneys' fees. In its opinion, the majority says that, although the Act does not mention attorneys' fees, the Act does authorize the collection of "the expenses of administration and of maintenance and repair of the common elements," and further binds co-owners to contribute toward "any other expense lawfully agreed upon." The majority surmises from this language in the Act that since the parties, in their *bylaws*, agreed that the association's annual and special assessments should include attorneys' fees, the trial court was authorized by law to award appellee such fees in this litigation wherein it sued appellants for their share of common-area expenses.

Clearly, the Act makes no mention whatsoever of attorneys' fees, and for that reason alone, the majority should have ended its inquiry and held the trial court was wrong in awarding fees to the appellee. Instead, the majority took the private bylaws that controlled the parties' horizontal property regime, and construed those bylaws as being part of the Act. In doing so, the majority concludes that attorneys' fees are "other expense(s) lawfully agreed upon." By this engrafting process, the majority claims the language of the Act "expressly" authorizes the award of attorneys' fees. If this logic controls, I see nothing to prevent parties from entering private agreements under which they agree attorneys' fees are "costs" or "expenses" and awardable as such. However, such a practice would appear contrary to the rule that the term "costs" or "expenses" as used in a statute is not understood ordinarily to include attorneys' fees. *See* 20 Am. Jur.

2d *Costs* § 72 (1965). In view of the position now taken by the majority, I would expect written contracts, leases and similar documents to provide that attorneys' fees be allowable as costs or expenses even though no statute specifically mentions attorneys' fees, but does contain language that costs (or expenses) are recoverable.

Another reason I part with the majority's logic is that the terminology "other expense," as employed in the Act, in no way indicates the General Assembly intended that term to include attorneys' fees. As pointed out in the majority opinion, Ark. Code Ann. § 18-13-116(a) (1987) — where the "other expense" language appears — concerns itself with an owner's obligation to share in the expenses of the administration, maintenance and repair of the general common elements. That provision makes no reference as to costs or expenses incurred in collecting such common-area expenses.

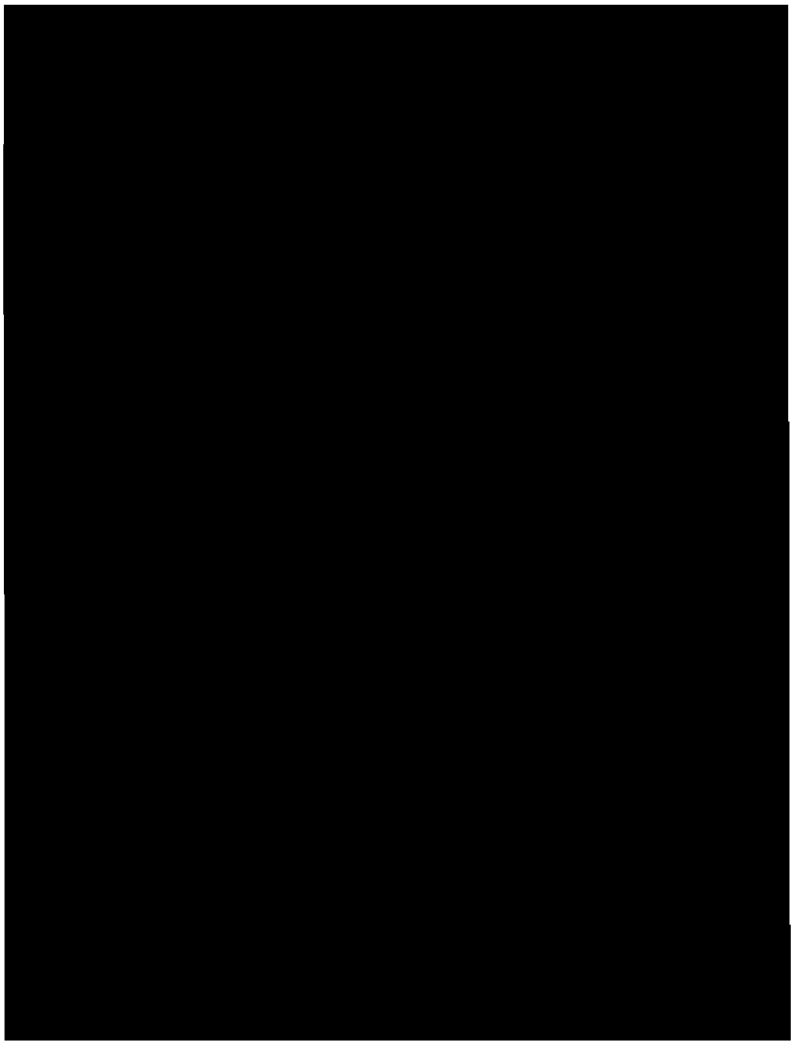
The appellee, in the present case, brought suit against the appellants for their pro-rata unpaid share of expenses actually incurred in maintaining the common areas. The statutory language in issue here offers no suggestion that it was intended to include attorneys' fees incurred in the event action is required to collect common-area expenses from a horizontal-property owner.

If this court now adheres to the rule that parties, by agreement or bylaws, may authorize attorneys' fees as costs or expenses, we should plainly adopt that view. If not, the court should continue to deny attorneys' fees as costs or expenses unless a statute exists that expressly or specifically provides such fees are recoverable.

Donna STEPHENS *v.* STATE of Arkansas

CR 87-208 750 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered May 23, 1988
[Rehearing denied June 27, 1988.*]



* Hickman, Hays, and Glaze, JJ., would grant rehearing.

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

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

JOHN I. PURTLE, Justice. This is an appeal from a Faulkner County Circuit Court jury verdict wherein the appellant was found guilty of driving under the influence of intoxicants in violation of Ark. Stat. Ann. § 75-2503 (Ark. Code Ann. § 5-65-103 (1987)). She was sentenced to thirty (30) days in jail and fined $750.00. The appellant argues that she was denied her right to a speedy trial. We agree that the appellant was denied her Sixth Amendment right to a speedy trial and reverse and dismiss.

On June 28, 1984, the appellant was arrested and charged with driving under the influence of intoxicants. She was tried and convicted in municipal court on January 23, 1986. She immediately appealed to the circuit court and a trial was held on June 22, 1987.

On June 19, 1987, the appellant filed a motion to dismiss in the circuit court. Several grounds for dismissal were alleged. The third paragraph of the motion reads as follows:

> Defendant motioned and requested trial court [municipal court] to dismiss for failure to prosecute which is jurisdictional and should have been granted as defendant was charged on June 28, 1984 with the offense of DWI and was not tried until January 23, 1986.

No verbatim record of the trial in the municipal court was made. However, the motion to dismiss filed in the circuit court specifically alleges assertion of her speedy trial rights in the municipal

court. In the absence of a stenographic report of the proceedings in the municipal court, we are unable to determine whether the appellant asserted her right to a speedy trial. However, her case was tried de novo in the circuit court on the exact same charge. Therefore, she was free to utilize the same defense in the circuit court.

Appeals from the municipal courts to the circuit courts are tried de novo. Appeals to circuit courts are controlled by Ark. Code Ann. § 16-96-507 (1987) which reads as follows:

> Upon the appeal, the case shall be tried anew as if no judgment had been rendered, and the judgment shall be considered as affirmed if a judgment . . . is rendered against the defendant, and thereupon he shall be adjudged to pay costs of the appeal.

We have restated this principle many times. In *Killion* v. *City of Waldron*, 260 Ark. 560, 542 S.W.2d 744 (1976), this court decided a case dealing with an erroneous ruling by a municipal court relating to a violation of a traffic law. The case was appealed to the circuit court where it was tried de novo to a jury. On appeal Killion argued the erroneous ruling of the municipal court. We held that even though the municipal court erred, the accused was not entitled to rely upon such error because he had the right to appeal to the circuit court where he was entitled to a new trial "as if no judgment had been rendered in the municipal court." We affirmed the action by the circuit court because the appellant received a fair trial, i.e., the trial in the circuit court had not been influenced or affected by what had taken place in the municipal court.

Again we held, in *Hogan* v. *State*, 289 Ark. 402, 712 S.W.2d 295 (1986), that "appellant cannot rely on an error in the municipal court after he has received an entirely new trial in the circuit court, 'as if no judgment had been rendered' in the municipal court." Even if the municipal court lacks jurisdiction to proceed with an information, this defect is cured on appeal to the circuit court because the trial in the circuit court is de novo. *Hill* v. *State*, 174 Ark. 886, 298 S.W. 321 (1927).

Counsel for appellant filed a motion to dismiss for lack of a speedy trial before the appellant was tried in the circuit court.

By the time the motion was made it had been almost three years since the appellant's arrest. More that nineteen months elapsed before her trial in the municipal court. The trial in circuit court is tried as though there had been no trial in municipal court. Therefore the speedy trial issue was timely raised.

The leading case of *Barker* v. *Wingo*, 407 U.S. 514 (1972), resolves most of the issues raised in this case. In addressing the remedy for the denial of a defendant's constitutional right to a speedy trial, the *Barker* opinion stated:

> This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, *but it is the only possible remedy*. [Emphasis added.]

The holding of the *Barker* opinion prescribes the balancing tests which are necessarily involved in the speedy trial issue. The Court held that there are four basic factors to be considered in determining whether a defendant's right to a speedy trial has been violated. These are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) the prejudice to the defendant.

The length of the delay is usually the triggering mechanism; otherwise, the matter would probably go unnoticed. An inquiry into such a delay necessarily involves the circumstances of each case and is therefore applied on an ad hoc basis. In the present case a nineteen month delay, in a trial for driving under the influence, most certainly triggers the speedy trial issue. There is nothing in the record concerning this delay other than the previously mentioned motion to dismiss filed by the appellant's attorney prior to commencement of the circuit court trial.

After the speedy trial issue is raised it becomes necessary to determine the reasons the state assigns to justify the delay. The first issues to be considered, if the accused is denied a speedy trial, are the sanctions imposed upon the state and whether the appellant waived the right to a speedy trial. Certainly it is prejudicial for the state to deliberately delay the trial in order to gain an advantage for the state or hinder the defenses of the accused. *United States* v. *Marion*, 404 U.S. 307 (1971). The

Barker opinion stated: "A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

Whether a defendant has asserted his right to a speedy trial must be carefully examined. We must consider the length of and reason for the delay and the prejudice which may have resulted from such a delay. The defendant's assertion of such a right in most cases disposes of the question. *Shaw* v. *State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986). The accused is entitled to every reasonable presumption against waiver. *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389 (1937). Courts should not presume acquiescence in the loss of fundamental rights. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937). In *Carnley* v. *Cochran*, 369 U.S. 506 (1962), the Supreme Court held:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not a waiver.

The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Boykin* v. *Alabama*, 395 U.S. 238 (1969). This court has also recognized that waiver may not be presumed from a silent record. *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Admittedly it is impossible to define the exact time in every case when the right to a speedy trial must be asserted or waived. However, that does not place the burden of proof upon the defendant. After all, a defendant is under no duty to bring himself to trial. The Supreme Court held in *Dickey* v. *Florida*, 398 U.S. 30 (1970), that the right to a prompt inquiry into criminal charges is fundamental and it is the duty of the charging authorities to provide a prompt trial. The right of a speedy trial is so fundamental it is guaranteed by the Constitution and is "not to be honored only for the vigilant and knowledgeable." *Hodges* v. *United States*, 408 F.2d 543 (8th Cir. 1969).

In deciding whether a defendant can waive his right to a speedy trial, the Supreme Court in *Barker* held:

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.

The appellant contends that she was denied a speedy trial in the municipal court and also that she was denied a speedy trial in the circuit court. Again we find the *Barker* opinion helpful:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

In *Harwood* v. *Lofton*, 288 Ark. 173, 702 S.W.2d 805 (1986), we held that "once the accused has shown that the trial is to be held after the speedy trial period expires the state has the burden of showing the delay was legally justified." We discussed the speedy trial issue at some length in *Novak* v. *State*, 294 Ark. 120, 741 S.W.2d 243 (1987). The *Novak* opinion clearly placed the burden of showing the necessity of the delay on the state. The *Novak* opinion, after applying the balancing test established in *Barker*, "placed the primary burden on the courts and prosecutors to assure that cases are brought to trial." The opinion further stated: "[A] defendant has no duty to bring himself to trial; rather the state has that duty, as well as the duty of insuring the trial is consistent with due process." The *Novak* opinion was decided essentially on the four factors relating to a speedy trial as enumerated in *Barker*. Arkansas Rules of Criminal Procedure

Rule 28 would likewise require a similar result.

The other issues argued by the appellant are rendered moot in view of our ruling that the appellant was denied her right to a speedy trial. After reviewing the circumstances in this case, and applying the balancing process required by *Barker*, we hold that the appellant's right to a speedy trial was violated. Although dismissal of the charge is a rather severe remedy it is the only possible one for denial of a speedy trial.

Reversed and dismissed.

HICKMAN, HAYS and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. Based on neither rule nor case law, and without notice to the trial bench, the majority holds that if the period between the date of an arrest and the date of trial in municipal court exceeds the time for speedy trial provided by A.R.Cr.P. Rule 28 (now one year in this instance), then the charges must be dismissed. It makes no difference whether the defendant moved to dismiss the charges in municipal court, nor does it matter whether the defendant may have been the cause of the delay, the mere time element, per se, is sufficient. I respectfully disagree and will attempt to demonstrate several reasons why this case should be affirmed.

These are the significant dates:

June 28, 1984—Appellant arrested for DWI.

January 23, 1986—Appellant tried in municipal court.

January 23, 1986—Appeal to circuit court.

April 13, 1986—Counsel notified of jury trial setting for week of June 16.

June 22, 1987—Jury trial in circuit court.

At 3:45 on Friday afternoon before the jury trial on Monday, appellant filed a motion to dismiss, which makes no mention of speedy trial. On Monday morning appellant moved for a dismissal on two grounds: 1) the appellant was not tried in municipal court within one year of the date of her arrest and 2) she was not tried in circuit court within one year of her appeal. The second argument has not been pursued on appeal before this court and

need not be discussed, except to note that appellant *was* tried in circuit court within the applicable time as then prescribed by A.R.Cr.P. Rule 28, that is, eighteen months.

First, neither motion was timely. As the state pointed out to the circuit judge, it had no notice that speedy trial was to be asserted by the appellant and, hence, the state had no opportunity to determine and prove whether there were excludable periods under A.R.Cr.P. Rule 28.3. In exactly the same circumstance, in *Summers* v. *State*, 292 Ark. 237, 729 S.W.2d 147 (1987), we refused to dismiss a petition to revoke a probation which was not heard within sixty days, as required by Ark. Stat. Ann. § 41-1209(2) (Repl. 1977). Our refusal was based on the failure of the defendant to make a timely objection to the delay, hence the state was not placed on notice before the hearing that such objection would be raised. "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." Id., at 239. The identical situation exists here.

Second, we have no transcript or other evidence of the proceedings in municipal court and therefore it is impossible to determine whether appellant waived the right to a speedy trial by not raising the issue in that court, *as required* by A.R.Cr.P. Rule 28.1(f); *Duncan* v. *State*, 294 Ark. 105, 740 S.W.2d 923 (1987); *Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987). Nor can we determine whether there were excludable periods under Rule 28.3 chargeable to the appellant. On this ground alone the case should be affirmed.

The majority accepts without question the assertion of the appellant that the defendant "motioned and requested the trial court to dismiss for failure to prosecute which is jurisdictional," as evidence that the issue of speedy trial was raised in municipal court. But we are not bound by the mere allegations of a pleading. *Munnerlyn* v. *State*, 292 Ark. 467, 730 S.W.2d 895 (1987); *Green* v. *State*, 223 Ark. 761, 270 S.W.2d 895 (1954); *Buschow Lumber Co.* v. *Ellis*, 194 Ark. 104, 105 S.W.2d 531 (1937); *Booth* v. *St. Louis Southwestern Ry. Co.*, 170 Ark. 801, 281 S.W. 8 (1926). It is the appellant's burden to produce a *record* that demonstrates error and a proper objection thereto. *S.D. Leasing*

Inc. v. *RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). Appellant has provided neither.

Third, A.R.Cr.P. Rule 28, by its own language, applies to charges pending in *circuit court* and appellant has cited nothing to support the contention that the rule applies to municipal court. If the majority concludes that the rule should be broadened to apply to municipal court trials, it ought, at least, to revise the rule in a manner that adopts appropriate procedures and gives reasonable notice to the bench and bar, as well as to the public.

Fourth, even if Rule 28 were now applicable to municipal courts, the rule does not require a trial within one year, as appellant argued below, except as to charges filed *after* October 1, 1987. It is undisputed that the charge against appellant was filed no later than June 28, 1984.

The majority cites cases holding that it is the state's burden to show the speedy trial requirement was not breached by the prosecution. But those cases have no relevance to the facts of this case where the state had no notice prior to the commencement of trial that speedy trial in municipal court was to be an issue on appeal in circuit court.

I submit the judgment of the circuit court should be affirmed.

HICKMAN, J., and GLAZE, J., join this dissent.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
v. M.D.M. CORPORATION d/b/a Nursing Home and
North Arkansas Life Care Center, Inc.

87-356 750 S.W.2d 57

Supreme Court of Arkansas
Opinion delivered May 23, 1988

Breck G. Hopkins, Deputy Gen. Counsel, and *Richard B. Dahlgren*, Asst. Gen. Counsel, Department of Human Services, for appellant.

Robinson, Staley, Marshall & Shively, by: *Scotty Shively*, and *William T. Marshall*, for appellees.

ROBERT H. DUDLEY, Justice. The appellant seeks an advisory opinion, and we dismiss the appeal because it is moot. The appellees, two corporations that operate nursing homes, submitted applications to the appellant, Office of Long Term Care of the Arkansas Department of Human Services, for licenses to expand their nursing homes. The appellees contended their applications should have been immediately approved because they fell within a capital expenditure exemption contained under Act 593 of 1987 (Regular Session). The appellant contended that the exemption did not entitle appellees to the licenses because their applications were not approved prior to the effective date of Act 40 of 1987 (1st Extraordinary Session). Ark. Code Ann. § 20-8-106 (Supp. 1987). Prior to exhausting all administrative appeals, the appellees filed a petition for a writ of mandamus. The trial court issued the writ and ordered appellant to begin the review process of appellees' applications for licensure. The appellant applied for an order of supersedeas, but it was not issued. The appellant's reply brief states that the hearings now have been held. Therefore, the issue is moot. We do not decide moot cases. *Hogan* v. *Bright*, 214 Ark. 691, 218 S.W.2d 80 (1949).

In oral argument of this case the attorneys for both parties were asked if they were not seeking an advisory opinion in a moot case. The attorney for the appellant admitted that it was

moot, but argued that the trial court applied Act 593, instead of Act 40, and the holding became a binding precedent unless reversed in this appeal. The short answer to the argument is that the trial judge did not rule that Act 40 was inapplicable. There is no definitive holding on the question of which act governs. The attorney for the appellees, whose clients stand to benefit by this appeal being dismissed, took issue with appellant's statement that both hearings had been held. She stated that the hearing had been held for one appellee and indicated the review process was under way for the other. We do not know the exact state of the case, but obviously the affirmative order of the trial court to process the application is being followed, so the case is moot. The issues argued in their appeal have not yet been fully adjudicated below. They will have to be decided administratively and by a court of competent jurisdiction before they can be decided by an appellate court.

Appeal dismissed.

Bill ABERNATHY *v.* Honorable John S. PATTERSON, Judge, Pope County Circuit Court

87-308 750 S.W.2d 406

Supreme Court of Arkansas
Opinion delivered May 23, 1988

Shermer & Walker, for petitioner.

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

STEELE HAYS, Justice. This is an original action by the petitioner, Pope County Judge Bill Abernathy, to have this court prohibit the Pope Circuit Court from proceeding to trial upon indictments issued against him by a special grand jury. Judge Abernathy contends the grand jury was selected illegally and, hence, its indictments are void. We granted a temporary writ of prohibition and required briefs pursuant to Rule 16 of the Rules of the Supreme Court and Court of Appeals. Having considered the arguments we now dissolve the temporary writ of prohibition.

On November 1, 1986, the Circuit Court of Pope County, acting pursuant to Ark. Code Ann. § 16-32-103 (1987) [Ark. Stat. Ann. § 39-205.1 (Supp. 1985)], selected at random a list of 800 members to serve as petit jurors for 1987. In May and June of 1987, the court, at the request of the prosecuting attorney, selected 60 names from the jury wheel to serve as a special grand jury.

On June 30 the grand jury returned one felony indictment and one misdemeanor indictment with four counts against Judge Abernathy, who then moved to void the indictments. Abernathy contends Ark. Code Ann. § 16-32-103 (1987) [Ark. Stat. Ann. § 39-205.1 (Supp. 1985)] exclusively controls the selection of jurors, whereas the respondent argues that the selection may be made in accordance with either Ark. Code Ann. § 16-32-201 (1987) [Ark. Stat. Ann. § 39-217.1 (Supp. 1985)], or § 16-32-103. The end result, as we interpret these contentions, is that Abernathy maintains § 16-32-103 requires the selection of 100 grand jurors, whereas the circuit judge selected only 60.

Prohibition is an extraordinary writ and is never issued

to prohibit a trial court from erroneously exercising its jurisdiction, only where it is proposing to act in excess of its jurisdiction. *Lowery* v. *State*, 215 Ark. 240, 219 S.W.2d 932 (1949); *Skinner* v. *Mayfield*, 246 Ark. 741, 439 S.W.2d 651 (1969); *Miller* v. *Reed*, 234 Ark. 850, 355 S.W.2d 169 (1961).

Assuming, without deciding, that there were irregularities in impanelling this grand jury, it is clear its members were selected at random from a jury wheel compiled from the voter registration list. Whether the irregularities would constitute reversible error we will not here decide, we need only determine whether the Pope Circuit Court clearly exceeded its jurisdiction.

Petitioner relies primarily on *Streett* v. *Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975), but we do not read *Streett* as holding that any irregularity in the selection of jurors by circuit courts can be challenged by writ of prohibition. In *Streett* there was no attempt whatever to comply with existing law, and no random selection of grand jurors, the circuit judge of Faulkner County simply dismissed an existing grand jury, presumably properly impanelled, and immediately proceeded to impanel another special grand jury by instructing the sheriff to select 25 grand jurors. That selection, it appears, was to be made by whatever method pleased the sheriff. The prosecuting attorney of that judicial district moved to prohibit this clear violation of law and a majority of this court held the prosecutor had standing to do so and that the circuit court was proceeding in excess of its jurisdiction. We find little similarity in the two situations.

Petitioner cites *Horne* v. *State*, 253 Ark. 1096, 490 S.W.2d 806 (1973), as holding that the provisions of the jury wheel act are mandatory. But we have recognized that some sections of the act are more important than others and that any irregularity in the selection process does not *per se* invalidate the proceedings. In *Huckaby* v. *State*, 262 Ark. 413, 557 S.W.2d 875 (1975), we said:

> Act 568 of 1969 is a comprehensive statute by which the legislature directed the use of a jury wheel and made other changes in the selection of juries. In *Horne* v. *State*, 253 Ark. 1096, 490 S.W.2d 806 (1973), we held to be mandatory that section of Act 568 which requires the jury commissioners to meet each year and select prospective

> jurors for the following calendar year. . . .
>
> In *Horne*, however, we did not hold, as counsel now seem to argue, that every provision in Act 568 is mandatory in the sense that noncompliance requires that the jury panel be quashed. Some sections of the act are more important than others. . . . There was, in the circumstances, a substantial compliance with the statute.

In *Harrod* v. *State*, 286 Ark. 277, 691 S.W.2d 172 (1985), and *Williams* v. *State*, 278 Ark. 9, 642 S.W.2d 887 (1982), we found substantial compliance with the act and rejected challenges to the jury selection. As we have seen, there was not even minimum compliance in *Streett* v. *Roberts, supra.*

We conclude that the circuit court of Pope County is not clearly without jurisdiction to proceed in this case and, hence, petitioner's proper remedy, if it becomes necessary, is by appeal rather than by prohibition.

The Temporary Writ of Prohibition is dissolved and writ denied.

HICKMAN, J., and GLAZE, J., concur.

PURTLE, J., dissents.

TOM GLAZE, Justice, concurring. The majority opinion correctly states and addresses the petitioner's contention, but I believe the petitioner is misdirected as to the purpose served by Ark. Code Ann. § 16-32-103 (1987) — Arkansas's law that establishes the procedure for selecting a district's or county's master list of prospective jurors. Section 16-32-103(a) sets forth the random manner by which names of persons are selected from the voter-registration list, and § 16-32-103(b) provides the required minimum numbers of names to be listed from which petit or grand jurors are drawn and empaneled. Section 16-32-103 provides no requirement that a separate master list be kept for petit and grand juries. Nonetheless, petitioner here contends otherwise, arguing that the judge was required to compile a grand-jury-master list, containing 100 prospective grand jurors, from which he should have empaneled the grand jury. Petitioner argues that the judge erred by selecting 60 names from the petit-

jury-master list, which contained 800 prospective jurors.[1]

Assuming the correctness of the petitioner's interpretation of § 16-32-103(b), no prejudice would attach by the procedure employed by the circuit judge since he selected 60 prospective jurors from a petit-jury list (and jury wheel) containing 800 randomly selected names rather than the lesser number of 100 names, which, under petitioner's theory, would have been required if a grand-jury list had been prepared. In sum, the petitioner was favored with a larger master panel (800) from which grand jurors were selected since if a prospective grand-jury list (and jury wheel) had been prepared, the judge would have drawn from only 100 names.

Justice Purtle, in his dissenting opinion, concedes that a separate grand-jury list containing 100 names would comply with the statutory law, but he also suggests that a list with the total of the minimum petit and grand juror numbers (1000 and 100) set out in § 16-32-103(b) would comply with the law as well. Frankly, the language contained in § 16-32-103(b) is not as clear as it should be, but I fail to see how the major purpose and intent of this law is enhanced by a construction that would require adding the minimum members for petit and grand jurors when preparing the master list. The major importance of § 16-32-103 is its employment of a random-selection method used for the empaneling of petit and grand juries. Section 16-32-103 proscribes situations as the one presented in *Streett* v. *Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975), where the judge instructed the sheriff to select twenty-five grand jurors — the panel from which the judge chose the sixteen-member grand jury.

In the instant case, the petitioner was afforded the protection of the random-selection method which provided a large number (800) of prospective jurors. In enacting § 16-32-103(b), the General Assembly required that at least 100 prospective jurors be randomly selected before the circuit judge proceeded in drawing a grand-jury panel. In my opinion, the judge's action in this cause was totally, not just substantially, consistent with the requirements set out in § 16-32-103. Therefore, I concur with the

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[1] Petitioner also complains that § 16-32-103(b) required Pope County to have 1,000, rather than 800 prospective petit jurors.

majority that the petitioner's request for a writ of prohibition should be denied.

HICKMAN, J., joins in this concurrence.

JOHN I. PURTLE, Justice, dissenting. I dissent because the majority fails to recognize the mandatory provisions of Ark. Code Ann. § 16-32-103 (1987). The majority seems to hold that so long as there is good faith on the part of the circuit judge and some similarity to the law, then it is alright to proceed in a "short-circuited manner." I cannot go along with such loose interpretation of the clear and unambiguous law applicable to this case.

On May 15, 1987, the court, at the request of the prosecuting attorney, selected 50 names to serve as a special grand jury. These names were randomly selected from the jury wheel which had been previously established on November 1, 1986. On June 8, 1987, the court entered an ex parte order allowing the random selection from the jury wheel of an additional 10 names to serve as prospective grand jurors.

On June 30, 1987, the special grand jury returned one felony indictment and one misdemeanor indictment with four counts against Bill Abernathy. The petitioner moved to void the indictments on the grounds that the grand jury was not properly impaneled and the facts were not properly presented to the grand jury.

The Attorney General concedes that Act 1066 of 1985, Ark. Code. Ann. § 16-32-103 (1987), no longer provides for the use of jury commissioners but argues that the Act did not repeal section (c) of the provisions of Act 485 of 1975, Ark. Code Ann. § 16-32-201(c) (Ark. Stat. Ann. § 39-217.1). I do not agree with the Attorney General, or the majority opinion, on this point. The previous act required that when a grand jury was impaneled, it should consist of sixteen (16) qualified grand jurors plus a reasonable number of alternates. Act 1066 of 1985 requires, in this case, that 100 prospective grand jurors be selected during the month of November or December to serve during the following calendar year. These two provisions simply cannot be reconciled.

The grand jury is a powerful tool and should not be used in a haphazard manner. This court has traditionally taken the view that a circuit court is without jurisdiction in matters where an

improperly impaneled grand jury has returned indictments. I also disagree with the majority's distinction between the case at bar and *Streett* v. *Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975), where we stated:

> If the grand jury proceedings are void it is clearly appropriate for the prosecuting attorney to commence and prosecute an action [by information] to avoid the waste of the taxpayers' money necessarily involved in the futile trial of criminal cases that might be tainted with reversible error from the very outset.
>
> . . .
>
> [I]s the Writ of Prohibition the proper remedy? We have no doubt that it is. A basic purpose of the writ is to prevent a court from exercising a power not authorized by law, when there is no other adequate remedy. *State, ex rel. Purcell* v. *Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969). If the circuit court in this instance is exercising its authority in a manner contrary to law, prohibition is the only remedy to provide prompt and effective relief in the public interest.
>
> . . .
>
> [W]as the circuit judge's method of impaneling a special grand jury contrary to law? We have no doubt that it was. There is no dispute about the facts.

The present case is like *Streett* in that there is no dispute concerning the facts. Therefore, we need examine only the law to reach the right result. The controlling statute is Ark. Code Ann. § 16-32-103, which provides for the manner and selection of jurors as follows:

> (a) During the month of November or December of each year, the prospective jurors for the following calendar year shall be selected from among the current list of registered voters of the applicable district or county in the following manner:
>
> (1) The circuit judge, in the presence of the circuit clerk, shall select at random a number between one (1) and one hundred (100), inclusive, which shall be the starting

> number, and the circuit court shall then select the person whose name appears on the current voter registration list in that numerical position, counting sequentially from the first name on the list.

The statute designates the number of persons to be selected based upon the number of qualified registered voters in the district or county as reflected by the current voter list. The minimum number of prospective petit jurors required for Pope County is 1,000 and the minimum number of prospective grand jurors is 100. The court may select a greater number but has no authority to select fewer than the minimum number designated by statute.

In the present case the circuit court complied with neither the old nor the new law in selecting the grand jury. Act 1066 establishes the minimum number of both prospective petit and grand jurors which must be selected from the outstanding voter registration list. The Act does not specify whether the grand jury panel can be pulled from the petit jury wheel. Because the Pope County Circuit Court failed to select the minimum number of jurors for the grand jury panel, its action rendered the indictments void. The circuit court could have complied with the present law by placing eleven hundred (1100) names in a master jury wheel box and withdrawing one hundred (100) to serve as the grand jury; or the circuit court could have selected one hundred (100) names from the qualified voter registration list to establish a separate grand jury panel.

The failure of the court to establish a pool containing the minimum number of prospective jurors was fatal. The reduced number in the petit jury wheel automatically reduced the number of eligibles from which to draw the grand jury. The lack of the minimum number for the prospective grand jury list further reduced or limited the petitioner's opportunity for a cross-section of his peers to serve on the jury. This procedure is contrary to expanding the random selection of grand and petit jury members as intended by Act 1066. If the number of prospective grand jurors can be reduced by fifty percent (50%), as was done in this case, what would prevent the number from being reduced by 75% or more?

The respondent argues that the old system was used in this case and that the grand jury was properly selected because a

sufficient number of persons was drawn to provide for 16 qualified grand jurors plus a reasonable number of alternates. This could be said about any list of 16 or more qualified electors regardless of how the names were obtained. That is the evil of the old system which was changed by the legislature. As previously stated, section 16-32-201(c) is in direct conflict with the new Act. It was therefore repealed by implication.

I agree with the respondent that statutes must be construed together and reconciled, if possible. *Poe* v. *Housewright*, 271 Ark. 771, 610 S.W.2d 577 (1981). Likewise repeals by implication are not favored. *Davis* v. *Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980). In the present case the General Assembly repealed "All laws and parts of laws in conflict with this Act [Act 1066 of 1985]. . . ." Repeal by implication will not be adjudged unless the legislative intent is clear and necessary. In *McDonald* v. *Wasson*, 188 Ark. 782, 67 S.W.2d 722 (1934), this court, at page 788, stated:

> The law as to implied repeal is stated in 59 C.J. 904, as follows: "An implied repeal is one which takes place when a new law contains provisions which are contrary to, but do not expressly repeal, those of a former law. A statute, or a provision thereof, may be repealed by implication. Whether it has been so repealed is a question of legislative intent. While such a repeal is not favored, nevertheless it must be recognized and accorded effect where it is apparent that it was intended. Conversely, there is no room for repeal by implication where no legislative intent to repeal is indicated or expressed, or an intent not to repeal is apparent or manifest."

It is obvious that the legislature intended to eliminate the jury commissioner system when Act 1066 of 1985 was enacted. The law no longer provides for selecting prospective jurors by jury commissioners. These duties are now required to be performed by the circuit judge. The heart of the new statute is to provide for a random selection of both grand and petit juries. The number selected for each panel is determined by the number of persons currently registered to vote. These requirements are incompatible with the former method of selection of juries by commissioners. Therefore, I believe Act 1066 repealed any provision of the previous statutes providing for selection of juries in any manner

inconsistent with the provisions of the Act. Because the indictments are illegal and void the trial court has no authority to proceed further based upon these indictments.

The concurring opinion of Justice Glaze obviously does not comprehend this dissent or the law. Therefore, I will not address his opinion.

I would grant the writ.

STATE FARM FIRE AND CASUALTY COMPANY
v. Ola STOCKTON, Ira Stockton, and First
National Bank, Siloam Springs, Arkansas

88-66 750 S.W.2d 945

Supreme Court of Arkansas
Opinion delivered May 31, 1988

Roy & Lambert, by: *John D. Copeland*, for appellant.

Elrod & Lee, by: *Daniel R. Elrod*, for appellee First National Bank, Siloam Springs, Arkansas.

Odom, Elliott & Martin, by: *Don R. Elliott, Jr.*, for appellees Ola Stockton and Ira Stockton.

JACK HOLT, JR., Chief Justice. This case involves an issue of first impression in Arkansas: whether an insurer, when canceling an automobile liability policy, must notify both the insured and any bank or other lending institution having a lien on the named insured's automobile in order for cancellation to be effective with respect to the insured. Jurisdiction is pursuant to Ark. Sup. Ct. R.

29(1)(c).

On June 24, 1985, appellee Ola Stockton, through agent Ralph L. Reeves, purchased a liability and collision policy for her 1982 Dodge Colt from appellant State Farm Fire and Casualty Company ("State Farm"). The policy was to be effective from June 24, 1985, until December 24, 1985. Stockton paid one-half of the $215.26 premium, or $107.63, and received a policy. Appellee First National Bank of Siloam Springs, Arkansas ("First National Bank"), which financed the vehicle, was listed on the policy as loss payee.

Stockton received notice from State Farm that the balance of $107.63 was due on August 4, 1985. She did not make the payment. She then received a second notice requiring payment by September 24, 1985. Subsequently, Stockton received notice, dated September 10, 1985, that her policy would be cancelled as of September 24, if she did not make payment by that date. She did not make the payment.

On September 25, Ola Stockton's son Ira, while driving Ola's car, had a collision with a vehicle owned by Maxine Grammer. All parties agree that the car sustained total damages. On September 26, Ola Stockton tendered a check for $107.62 to her agent. State Farm reinstated the policy as of September 26 and issued Ola Stockton a refund check in the amount of $2.37 for the day (September 25) she was not covered by the policy.

On November 4, 1985, Ola and Ira Stockton filed a complaint in the Chancery Court of Washington County for a declaration that Ola Stockton was fully insured as of September 25, 1985. They also prayed for a declaration requiring State Farm to assume the defense to the claim of Maxine Grammer, to pay for the damage to her automobile, and to pay attorneys' fees.

Subsequently, First National Bank filed a complaint in intervention against Ola Stockton because she had defaulted on her promissory note executed in favor of the bank and against State Farm and Ralph Reeves because they refused to pay the sums owed to the bank, as loss payee, under the policy.

The case (except First National Bank's complaint in intervention against Stockton) was transferred to circuit court. The court found in its opinion letter and judgment that Ark. Code

Ann. § 23-89-304 (1987) [formerly Ark. Stat. Ann. § 66-4009 (Repl. 1980)] requires an insurance company to give written notice to both an insured and to any bank or lending institution having a lien on the named insured's automobile before cancellation of insurance is effective. The court held that even though State Farm gave notice to Ola Stockton, this action did not legally cancel the policy since State Farm did not notify First National Bank. In addition, the trial court entered a declaratory judgment requiring State Farm to assume the defense of the claim of Maxine Grammer on behalf of Ola Stockton and awarded First National Bank $1,348.40, which represented the actual cash value of the automobile at the time of the loss minus the salvage value and the deductible under the policy. Furthermore, the trial court held that Ralph Reeves had no liability and that Ira Stockton had no standing in the case.

On October 20, 1987, a second hearing was held to determine the attorneys' fees to be awarded. In an amended judgment, the trial court awarded Ola Stockton attorney's fees in the amount of $7,148.75.

From the judgment of the trial court, State Farm appeals. We affirm.

DUAL NOTIFICATION REQUIREMENT

State Farm argues that the trial court erred in holding that written notice of cancellation given to Ola Stockton did not legally cancel her automobile liability policy. It asserts that Ark. Code Ann. § 23-89-304 (1987) does not require that notice be given to both an insured and to any bank or lending institution having a lien on the named insured's automobile in order for cancellation to be effective as to the insured. We disagree.

■ Section 23-89-304 provides in pertinent part as follows:

Time for notice of cancellation.

(a) *No notice of cancellation* of a policy to which § 23-89-303 applies, and no notice of cancellation of a policy which has been in effect less than sixty (60) days at the time notice of cancellation is mailed or delivered, *shall be effective unless mailed or delivered by the insurer to the named insured and to any bank, or other lending institu-*

> *tion having a lien on the named insured's automobile* at least twenty (20) days prior to the effective date of cancellation, provided that where cancellation is for non-payment of premium, at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given. [Emphasis added.]

By the plain language of the statute, an insurance company must give notice of cancellation to both the insured and to any bank or other lending institution having a lien on the named insured's automobile for cancellation to be effective. Cancellation of the automobile liability insurance policy in this case was ineffective since State Farm, although it gave notice of cancellation to Ola Stockton, failed to notify First National Bank.

State Farm cites *Wisniewski* v. *State Farm General Ins. Co.*, 25 Wash. App. 766, 609 P.2d 456 (1980), and *Szymczak* v. *Midwest Premium Finance Co.*, 19 Ohio App. 3d 173, 483 N.E.2d 851 (1984), to support its position that where a statute provides that notice of cancellation must be given to both an insured and to a mortgagee, notice to the insured is effective as to the insured even if the insurer does not give notice to the mortgagee.

In *Wisniewski*, the relevant statute, Wash. Rev. Code § 48.18.290 (1976), provided in pertinent part as follows:

> (1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy, may be affected as to any interest only upon compliance with either or both of the following:
>
> (a) Written notice of such cancellation must actually be delivered or mailed to the insured or his representative in charge of the subject of the insurance not less than twenty days prior to the effective date of the cancellation except for cancellation of insurance policies for non-payment of premiums, which notice shall be not less than ten days prior to such date;
>
> (b) Like notice must also be delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder.

The Court of Appeals of Washington held that notice to the insured was effective to cancel the policy in question with respect to the insured even though notice was not given to the mortgagee. However, the Washington statute, even though it provided for dual notification, did not clearly state, as does Ark. Code Ann. § 23-89-304, that cancellation is ineffective unless an insurer gives notice to both an insured and to any bank or other lending institution having a lien on the named insured's automobile.

In *Szymczak, supra*, the court held that "failure to provide proper notice to a mortgagee would be a defense to cancellation available to that mortgagee and not to the insured." However, the relevant Ohio statute, Ohio Rev. Code Ann. § 1321.81 (Page 1979), like the Washington statute, did not plainly state that before cancellation is effective, notice must be given to an insured and a bank or other lending institution having a lien on a named insured automobile. Thus, we likewise do not consider it persuasive authority.

REASONABLENESS OF ATTORNEYS' FEES

State Farm also argues the amount of the award of attorneys' fees was excessive. We disagree.

In the event an insurer wrongfully refuses to pay benefits under an insurance policy, the insured may recover the overdue benefits, twelve percent (12%) damages upon the amount of the loss, and reasonable attorneys' fees. Ark. Code Ann. § 23-79-208 (1987) [formerly Ark. Stat. Ann. § 66-3238 (Repl. 1980)]. The computation of attorneys' fees is governed by such factors as the experience and ability of the attorney, the time and labor required to perform the legal service properly, the amount involved in the case and the results obtained, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, whether the fee is fixed or contingent, the time limitations imposed upon the client or by the circumstances, and the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *See Southhall* v. *Farm Bureau Mutual Ins. Co. of Arkansas, Inc.*, 283 Ark. 335, 676 S.W.2d 228 (1984); *Equitable Life Assur.* v. *Rummel*, 257 Ark. 90, 514 S.W.2d 224 (1974). While courts should be guided by these recognized factors, there is no fixed formula in determining the

reasonableness of attorneys' fees. *Id.* Because of the trial judge's intimate acquaintance with the record and quality of service rendered, we usually recognize the superior perspective of the trial judge in assessing the applicable factors. *Id.* Accordingly, an award of attorneys' fees will not be set aside absent an abuse of discretion by the trial court. *Id.*

Don Elliott, Stockton's attorney, presented a detailed, itemized, fee statement to the trial court containing dates, description of services, specific hours spent (75.5), and hourly rate ($95.00). Three attorneys testified concerning Elliott's outstanding reputation and superior ability and the fee customarily charged in the locality for similar services—$100.00 per hour. Although the amount involved in the case was only $1,348.40, the issue of whether an insurance company, when cancelling a policy, must give notice to both an insured and to any bank or other lending institution having a lien on the named insured's automobile in order for cancellation to be effective with respect to the insured is novel.

The trial court awarded Stockton $7,148.75 in attorneys' fees for 75.5 hours spent by her attorney at $95.00 an hour, plus interest. Based upon the evidence presented at trial, we cannot say the trial court abused its discretion in the computation of attorneys' fees.

RECOVERY BY THE LOSS PAYEE

State Farm asserts that the trial court erred in entering judgment in favor of loss payee First National Bank against State Farm since the bank has not repossessed the automobile as required by the language of the policy. The relevant policy provision provides as follows:

> If a creditor is shown in the declarations, we may pay any comprehensive or collision loss to:
>
> 1. you and, if unpaid, the repairer; or
>
> 2. you and such creditor, as its interest may appear, when we find it is not practical to repair your car.
>
> 3. the creditor, as to its interest, if your car has been repossessed.

State Farm's contention that First National cannot recover because it has not repossessed the automobile is premised on the incorrect assumption that subsection (2) of the above provision is inapplicable because the insured, Ola Stockton, does not have an interest in the policy. However, as held above, she does have an interest in the policy since State Farm did not effectively cancel the policy. Subsection (2) does not require repossession but simply that the insurer find it impractical to repair the automobile in question. State Farm does not dispute the fact that this condition has been satisfied. In fact, one of its witnesses admitted that the car was "totaled." Therefore, we find the trial court was correct in entering judgment in favor of First National Bank.

State Farm also argues that the trial court erred in holding that First National Bank was entitled to a judgment against State Farm in the amount of $1,348.40 plus interest in that there is no evidence to support such a ruling.

Stockton testified at trial that the market value of her automobile was $2,300.00. She admitted that she derived this figure from the fact that she paid $2,300.00 for the vehicle four months prior to the accident. The stipulated NADA (National Automobile Dealers' Association) market value on the date of the accident was $1,905.00. The trial court averaged the two numbers for an actual cash value of $2,100.00. Pursuant to the "Limit of Liability" section of the policy, the court subtracted the policy deductible of $500.00 and the stipulated salvage value of $251.60, resulting in a net judgment of $1,348.40.

State Farm asserts, in effect, that what Ola Stockton paid for the car four months prior to the accident was incompetent evidence of market value. State Farm cites no authority in support of this proposition, nor is the argument convincing on its face. Therefore, we do not consider its contention. *Reed* v. *Alcoholic Beverage Control Div.*, 295 Ark. 9, 746 S.W.2d 368 (1988).

Affirmed.

PURTLE and HAYS, JJ., dissent in part.

JOHN I. PURTLE, Justice, dissenting. I disagree with that part of the majority opinion which holds that before cancellation

is effective as to an insured, the lienholder must also be notified. It is true that the notice of cancellation provision of Ark. Code Ann. § 23-89-304 (1987) uses the conjunctive "and"; i.e., that no notice of cancellation "shall be effective unless mailed or delivered by the insurer to the named insured *and* to any bank . . . ." (Emphasis added.) However, a literal reading of these words gives an absurd result. Such a literal reading results in a construction of this statute which is completely contrary to its obvious purpose. It is therefore imperative that the history of this statute be considered.

The history of this statute commences with Act 333 of 1969, and was first amended by Act 66 of 1973. As amended in 1973 the statute read as follows:

> (a) No notice of cancellation of a policy to which Section 2 of Act 333 hereof applies, and no notice of cancellation of a policy which has been in effect less than sixty (60) days at the time notice of cancellation is mailed or delivered, shall be effective unless mailed or delivered by the insurer to the named insured at least twenty (20) days prior to the effective date of cancellation, provided, however, that where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given.

It takes no imagination at all to realize that lending institutions holding liens on policyholders' vehicles were left out in the cold if the policyholder allowed a policy to lapse and the insurer failed to notify the lienholder. Needless to say such institutions initiated reform of this statute which manifested itself as Act 528 of 1975. The act amended the existing statute simply by inserting into the law the following words: "and to any bank, or any other lending institution having a lien on the named insured's automobile."

Obviously the purpose of the amendment was to protect lending institutions because insureds were already protected. However the added provision requiring notice to the lienholder was inartfully drafted. Had a comma simply been inserted before the added words, the true intent would have perhaps been more clear. The application of the first rule of statutory construction (i.e., that a statute, if not ambiguous, is to be construed just as it

reads) thus gives the absurd conclusion reached by this court: the amendment which was designed to protect the lienholder's interest results in a completely unjustifiable windfall to the insured. Act 528 amended the statute to read as follows:

> (a) No notice of cancellation of a policy to which Section 2 of Act 333 hereof applies, and no notice of cancellation of a policy which has been in effect less than sixty (60) days at the time notice of cancellation is mailed or delivered, shall be effective unless mailed or delivered by the insurer to the named insured *and to any bank, or any other lending institution having a lien on the named insured's automobile*, at least twenty (20) days prior to the effective date of cancellation, provided, however, that where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given. [Emphasized words were added by Act 528.]

The result of the majority opinion is that the insurer must notify both the insured and the lending institution for the notice to either to be effective. Surely that was not the intent of Act 528.

I concede that the majority interprets the statute just as it reads. That is the proper and correct thing to do—unless the results of such reading are obviously irrational, which is the case here.

HAYS, J., joins this dissent.

Arthur F. GNAS and Ethelmae Gnas v. BURGER & ASSOCIATES, INC.

88-73 750 S.W.2d 58

Supreme Court of Arkansas
Opinion delivered May 31, 1988

Jackson, Loving & Gutman, by: *Gary D. Jackson*, and *Landers and Shepard*, by: *Michael R. Landers*, for appellants.

Burbank, Dodson & McDonald, by: *Gary D. McDonald* and *John W. Unger, Jr.*, for appellee.

ROBERT H. DUDLEY, Justice. The primary issue in this case is whether the appellants' mortgage or the appellee's mortgage has priority. The chancellor held that the appellee's mortgage is entitled to priority. We affirm that holding.

The debtor, Moro Bay Oil Company, Inc., gave two promissory notes to the Smackover State Bank, which were subse-

quently assigned to the appellee, Burger & Associates, Inc. The notes were secured by a mortgage and assignment of oil runs on an oil, gas, and mineral lease in Bradley County.

The debtor oil company also executed a promissory note to the appellants, Arthur and Ethelmae Gnas. This note was secured by a mortgage and assignment of oil runs on the same oil, gas, and mineral lease that secured appellee's notes. The appellants' mortgage provided:

> This mortgage and assignment of oil runs is junior and subordinate to that certain mortgage and assignment of oil runs executed by Moro Bay Oil Co., Inc. to Smackover State Bank of Smackover, Arkansas. . . .

The debtor, Moro Bay Oil Co., Inc., filed a petition in the bankruptcy court seeking relief under Chapter 11. Claims were filed by the Smackover State Bank and by appellants on their notes.

The debtor and the appellee subsequently entered into a separate contract which provided in part:

> MORO BAY agrees to convey unto BURGER [appellee] an undivided One-half (½) of all its interest in said Lease upon completion of the terms and provisions herein contained. BURGER agrees, as partial consideration, to purchase such Note from the BANK. BURGER further agrees to a moratorium of payments pursuant to and on said Note until such time as the GNAS [appellants] Note has been paid in full. It is mutually agreed by the parties hereto that such moratorium of payments shall not and does not constitute a subordination of the Note to the Gnas Note. The parties hereto further agree that said Note shall draw simple interest on such Promissory Note as thereon stated.

At approximately the same time the separate contract was entered, the debtor, the appellee, and the appellants entered into a settlement agreement which was part of a plan of reorganization. It provided in part:

> 8. Smackover State Bank held a promissory note from Moro Bay which was secured by a first mortgage

> prior to that said second mortgage held by Gnas [appellants]. Burger & Associates, Inc., [appellee] transferee of such note and first mortgage, agrees to defer receipt of any payments on such note until the claim of Gnas [appellants] is paid in full as provided herein, provided, however, that said first mortgage shall retain its lien priority over the second mortgage.

The agreement then provided that the debtor immediately would pay $100,000.00 to the appellants, followed by thirty-six monthly installment payments of $6,022.75, and a final balloon payment of $200,000.00. The debtor made the initial payment and seven of the monthly installments and then ceased making payments.

After the debtor stopped making the payments set out in the settlement agreement, the appellee filed suit against Moro Bay Oil Company, Inc., to foreclose on the oil, gas, and mineral leasehold. The appellants intervened and also sought to foreclose on the same security. Both claimed first mortgages. The chancellor ruled in favor of appellee.

■ The appellants argue that the agreements should have been construed to mean that appellee had no right to foreclose until appellants were paid in full. The argument completely overlooks the fact that appellants' mortgage and both agreements provide that appellee's mortgage is first in priority. The contract between Moro Bay and appellee only provided for a moratorium of *payments* on the notes and this "moratorium of *payments* shall not and does not constitute a subordination." (Emphasis added.) Similarly, by the terms of the settlement agreement, appellee agreed to defer receipt of the payments on its note until appellants' claim "is paid in full *as provided herein*, provided, however, that the first mortgage [appellee's] shall retain its lien priority over the second mortgage [appellants']." (Emphasis added.) The chancellor correctly held this language meant that as long as payments were being made as set out in the agreement there was a moratorium on payments to appellee, but once payments stopped and foreclosure began, appellee had priority over the second mortgage.

■ Appellants also argue that appellee's conduct enabled debtor Moro Bay to modify its contractual obligations. However,

they do not explain how Moro Bay modified its contractual obligations to appellants, nor what existing contractual rights they gave up. We will not search the record to see if such an argument might have a factual basis. Accordingly, we find no merit in the argument.

After the chancellor had found that, under the terms of the promissory notes, Moro Bay owed $125,350.69 to appellee and that appellee was entitled to a first lien on the security, appellants tendered $125,350.69 to the appellee for its two promissory notes. The appellee refused to sell the notes to appellants for the tendered amount. The chancellor refused to order the appellee to accept the tender, and appellants cite this as error. The appellants do not cite any authority for their argument and do not make a convincing argument on the point. In effect, they ask us to research the point and reverse if the result of our labor so demands. We decline to do so. " 'Assignments of error presented by counsel in their brief, 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, 862, 545 S.W.2d 606, 609 (1977).

Affirmed.

Jeff ROSENZWEIG *v.* Floyd J. LOFTON, Circuit Judge, Pulaski County Court, First Division

88-17 751 S.W.2d 729

Supreme Court of Arkansas
Opinion delivered May 31, 1988

Dodds, Kidd, Ryan and Moore, by: *Richard N. Moore, Jr.*, for appellant.

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

STEELE HAYS, Justice. This is an appeal from an order finding the appellant, Jeff Rosenzweig, in contempt of court. The Honorable Floyd Lofton, Circuit Judge, imposed a fine of $500 from which Mr. Rosenzweig has appealed. Jurisdiction in this court attaches under Rule 29(1)(h) of the Rules of the Supreme Court and Court of Appeals. We find no basis for the trial court's action and, accordingly, we reverse.

Judge Lofton appointed Mr. Rosenzweig to represent Michael Neal on a charge of aggravated robbery. Rosenzweig filed a pretrial motion to suppress an in-court identification of the accused by a witness to the crime. A hearing on the suppression motion resulted in Mr. Rosenzweig being found to be in contempt. We think it necessary to quote at some length from the record, as it demonstrates, we believe, the absence of any disrespect or insolence which could sustain a finding of contempt. When Mr. Rosenzweig asked an investigating officer why no live line up was conducted, the following occurred:

THE COURT: You want him to conduct one?

MR. ROSENZWEIG: Yeah.

THE COURT: It's not too late. If you want him to conduct one, we will.

MR. ROSENZWEIG: That's fine.

THE COURT: Well, you know, just get off of this and we'll have you conducted one.

MR. ROSENZWEIG: That's fine with me.

THE COURT: Fine.

MR. ROSENZWEIG: Okay.

THE COURT: You know — What is it set for trial?

MR. ROSENZWEIG: Next week. We can have it any time.

THE COURT: You've waited a long time but we —

MR. ROSENZWEIG: Well, I was appointed on this case, your Honor —

THE COURT: Okay. We'll try to get it done. (T. 41).

MR. ROSENZWEIG: — you know, this summer. I have never heard of Mr. Neal before you appointed me because Mr. Laster had a conflict.

THE COURT: Well, you know, that's not a problem. I'm not concerned about that.

MR. ROSENZWEIG: If we're going to have a live line up, then I'm not going to pursue this motion.

THE COURT: Well, then we're not going to have a live line up. You can go on with this.

MR. ROSENZWEIG: Judge —

THE COURT: I'm just trying to accommodate you. I'm not buying your argument, Jeff.

MR. ROSENZWEIG: Judge, here is the situation. Let me explain to you why I don't —

THE COURT: I don't care.

MR. ROSENZWEIG: Well, I'd like to say for the record —

MR. DOUGLASS: This just goes to credibility anyway.

MR. ROSENZWEIG: I'd like to state for the record.

THE COURT: Go on. Can you do it after we get through?

MR. ROSENZWEIG: No, sir, because I think it's very important right now.

THE COURT: Well, I'm not going to pay any attention to it.

MR. ROSENZWEIG: If you will just listen to me.

THE COURT: I'm not going to pay any attention to it, Jeff. Go on.

MR. ROSENZWEIG: Will the Court please listen to me and let me explain.

THE COURT: Have I got any choice?

MR. ROSENZWEIG: Yes. No. You do but — The situation is this: If we're going to have a live line up —

THE COURT: We're not going to have any. You haven't shown any prejudice.

MR. ROSENZWEIG: Judge —

THE COURT: I offered that as an accommodation to you.

MR. ROSENZWEIG: And we'd love to have one.

THE COURT: Well, then do it.

MR. ROSENZWEIG: Well, we'll need six people and have it down at the Police Department.

THE COURT: Well, they'll do that for you, Jeff.

MR. ROSENZWEIG: Okay.

THE COURT: I'm not in the business of conducting

line ups.

MR. ROSENZWEIG: Okay. and, if we're going to have that —

THE COURT: We're not going to have that.

MR. ROSENZWEIG: I thought —

THE COURT: Because you want to stop this proceeding now.

MR. ROSENZWEIG: If you'll let me explain. (T. 43)

THE COURT: I'm trying to, Jeff.

MR. ROSENZWEIG: Okay. Thank you. Please — If the Court would please not interrupt me.

THE COURT: If I thought it would be effective, I would.

MR. ROSENZWEIG: Our position is this: If we're going to have a — The person who would be viewing that live line up, which we would like to have, is outside the courtroom at this time. What I don't want to do is have her view Mr. Neal and — Mr. Neal here all by himself and then go view a live line up. If we have a live line up, then I will cease and drop this motion.

THE COURT: I'm not going to do that, Jeff. You're not going to run the Police Department's way of doing business. Now, if you don't want to run this case the way it is, just let me know and I'll relieve you and I'll appoint Jim Clouette. Now you're just fishing and blowing smoke.

MR. ROSENZWEIG: No, sir, I'm not.

THE COURT: Do you want to be relieved?

MR. ROSENZWEIG: I'd like —

THE COURT: Do you want to proceed, be relieved or be quiet?

MR. ROSENZWEIG: I — if I understand —

THE COURT: Do you want to proceed, be relieved or

be quiet? (T. 44)

MR. ROSENZWEIG: I'd like — Judge, I'm not sure I understand what the Court's ruling is. May I ask you what the Court's ruling is?

THE COURT: What's the question?

MR. ROSENZWEIG: The question is: Are we going to have a live line up?

THE COURT: No. I'm not going to let you conduct the line up for the Police Department the way you want it done.

MR. ROSENZWEIG: No, sir. I —

THE COURT: We're not going to have one, Jeff. Now, you're getting close to being in contempt. Now, proceed or get out of it, or let me relieve you. If you don't want to go to trial with this case, fine. I'll relieve you and appoint somebody else. If you want to proceed, go on. You're not going to run the Police Department's procedure for having line ups.

MR. ROSENZWEIG: I'm not asking to run the Police Department —

THE COURT: Don't argue with me, Jeff. Proceed. Would you rather be relieved?

MR. ROSENZWEIG: No, sir.

Mr. Rosenzweig made his proffer and testimony resumed. When the witness concluded, the following occurred:

THE COURT: Call your next witness.

MR. ROSENZWEIG: Judge, if you will give me permission, please to address the Court for a minute.

THE COURT: Why?

MR. ROSENZWEIG: Judge, I'll explain it to you.

THE COURT: I'd rather you just follow procedure and call witnesses, Jeff. (T. 52)

MR. ROSENZWEIG: Judge — Judge, if you please

would let me address something to the Court. I'm not meaning any disrespect to the Court or anything of that nature with regard to it. I am baffled by what I understand your rulings to be a minute ago and I just want to make sure I understand correctly what you're saying.

I understood you to say, when I was asking him some questions, something to the effect of, "You want a line up? We'll have a line up." We are not telling the Police Department what to do. We'd love to have a live line up.

If in fact we are going to have a line up, I would drop, cease, desist, forget about this motion dealing with the photo spread and have a live line up.

THE COURT: I'm not going to bargain with you, Jeff.

MR. ROSENZWEIG: I'm not trying to bargain. I'm —

THE COURT: If you and the Prosecutor want to get together and have a line up, you may do so. But, now, we're going to proceed with this hearing today, Jeff.

MR. ROSENZWEIG: Okay.

THE COURT: And we're going to get through with your motion today.

MR. ROSENZWEIG: Okay.

THE COURT: Call your next witness.

MR. ROSENZWEIG: Okay. May I talk with the Prosecutor a second?

THE COURT: You may call your next witness. (T. 53)

MR. DOUGLASS: No. Go ahead and call your next witness.

MR. ROSENZWEIG: Judge, that's —

THE COURT: Call your witness, Jeff.

MR. ROSENZWEIG: Judge, if I may —

THE COURT: No. I'm going to hold you in contempt of court. I'm not going to tell you any more. Call your next witness.

MR. ROSENZWEIG: Let me talk to the Defendant for a second. Okay? May I?

(Thereupon, Counsel for the Defense conferred privately with the Defendant; then the following proceedings occurred:)

MR. ROSENZWEIG: We have no further testimony, your Honor.

THE COURT: You're not going to call the victim?

MR. ROSENZWEIG: No, sir. And may I state the reason why in the record?

THE COURT: You may because I've got a few things I want to say, too. So, I want you to get your say first.

MR. ROSENZWEIG: Okay. Judge, our position is — As I say, if I understand what you were offering —

THE COURT: I didn't make you an offer. I don't bargain with defense attorneys. (T. 54)

MR. ROSENZWEIG: I wasn't — Offer. Let me use some other verb then. What I understand the Court to say was that, words to the effect that, "If you want a line up, we'll have a line up." And that's fine with us. That's — That was great. We'll do it according to Police Department procedures. I wasn't trying to —

And my position with regard to not calling any further witnesses is if we were going to have a live line up, under those circumstances I did not want and do not and did not want to taint that by having Ms. Rhodes, the viewer of the line up, see Mr. Neal under these circumstances, being the only black male in this room, being clad in an orange jumpsuit, when it's obvious the circumstances under which this happened. That was my reason.

I did not intend — and I think that the record, when the Court looks at it — would so reflect that I did not — was

not trying to dictate anything to the Court. I was trying to understand the Court's ruling with regard to it.

We would love to have a live line up. That would be wonderful. It would be perfect. And Mr. Neal feels and I feel that he would be vindicated by it.

Now, with regard to the Court's attitude, apparent attitude toward me, nothing I said was intended in any disrespect to the Court. I believe my tone of voice was not disrespectful. (T. 55) I was in the process and have been in the process of trying to, number one, make an appropriate appellate record and, number two, trying — well, appropriate trial and appellate record with regard to it.

Number two, I was trying to understand the Court's ruling. And I think the record would reflect clearly that the Court offered to have a line up and then the Court said, "No, there won't be a line up." And then at another juncture the Court said, "Well, if you get with the Prosecutor, you can have a line up." And then I asked for a minute to talk with the Prosecutor.

I will make myself available at a line up if we could have one. We can have one any time before trial. It doesn't matter.

That's the situation. And, if the Court has any question about it, I would suggest that the Court have the court reporter type up the transcript of these proceedings and examine it or listen to the tape of it.

THE COURT: Have you got anything else you want to say?

MR. ROSENZWEIG: No, sir.

THE COURT: Mr. Prosecutor?

MR. DOUGLASS: I don't have anything else to say. I just need a ruling on the motion.

THE COURT: The Motion will be denied. The record should show that Mr. Rosenzweig filed this motion. He knows how to get an independent line up if he wants one. He didn't want one. He wants a continuance. (T. 56)

The record should also show that he told the Court prior to coming in here that he had mixed emotions about this because he didn't want to expose his client to the victim before trial but he felt he had to do it.

This was an exercise in futility. It was a searching, fishing expedition. It was not made in good faith. The offer to bargain with the Court was not made in good faith. It is the chicanery to which Mr. Rosenzweig is well noted throughout the Bar. It is not intellectually honest. It does not serve the system well. Does not serve his client well. And the Court does not bargain with defense lawyers, as Mr. Rosenzweig frequently tries to put the Court in a position of doing.

The motion to suppress the in court identification will be denied, failure of proof on part of the Defendant.

I don't care whether you have a line up or not, Jeff. It's not my business. You know how to do that. You're smart enough to do it. But you'd rather have the record than to have something that you can't live with.

The Court finds you in contempt of court and fines you Five Hundred Dollars.

MR. ROSENZWEIG: May I — I'd like to appeal that. I will file a Notice of Appeal. Now, your Honor, may I respond on the record —

THE COURT: No. (T. 57)

MR. ROSENZWEIG: So that we —

THE COURT: No. Because I asked you if you had anything else to say, Jeff, and you said, "No." This record is closed to you.

MR. ROSENZWEIG: Judge —

THE COURT: This record is closed. Now, I'll make it a Thousand Dollars if you want to pursue it. You've got that record to appeal from. There will be no response by you. Fine of Five Hundred Dollars. All right. Thank you.

MR. ROSENZWEIG: Judge, uh —

THE COURT: We're in recess, Jeff. I don't want to talk with you. I'm out of sorts with you right now. It would not be a good idea.

MR. ROSENZWEIG: Judge, I —

THE COURT: I don't want to talk to you, Jeff.

MR. ROSENZWEIG: I need — I need to know when I can talk with you with someone else present, if you can tell me that.

THE COURT: My term ends in 1990. See me some time right after that. (T. 58)

Evidently the trial court was annoyed because counsel stated that if he could have a line-up he would withdraw the motion then being heard. Why that would be an irritant is not apparent. It is apparent, both from the stenographic record and from a tape recording of the hearing that Mr. Rosenzweig's behavior did not approach contemptuous conduct in either his remarks or his tone. He was plainly confused by the court's comments, which we, too, find unaccountable. But we find nothing to justify the stinging rebuke administered by the trial judge. Indeed, we have carefully reviewed both record and recording and are thoroughly satisfied that counsel's demeanor to the trial court was at all times respectful. If the trial court had reasons for its strong reproach of counsel at the close of the hearing, they are not to any degree evidenced in the record.

A few days after the hearing Mr. Rosenzweig filed a motion asking Judge Lofton to recuse from the case of *State* v. *Michael Neal*. When the motion was presented, the following occurred:

THE COURT: Bob, do you have anything to say?

MR. ROBERT W. LASTER, ATTORNEY FOR A CO-DEFENDANT: No, sir.

THE COURT: Mr. prosecutor?

MR. PENCE: Nothing. (T. 61)

THE COURT: Mr. Rosenzweig, my feelings about you are well known. I make no secret about them. Is that going to be your position in everything in this — First

Division?

MR. ROSENZWEIG: Your Honor, I'm not in a position to answer that at this time because I'm still thinking about it. And I —

THE COURT: I will make you a deal. I'm not going to let you forum shop and you can accept other cases in this court.

(Abstracter's Note: Appellant's recollection, which he feels is borne out by the tape is that the judge said "can't accept." Certainly, "can't" fits the context of these proceedings and the judge's remarks.)

I basically just don't like you. I don't think there's any question about that.

If you will give me your word that you will not accept any more cases in First Division as long as I'm on the Bench, I will grant you a continuance or I will relieve you or I will recuse in this case. Otherwise, I can try this case just as fairly. And all you're entitled to is a record. If you can prove error, you can prove error. And that's what you want. You want error. You want record. If that's what you want, fine. Otherwise, I'm going to deny your motion.

But, if you will make me a promise that you won't accept any more cases in this court as long as I'm on the Bench, I'll grant your request. If you don't think you can get a fair trial, that shouldn't be very difficult for you. (T. 62)

Mr. Rosenzweig respectfully and properly declined to make a commitment of that sort. Nor can we sanction the proposal. It was wholly inappropriate for the trial court to condition his recusal in the case on a commitment by counsel that he would refrain from practicing in First Division, Pulaski Circuit Court, so long as Judge Lofton was on the bench. It goes without saying that any member of the bar of Arkansas in good standing should have no compunction in practicing before any member of the trial or appellate bench, irrespective of personal relationships. A judge who cannot lay aside attitudes toward an individual practitioner which might affect impartiality has a duty to recuse

on his or her own motion.

We need not cite statutory and case law dealing with the procedural or substantive rules of contempt of court. There is no dispute as to the law. Our decision turns entirely on the lack of any factual basis for a determination of contempt. Having examined the proceedings in their entirety, we believe Mr. Rosenzweig is entitled to be fully absolved of any taint of impropriety toward the trial judge, and we so hold.

REVERSED.

BOARD OF TRUSTEES for the City of Little Rock, Arkansas, Police Pension Fund, et al.
v. CITY OF LITTLE ROCK, Arkansas

87-345 750 S.W.2d 950

Supreme Court of Arkansas
Opinion delivered May 31, 1988

Robert A. Newcomb, for appellants.

Mark Stodola, City Attorney, by: *Thomas M. Carpenter*,

Asst. City Attorney, for appellee.

DAVID NEWBERN, Justice. The Board of Trustees for the City of Little Rock Police Pension and Relief Fund and individual members of the board sued the City of Little Rock, contending that the city had not made certain contributions to the police pension fund required by law.

The city agreed with respect to some of the funds sought and made the appropriate contributions. However, the city claimed, with respect to a percentage of the fines collected from violators of municipal ordinances, that it was exempted by law from having to make those contributions. The circuit court agreed with the city, and the board has brought this appeal, contending that: (1) the legislation by which the city claims exemption was special legislation prohibited by Amendment 14 to the Arkansas Constitution; (2) the exempting legislation was repealed by a subsequent act; (3) the court erred in not allowing testimony about the intent of the legislature in passing the exemption on which the city relies; and (4) the court should have granted a new trial on the basis of newly discovered evidence. We hold that the exempting legislation was not repealed and could have had a rational basis, and thus it was not in violation of the Constitution. We also hold that the proffered testimony was inadmissible and that a new trial on the basis of newly discovered evidence was not justified. We therefore affirm the judgment of the trial court.

Act 250 of 1937 set up police pension and relief funds for cities of over 16,000 population. Act 206 of 1959 dealt with police pension and relief funds for cities of 75,000 or more. It referred to Act 250 of 1937 for the basic procedures, but added that cities with more than $80,000,000 property valuation were exempt from the provision requiring the cities to contribute to the fund 10% of fines for violations of municipal ordinances, and it left in place the requirement that those cities contribute to the fund money saved as a result of suspensions of police officers without pay and a fixed part of property taxes.

The exempting language of Act 206 of 1959 was codified as Ark. Stat. Ann. § 19-1802.1 (Repl. 1980). It was thereafter amended on several occasions to raise the exemption ultimately, in 1977, to cities having an assessed valuation of $200,000,000, or more, and then Act 690 of 1987 repealed the exemption alto-

gether. At the time it was raised to $200,000,000, only the City of Little Rock qualified for the exemption. Prior to the repeal of the exemption, however, several other cities qualified.

At a circuit court hearing, the board contended the city should have paid into its fund 10% of the fines levied for municipal ordinance violations for the years 1983, 1984, and 1985. The city claimed the exemption for those years. In support of its contention that the exemption violated the constitution the board offered the testimony of a former state senator who had introduced the legislation increasing the level of exemption from time to time. He would have testified the exemption was modified with the intention, in part, of keeping Little Rock from having to make the contributions. The board also proffered the testimony of the state administrator of the funds who would have testified that the Little Rock fund was actuarily unsound in comparison with the funds of other cities. The court refused to admit the testimony of these witnesses.

1. Repeal

The board contends that the legislation creating the exemption based on property valuation and each of the subsequent acts increasing the amount for exemption were amendments of Section 2 of Act 250 of 1937. Section 2 of Act 486 of 1981 began as follows: "Section 2 of Act 250 of 1937, as amended, the same being Arkansas Statute 19-1802, is hereby amended to read as follows . . . ." What followed was a revision of that section with no mention of exemption based on property valuation. The board contends the exemption was thus repealed because it had been created and changed from time to time by amending section 2 of Act 250 of 1937.

Act 206 of 1959, which created the initial exemption, did not purport to amend Act 250 of 1937. As mentioned above, it dealt with police pension and relief funds for cities of over 75,000 population and referred to Act 250 of 1937 for the basic procedures and then created the exemption. It was codified as Ark. Stat. Ann. § 19-1802.1. Each of the subsequent acts raising the property valuation level for exemption amended § 19-1802.1, not § 19-1802. The general assembly showed that it did not regard the exempting legislation as having been previously repealed when it specifically repealed it by Act 690 of 1987. *See*

N. Singer, *Sutherland Statutory Construction*, § 23.11 (4th Ed. 1985). In view of this history of the legislation, we conclude the exemption was in effect during the period in question.

2. Special legislation

Statutes are presumed not to be unconstitutional, and they will not be struck down unless they conflict with the Constitution "clearly and unmistakably." *Board of Trustees of Municipal Judges and Clerks Fund, City of Little Rock* v. *Beard*, 273 Ark. 423, 620 S.W.2d 295 (1981); *Buzbee* v. *Hutton*, 186 Ark. 134, 52 S.W.2d 647 (1932). Amendment 14 prohibits the general assembly from passing local or special acts. An act is special if by some inherent limitation it arbitrarily separates some person, place, or thing from those upon which, but for such separation, it would operate. A local act is one that applies to any division or subdivision of the state less than the whole. *Board of Trustees of Municipal Judges and Clerks Fund, City of Little Rock* v. *Beard, supra; Thomas* v. *Foust*, 245 Ark. 948, 435 S.W.2d 793 (1969).

When the exemption was made to apply to cities with over $200,000,000 property valuation, it applied only to Little Rock. Classification among geographical or political subdivisions is permitted if the general assembly could have had a rational basis for it, *Lovell* v. *Democratic Central Committee*, 230 Ark. 811, 327 S.W.2d 387 (1959); *Knowlton* v. *Walton*, 189 Ark. 901, 75 S.W.2d 811 (1934), and the fact that the classification includes only one city does not necessarily mean that it is "local" in the constitutional sense. *See Mankin* v. *Dean*, 228 Ark. 752, 310 S.W.2d 477 (1958).

The fund is supported by percentages of fines collected and may also be supported by a tax on all taxable property in a city having a fund. Ark. Code Ann. §§ 24-11-403 and 24-11-404 (1987). We agree with the city's argument that the general assembly could have concluded that a city or cities with the highest amount or amounts of taxable property could contribute enough from that source to make contribution from municipal fines unnecessary.

3. The testimony

The testimony of the former state legislator with respect to his intent in introducing the exempting legislation was clearly inadmissible. *Atkinson* v. *Board of Trustees of the University of Arkansas*, 262 Ark. 552, 559 S.W.2d 473 (1977); *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W.2d 1007 (1935).

The board cites *Webb* v. *Adams*, 180 Ark. 713, 23 S.W.2d 617 (1929), for the proposition that we look to the practical effect of legislation in making our determination whether it is special or local in nature. That is exactly correct. The board argues that the testimony of the fund administrator should have been admitted as it would have shown that the practical operation of the legislation was to set Little Rock apart, and thus the testimony was relevant.

The exclusion of the evidence was correct for two reasons. First, no one contends that the legislation in question is not local or special in the sense that when it was passed it affected only Little Rock, and more recently has affected only Little Rock and a few other cities. The question, rather, as noted above, is whether the general assembly could have had a rational basis for making the classification. The testimony of the administrator had no bearing on that issue. Second, it is impossible to tell from the proffered testimony whether the Little Rock fund suffers in terms of soundness because of the exemption. The witness refers to one biennial evaluation done in 1984 from which she concluded that more contributions were needed. She did not, however, reach any conclusion whether the fund would have been sound in 1984 had the city contributed the percentage of municipal fines sought by the board, nor did she say how the soundness would be affected by the city's agreement to pay the 10% of fines collected for violations of state laws and for disciplinary suspensions.

4. Newly discovered evidence

The board moved for a new trial contending that the general assembly's repeal of the exemption was newly discovered evidence showing that the law violated the Constitution. Act 690 of 1987 was signed into law on April 7, 1987. While we have strong doubt that this act shows the exemption legislation to have

been unconstitutional, it clearly could have been discovered before the judgment in this case was entered on June 19, 1987. Ark. R. Civ. P. 59(a)(7). *Big Rock, Inc.* v. *Missouri Pacific Ry.*, 295 Ark. 495, 749 S.W.2d 675 (1988); *Liggett* v. *Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987).

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. My dissent is based primarily on Amendment Fourteen to the Arkansas Constitution which reads in its entirety as follows:

> The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts.

The amendment is short and simple. There is no need to resort to complicated rules of interpretation. As we have stated so many times statutes are to be construed in accordance with their plain and ordinary meaning. This makes sense. Why complicate a statute by reading in all sorts of exceptions in order to accommodate special situations. That is exactly contrary to what the people of the state of Arkansas expected by the adoption of Amendment Fourteen.

I disagree with the majority in upholding this special and local legislation especially when it has already been expressly or impliedly repealed. In addition, I believe the majority opinion errs in excluding the proffered testimony of Ralph Patterson and Kathryn Hinshaw in its entirety.

The Policemen's Pension and Relief Fund was first established by Act 250 of 1937. Act 250 provided that cities with 16,000 or more inhabitants shall add to such funds ten percent (10%) "of all fines and forfeitures collected by the police department of such city for violation of city ordinances . . . ." The act did not provide an exemption for any city.

Act 206 of 1959 created an exemption for the city of Little Rock from paying into the policemen's pension fund ten percent (10%) of all fines and forfeitures collected by the police department for violation of city ordinances. Section 2 of this act in part provided: "any city that now has, or hereafter has, an assessed

property valuation in excess of $80,000,000" is exempted from adding to the policemen's pension fund the ten percent (10%) of all fines and forfeitures collected. At the time of the enactment of Act 206 the exemption applied only to the city of Little Rock.

The exemption, created for the city of Little Rock, had the effect of severely underfunding the pension plan between the years of 1959 and 1981. By 1981 the policemen's pension plan for the city of Little Rock was not financially able to meet the pension and retirement benefits according to state standards. This sad state of affairs is more proof that local and special legislation is generally unwise. Had the city of Little Rock not obtained passage of Act 206, exempting the city from paying some of the funds required to be paid by other cities, the Policemen's Pension and Relief Fund for the city would no doubt have been in a stronger financial condition.

The legislature attempted to correct this mistake by enactment of Act 486 of 1981. This act increased the amount of money added to the fund by the city through contributions collected from forfeitures and fines, and deleted the special exemption for the city of Little Rock. The act mandated that *all* cities add to the fund the ten percent (10%) of all fines and forfeitures collected for violation of city ordinances and state laws. Act 486 followed word for word, with minor changes, Act 250 of 1937. It is apparent that the legislature did not feel the need to specifically state that "the exemption is no longer applicable to the city of Little Rock." Act 486 was expressly made applicable to all cities.

Section 2 of Act 486 of 1981 states: "Section 2 of Act 250 of 1937, as amended, the same being Arkansas Statute 19-1802, is hereby amended to read as follows: Section 2. . . . ." Act 486 then reenacted Section 2 of Act 250 essentially as it was originally enacted with two exceptions: the 10% of fines and forfeitures was expressly extended to include fines relating to state laws as well as city ordinances; and no cities were exempted from any of the provisions of the act. The 1981 act concluded by stating: "All laws and parts of laws in conflict with this Act are hereby repealed." In spite of this clear and express language, the city of Little Rock continued to evade its duty to follow the law and provide for proper and adequate funding for its police department retirement benefits. For its failure to do the just and right thing in the matter,

the city argues that its own "special exemption" had not been expressly repealed by the 1981 act.

It became apparent to the General Assembly that the city of Little Rock was not, under any circumstances, going to comply with the 1981 act, even though the city had to be aware of the serious financial plight of the policemen's pension fund. In obvious disgust with Little Rock's continued defiance of the law and neglect and abuse of the retirement benefits for its policemen, the General Assembly enacted Act 690 of 1987. This act states: "The third sentence of Section 2 of Act 206 of 1959 as amended, the same being Arkansas Statutes 19-1802.1, is hereby repealed." There is now no escape from its legal and moral obligations because the third sentence of Act 206 was Little Rock's own special exemption from fully and fairly contributing to the policemen's retirement fund. Although this exemption had been at least impliedly repealed in 1981, it cannot now even arguably be said that the exemption still exists.

Unfortunately the pension plan has deteriorated to such an extent that the plan will not be adequately funded for several years. Hopefully the fund will be able to provide all of the benefits which will be required. However, this would currently not be a problem had the city simply complied with the 1981 act as was intended. All other cities having such a plan complied.

The adverse consequences of the 1959 act and the financial condition of the policemen's pension plan should have been examined by the trial court. The testimony of Kathryn Hinshaw, the executive director of the pension plan, should have been admitted. The majority states that "it is impossible to tell from the proffered testimony whether the Little Rock fund suffers in terms of soundness because of the exemption." Why else would the Little Rock fund be financially unable to meet retirement and pension benefits? The proffered testimony of Ms. Hinshaw was directly on point. There are four sources from which contributions are made to the pension fund. These are: (1) deductions from the policemen's salary, matched by contributions from the municipality; (2) fines and forfeitures for the violation of state laws; (3) millage levies; and (4) ten percent (10%) of the fines and forfeitures collected by the police department for violations of city ordinances. The city of Little Rock has contributed to the

fund through all of the above except number (4). Therefore it is only logical that its failure to pay the ten percent (10%) is the reason the plan is underfunded.

The city of Little Rock has since 1959 not been paying ten percent of the fines and forfeitures collected. Now the policemen's pension fund needs an additional $1.4 million per year to meet adequate funding requirements established by state standards. The plan is primarily underfunded because special and local legislation has exempted the city of Little Rock from paying the ten percent (10%) of fines and forfeitures which all other cities have been required to pay. The testimony of Kathryn Hinshaw would have enabled the trial court to have made this determination. Also, the testimony of Ralph Patterson was relevant as to the history of the act even if inadmissible to show the intent of the legislature.

It is unfortunate and disappointing that the state's largest and wealthiest city has so woefully neglected and underfunded the retirement benefits for its policemen. I can find no rational state purpose for the exception created by the special and local amendment to the statute exempting Little Rock from paying its full share into the retirement fund. The only way to partially repair the damage to the policemen's retirement fund is to require the city to pay the funds it illegally withheld during the years 1983, 1984 and 1985.

Apparently the General Assembly has retreated somewhat from its foray into the special and local legislative field. Such ventures by the General Assembly in the past caused the people to rise up and pass Amendment Fourteen. Hopefully, it will not be necessary for the people to take similar measures once again. This court could help guide the way by strictly following Amendment Fourteen, just as it reads.

HICKMAN, J., joins this dissent.

GENERAL TELEPHONE COMPANY of the Southwest *v.* ARKANSAS PUBLIC SERVICE COMMISSION

88-27 751 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 31, 1988
[Rehearing denied July 5, 1988.]

William G. Mundy; William H. Ballard; and *Mitchell, Williams, Selig, Jackson & Tucker*, by: *Kent Foster*, and *Michael O'Malley*, for petitioner.

Ivester, Henry, Skinner & Camp, A Professional Corporation, by: *Herman Ivester*, and of counsel: *Richard C. Hartgrove* and *Garry S. Wann*, for amici curiae ALLTEL Arkansas, Inc. and Southwestern Bell Telephone Company.

Gilbert L. Glover and *Art Stuenkel*, for respondent.

DAVID NEWBERN, Justice. General Telephone Company of

the Southwest (company) petitioned the Arkansas Public Service Commission (commission) for a rate increase which would have produced $6,410,615 in new revenue. The commission approved an increase of $809,001. Upon rehearing, the amount was reduced to $159,165. In *General Telephone Company v. Arkansas Public Service Commission*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), the Arkansas Court of Appeals affirmed the commission in all respects, and this court granted certiorari upon the company's request that we review matters in the court of appeals' decision which are of legal significance and public interest. The company contends the court of appeals erred in finding it was not improper for the commission to have used an evaluation procedure called the "modified balance sheet approach" to determine working capital needed by the company. It is also contended that the court erred in approving the commission's consideration of savings which would accrue to the company in the future and not during the limited time required by statute to be used as a sample or test period to evaluate the need for additional revenue. Finally, the company contends the court erred in permitting the reduction on rehearing to stand because the rehearing had been sought by the commission staff (staff) which lacked standing to request rehearing. We hold that the use of the modified balance sheet approach to determine working capital is not confiscatory, that the commission's consideration of savings to be achieved in the future was permissible because the changes which would bring them about were implemented during the statutory period, and that the company was not unfairly prejudiced by the rehearing at the instance of the commission staff. The decision of the court of appeals is affirmed.

1. Methods of determining the need for higher rates

a. Working capital and "return on return"

One of the assets needed by a utility to provide service is cash working capital. It needs enough money to be able to pay the costs of providing service to the consumers during the time it must wait for the consumers to pay for the services. The company presented to the commission a study which figured the value of its needed working capital on the basis of its entitlement to the amount the consumers would pay for the services, and it asserted it was entitled to a return (comparable to interest or profit) on that asset just as on any other asset of the company. The commission staff had prepared a study in which the amount of working capital was

figured on the basis of the company's entitlement to consider the cost of providing the service, rather than the price of the service to the consumers, as an element of working capital. The staff's study thus showed an asset substantially smaller than the company's study. The effect of using the staff approach was to allow the company a return on a smaller asset. The company argues that was improper because it is entitled to a return on that which it has coming, *i.e.*, the price of the service. The commission argues the company is entitled only to a return on an element of working capital determined by the cost to the company of providing the service.

In a hearing before the commission, the staff presented testimony showing that the study done by the company was erroneous in several respects and that the staff had attempted to work with it but found it impossible to make the corrections needed in time to use the company figures in the hearing. The staff therefore presented its study, and the commission based the result it reached on the staff study. The modified balance sheet approach was thus used by the commission, allowing the company a return on the working capital asset calculated using the cost of providing services rather than the price to be received.

b. "Fungible" liabilities

The other major complaint of the company with respect to the result based on the staff study and the modified balance sheet approach is that it treats all liabilities the same. The company contends it is obvious that some liabilities, such as long-term debt to investors, produce revenue and others, such as money owed for depreciable assets, such as telephone poles, do not. The company's position is that the staff's approach thus presents an inaccurate picture of the company's condition. The company argues that it is wrong to treat all liabilities as "fungible." The company's point is that it is entitled to a return on its investors' money which is a liability in the sense that it is money owed to stockholders or bond purchasers. When such a liability is lumped on one side of a balance sheet with other liabilities, such as, for example, accounts payable, sight of the need for a return on the revenue producing liabilities is lost. A fund-generating liability, such as long-term debt to investors, thus may appear to have a cost of zero which the company contends is inaccurate, gives a

distorted view of the need for working capital, and leads to establishment of a rate which confiscates its property.

The statute pursuant to which the court of appeals reviews the actions of the commission, Ark. Code Ann. § 23-2-423(c)(3), (4), and (5) (1987), limits the review as follows:

> (3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.
>
> (4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.
>
> (5) All evidence before the commission shall be considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of any action at law or in equity.

The court of appeals held that the commission's decision on the amount of increase in revenues for the company was supported by substantial evidence. *General Telephone Company of the Southwest* v. *Arkansas Public Service Commission*, 23 Ark. App. 73, 744 S.W.2d 392 (1988). The company's argument here is that the method used by the commission and approved by the court of appeals was so inaccurate and improper that it amounted to confiscation of its property.

As we understand it, the approach taken by the commission was based upon an accountant's long-range evaluation of the company's needs using a balance sheet rather than the day-to-day cash flow analysis urged by the company. While we would reverse a decision where confiscatory rate making was evident, *Public Service Comm'n* v. *Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *Chicago M. St. P. Ry. Co.* v. *Minnesota ex rel. Railroad & Warehouse Comm.*, 134 U.S. 418 (1890), we are not concerned with the method the commission used, and the court of appeals approved, to determine the rate needed to supply

the company adequately with working capital. *General Tel. Co.* v. *Arkansas Public Service Comm'n*, 272 Ark. 440, 616 S.W.2d 1 (1981). The only cited exception to this general rule that we do not evaluate methods occurred in *Acme Brick Co.* v. *Arkansas Public Service Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957). There we held that the commission could not discard means which evaluated the company and its needs for something called a "fair field price" method. We have no such departure from traditional public utility rate-making before us in this case.

The company has accurately demonstrated that the method used by the commission is different from the one it proposed, but it has not demonstrated that the commission's approach resulted in such a small increase in revenues that its property was confiscated. We accept the company's argument that the method it proposed is the favored one and has been used far more often than the modified balance sheet approach. While the modified balance sheet approach has not been the subject of a previous Arkansas appellate court decision, it has previously been used and discussed in a published opinion by the commission. *Re Arkansas Power & Light Co.*, 66 PUR 4th 167 (1985). The fact that it is a relatively new method of accounting does not mean that it reaches a necessarily confiscatory result.

The court of appeals correctly deferred to the expertise of the commission once it was determined that the commission's factual determinations were demonstrated to be supported by substantial evidence. *Southwestern Bell Tel. Co.* v. *Arkansas Public Service Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980). As long as the decision falls within the "zone of reasonableness" we cannot find it was confiscatory. *Public Service Comm'n* v. *Continental Tel. Co., supra.* While the company has demonstrated some comparative deficiencies in the modified balance sheet approach, it has not shown that those deficiencies are not otherwise compensated for in the result reached or that the revenue increase received was so unreasonable as to be confiscatory.

2. Savings outside the test period

When a utility appears before the commission to seek a rate increase, it may present data based on its experience during a test period of twelve consecutive months, or it may use experience

data from a six-month period along with projections for another six months. Ark. Code Ann. § 23-4-406 (1987). The statute also provides, in part:

> However, the commission shall also permit adjustments to any test year so utilized to reflect the effects on an annualized basis of any and all changes in circumstances which may occur within twelve (12) months after the end of the test year where such changes are both reasonably known and measurable.

The company chose 1984 as its test year. During 1985 the company instituted a number of efficiency programs designed to save expenses in providing service to the rate payers. The commission used its information about these programs, which were instituted in 1985, to determine the company's need for additional revenues was not as great as it might otherwise have been. The company argues that it was error to use this information because the savings were, for the most part, not to be realized until after 1985.

We have only to read the language quoted from the statute to decide that the commission did not abuse its powers in this respect. The "changes in circumstances" were "reasonably known and measurable," and they occurred during twelve months after the test year.

3. Staff standing

The company argues that it was improper for the commission to allow its staff to seek the rehearing of its order which resulted in the reduction of the amount of new revenue it was to allow the company. The statute governing rehearings before the commission, Ark. Code Ann. § 23-2-422 (1987), provides, in subsection (a), that application for rehearing may be made by "[a]ny party . . . aggrieved by an order issued by the commission." The commission argues it has the power to make rules and that it has, by its Rule 1.05, provided that its staff is to be bound by the commission's rules as a party. In the first order issued in this case, the commission designated the staff as a party. The commission argues that the company waived its right to object to the staff being treated as a party before it by not raising the issue until it filed its motion to dismiss the staff's rehearing

application.

A quick look at the statutes providing for rate hearings before the commission shows the commission to be, without doubt, a quasi-judicial body. *See* Ark. Code Ann. §§ 23-2-401 through 23-4-424 (1987 and Supp. 1987). It is troublesome that an agency which is placed in a decision-making role can have its own staff before it as a party. Even if the internal operating procedures of the commission kept the commissioners totally isolated from their staff, and we assume that is not the case, we would find a serious appearance of impropriety in this situation. It is a little like a judge making his or her law clerk a party to a case even though the law clerk has a close association with the judge, is his or her employee, and has the judge's ear before and after the hearing.

We have real doubts about this situation, especially now that the Arkansas Attorney General may represent the public interest in these cases, Ark. Code Ann. § 23-4-305 (1987). In this case, however, we find no specific, unfair prejudice in permitting the staff to ask for rehearing. Arkansas Code Ann. § 23-2-426(a) (1987) provides: "The commission may at any time, and from time to time, after notice, and after opportunity to be heard as provided in the case of complaints, rescind or amend by order any decision made by it."

While we find no prejudice resulting from the treatment of the staff as an adverse party before the commission in this case, this opinion should not be read as generally approving a situation we regard as giving an appearance of impropriety. In other instances prejudice may be demonstrated to have resulted from this apparent conflict. For now, we will reserve judgment on the matter.

Affirmed.

HAYS, J., not participating.

John W. SCULLY and Margaret Scully, His Wife
v. Frederick MIDDLETON

88-30 751 S.W.2d 5

Supreme Court of Arkansas
Opinion delivered May 31, 1988

Lesly W. Mattingly, for appellants.

Matthews & Sanders, by: *Marci Talbot Liles*, for appellee.

TOM GLAZE, Justice. This is an appeal from the trial court's granting of the appellee's motion for summary judgment in

appellants' tort cause of action. Appellants' sole point for reversal is that the trial court erred in its ruling that there were no genuine issues of fact to be determined and that the appellants were not entitled to recover from the appellee as a matter of law. We find no error, and therefore we affirm.

Appellant John Scully and a co-worker, Bruce A. Jones, were performing construction work on appellee's property when Jones was injured by a shock he sustained from a defective electrical outlet.[1] Almost three weeks later, Jones, while putting up trusses with Scully, suffered a black-out or fainting spell allegedly caused by his injuries from the electrical shock. When Jones blacked out he lost control of the truss causing it to fall, knocking Scully to the floor and injuring him. Scully and his wife filed suit against the appellee for the damages arising from his injuries.

As we have stated numerous times, summary judgment is an extreme remedy which will be granted only when there is no genuine issue of material fact. *See, e.g., Ford* v. *Cunningham*, 291 Ark. 56, 722 S.W.2d 567 (1987). In reviewing the granting of summary judgment, this court has stated that the burden of proving that there is no genuine issue of fact is upon the moving party. All proof submitted must be viewed in the light most favorable to the party resisting the motion and any doubts and inferences must be resolved against the moving party. *Id.*

In order to prove liability in this tort case, appellants must allege and show that appellee committed a negligent act and that the negligent act was the proximate cause of the injury. Appellants have failed in both respects, but we need only limit our discussion to the negligence issue.

Negligence is defined as the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. *St. Mary's Hosp.* v. *Bynum*, 264 Ark. 691, 573 S.W.2d 914 (1978), citing AMI Civil 2d, 301. To constitute negligence, an act must be one

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[1] For purposes of this appeal, the parties agreed that the electrical outlet was defective.

from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner. *Id.* We have held that before a negligent act may be used as the basis to recover damages, there must be a showing that the negligent act proximately caused the damages sustained and that such damages were reasonably foreseeable. *Dongary Holstein Leasing, Inc.* v. *Covington*, 293 Ark. 112, 732 S.W.2d 465 (1987); *see also Jordan* v. *Adams*, 259 Ark. 407, 533 S.W.2d 210 (1976); *Missouri Pacific R.R. Co.* v. *Johnson*, 198 Ark. 1134, 133 S.W.2d 33 (1939).

When considering the definition of negligence, specifically the foreseeability requirement, as applied to the undisputed facts in this case, we believe only one conclusion can be reached, *viz.*, John Scully's injuries could not have been reasonably foreseen by the appellee. If the question posed here were whether Jones's, not Scully's, injury was foreseeable, the answer clearly would be yes, since any person, who provided a faulty electrical outlet, could have reasonably anticipated a worker using that outlet might sustain an injury. Here, however, Scully's injuries were not caused by appellee's defective electrical outlet, but instead his injuries allegedly resulted from a truss that fell on Scully because Jones purportedly blacked-out from the electrical shock he sustained three weeks earlier. On these facts, we are unwilling to hold Scully's injuries were the result of appellee's negligence.

Because we agree with the trial court's finding that appellants were not entitled to a recovery from the appellee as a matter of law, we affirm the court's decision granting appellee's motion for summary judgment and dismissing this cause.

Don VENHAUS, Pulaski County Judge, Pulaski County, Arkansas *v.* Gary ADAMS, et. al.

87-305 752 S.W.2d 20

Supreme Court of Arkansas
Opinion delivered May 31, 1988

Ivester, Henry, Skinner & Camp, by: *Stephen L. Curry*, for appellant.

Brent Baber and *Lester W. Mattingly*, by: *Lester W. Mattingly*, for appellees.

HARRY TRUMAN MOORE, Special Chief Justice. This is an appeal from a judgment of the Pulaski County Chancery Court granting judgment for overtime pay incurred during a limited period of time to each of the appellees, who were, during the period of time in question, all deputies in the Pulaski County Sheriff's office. Appellants, Don Venhaus, Pulaski County Judge, and Pulaski County, Arkansas, argue that the trial court erred in determining that Pulaski County is liable for overtime compensation because: (1) the deputies were salaried employees and no legal authority exists for overtime compensation; (2) no legislative appropriation for funds for overtime compensation had been enacted; and (3) no authority exists for the payment of overtime of one and one-half (1-½) times the deputies' rate of pay. We agree with appellant's position on all three issues and reverse.

Appellees were at all times relevant to this cause deputy sheriffs from the Pulaski County Sheriff's office, and had been hired on a salaried basis pursuant to a salary and budget ordinance which established various positions within the sheriff's office by rank, number of positions for each rank, and salary for each position. It is clear from the testimony that appellees often were required to work hours in excess of 40 hours, and that there had been various methods used by the sheriff's department in at

least two different administrations in determining whether compensatory time off or overtime pay would be given for hours in excess of 40 hours per week.

Throughout the time in question, there was no standard method for either reporting compensatory time, with various divisions within the sheriff's department having various methods of recordkeeping, or determining how much compensatory time would be given for hours in excess of 40 hours per week, with the testimony varying that compensatory time was given on a "straight-time" basis, "time and one-half" basis, and even a "two-for-one" basis.

The period covered by the lawsuit also included the entire first term of Mr. Tommy Robinson as Sheriff of Pulaski County. It is clear from the testimony, including Mr. Robinson's, that during this period of time there were strained relations between Mr. Robinson and then County Judge William Beaumont, and between Mr. Robinson and several members of the quorum court. During this time, many members of the Pulaski County Sheriff's Department, including several of the appellees herein, also formed a union and attempted to be recognized by the sheriff and the Pulaski County Quorum Court.

After numerous preliminary hearings, a trial on the merits with respect to the issue of overtime pay commenced on May 31, 1984, and after hearing extensive testimony over a period of several months, the trial court issued its order dated August 13, 1985, finding the appellant, Pulaski County, liable to the appellees for all hours worked in excess of 40 hours per week beginning September 10, 1981, and ending March 9, 1982.

The appellees then moved for reconsideration of the rate of compensation for overtime hours, and following additional hearing the trial court, by its order of April 15, 1986, ordered that the overtime hours during the period of liability be compensated at one and one-half times the regular rate of pay. A total judgment in the amount of $61,433.32 was entered against appellants.

The appellees had attempted to recover from the county on several theories. They claimed that they were entitled to be certified as a class. They claimed that they were entitled to be paid overtime for all hours worked in excess of 40 hours per week for a

period beginning prior to 1981. They claimed that they were entitled to recover under the terms of a collective bargaining agreement between the sheriff and the appellees. They claimed that they were entitled to overtime pay since it was promised by the sheriff and claimed that the quorum court had delegated authority to the sheriff to bind the county. They claimed that they should recover under theory of restitution. They claimed that they were entitled to rights under the statutory law concerning overtime pay. Finally, they claimed that they performed necessary services to the county and should be paid, notwithstanding the fact that the quorum court failed to appropriate funds for overtime pay. The trial court agreed only with the last theory of recovery. While the appellees raised several of these theories in their notice of cross-appeal, their brief was limited to the argument that the trial court did not err in finding that appellants were liable for overtime compensation to appellees. Accordingly, we will consider that argument first.

I. The trial court erred in finding that appellants were liable for overtime compensation to appellees, because appellees are salaried employees and no legal authority exists for overtime compensation.

There is no federal or state authority which would have required the appellants to have paid overtime compensation to salaried employees.

First, the Federal Fair Labor Standards Act of 1938, as codified in 29 U.S.C. Section 201, et seq., originally provided overtime compensation for specific employees engaged in interstate commerce activities. In 1974, Congress amended the act by extending the overtime requirement to public agency law enforcement and fire protection employees. However, in *National League of Cities* v. *Usery*, 426 U.S. 33, the United States Supreme Court struck down that portion of the Act which pertained to employees performing traditional governmental functions, including law enforcement. The Supreme Court reasoned that this inclusion interfered with the State Sovereign Power to establish wage and overtime controls on its employees or those of its political subdivisions.[1]

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[1] While *Usery* was subsequently overruled in *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, *Usery* was the controlling law during the time period in question. Accordingly, appellees are unable to retroactively apply *Garcia* and rely on provisions of the Federal Fair Labor Standards Act.

The Arkansas Statutory Law concerning overtime pay reveals a similar exclusion for governmental employees. The "Minimum Wage Act of the State of Arkansas," now codified as Ark. Code Ann. Section 11-4-201, et seq., provides for overtime compensation for particular employees who work in excess of forty (40) hours per week. However, Ark. Code Ann. Section 11-4-203(7)(C), in defining "covered employees," specifically exempts those employed "by the state or any political subdivision thereof, except public schools and school districts."

II. The trial court erred in finding that appellants are liable for monetary overtime compensation to appellees, because no legislative appropriation of funds have been enacted.

The appellants next contend that there was no liability for overtime compensation for appellees because there was no legislative appropriation funds. We find this argument meritorious.

The authority to establish both the number and compensation of all county employees, including deputy sheriffs, is clearly vested in the quorum court of each county pursuant to Amendment 55 to the Arkansas Constitution. *Beaumont* v. *Atkinson*, 267 Ark. 511, 593 S.W.2d 11 (1980). The enabling legislation for Amendment 55 was Act 742 of 1977, now codified as Ark. Code Ann. Sec. 14-14-101, et seq. In regard to the quorum court's specific legislative authority, Ark. Code Ann. § 14-14-801 provides:

> (a) As provided by Arkansas Constitution, Amendment 55, Section 1, Part (a), a county government, acting through its quorum court, may exercise local legislative authority not expressly prohibited by the Arkansas Constitution or by law for affairs of the county.
>
> (b) These powers include, but are not limited to, the power to: . . . (2) appropriate public funds for the expenses of the county in a manner prescribed by ordinance; . . . (6) fix the number and compensation of deputies and county employees.

While it is clear that a county sheriff has the authority to appoint his deputies, it is equally clear that the compensation for these individuals is within the exclusive jurisdiction of the quorum court. The record discloses that a clear majority of the

individual appellees who testified at trial admitted their knowledge of county legislative proceedings and the requirement of an appropriation by the quorum court as a condition to their employment and pay.

The record also clearly reflects that the annual budgets as adopted by the Pulaski County Quorum Court in the two fiscal years encompassed by the trial court's orders, i.e., the last part of 1981 and the first part of 1982, appropriated only *annual* salaries for appellees' compensation and no appropriation was made for overtime pay.

The trial court found, however, that between September 10, 1981, and March 9, 1982, that a period of overtime for "necessary" services obligated the county to pay hourly pay for all hours worked over 40 hours per week even absent a valid appropriation for overtime pay. The court found that the additional services were required as a result of the litigation in Federal District Court, *Billy Hill, et al.* v. *Pulaski County, et al.*, E.D. Ark. No. LR-C-79-465.

The court found that such necessary services are mandated by Ark. Code Ann. Sec. 14-14-802, which provides:

> (a) A county government, acting through the county quorum court, shall provide, through ordinance, for the following necessary services for its citizens:
>
> (1) The administration of justice through the several courts of record of the county;
>
> (2) Law enforcement protection services and the custody of persons accused or convicted of crimes; . . .

In making its ruling, the trial court relied upon this court's holding in *Union County* v. *Union County Election Commission*, 274 Ark. 286, 623 S.W.2d 827 (1981). In Union County, the election commission had requested an appropriation of $7,500.00 to prepare appropriate ballot forms and to set up an election machine. The quorum court, in response to this request, appropriated only $3,500.00 of the requested $7,500.00. The election commission later submitted a claim in the amount of $7,500.00, but the Union County Judge refused to honor the election commission's claims since the claim exceeded the existing appropriation. The lower court directed the county judge to pay the

election commission's total claim despite the lack of a legislative appropriation.

However, in reversing the trial court's decision, this court held:

> The amount allowed for voting machine preparation is not fixed by state law and there is nothing in Amendment 55, the revision of county government amendment, and nothing in Ark. Stat. Ann. Sec. 17-3101 through 17-4208 (Repl. 1980 and Supp. 1981), the County Government Code, to prohibit or to curtail the power of the quorum court from exercising its discretion on the amount to be allowed, so long as it is reasonable.
>
> The trial court ruled that the commission's action was not without reasonable basis in setting the amount at $7,500.00. That is an erroneous application of the law because such a standard means that an agency of county government which is obligated by law to perform a specified function has the discretion to determine the amount of money to be spent, rather than the quorum court. We hold that an agency of county government which performs a function imposed by law must live within its appropriation unless that appropriation is unreasonable. Appropriations made by the quorum court are presumed to be reasonable and the burden rests on the entity filing the claim in excess of an appropriation to prove unreasonableness.

Did the appellees meet their burden of proving that the appropriations in the 1981 and 1982 budgets for the operation of the sheriff's office were unreasonable? We think not.

First, there was no finding by the trial court that the individual appropriated salaries were unreasonable. Even though the sheriff's testimony indicated his bitterness toward the quorum court for cutting $300,000.00 from what he had thought his department's budget was going to be for 1981, the record also reflects that the county was experiencing a revenue shortfall and also faced a cut back in federal revenue sharing funds. The initial budget for the sheriff's department for 1981 totaled $3,400,000.00, of which sum $2,587,000.00 was appropriated for

salaries for sheriff's department employees. The record also reflects that the budget ordinance was later amended to add an additional $600,000.00 appropriation for the sheriff's department for 1981, even though this resulted in the transfer of funds from other departments. The uncontradicted testimony of Mr. Lawrence L. Goddard, a member of the Pulaski County Quorum Court, indicates that the appropriations for the sheriff's department totaled one-third of the entire Pulaski County budget.

The trial court attempted to support its findings concerning the necessity of the overtime pay on the order entered in the Federal District Court on December 4, 1981, which required that 45% of the officers in the sheriff's department staff the Pulaski County Jail. While we are sympathetic with the dilemma placed on the sheriff's office as a result of the Federal Court order, we also find that the manner in which the Pulaski County Quorum Court reacted to the terms of the order was reasonable. As previously mentioned, before the end of fiscal year 1981, an additional $600,000.00 was added to the sheriff's department appropriation. Second, the Federal Court litigation concerning the Pulaski County Jail had been pending for ten years, and there is no way that the quorum court could have reasonably known at the time of the adoption of its 1981 budget that such an order as the one entered December 4, 1981, would be forthcoming within that fiscal year. Finally, in the adoption of its 1982 budget, the quorum court funded all the positions required by the Federal Court order.

A review of the Pulaski County ordinances affecting the county's personnel policy is appropriate. At the time the controversy first arose, Pulaski County Ordinance 255, enacted August 28, 1979, provided that the quorum court shall establish the number and compensation of county employees. The ordinance further provided that the job title, classification, and annual pay rate shall be specified for each budget position of a department or office in the annual budget. This ordinance contained no language concerning definition of the work week.

The second ordinance addressing the "work week definition" was Pulaski County Ordinance 82-OR-19, dated June 22, 1982, which amended Ordinance 255. According to testimony by quorum court member Wilandra Dean and Sheriff Tommy

Robinson, the ordinance was drafted to address the issue of the additional hours being worked by Pulaski County Sheriff's deputies. The ordinance provided definitions of "compensatory time," "scheduled overtime," and defined the term "work week" or "working week," or "regular work week," or "normal work week" as meaning 40 hours of work by a county employee during any seven consecutive calendar days.

However, the ordinance further gave the exclusive authority to the quorum court to prescribe the maximum overtime wage appropriation to each agency, to set the maximum rate or rates of overtime pay, and to set the hourly rates for overtime. Any of these provisions would have had to have been prescribed by ordinance.

This ordinance made the existence of a specific and valid appropriation a condition precedent to overtime pay. Since the Pulaski County Quorum Court never appropriated funds to the sheriff's department for the payment of the overtime wages at issue, the trial court erred in awarding a monetary judgment to the individual deputies as no legal authority existed to support such a finding.

Further, it must be noted that the provisions of Ordinance 82-OR-19 did not become effective until 30 days after its passage on June 22, 1982, which was several weeks after the end of the period during which the overtime services were "necessary."

The issue of entitlement of governmental employees to compensation absent an appropriation by the appropriate legislative body was recently addressed by this court in *City of Greenbriar* v. *Cotton*, 292 Ark. 264, 737 S.W.2d 444 (1987). In that case, the duly elected city marshal of Greenbriar lawfully appointed a deputy to serve as deputy city marshal, but the city council failed to appropriate funds for either salary or expense allowance. The evidence showed that the deputy bought uniforms, worked as many as 60 hours per week, expended funds for the use of his automobile and otherwise performed the official functions of the position. This court found that while a city marshal was empowered to appoint a deputy, the exclusive responsibility of determining whether a salary would be paid was vested in the legislative body, in that case, the city council. Absent an appropriation, no right to compensation in the form of salary

or overtime pay accrued.

Here, no one has questioned the authority of the sheriff to appoint his deputies, or to the deputies' entitlement to an annual salary as appropriated by the quorum court. However, to the extent that additional overtime pay has been ordered by the trial court, such action is contrary to law.

III. The trial court erred in finding that appellants are liable for monetary overtime compensation based upon payment at one and one-half times appellees' rate of pay.

On motion for rehearing, the appellees successfully convinced the trial court to modify its original ruling allowing compensation for hours worked over 40 hours per week at their regular rate of pay to award pay at time and one-half. We reverse this ruling.

In making its ruling, the court noted a memorandum dated September 10, 1981, which was a letter from Major Zoeller in the sheriff's department to other deputies which stated:

> Major Bowman, per our conversation and agreement, the patrol division will staff the correctional facility for all three shifts for those positions which are open Monday, Tuesday and Wednesday. For this involuntary overtime, employees will be paid time and one-half pay.
>
> Thursday and Friday will be staffed by the corrections facility and process will cover Saturday and Sunday.

In modifying its order, the court found that this policy was "codified in 82-OR-19 by implication." We find no authority which will allow an independent inter-governmental memo to be codified by implication. Further, as previously discussed, the provisions of 82-OR-19 did not become effective until July 22, 1982, were not retroactive, and were clearly not applicable to hours worked between September, 1981, and March, 1982.

Also, the trial court's reliance upon representations made by one employee of the sheriff's department to other employees of the sheriff's department is contrary to this court's holding in *City of Greenbriar* v. *Cotton, supra.* This court has consistently held that in order for a public officer to bind the political subdivision to a contractual obligation, the acts of such

official must have been made within his actual authority. *Hankins* v. *City of Pine Bluff*, 217 Ark. 226, 229 S.W.2d 231 (1950). Where, as here, a public officer's actions exceed his authority, his acts are null and void. *Woodward* v. *Campbell*, 39 Ark. 580 (1882). *See also Venhaus* v. *Hale*, 281 Ark. 390, 663 S.W.2d 930 (1983).

Reversed and dismissed.

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

BOYCE, WAYNE, Special Justice, joins in this opinion.

Raymond WATSON *v.* STATE of Arkansas

CR 86-107 752 S.W.2d 240

Supreme Court of Arkansas
Opinion delivered May 31, 1988

King & Ponder, by: *Kevin N. King*, for appellant.

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

Gen., for appellee.

PER CURIAM. The petitioner Raymond Watson was convicted of three counts of receiving stolen property and one count of possession of a controlled substance. He was sentenced to three years imprisonment on each count of receiving stolen property and to ten years for the possession charge for a total of nineteen years imprisonment. His convictions were affirmed on appeal in *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987). The petitioner now seeks permission to proceed in circuit court pursuant to Criminal Procedure Rule 37.

The petitioner alleges that to convict him of three counts of theft by receiving where the counts constituted one course of continuing conduct violates Ark. Code Ann. § 5-1-110(a)(5) (1987) [Ark. Stat. Ann. § 41-105(e) (Repl. 1977)]. He also claims that his attorney was ineffective for failing to raise the issue at trial.

The petitioner traded some marijuana for two three-wheeled vehicles and some welding equipment which J.R. Robinson, Jr., and Bobby Foster brought to his farm. Robinson and Foster were arrested and they informed the police that they had taken the stolen property to the petitioner and he had given them marijuana in exchange for it. Ultimately a search warrant for the petitioner's farm was executed and the officers found marijuana, the vehicles, and the welding equipment.

The petitioner argues that since he received the stolen property in one transaction, he cannot be convicted of three separate counts of receiving stolen property. He cites Ark. Code Ann. § 5-1-110(a)(5) which provides:

> (a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> * * *
>
> (5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate

offenses.

The statute which defines theft by receiving provides:

> (a) A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.

Ark. Code Ann. § 5-36-106 (1987) [Ark. Stat. Ann. § 41-2206 (Repl. 1977)].

The basis of the crime, therefore, is receiving the stolen property. The petitioner did that during one transaction. *See Gilmore* v. *State*, 110 S.W.2d 355 (Mo. App. 1986). In *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980), we said that a continuing offense must be a continuous act or series of acts set on foot by a single impulse and operated by an unintermittent force. In this case the petitioner received the stolen property only once, not on several occasions. Under these circumstances we hold that only one conviction for theft by receiving should lie. *See Yarbrough* v. *State*, 257 Ark. 732, 520 S.W.2d 227 (1975).

Although this issue was not raised at trial, it involves a question of double jeopardy which if meritorious is sufficient to void the judgment. We therefore set aside two of the convictions and sentences for theft by receiving. The convictions and sentences for one count of theft by receiving and one count of possession of a controlled substance are not disturbed.

Petition dismissed; sentence modified.

Tillman Clayton RUSSELL *v.* STATE of Arkansas

CR 88-15 751 S.W.2d 334

Supreme Court of Arkansas
Opinion delivered June 6, 1988

Jack D. Files, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Tillman Russell was convicted of possession of marijuana with intent to deliver and sentenced to 25 years imprisonment. He is a habitual offender with eight prior felony convictions. His three arguments on appeal are meritless.

He first argues that four packets of marijuana, a "roach," and a pipe, which were found in his vehicle, were illegally seized and should not have been admitted into evidence. He also argues that statements he later made should have been suppressed because they were a result of the illegal seizure. We cannot say the trial court clearly erred in allowing this evidence to be introduced. On appeal all evidence is viewed in a light most favorable to the appellee. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

Two officers in a state police vehicle passed Russell, who was proceeding in a vehicle in the opposite direction. They clocked Russell at 67 m.p.h. and turned around to stop him. (The speed limit at the time was 55 m.p.h.) When Russell pulled over, he immediately exited his vehicle and walked back to the police vehicle. One officer approached Russell's vehicle and saw a small pipe in the vehicle on the "hump" between the two front bucket seats. He also saw a "roach" lying on the console. The other officer was called to look in the vehicle. Based on experience, the officers considered it a pipe used to smoke marijuana. Upon opening the vehicle door, the officers found the packets of marijuana under a shoe box, which was turned upside down on the front floorboard.

Undoubtedly the pipe was in plain view and, considering the evidence most favorable to the state, so was the "roach." Therefore, the seizure was not in violation of the Fourth Amend-

ment. The officers testified that Russell was stopped for speeding and erratic driving. One officer testified that as they were pursuing Russell, the vehicle moved in an erratic manner and the driver moved around inside the vehicle, leaning over into the passenger side as if he were hiding something. The initial stop was legal; the officers had a right to look into the vehicle, and seeing contraband, had a right to see if other contraband were in the vehicle. *United States* v. *Ross*, 456 U.S. 798 (1982). In *Cook* v. *State*, 293 Ark. 103, 732 S.W.2d 462 (1987), we upheld a seizure under strikingly similar circumstances.

Russell's second argument is that the trial judge should have recused because he was a deputy prosecuting attorney at the time of one of Russell's prior convictions; also he had refused to file charges against an individual on Russell's request. We are asked by the appellant to overrule our decision in *Jordon* v. *State*, 274 Ark. 572, 626 S.W.2d 977 (1982). The trial judge in *Jordon* was the prosecutor, not merely a deputy, and we still held it was not necessary for him to recuse. The appellant has demonstrated no basis for requiring this judge to recuse.

Finally, Russell argues he was improperly sentenced. He argues that since he was convicted under the controlled substances act, he should be sentenced under its enhancement provision, Ark. Stat. Ann. § 82-2624 (Repl. 1976) [Ark. Code Ann. § 5-64-408 (1987)], which provides:

> (a) any person convicted of a second or subsequent offense under this chapter shall be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

Russell was sentenced under Ark. Stat. Ann. § 41-1001 (Repl. 1977) [Ark. Code Ann. § 5-4-501 (1987)], the general statutory provision for sentencing habitual criminals.

It is undisputed that Russell had eight prior felony convictions, four of which were for delivery of controlled substances; however, four of the convictions were for other felonies: a burglary and theft, theft by receiving, and two separate convictions for failure to appear.

We reject Russell's argument that Ark. Stat. Ann. § 82-2624 mandates that he be sentenced under that statute. First,

§ 82-2624, which was enacted after § 41-1001, does not preclude sentencing a habitual criminal under § 41-1001. Second, when two punishment statutes exist, a court is not prevented from using the more stringent provision. *Rowe* v. *Lockhart*, 736 F.2d 459 (8th Cir. 1984). More importantly, four prior felonies in this case were not drug related. Surely the legislature did not intend to prevent a habitual offender from being sentenced under the habitual criminal statute simply because he is being convicted under the controlled substances act and has a prior conviction under the act. Even penal statutes should not be interpreted so strictly as to reach absurd consequences which are clearly contrary to legislative intent. *Williams* v. *State*, 292 Ark. 616, 732 S.W.2d 135 (1987).

Russell is a habitual criminal under § 41-1001, and we determine that in this case it was not error to sentence him under this act.

Affirmed.

JOHNSON TIMBER CORPORATION *v.* Norma Jean STURDIVANT, Administratrix, et al.

87-163 752 S.W.2d 241

Supreme Court of Arkansas
Opinion delivered June 6, 1988
[Interim Opinion delivered July 11, 1988.*]
[Opinion of June 6, 1988 Set Aside on Rehearing October 17, 1988.]

* Gipson, Sp.J., joins in the order; Glaze, J., not participating.

Griffin, Rainwater & Draper, by: *Richard E. Griffin*, for appellant Georgia-Pacific Corporation.

Laser, Sharp & Mayes, P.A., for appellant Johnson Timber Corporation.

McKenzie, McRae & Vasser, for appellant Lemmie Smith and J & N Logging Company, Inc.

Rose Law Firm, A Professional Association, for amicus curiae American Forestry Association.

Boswell, Tucker & Brewster, and *Bramblett & Pratt*, for appellee Norma Jean Sturdivant, Administratrix, etc.; *Compton, Prewett, Thomas & Hickey, P.A.*, for appellees Catherine M. Vestal, Executrix, etc., and James C. and Linda Meshell; *Shackleford, Shackleford & Phillips, P.A.*, for appellee Nelda C. Meshell, Administratrix, etc.

JOHN I. PURTLE, Justice. A Union County Circuit Court jury awarded more than $5,000,000 to the various appellees for three wrongful deaths and a personal injury, all arising out of a motor vehicle collision. The appellants' common arguments for reversal are that the trial court erred in refusing to grant a directed verdict or a judgment notwithstanding the verdict, or a new trial, and that the court erred in refusing to give or in giving certain jury instructions. Numerous other arguments are presented by the several appellants and will be considered later herein. Finding no prejudicial error, we affirm the action of the

trial court in entering judgments in accordance with the jury verdicts.

A truck loaded with pulpwood and driven by Joe Thrower was traveling east on U.S. Highway #82 in Union County shortly before daylight on March 1, 1985, when the vehicle developed an electrical fire and Thrower stopped it in the eastbound traffic lane of the highway. The stalled truck had neither lights nor reflectors to warn other drivers as they approached. Thrower did manage to flag down a westbound log truck, driven by Lemmie Smith, who was employed by J&N Logging Company, Inc. Smith stopped his truck in the westbound traffic lane alongside Thrower's stalled vehicle. Smith told Thrower that he could not help him but would report the situation and send help when he reached the nearby city of Strong.

At the time of the occurrence Thrower was hauling a load of pulpwood for Charles G. Johnson d/b/a Johnson Timber Company to the Georgia-Pacific plant in Crossett. The pulpwood had been cut from land that did not belong to Georgia-Pacific. Thrower owned the truck he was driving. Smith was hauling a load of logs in a truck owned by J&N Logging to a Georgia-Pacific sawmill. These logs had been harvested from Georgia-Pacific land. It is undisputed that Smith was an employee of J&N and was in the course of his employment at the time of the accident.

As Smith drove away from Thrower's truck toward Strong, he met an eastbound automobile driven by Frank Sturdivant, Jr., in which Donald Vestal, Lloyd Meshell and James Meshell were passengers. The automobile crashed into the rear of the Thrower truck resulting in the injury of James Meshell and the death of the other three occupants.

Georgia-Pacific (GP) contracted with Johnson to cut and haul pulpwood from land owned by GP as well as from land owned by others. (The pulpwood being hauled by Thrower was cut from land owned by one Tatum.) Johnson, in turn, had an oral agreement with Thrower to do the actual cutting and hauling. All of the pulpwood being cut and hauled by Thrower during this period was delivered to Georgia-Pacific and was credited to the GP-Johnson contract. J&N contracted to cut and haul timber solely for Georgia-Pacific from Georgia-Pacific land during the

period of time in question. The terms of the contracts and the relationship among these parties will be treated in detail later in this opinion.

Separate suits on behalf of the injured party and the various survivors were filed and were consolidated for trial. The issues of comparative fault, agency and damages were submitted to the jury on interrogatories. The jury answered the interrogatories that the agency relationship existed between Thrower and Johnson, between Johnson and GP, and between J&N and GP, and that Thrower was 85% at fault and Smith 15%. The jury also found Sturdivant was not at fault.

The critical issues in this appeal concern the question of agency between and among the various defendants. The contracts were written by Georgia-Pacific and by their terms obviously intended to create the status of independent contractors, thereby limiting GP's exposure to liability in occurrences such as this. It is therefore necessary to examine in detail the contracts which were in effect at the time.

The cutting and hauling contracts which Johnson & J&N entered into with Georgia-Pacific were essentially the same. The contracts repeatedly stated that Johnson and J&N were independent contractors. The contracts incorporated by reference schedules which were considerably more specific and detailed than the contracts themselves. If a party followed all the specific details and requirements in the contracts there would be no need for any supervision. By complying with the details in the contracts, the "contractors" and their employees were under the direct control of GP as to the details of the performance of the contracts.

Some of the specifics of the contracts were: Georgia-Pacific determined trees to be cut by spotting them with paint; GP dictated the beginning and ending of cutting periods; Georgia-Pacific had the right to speed up, slow down or even stop the harvesting of timber on tracts of land covered by the contract, whether owned by Georgia-Pacific or not; each contract contained provisions requiring the contractors to provide worker's compensation and liability insurance; GP set the minimum limits of coverage and was listed on the policies as a "certificate holder"; the insuring agencies were required to report any changes in coverage or cancellations, etc., direct to Georgia-Pacific;

worker's compensation insurance premiums were withheld by Georgia-Pacific from the proceeds due the contractors for the pulp and logs delivered.

The contracts required Johnson Timber Company and J&N to meet the requirements of the law, including the Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act (OSHA); provided that accidents be reported to GP's legal department; required that the contractors' records be available for inspection by GP at any time and provided that the records would be inspected at least monthly; gave Georgia-Pacific the right to refuse to unload trucks which were not in compliance with the loading specifications of Georgia-Pacific; required large loads to be separated to allow Georgia-Pacific to unload with their equipment; set detailed specifications for wood which would be delivered including the size, species and general appearance of the wood; and set the destination or delivery point. The specifications set out in the incorporated schedules for "pulpwood contractors," e.g., included:

> Contractor agrees to cut from standing timber only marked trees and to fell said trees free of unmarked trees. (By marked trees are meant only such trees as are marked with paint in a conspicuous manner). All wood must be green and sound, with knots and branches trimmed flush with the body of tree.
>
> All truck delivered wood must be cut in lengths not less than 4', or greater than 6'-6" in length. Rail wood must be cut in lengths not less than 5', and not more than 5'-6" in lengths.
>
> No axe-cut or wood with splintered ends will be acceptable.

Georgia-Pacific furnished trained foresters to assist the contractors; prepared the contracts and filled in the blanks before presenting them to the contractors for their signatures; and retained the right to terminate the contracts at any time.

The contracts repeatedly declared that Johnson and J&N were independent contractors and that Georgia-Pacific would not exercise any physical control over the contractors or their employees or equipment and operations. The contracts also

contained "hold harmless" provisions which, when coupled with the requirements and prohibitions, were intended to shield Georgia-Pacific from all angles. Between the contract and the attached specifications there was indeed very little ground not covered.

Due to the multiple briefs and points argued on appeal we consolidate the discussion of the arguments whenever possible.

The central issues which we must decide are whether J&N Logging Company was the agent, servant or employee of Georgia-Pacific; whether Thrower was the agent of Johnson Timber; and, if Thrower was indeed an agent, whether Johnson Timber was the agent of Georgia-Pacific. On appellate review of a trial court's denial of a motion for a directed verdict or a motion for a judgment notwithstanding the verdict, we must determine whether the verdict is supported by any substantial evidence. See, e.g., *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987); and *Arkansas Power and Light* v. *Adcock*, 281 Ark. 104, 661 S.W.2d 392 (1983). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. *Kinco, Inc.* v. *Schueck Steel, Inc.*, 283 Ark. 72, 671 S.W.2d 178 (1984). Such proof, with all reasonable inferences, is examined in the light most favorable to the party against whom the motion is sought, and if there is any substantial evidence to support the verdict we affirm the trial court.

We have repeatedly held that the two essential elements of agency are authorization and right to control. The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents to so act. *Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985). Ordinarily the question of agency is one of fact to be decided by the trier of fact. *Id.* However, if only one reasonable inference can be drawn from the proof presented, then it becomes a question of law. *Evans* v. *White*, supra, citing *Campbell* v. *Bastian*, 236 Ark. 205, 365 S.W.2d 249 (1963).

When it is demonstrated that the person causing an injury was at the time rendering service for another and being paid for that service, "and the facts presented are as consistent with the master-servant relationship as with the independent

contractor relationship, then the burden is on the one asserting the independence of the contractor to show the true relationship of the parties." *Schuster's Inc.* v. *Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987), citing *Phillips Cooperative Gin Co.* v. *Toll*, 228 Ark. 891, 311 S.W.2d 171 (1958). "It is generally held by the courts, including our own, that if the employer claims that an employee is an independent contractor for whose acts he is not responsible, the burden is upon him to show that fact." *Phillips*.

The appellants in the present case entered into written agreements. In *Ozan Lumber Co.* v. *McNeely*, 214 Ark. 657, 217 S.W.2d 341 (1949), we stated:

> Although a written contract creates the relation of employer and independent contractor, such relation may be destroyed by conduct of the employer through direction of means and methods of producing physical results, and it becomes a question of fact for the jury if there is any substantial evidence to show that such conduct became operative.
>
> . . .
>
> Similarly, where the nature of the relation between employer and employee depends upon the meaning of a written instrument collaterally introduced in evidence, and the effect of such instrument depends, not only upon its construction, but also upon extrinsic facts and circumstances, the inferences of fact to be drawn from the instrument must be left to the jury.

The appellants rely rather heavily on *Moore and Chicago Mill & Lumber Co.* v. *Phillips*, 197 Ark. 131, 120 S.W.2d 722 (1938), in which this court held that *Moore* was an independent contractor of Chicago Mill and Lumber. The facts of that case and of the present appeal are superficially similar in that Chicago Mill and Lumber contracted with Moore for the delivery of timber according to specific and definite contractual directions that were to be observed by the contractor in the cutting of the timber, especially as to location and dimension. However, "[t]here [was] nothing in the contract showing an intent upon the part of the company to retain control or direction of Moore in the

exercise of the means or method by which he should perform the contract." Chief Justice Griffin Smith, speaking for the court, observed:

> The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. On the other hand, if control of the means be lacking, and the owner does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists.

Moore defined an independent contractor as one who contracts to do a job according to his own method without being subject to the control of the other party except as to the result of the work. That statement is still the law. Indeed, Arkansas Model Jury Instruction 707, which was given to the jury over the appellants' objection that it is an "inaccurate" or "incomplete" statement of the law, provides in part:

> An independent contractor is one who, in the course of his independent occupation, is responsible for the performance of certain work, uses his own methods to accomplish it, and is subject to the control of the employer only as to the result of his work.

The appellants also rely upon the case of *Newton & Fitzgerald* v. *Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979). True, *Newton* had many facts in common with the present case, but the issue in that case was whether Newton was an independent contractor of Fitzgerald or whether he was merely a supplier of logs to Fitzgerald. The present case is clearly distinguishable from *Newton.* There, the record demonstrated "that Moses Newton does not cut logs from lands marked and designated by Fitzgerald or any of the other contractor dealers. Newton makes his own arrangements with a landowner to cut logs and when he gets a load ready to go, he hauls the logs to Georgia-Pacific's mill."

Both Thrower and Smith were hauling wood to Georgia-Pacific at the time of the occurrence giving rise to this litigation. Smith was hauling logs which had been cut from

Georgia-Pacific land and Thrower was hauling pulpwood which had been contracted for delivery to Georgia-Pacific's Crossett Plant. We held in *Ozan Lumber Co.* v. *McNeely*, supra, that after the plaintiffs introduce testimony showing that the driver of a log truck is hauling for a lumber company at the time of the injuries complained of, the burden then rests with the lumber company to establish the relationship of independent contractor. *Ozan Lumber* also stated that evidence that the company was carrying liability insurance covering the truck driver and evidence that the company paid workers' compensation insurance on the workers are both relevant factors to be considered in determining the issue of employee versus independent contractor.

In *Ozan* we quoted from *Delamar & Allison* v. *Ward*, 174 Ark. 82, 41 S.W.2d 760 (1931), as follows: "Evidence that defendants were carrying liability insurance covering the negligence of a truck driver hauling gravel was a circumstance to be considered in determining whether the truck driver was employed by defendants or was an independent contractor." In the instant case Georgia-Pacific did not carry liability insurance covering the drivers, but by the terms of the contracts Johnson and J&N were required to have such insurance in an amount set by GP and with a company acceptable to GP. GP was listed as a "certificate holder" on these insurance policies and received notice of all endorsements, changes and cancellations.

Workers' compensation insurance covering the drivers is required by the terms of the contracts. In fact, Georgia-Pacific withholds the workers' compensation premiums from the payments made to the contractors for the delivery of wood products by Thrower and Smith. The premiums were based on the quantity of wood delivered rather than the payrolls. By collecting the premiums in this manner it was about as accurate as if the premium had been based upon payroll records. Payment of workers' compensation insurance premiums is evidence relating to the status as employer-employee or independent contractor. *Ozan Lumber.*

Their contracts also required Johnson and J&N to follow the federal laws relating to safety (OSHA) and the FLSA. The guarantee of minimum wages is evidence that an individual is an employee and not an independent contractor. In *Irvan* v.

Bounds, 205 Ark. 752, 170 S.W.2d 674 (1943), we stated that compliance with the federal wage and hour law "indicates that Irvan considered Bounds to be an employee, because, if Bounds was an independent contractor, and not an employee, it was not necessary, in order to comply with the federal law, to guarantee him any minimum wage."

There is no hard and fast rule whereby we are always able to determine whether a worker is an employee or an independent contractor. Each case must stand upon its own facts as developed at the trial. All of the parties generally state the correct law applicable to this case. However, as usual, the emphasis and interpretation to be applied to the facts are where the parties disagree.

The following are but a few of the factors considered in reaching our conclusion that the issue was properly a fact question for the jury: GP prepared the contracts and filled in the blanks before presenting them to the "contractors"; required liability insurance with a company acceptable to GP; withheld workers' compensation premiums; could terminate the contract at will; required that the wood be loaded in a manner compatible with GP's unloading equipment; required each worker not only to abide by OSHA standards but also GP's local safety rules; controlled the size and shape of logs and the delivery rate; furnished foresters to assist in locating boundaries, surveying and spotting trees; maintained the right to refuse to accept timber which was not loaded properly, contained culls, or was too small or too large; and maintained the right to refuse to accept timber if the employees were not wearing proper safety equipment.

We cannot point to any specific fact which establishes the employer-employee relationship. However, we conclude that all the facts and circumstances established by the proof, when considered together, are sufficient to present questions of fact to be decided by the jury. See *Phillips Cooperative Gin Co.* v. *Toll*, supra. The employer-employee relationship between J&N and Smith is not in dispute. The facts are clearly sufficient to present the question to the jury concerning the relationships between Johnson and Thrower, between Johnson and GP, and between J&N and GP. We hold that there was substantial evidence to support all findings relating to the issue of agency.

Johnson argues that the trial court should have granted it a directed verdict because, as a matter of law, Thrower was an independent contractor. In *Ozan Lumber Co.* v. *Tidwell*, 210 Ark. 942, 198 S.W.2d 182 (1946), we considered the nature of an oral agreement for the cutting and hauling of timber. We stated: "If the contract is oral, and if more than one inference can fairly be drawn from the evidence, the question should go to the jury whether the relation is that of employer and independent contractor or that of master and servant." In the present case, there is sufficient evidence to indicate that both Johnson and GP retained a degree of control over the work of Thrower consistent with his status as an employee. The resolution of this issue was therefor properly submitted to the jury.

The contracts and incorporated schedules were so detailed and complete that there was little room for an independent contractor to function. Practically all decisions relating to the performance of the contracts had already been determined by the terms of the contracts. Georgia-Pacific dominated every phase of the work to such an extent that the relationship between and among the defendants was a question of fact for the jury.

All appellants argue the court erroneously gave instructions to the jury or failed to give proper instructions. The rule concerning instructions is stated in our Per Curiam of April 19, 1965:

> If Arkansas Model Jury Instructions (AMI) contains an instruction applicable to a civil case, and the trial judge determines that the jury should be instructed on the subject, the AMI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for refusing the AMI instruction. Whenever AMI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an AMI instruction cannot be modified to submit the issue, the instruction on that subject should be simple, brief, impartial, and free from argument.

Appellants argue that the court erred in giving AMI 707 and refusing three instructions on the issue of agency which were requested by the appellants. The notes following AMI 707

provide that this instruction should be given "when there is an issue whether a person is an agent or an independent contractor." The instructions requested by the appellants apparently were taken from *Moore and Chicago Mill & Lumber* v. *Phillips*, supra, and basically are accurate statements of the law. However, as noted earlier in this opinion, AMI 707 is an accurate statement of the law. Indeed, the definition of an independent contractor found in AMI 707 is nearly identical to the definition found in *Moore and Chicago Mill*. Even if a non-AMI instruction correctly states the law, it is not error to refuse it when an AMI instruction covering the same subject matter is appropriate. *Wharton* v. *Bray*, 250 Ark. 127, 464 S.W.2d 554 (1971). The trial court therefor did not err in giving AMI 707 and refusing the three requested instructions.

The defendants requested that the court give an instruction which included the bracketed portion of AMI 901(B):

> When the driver sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout (or if he is warned of approaching imminent danger) then he is required to use ordinary care to have his vehicle under such control as to be able to check its speed or stop it, if necessary, to avoid danger to himself or others.

The trial court instructed the jury according to AMI 901 (A), (B) and (C)—that it is the duty of a driver to keep a proper lookout, to keep his vehicle under control, and to drive at a reasonable speed.

The requested portion of 901(B) is properly refused when, e.g., the driver of an automobile is faced with an unexpected emergency which he could not have reasonably anticipated. *Home Insurance Co.* v. *Harwell*, 263 Ark. 884, 568 S.W.2d 17 (1978). On the other hand, in *East Texas Motor Freight* v. *Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986), we held that it was not error to have given the bracketed part of 901(B), where drivers could see smoke crossing the highway from some distance away. We are of the opinion, in the present case, that the trial court correctly refused the bracketed portion of 901(B). While there was evidence that both Thrower and Smith attempted to warn the approaching automobile of the stalled truck, there was no evidence that the driver of the automobile saw, or reasonably should have seen, the danger.

The defendants also requested that the court instruct the jury according to AMI 910. This instruction simply states that a passenger in an automobile is required to use ordinary care for his own safety. We have held this instruction to be proper only when there is evidence that the passenger's conduct was a negligent act or omission which operated as a proximate cause of the injury. *Reed* v. *McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967). There was no such evidence in the present case. Under the circumstances of this case, it would have been pure speculation for the jury to have found that the passengers' failure to warn the driver was a proximate cause of the injuries. See also *Curbo* v. *Harlan*, 253 Ark. 816, 490 S.W.2d 467 (1973); and *Kyser* v. *Porter*, 261 Ark. 351, 548 S.W.2d 128 (1977). Moreover, the court did instruct the jury according to AMI 305(B)—that it was the duty of all persons involved in the occurrence to use ordinary care for their own safety and the safety of others.

Appellant J&N Logging Company also requested that the court give AMI 616, the model instruction based on the "rescue doctrine." J&N argues that Smith was attempting to rescue Thrower, and therefore it was error to refuse the requested instruction. This instruction applies when a person "acting under stress in response to humanitarian impulses" is "attempting to rescue another who reasonably appears to be in danger of substantial injury or loss of life." The court correctly refused this instruction because there was no evidence that Thrower reasonably appeared to be in danger of substantial injury. See *Price* v. *Watkins*, 283 Ark. 502, 678 S.W.2d 762 (1984); and *Woodruff Electric Co-op* v. *Weis Butane*, 225 Ark. 114, 279 S.W.2d 564 (1955).

The appellants objected to the jury being instructed concerning Ark. Code Ann. § 27-51-1303 (1987). This statute concerns stopping, standing, or parking other than in a business or residential district. The statute specifically provides:

> (a)(1) Upon any highway outside of a business or residence district, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or leave the vehicle off such part of the

> highway. In any event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles, and a clear view of the stopped vehicles shall be available from a distance of two hundred feet (200') in each direction upon the highway.
>
> . . .
>
> (b) This shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of the highway in a manner and to an extent that it is impossible to avoid stopping and temporarily leaving the disabled vehicle in that position.

The statute does not prohibit any person from leaving a vehicle on the main-traveled portion of a highway when it is impossible to stop, park or leave the vehicle off such portion of the highway. However, the statute requires that "in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles."

In *American Bus Lines, Inc.* v. *Merritt*, 221 Ark. 596, 254 S.W.2d 963 (1953), a passenger bus stopped on the main-traveled part of a highway to discharge passengers. An automobile attempted to go around the stopped bus and collided with an opposite-bound vehicle. The opinion discussed this statute in detail but summed up in the following words:

> Every case must be decided on its own facts; and in some cases, as here, it becomes a question for the jury as to whether it is practical to stop the vehicle off the highway . . . But here, where reasonable minds may differ as to whether it is practical to remove the vehicle from the pavement before stopping, it becomes a question for the jury, and the statute may be taken into consideration in determining whether there was negligence in stopping the bus on the pavement.

It is a question of fact for the jury whether it was practical for both Thrower and Smith to have stopped their vehicles on the shoulder of the highway. It is undisputed that Smith stopped his vehicle alongside the Thrower vehicle in violation of this statute. There was evidence that the nearby shoulders of the highway were

sufficiently broad to have allowed the trucks to have stopped off the highway.

Appellant J&N Logging also argues that there is no substantial evidence that Smith was negligent. For reasons stated immediately above, we hold that there is evidence from which the jury could have found that Smith was negligent, which negligence was a proximate cause of the injuries.

Appellants argue that a mistrial should have been granted or that the jury panel should have been quashed due to allegedly improper remarks by counsel for appellees during the voir dire of the jury. The incident complained of was counsel's response to the question of a member of the jury panel concerning a situation where both parties were negligent but the negligence of one outweighed the negligence of the other. The attorney's response was: "I'll give you an example to answer your question. We have in Arkansas comparative negligence law, so if you found the one party 60% at fault and the other one 40% at fault, then a million dollars in damages would be reduced down to $600,000 by the percentage of their negligence."

Although this exact situation has not been previously considered by the court, we have on numerous occasions considered statements by counsel during closing arguments concerning answers to interrogatories. The general rule when submitting a case to the jury on interrogatories, is that the jury may not be informed by counsel or by the court of the effect that their answers may have upon the ultimate liability of the parties. *Wright* v. *Covey*, 233 Ark. 798, 349 S.W.2d 344 (1961). In the case of *International Harvester Co.* v. *Pike*, 249 Ark. 1026, 466 S.W.2d 901 (1971), counsel told the jury in his closing argument: "If the jury finds that Earl Pike assumed the risk of his own injury, he will not receive a nickel." We held that this statement violated the rule against informing the jury of the effect of their answers to interrogatories. See also *Stull, Administratrix* v. *Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981).

In *Buckeye Cellulose* v. *Vandament*, 256 Ark. 434, 508 S.W.2d 49 (1974), plaintiff's counsel in closing argument stated: "[I]f there's some argument about how much, we ask you to decide the larger amount because his Honor, there, if you give [the plaintiff] too much, can cut it down, but if you give him too

little, he can't increase it." Objection was made and the court stated: "I suppose it is improper argument, it is the law but probably is not a proper argument to present to the jury. In any event you are instructed to disregard it." In *Buckeye*, we stated that a trial court is accorded great latitude in correcting any prejudicial effect of argument by counsel and that we do not reverse unless such prejudice appears manifest and the court's admonition is not sufficient to eliminate that prejudice from the jurors' minds. We held that the "admonition" given by the court was insufficient to remove the prejudicial error of the remarks of counsel.

A well reasoned analysis of this subject can be found in *Wright* v. *Covey*, supra. *Wright* held that it is not error, in submitting a case on interrogatories, for the court to instruct the jury that contributory negligence is not a bar to recovery if it is of less degree than the defendant's negligence and that the award of damages is diminished in proportion to the contributory negligence. This statement of the law is remarkably similar to the comments objected to in this appeal. We stated in *Wright* that we did not think this instruction "had the effect of telling the jurors anything which they as intelligent men might not have deduced from the wording of the special interrogatories." We went on to remark: "It is a matter of common knowledge to the bench and bar that counsel may argue long and loud to the jury that a certain issue should be answered in a particular way."

Counsel's comments during voir dire explaining comparative negligence law are similar to these statements made in closing argument or in the court's instructions. The general rule appears to be that while an attorney may specifically argue what the answer to an interrogatory should be, he may not comment on the effect the answers will have on the outcome of the trial. In this case we believe the trial court cured the error, if there was any, by admonishing the jury to disregard the explanation of the law given by plaintiff's counsel. The failure of the trial court to grant a mistrial will not be reversed unless the court clearly abused its discretion.

Appellants also claim prejudicial error when counsel for one of the plaintiffs during opening argument displayed the interrogatories before the jury and argued for appropriate an-

swers. A motion for mistrial was denied. Such conduct amounts to no more than suggesting the answers to interrogatories.

The appellants strenuously argue that the various insurance policies should not have been admitted into evidence. They argue that the policies were not relevant to the issue of agency, or, if relevant, the probative value of this evidence is substantially outweighed by its prejudicial effect. The various insurance contracts were entered into the record with the limits of coverage deleted. Appellant Johnson specifically argues that his liability insurance policies had no relevance because they did not include coverage for Thrower or Thrower's vehicle. Appellant J&N concedes its policies covered Smith but argues they were not relevant.

There was much discussion among the attorneys and between the attorneys and the trial court concerning the introduction of the various insurance policies and the cautionary instruction to be given to the jury. Before the trial commenced there was a lengthy discussion in chambers concerning the admission of the policies, including an exchange among the attorneys for the defendants concerning the frequency that the admonition should be given. After considerable discussion about the admonition to be given limiting the purpose for which the policies had been introduced, the court stated: "I'd ask you to write out, I'd ask both of you to write out that admonition that you feel that the court should make to the jury and let me consider both, then I'll make that and I'll read it to the jury . . . You write it out, let me see it and I will admonish the jury in that regard." The instruction agreed upon by counsel at that time is as follows: "The question of insurance is only to be considered by you, the jury, in determining the relationships between the parties and should not in any way be considered by you for any other purpose." The court, after reading this instruction to counsel, then stated: "I'll give that when you desire it."

After the trial was in progress there was another discussion in chambers concerning the introduction of the insurance policies. This discussion focused on the deletion of the coverage limits from the policies and the instruction to be given concerning the deletions. The trial then continued in open court, and the policies, with the coverage limits "whited out," were introduced into

evidence. Before their introduction the court gave a limiting instruction which included the following statement:

> So those are additional items or exhibits which are in evidence which you are entitled to see and to examine. I do have an admonition with respect to both exhibits. Exhibits introduced into evidence relating to certificates of insurance have been altered by Order of the Court in order to eliminate or eradicate the limits or the amounts of the insurance, and such should not be considered by you. Such eliminated or eradicated portions of the contract, that's not made to deceive or in any [way] mislead you. Merely by Order of the Court as this particular item of insurance relates to the evidence. Is that an acceptable admonition by all parties?

One of the defense attorneys replied: "Yes, your Honor."

From the record it is obvious that the litigants had an agreement as to the exact wording of the limiting instruction, but that the court slightly misstated it when he cautioned the jury. However, defense counsel then agreed that the instruction given by the court was satisfactory.

It is fundamental that evidence relating to the existence of liability insurance is not ordinarily admissible because of its lack of relevance and its inherently prejudicial nature. *Ben M. Hogan, Inc.* v. *Nichols*, 254 Ark. 771, 496 S.W.2d 404 (1973). Such evidence should be admitted only when it is relevant to the issues. In *Hogan*, we stated:

> Evidence along these lines has been admitted when it tended to show facts or circumstances having a bearing upon an issue. This policy or its content could be admitted only to the extent it tends to show that Cumbie and Steele were employees of Hogan.

In *Brown* v. *Keaton*, 232 Ark. 12, 334 S.W.2d 676 (1960), we stated that contractual provisions for liability insurance, though not admissible for all purposes, were relevant matters to be considered by the jury on the issue of a party's status as an employee or independent contractor. See also *Ozan Lumber* v. *McNeely*, supra; and *Phillips Cooperative Gin Co.* v. *Toll*, supra. *Brown* emphasized, however, that the jury should be instructed to

consider such evidence only with respect to the issue upon which it is admitted. *Brown* further emphasized that it is incumbent upon the plaintiffs, when offering proof not admissible for all purposes, to request that the court admit it for the limited purpose only.

An early case involving this question is *Delamar and Allison* v. *Ward*, supra. There evidence of liability insurance was submitted to the jury with the instruction that "This testimony is submitted to you as a circumstance only for you to consider in determining whether or not Delamar and Allison, the defendants, had any control or dominion over the truck which figured in the case you are now trying, and you will not consider that testimony, gentlemen, for any other purpose . . ." This court held that the fact that the defendants were insured against liability for injuries occasioned by the truck drivers was a circumstance to be considered in determining whether the drivers were employees or independent contractors.

Johnson argues rather strenuously that his insurance policies were not relevant and that their admission was highly prejudicial. The record reveals that the policies named Georgia-Pacific as a "certificate holder" on both the general liability and vehicular liability policies. The general liability policy covered, among other things, "hired and non-owned" vehicles. Other liability policies covered several log trucks, tractors and trailers. Johnson testified that he did not own any such equipment. It is clear that these policies were relevant to the determination of the relationship among the defendants, GP, Johnson and Thrower.

The trial court did not err in allowing the policies to be introduced into evidence. As stated in *Brown* v. *Keaton, Hogan* v. *Nichols*, and *Delamar and Allison* v. *Ward*, liability insurance is relevant to the determination of the issue of employee or independent contractor. Such evidence is, of course, subject to a limiting instruction. Although the exact instruction agreed upon before the trial commenced was not given, the defendants not only did not object to the instruction given by the court, they expressly agreed that the instruction was satisfactory.

We lastly consider the argument that the award to Linda Meshell in the amount of $750,000 for loss of consortium is so grossly excessive as to shock the conscience of the court. We have many times considered the argument that an award of

damages for loss of consortium was excessive. We review each case upon its own merits and reduce the award only if it is shown to have been influenced by prejudice or is so grossly excessive as to shock the conscience of the court. *Morrison* v. *Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981). Consortium is not easily defined. From our prior cases we conclude that consortium may be generally defined as the comfort, society, affection, services, and other indefinable elements reasonably expected from the injured person. Damages for loss of consortium do not include the personal inconvenience of the claimant. Nor do they include matters such as pain and suffering, loss of wages, medical expenses and other damages personal to the injured party. In the present case, Mr. Meshell has received a judgment covering these elements of damages. Ms. Meshell's claim for loss of consortium must stand or fall on its independent merit.

The excessiveness of a verdict must be considered on a case by case basis and each must be examined on its own facts. *Breitenberg* v. *Parker*, 237 Ark. 261, 372 S.W.2d 828 (1963). Although loss of consortium is most difficult to measure in dollars and cents, recovery for such loss should be dictated by reason and justice. *White* v. *Mitchell*, 263 Ark. 787, 568 S.W.2d 216 (1978). We considered the propriety of an award for loss of consortium in *Morrison* v. *Lowe*, supra, where the trial court had reduced the jury verdict from $100,000 to $30,000. In affirming the reduction of the award we pointed out that we review the record de novo on appeal to determine whether the amount of the judgment shocks the conscience of this court. We have often reduced consortium awards because the jury considered matters included in the spouse's recovery. See, e.g., *Scheptmann* v. *Thorn*, 272 Ark. 70, 612 S.W.2d 291 (1981).

Factually no two cases are exactly alike. Therefore, in reaching our decision on this award for loss of consortium, we are compelled to review the facts. The husband's injuries in this case were severe. He is generally confined to a wheelchair, wears diapers, is fed through a funnel in an opening in his stomach, is incapable of a conjugal relationship, and will probably never regain bowel and bladder control. He has severe speech impairment and considerable brain damage. All the testimony relating to the husband's injuries was before the jury at the same time that it was considering the wife's claim for damages. Ms. Meshell's

damages and the damages of her husband are interwoven and difficult to distinguish. The wife told how she sat by her husband's bed at night and cried until she couldn't cry anymore. Much of her testimony concerned the care and services she rendered to her husband.

After reviewing the evidence presented to the jury, we are confident that the award for loss of consortium was based partly upon matters included in the husband's recovery and not properly embraced within the concept of consortium. We conclude that the amount of the award was influenced by passion and is therefore excessive. Much of the wife's testimony related to her husband's pain and suffering and his horrible injuries and permanent disabilities as well as the services she rendered in caring for him. These items constitute elements of the husband's recovery. The judgment for Linda Meshell in the amount of $750,000 is excessive and should be reduced to $250,000.

The issue as to employee or independent contractor was in sharp dispute. Unquestionably there was substantial evidence to support the verdict of the jury on the issue of agency. Had the decision been for the appellants there would have been substantial evidence to support that verdict. The facts presented clearly establish that the issue was one properly presented to the jury for resolution. We conclude therefore that the trial court did not commit prejudicial error in refusing to direct a verdict, or grant a judgment notwithstanding the verdict or a new trial. As discussed above we do not find any of the other arguments sufficient to reverse the decision of the trial court except with respect to the award of damages to Linda Meshell. If within seventeen days she will enter a remittitur of $500,000, the judgment will be affirmed. Otherwise, the case will be remanded for a new trial on the question of damages for her loss of consortium. As to all other parties the judgment is affirmed.

Affirmed upon condition.

HICKMAN, J., concurs.

GLAZE, J., not participating.

MIKE GIBSON, Special Justice, dissents.

DARRELL HICKMAN, Justice, concurring. I wholeheartedly

agree with the majority decision. I write separately only to point out that I was one of two members of the court who dissented in *Newton & Fitzgerald* v. *Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979). I find the facts of that case, which involved the appellant Georgia-Pacific, and the legal arguments made there, very similar to those in this case. There are even more compelling arguments present in this case to justify the action taken by the trial court.

MIKE GIBSON, Special Justice, dissenting. Independent contractors are the backbone of many industries in Arkansas which are dependent upon such contractors to deliver needed food sources or raw materials to be processed or manufactured into a marketable product. The issue of independent contractor relationships has been much litigated through the years, since it is often a first line defense in tort litigation to avoid imputed liability to the owner. There is one crucial element that has always been applied in Arkansas when deciding the issue, and that is whether or not the owner has actual control or the right to control the method and manner of the work contemplated, and not just the end result.

The appellate court's responsibility in reviewing a trial court's denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict of the jury has been well stated by the majority, which is that if only one reasonable inference can be drawn from the proof presented, then it becomes a question of law. *Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985). In the case now before the court, there is but one "reasonable inference" to be drawn from the proof presented: Georgia-Pacific (GP) had no control or even any right to control the physical conduct or method and manner in which the work was conducted by the appellants, Johnson Timber Corporation (Johnson) and J & N Logging Company (J & N), when cutting, loading, and hauling logs to GP's mills, and no principal-agent or employer-employee relationship existed. The trial court, as a matter of law, should have directed a verdict or granted the motion for judgment notwithstanding the verdict for the appellant, GP.

The owner-independent contractor vs. principal-agent relationship is founded upon the issue of whether or not GP had any

physical control or the right to control the physical conduct or method and manner of Johnson and J & N when actually cutting, loading, and hauling the logs to GP's mills, which was the substance of their agreements, and which the parties had contracted to perform. At the time of the tragic accident, Johnson and J & N were both in the process of cutting, loading, and hauling logs to GP's mills.

The law in Arkansas was very aptly stated by Chief Justice Griffin Smith in *Moore and Chicago Mill and Lumber Co.* v. *Phillips*, 197 Ark. 131, 120 S.W.2d 722 (1938), a case directly on point, which has been followed as the law in Arkansas for almost fifty years:

> By a long line of decisions this court is committed to the universal rule, that where the contractor is to produce a certain result, according to specific and definite contractual directions, agreed upon and made a part of the contract, and the duty of the contractor is to produce the net result by means and methods of his own choice, and the owner is not concerned with the physical conduct of either the contractor or his employees, then the contract does not create the relation of master and servant. This court has consistently accepted and stated the settled rule that even though control and direction be retained by the owner, the relation of master and servant is not thereby created unless such control and direction relate to the physical conduct of the contractor in the performance of the work with respect to the details thereof.

There are no facts in the record to indicate that the appellant, GP, had any control over the physical conduct of any of the other appellants, nor, more importantly, even a right to control such conduct, which involves the cutting, loading, and hauling of logs, at the time of the tragic accident which resulted in the death of four individuals near Strong, Arkansas. GP must have had control or the right to control the method and manner of the work to be performed (cutting, loading, and hauling logs) by the appellants, Johnson and J & N, as opposed to the right to control the end result, in order to establish a principal-agent or master-servant relationship.

Appellants and appellees relied heavily upon the written

agreements of the parties as evidence of the owner-independent contractor relationship and the principal-agency relationship. Since there was no evidence before the court which questioned the legality of the agreements or the good faith of the parties in entering into the agreements, the issues are: (1) whether or not the agreements, in and of themselves, create the relationship of principal-agent or owner-independent contractor between GP and Johnson, and GP and J & N; and (2) if such agreements do create an owner-independent contractor relationship, has the subsequent conduct of the parties created a principal-agency relationship?

The agreement between J & N and GP, titled "Cutting and Hauling Contract," first states that GP and J & N have reached an agreement and then describes the lands on which GP owns timber that has been marked by GP for cutting and the log specifications, "large butt logs, 33" or 35", with minimum scaling diameter of 14"; and to be delivered to El Dorado." The preliminaries of the agreement provide that GP desires to have the logs cut and hauled, and that J & N desires to cut and haul the logs in accordance with the terms of the contract.

Paragraph 1 provides that:

> *The duration of this contract shall be for four (4) weeks from date hereof.* The contractor agrees to cut, and shall have the exclusive right to cut, the now marked and identified timber on the property heretofore specified and to haul same to the destinations named in Paragraph 4 . . . . Cutting and hauling shall, in all respects, comply with sound principles of timber conservation and shall be done in accordance with the specifications . . . *Georgia Pacific shall exercise no control over any employee of the contractor or any equipment owned or used by the contractor.* Georgia Pacific may, at any time, examine the *results of the operations* of the contractor to see that the provisions of this contract, including the specifications as set forth in Schedule A, have been complied with . . . . [Emphasis added.]

Paragraph 2 provides that "the contractor agrees, *at times of his choosing*, to cut and haul diligently, weather permitting . . . . The contractor understands that Georgia Pacific's ply-

wood plants must have a steady flow of raw materials . . . ." [Emphasis added.]

Paragraph 3 states that Georgia-Pacific shall weigh and scale the logs for payment when delivered, but also that "if the contractor disagrees with the scale, he shall have the right to have the logs rescaled in his presence."

Paragraph 4 sets forth that the contractor is to be paid weekly, and states the rate to be paid per thousand-foot log scale and the point of delivery.

Paragraph 5 provides that the contractor shall reimburse GP for avoidable damage caused by the contractor to GP property, and also provides that "*either party . . . may . . . by giving the party in default three (3) days written notice, cancel and terminate this agreement.* [Emphasis added.] Upon such cancellation and termination, the offending party hereunder shall remain liable to the other party for actual damages sustained by such other party."

Paragraph 6 states that the contractor:

> will comply with all the state and federal laws and regulations imposed upon any person employing labor or renting equipment, including, but not limited to, the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as the Wage-Hour Law), and the Occupational Safety and Health Act of 1970, as amended.

The agreement further provides that the contractor must keep payroll records and "make all payroll records available to GP at any reasonable time in order that they may be checked . . . ." Also, the contractor is required to insure that his employees comply with OSHA safety regulations and specifically, wear safety goggles in the area where trucks are being unloaded.

Paragraph 7 provides that the contractor is to hold harmless and indemnify GP for any loss to persons or property arising out of the work to be performed as a part of requiring the contractor to maintain Workers' Compensation insurance and public liability insurance with the company acceptable to GP.

Paragraph 8 states that the contract represents the *entire agreement* between the parties. [Emphasis added.]

Paragraph 9 provides that if GP cannot take delivery by reason of an act of God, strikes, etc., then GP would not be liable to the contractor.

The agreement was signed by GP and J & N.

The Confirmation of Purchase Agreement entered into between GP and Johnson is not nearly as detailed as the J & N Contract, and is more in the nature of a supply contract. GP entered into an agreement with Johnson to purchase timber from Johnson to be cut on private lands not owned by GP.

The Confirmation of Purchase Agreement states that the buyer (GP) has agreed to purchase from the seller (Johnson), and paragraphs 1 and 2 state the price to be paid and that delivery is to be made by truck.

Paragraph 3 provides that the buyer (GP) shall scale all wood, however transported, in accordance with specifications set out in Schedule A.

Paragraph 4 provides that "because of *the risk of buyer under certain provisions of the Wage-Hour Law*, seller agrees to comply fully with all provisions . . . ," (emphasis added) specifically, (a) to pay minimum wages, (b) to keep payroll records and require seller's subcontractors to maintain such records, (c) to make payroll records available for buyer's (GP) inspection, and (d) to comply with OSHA safety regulations and safety rules of GP while on the property.

Paragraph 5 provides and gives each party, buyer and seller, the right to cancel the agreement or reduce the amount of production at any time by giving notice to the other.

Paragraph 6 provides that the seller (Johnson) warrants good title to the timber being purchased. Although not specifically stated in the Confirmation of Purchase Agreement, GP did require Johnson to maintain public liability insurance in specific amounts.

There is nothing in the record to indicate that the parties did not execute the contracts in good faith, and there is no question that the agreements were in effect at the time of the accident.

The contract between J & N and GP clearly states that "GP

shall exercise no control over any employee of the contractor or any equipment owned or used by the contractor." There is no evidence to the contrary in the record.

The Confirmation of Purchase Agreement between Johnson and GP does not establish any right of GP to control the method and manner of the work to be performed by Johnson. There is no evidence to the contrary in the record.

The Cutting and Hauling Contract between GP and J & N and the Confirmation of Purchase Agreement between GP and Johnson is not unlike the contract examined by the court in *Moore, supra*, where we stated that "the contract between Moore and the Company was filed as an exhibit to the answer. There was no substantial proof to show that the contract was colorable, nor were there any allegations or proof to show that it was not bona fide."

It is obvious from an examination of the written agreements entered into by the parties that there is nothing in the agreements to show an intent on the part of GP to retain control or direction of appellants, Johnson and J & N, in the exercise of the physical means or method by which Johnson and J & N performed under the contracts. There is no direction or control relating to the physical conduct of Johnson or J & N or their employees in the execution of the contracts. The contracts do provide certain directions to be observed by Johnson and J & N in the cutting of the timber, especially as to size, place, and dimension, but these are specific and definite and similar to plans and specifications often found in contracts covering the performance of labor of a similar character. The design of these agreements is to provide a given result, not the method and manner of the work to be performed. *Moore, supra.*

As stated in *Moore*, this court has consistently accepted and stated the settled rule that even though control and direction be retained by the owner, the relation of master and servant is not thereby created unless such control and direction relate to the *physical conduct* of the contractor in the performance of the work with respect to the details thereof.

In *Skorcz and J. H. Hamlen & Son, Inc.* v. *Howie*, 243 Ark. 640, 421 S.W.2d 874 (1967), a case in which Hamlen inspected

the area where the logs were to be cut on a weekly basis in order to determine if the logs were cut within the boundary lines; whether the trees were the proper size; if the stumps were too high; and if useable logs were left, we reversed a judgment against Hamlen and held that the evidence did not support a jury finding that an independent contractor relationship did not exist, and, in addition, was not supported by the fact that Hamlen had fired the contractor for not complying with those requirements. The same is true in the case before this court.

Several "specifics" are cited as evidence that Johnson and J & N and their employees were under the "direct control" of GP to sustain a master-servant relationship between GP and Johnson and GP and J & N. The term "specifications" is probably the more appropriate term to describe the "specifics" to be observed by Johnson and J & N in the cutting and hauling of the timber. However, all of the items referred to, if poured into one bag, provide no substantial evidence of any actual physical control by GP in the method and manner of the physical work to be performed, that is, the cutting, loading, and hauling of logs to GP's mills, or even the right of GP to control such work. There is a total lack of control of the means by which each "contractor" was to complete the work for GP, and there is no substantial evidence whatsoever that GP undertook to direct the manner in which the contractors or their employees should work while performing their duties as agreed to under the written agreements.

Since, under the terms of the written agreements, Johnson and J & N are independent contractors in their relationship with GP, the court must next determine if there is any evidence to show that by subsequent conduct, GP and Johnson and J & N abandoned their contractual relationship and entered into a principal-agent or master-servant relationship. In reviewing the record, the evidence offered outside of the written agreements, even testimony offered by appellees, corroborates and reaffirms the intent of the parties when entering into the Cutting and Hauling Contract and the Confirmation of Purchase Agreement.

Gene Staggs, a Procurement Forester for GP, testified by deposition that GP has no control over the kind of vehicle the contractor has, the shape they are in, who drives them, or how the wood is procured by the suppliers in the case of Johnson. In fact,

GP, in its dealings with Johnson, dealt only with Johnson on a buyer-seller basis and did not even know that Thrower, who was driving the truck stopped on the highway near Strong which resulted in the accident, was one of Johnson's drivers.

Joe Frank Thrower, who cut and hauled the logs to GP from lands procured by Johnson, testified that GP did not have anyone out on the job directing him to do anything, and that he dealt with his own operations and employees without assistance and direction from GP.

Mr. Charles Gil Johnson, the owner of Johnson, stated that GP did not check the equipment used by the log haulers, and has never, at any time, given him any advice about equipment to be used, or how to go about the "*manner and means*" of cutting and hauling the pulp wood.

Jerry Adams, the owner of J & N, testified that GP did not tell him who to work or who not to work out on the job and had nothing to do with his equipment. He further stated that the withholding and payment of Workers' Compensation payments by GP on behalf of J & N was something they just help with that saved him bookkeeping and made audits easier for GP.

Mr. Carroll Barnett, who had been in the wood business since 1946, was called as a witness at the trial by the appellees and testified that GP had never given him any instructions on how to run his operations; when he worked; what trucks he was to use; who he was to employ; or the method of cutting the timber and the manner in which he hauled it to the mill—which is all left up to him. He further testified that GP had no control over his equipment, his employees, or him.

In reviewing both the written agreements presented at the trial and the testimony, it is obvious there was no substantial evidence before the trial court at the close of appellants' case to indicate that GP had controlled the "method and manner" of Johnson, Joe Frank Thrower, J & N or Lemmie Smith when cutting and hauling pulp wood and logs to GP's mills.

On review of the trial court's order denying the motion for a directed verdict or motion notwithstanding the verdict requested by GP, we must determine whether the verdict is supported by any *substantial evidence* in a light most favorable to the party

against whom the motion is sought. *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. *Kinco, Inc.* v. *Schueck Steel, Inc.*, 283 Ark. 72, 671 S.W.2d 178 (1984). In this case, there was no "substantial evidence" to submit the independent contractor issue to the jury, and it was error for the trial judge not to grant the motion for a directed verdict or motion for judgment notwithstanding the verdict of the jury in favor of GP.

Apparently, several factors were relied upon by the trial court in reaching the conclusion that the issue was a proper question for the jury, which are hereafter addressed separately:

(1) GP provided the contracts and filled in the blanks before presenting them to the contractors.

The fact that GP prepared the contracts represents no evidence of the right of GP to control the physical conduct or the method and manner of the work to be performed, which was cutting, loading, and hauling logs to GP's mills. Since there is no evidence tending to question the execution of the contract, although there is an abundance of testimony reflecting that the parties understood the terms of the agreement in regard to their relationship, we must assume that the contract was executed in good faith by both parties. In fact, the record reflects that at the close of the appellees' case, GP moved for a directed verdict, alleging, among other things, that there was no evidence to support any scheme, plan or method by GP to insulate itself from liability. The trial court, in ruling upon the motion, found that the plaintiffs had not made a case to prove any scheme, plan or method by GP to insulate itself from liability. The trial court ruled that the allegation as set forth in the amended complaint of the plaintiffs had failed. There was no cross-appeal filed by the appellees in this case alleging error in the granting of the directed verdict by the trial judge, and we must, therefore, recognize on appeal that there was no scheme, plan or method by GP to insulate itself from liability.

(2) GP required liability insurance with a company acceptable to GP.

The liability insurance required did not insure GP, but only

insured Johnson and J & N for liability for the negligence of their employees. J & N cut and hauled logs from property owned by GP, and both J & N and Johnson's employees delivered logs on GP property, exposing GP's land and property to damage by J & N and Johnson, for which liability insurance coverage would provide some protection. Public policy should encourage, not discourage, a general public liability insurance to provide a means of compensation to those who might be injured.

GP did not pay for the liability insurance purchased by its contractors, but the insurance was paid for by the contractors from their own funds.

Ozan Lumber Co. v. *McNeely*, 214 Ark. 657, 217 S.W.2d 341 (1949), cites *Delamar & Allison* v. *Ward*, 184 Ark. 82, 41 S.W.2d 760 (1931), where it was held that "[e]vidence that *defendants were carrying liability insurance covering the negligence of a truck driver* hauling gravel was a circumstance to be considered in determining whether the truck driver was employed by defendants or was an independent contractor." [Emphasis added.] *Ozan* was relied upon to support the proposition that since GP required Johnson and J & N to maintain public liability insurance, the relationship became one of principal-agent. However, in the case before this court, as the testimony reflects, the liability insurance premiums were not paid by GP, nor was GP the named insured. Johnson and J & N, not GP, paid for their own general liability insurance to insure themselves against the negligence of their own employees.

Certainly, it should be the public policy of this state that public liability insurance be encouraged. The fact that public liability insurance is required of an independent contractor, who pays for the insurance, is not evidence of any control as opposed to the situation in which the owner would insure himself for liability of the alleged independent contractor. This case and *Delamar, supra*, are distinguishable.

(3) GP withheld Workers' Compensation premiums and required Workers' Compensation insurance be maintained by the contractors' employees.

Again, GP paid no Workers' Compensation premiums with any of its funds, nor did it insure any of Johnson's or J & N's

employees, but instead, they insured their own employees, and the premiums were paid by them. GP should not be penalized for complying with Arkansas law. In *Brothers* v. *Dierks Lumber & Coal Co.*, 217 Ark. 632, 232 S.W.2d 646 (1950), this court held in an opinion written by Justice Leflar that Arkansas Statutes Annotated § 81-1306 (1947) does make a "prime contractor" liable for the death and injury of an employee of a subcontractor when the subcontractor fails to secure compensation required by the Act. The Defendant in *Brothers* was a forest products company, and the court found the products company liable for payment of Workmen's Compensation benefits to an employee of the contractor. Compliance with the law in Arkansas should not be used to destroy the independent contractor relationship which existed, and such compliance should be encouraged.

In *Ozan, supra*, the court held that "if" it had been shown that appellants paid Workmen's Compensation insurance on Kirby for his employees, such testimony would have been relevant as a circumstance to be considered by the jury in determining whether Kirby was an employee or independent contractor. Since there was no such evidence, and since Kirby operated under the same written agreement that the company had with all of its logging contractors, it was reversible error to submit the issue of the employee relationship to the jury, and this court stated, "[w]hen the testimony in the instant case is considered in the light most favorable to appellees, we find no substantial evidence showing a modification of the written contract by the practice under it sufficient to support the verdict on this question."

Ozan cannot be stretched to stand for the proposition that since GP withheld money from and paid Workmen's Compensation premiums for Johnson and J & N's own funds, as a matter of convenience, as testified to by Jerry Adams, these acts made Johnson and J & N employees or agents of GP. To meet the test laid down in *Ozan*, the appellants would have to have shown that GP paid Workers' Compensation premiums on the employees of Johnson and J & N from its own funds.

(4) GP could terminate the contracts at will.

In *Moore, supra*, it was also contended by counsel for appellees that the power reserved to the company to permanently discontinue operations under the contract in and of itself created

the relation of master and servant. The court further noted that the "power to discharge," which is unrestricted, is a very important circumstance tending to disprove the relation of independent contractor. However, in this case, as stated by the court in *Moore*, the parties to this contract agreed that it might be temporarily suspended or totally rescinded. GP, Johnson, and J & N were competent to make such an agreement and, as such, it is distinguishable from an "unrestricted right of discharge," a condition which usually arises where the work to be done is general and indefinite, rather than definite and specific, as found in this case.

In the case now before the court, the parties entered into a written agreement in good faith; had full knowledge and understanding at the time of contracting that the agreement might be suspended or terminated, dependent upon supply needed; were competent to make such decisions; and the work to be done was definite and specific, just as in *Moore, supra.* The fact that GP could terminate the contracts at will does not destroy the independent contract relationship.

(5) GP required that the wood be loaded in a manner compatible with GP's unloading equipment and could refuse timber not properly loaded, or which was too small or too large; controlled the size and the shape of the logs and the delivery rate; furnished foresters to assist in locating boundaries, surveying and spotting of trees to be cut; and maintained the right to refuse to accept timber if employees were not wearing proper safety equipment while on GP's premises.

These facts relied upon by the majority to find an agency relationship have nothing whatsoever to do with control over the method and manner of the cutting, loading, and hauling of the logs.

The *Moore* case clearly held that supervision of the work in progress, specifications on the cutting of the timber, and the marking of logs that should be cut and hauled to the mill does not destroy the independent contractor relationship. In *Moore*, we stated:

> This court has consistently accepted and stated the settled rule that even though control and direction be retained by

> the owner, the relation of master and servant is not thereby created unless such control and direction relate to the physical conduct of the contractor in the performance of the work with respect to the details thereof.

(6) GP required each worker to abide by OSHA standards and GP's local safety rules, and to comply with the Fair Labor Standards Act.

Clearly, under the law, GP's liability under OSHA extended not just to its own employees, but also to employees of subcontractors and independent contractors. In *Teal* v. *E. I. Dupont De Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984), the court found that Congress had enacted 29 U.S.C., § 654(a)(2), "for the special benefit of all employees of an independent contractor who performed work at another employer's workplace."

For GP to purchase logs produced by employees who are not paid the minimum wage or overtime would be in violation of the "Hot Cargo" provision of the Fair Labor Standards Act, 29 U.S.C., § 215 (a)(1), for which GP would be liable for penalties. As held in *Wirtz* v. *Loan Star Steel Company*, 405 F.2d 668 (5th Cir. 1968), GP must also make a good faith effort to comply with the Act. No doubt, in an effort to comply with the law, GP required Johnson and J & N to comply with the Fair Labor Standards Act, and retained the right to audit their records to insure compliance as required by law.

The case now before the court is one where the proverbial "one cannot see the forest for the trees" is applicable. The substantive agreement between GP and Johnson and J & N deals with the cutting, loading, and hauling of logs to GP in order to keep GP supplied with a sufficient supply of logs to meet its production demands. J & N cut, loaded, and hauled logs under the terms of a "Cutting and Hauling Contract" upon lands owned by GP. Johnson procured timber on its own and hired Thrower to cut, load, and haul logs to GP under the terms of the Purchase and Confirmation Agreement between Johnson and GP. In both cases, GP executed no control over the physical conduct of J & N and its employees, or Johnson and its agents or employees, when cutting, loading, and hauling logs to GP's mills.

The "trees hiding the forest" are such things as preparation

of the contracts by GP; the requirement of liability insurance by GP; the withholding of Workers' Compensation premiums from funds due the contractors by GP and paying it for their convenience; the fact that GP could terminate the contracts; requiring that the wood be loaded in a manner so that it could be unloaded by GP's equipment when delivered; requiring the workers to comply with OSHA standards and local safety rules; setting the specifications of the size and shapes of the logs and their delivery rate; and designating trees to be cut which would comply with GP's specifications. None of these "trees which hide the forest" have anything to do with the control of the physical conduct, by GP, over the method and manner in which Johnson and J & N cut, loaded, or hauled the logs to the mill.

The record does not contain substantial evidence, either in the written documents or testimony, that GP controlled or even had a right to control the method and manner of the cutting, loading, and hauling of the logs to GP's mills. The only involvement of GP in this process was to be sure that the logs met certain specifications, and GP sought to protect itself by requiring its contractors to comply with the law.

In *J. L. Williams & Sons, Inc.* v. *Hunter*, 199 Ark. 391, 133 S.W.2d 892 (1939), this court held that there must be definite and substantial evidence in order to "go behind" the independent contractor relationship, when such relationship appears to exist as a result of written contracts:

> It is common knowledge that hundreds of logging operations throughout the state are constantly handled under contract, both oral and written, which leave to the performing party complete independence in effectuating the purpose of such contract. While the facts of each case should be carefully examined when suits are filed for personal injuries resulting from operations conducted by so-called independent contractors, something more than speculation and conjecture is necessary to convert a bona fide contract independently performed into one of master and servant.

199 Ark. at 395, 133 S.W.2d at 894.

In *Skorcz and J. H. Hamlen & Son, Inc., supra*, the court

found that an independent contractor relationship existed, and reversed a jury finding to the contrary. The facts in *Skorcz* are not unlike the facts in the case now before the court, where the injured party contended that the log hauler was not an independent contractor because:

> about once a week a representative of Hamlen visited the tract to see if the operation was confined within proper boundary lines; if all trees of proper size were being cut; if stumps were too high; and if usable logs were being left. The record also reveals that Hamlen would tell Joe where to unload the logs when they were delivered at the yard in Little Rock. Appellees also rely on certain testimony tending to show Hamlen might have been able to discharge Joe if he refused to do the things, mentioned above, as directed by Hamlen or his agent, and also on the fact that Hamlen and Joe had no written contract.

243 Ark. 642, 421 S.W.2d 875-876.

The majority admits that no specific fact can be pointed to which establishes the employer-employee relationship. However, the majority concludes that all the facts and circumstances establishing proof, when considered together, are sufficient to present questions of fact to be decided by the jury, citing *Phillips Cooperative Gin Co.* v. *Toll*, 228 Ark. 891, 311 S.W.2d 171 (1958), which held that when it is demonstrated that the person causing an injury was at the time rendering service for another and being paid for that service, and "the facts presented are as consistent with the master-servant relationship as with the independent contractor relationship, then the burden is on the one asserting the independence of the contractor to show the true relationship of the parties." The facts presented in this case are inconsistent with the master-servant relationship, but consistent with the owner-independent contractor relationship. As acknowledged, there is no specific fact presented which establishes the employer-employee relationship.

The *Restatement (Second) of Agency* § 1 comment A (1958), provides that the relation of agency is created as a result of conduct by two parties manifesting that one of them is willing for the other to act for him, subject to his control, and that the other consents so to act. The principal must in some manner

indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and "subject to his control." The essential elements are authorization and right to control. *Evans* v. *White, supra.* Johnson and J & N were not subject to the control of GP when physically cutting, loading, and hauling the logs to GP's mills, although they were subject to the control and direction of GP as to the end result of their work.

In *Southern Kraft Corporation* v. *McCain*, 205 Ark. 943, 171 S.W.2d 947 (1943), a contractor engaged in cutting wood at a stated price per cord was charged with the responsibility of hiring and firing his own men, furnishing their tools, and paying their wages. Southern Kraft exercised no control over them, except as to the result of the contract. This court held that these facts could lead only to the conclusion that an independent contractor relationship existed. *See also Crossett Lumber Company* v. *McCain*, 205 Ark. 631, 170 S.W.2d 64 (1943), and *Voss* v. *Ward's Pulpwood Yard*, 248 Ark. 465, 452 S.W.2d 629 (1970).

One can read into the facts presented and speculate, but based upon the entire record and the actual facts presented to the trial court, there is no substantial evidence to sustain the finding of the jury. The relationship between GP and Johnson and GP and J & N was clearly one of owner-independent contractor, and the judgment entered by the trial court should be reversed and dismissed as concerns GP.

INTERIM OPINION
DELIVERED JULY 11, 1988

752 S.W.2d 279

Griffin, Rainwater & Draper, P.A., by: *Richard E. Griffin*, for appellant Georgia-Pacific Corporation.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Ralph R. Wilson*, for appellant Johnson Timber Corporation.

McKenzie, McRae & Vasser, for appellants Lemmie Smith and J & N Logging Company, Inc.

Boswell, Tucker & Brewster; Shackleford, Shackleford & Phillips; Bramblett & Pratt; and *Compton, Prewett, Thomas & Hickey, P.A.*, by: *Robert C. Compton*, for appellees.

PER CURIAM. We will consider the petition for rehearing and the motions filed in this case after the court reconvenes on September 6, 1988.

Special Justice GIBSON joins in the order; GLAZE, J., not participating.

OPINION ON REHEARING SETTING ASIDE
ORIGINAL OPINION
OCTOBER 17, 1988

758 S.W.2d 415

DARRELL HICKMAN, Justice. On June 6, 1988, we handed down our decision in this case with Justice John Purtle delivering the opinion for the majority and Special Justice Mike Gibson dissenting. Justice Glaze did not participate. The appellants have filed a petition for rehearing, alleging any number of reasons therefor. The appellant Georgia-Pacific Corporation has filed a motion suggesting that Justice Purtle disqualify from further

participation in this case because he has a personal claim pending against Farmers Insurance Company, the insurer of one of the appellants.

Georgia-Pacific has also asked the remaining justices to consider disqualifying in view of the decision of the Supreme Court of the United States in *Aetna Life Ins. Co.* v. *Lavoie,* 106 S. Ct. 1680 (1986), and the more recent decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. ___, 108 S. Ct. ___, 100 L. Ed. 2d 855 (1988). In *Aetna* Justice Embry, who wrote the opinion for the Alabama court in a 5/4 decision, was discovered to have personally filed two lawsuits against insurance companies which involved the same issues as the *Aetna* case. It was suggested that Justice Embry had written an opinion deciding his own lawsuits. The United States Supreme Court ordered the decision set aside. As it turns out, Justice Purtle has a claim against an insurance company of one of the appellants and that claim relates to the issue of an independent contractor which is the main issue in this case. We would not presume Justice Purtle intentionally erred or knew Farmers Insurance was involved in this lawsuit, but it was his duty as the judge assigned to write the opinion to know it. His personal legal business should never conflict with his role as a justice, and it is his duty, not ours or others, to see to that.

Justice Purtle has recused from further participation in this case and filed a contemporaneous opinion stating his position. His participation in the case, whether it was inadvertent or not, cannot be overlooked.

There is no doubt that, in view of the decisions in *Aetna* and *Liljeberg*, our decision must be set aside and resubmitted for consideration, and that is our order. It is our further duty which has given us pause and concern. Should we all remain in the case? Should we all disqualify and ask for a completely new panel of judges? Should we make that decision individually or as a body?

First, there is no doubt that the United States Supreme Court decisions do not require that we recuse from further participation. The petitioner, Georgia-Pacific, makes much of Justice Brennan's concurring opinion in *Aetna*, but it was a concurring opinion and was not adopted by the majority. In fact when the case was resubmitted to the Alabama Supreme Court, none of the other justices recused on the ground they had been

influenced by Justice Embry.

This does not mean, however, that any individual justice should hesitate to disqualify if he decides to do so. What a judge can do and ought to do are not always the same.

The choice is undoubtedly an individual one. We have considered the fact that the decision was not unanimous; we have considered the fact there was a special justice participating; we have considered our duty to the appellees who are entirely innocent in this matter, who have won their lawsuit at the trial level and essentially prevailed on appeal; and we have considered the nature of our decision. It was not a routine case and would unquestionably be an important precedent for future litigation. While we did not, in the opinion authored by Justice Purtle, overrule any of our prior decisions, a strong argument can be made that we did indeed depart from past decisions and head in a new direction.

Finally, we have considered the reputation of this court and its meaning to those who come to us for final judgment regarding their rights, privileges and liberties. While we are not expected to be a perfect institution, we are expected to always try to do the right thing. It is not easy to sit in judgment of one's self. Frankly, some of us believe we should remain in the case, others do not. Given the unavoidable choice of letting a decision stand under a cloud or removing the cloud entirely, we choose the latter. Considering all the circumstances in this case, we have decided it would be in the best interest of all concerned for each of us to step aside and allow the governor to appoint seven special justices to decide the case. At least that way all the parties are where they started before this unfortunate matter surfaced.

We therefore set aside our decision in this case. We will each notify the office of the governor of our recusal in accordance with the Arkansas Constitution.

Special Justice GIBSON joins in this opinion.

GLAZE, J., not participating.

DISQUALIFYING OPINION OCTOBER 17, 1988

758 S.W.2d 417

JOHN I. PURTLE, Justice.

COMMENTS UPON RECUSAL

Rule 27 of the Rules of the Supreme Court reads as follows:

> Whenever it is desired to suggest the disqualification of a Judge of this Court in a case to be submitted, the attorney so desiring shall present the matter to the Court in consultation *a reasonable time before the day of submission of the case.* [Emphasis added.]

This case was originally scheduled for submission on February 8, 1988, but was subsequently withdrawn because of the recusal of a justice. The appeal was formally submitted to this court for consideration on March 14, 1988. On that same date, this case was orally argued before the court by the attorney for Georgia-Pacific. The opinion of this court was delivered on June 6, 1988. Glaze, J., not participating. Special Justice Mike Gibson, dissenting. The motion suggesting disqualification and petition for rehearing were filed on behalf of Georgia-Pacific on June 23, 1988.

No suggestion of disqualification was timely or properly made in this case. The rule requires the party suggesting disqualification to present the matter to the court in consultation a reasonable time before the day of submission. This motion and its very consideration by this court completely ignore the plain words of Rule 27. Moreover, I interpret the rule to provide for a direct consultation between the justice concerned and the attorney suggesting disqualification.

I am not participating in the petition for rehearing in this case because of the manner in which the appellant Georgia-Pacific has handled the petition and the motion suggesting disqualification. For the record, I wish to state that I had no knowledge that Farmers Insurance Group had any interest in this case until I was informed of the motion and petition by a newspaper reporter who had received copies of these documents before I did. (The original record is no longer available. It was

checked out and "misplaced" by appellant Georgia-Pacific subsequent to the opinion of this court.)

I have done absolutely nothing improper or unethical. Nevertheless, this motion and petition, and the overt accusations concerning this justice's ethics contained therein, have no doubt created in some minds the impression that I have somehow acted with impropriety or with the appearance of impropriety. Consequently, to avoid even the appearance of impropriety, and to preserve the integrity of this court and our civil justice system, I hereby recuse from participation in the consideration of this petition for rehearing.

There is not a precedent-setting word in the entire opinion. I will say nothing further to defend my ethics and integrity in this unfortunate situation. However, considering the action by the court in vacating the opinion, I am compelled to state that the original opinion set out above is proper and correct. Let the legal community decide whose ethics are questionable and who followed the law.

Jarol A. SHOREY *v.* Honorable Thurston THOMPSON

88-64 750 S.W.2d 955

Supreme Court of Arkansas
Opinion delivered June 6, 1988

Gordon L. Cummings, for appellant.

Thompson & Dodge, P.A., by: *Thurston Thompson*, for appellee.

JOHN I. PURTLE, Justice. This is an appeal from the denial by the circuit judge of a petition for certiorari to the municipal court of Benton County. We agree with the decision of the circuit court that certiorari was improper under the circumstances.

The appellant, charged with DWI, appeared for trial in the municipal court prepared to record the trial with a tape recorder. His request to record the proceedings with a "small, hand-held, pocket-size, quiet, unobstrusive recorder" was rejected by the municipal court judge on the ground that it constituted improper discovery by the defendant.

The trial was held without the use of the recorder and the appellant was convicted. He then applied to the circuit court for a writ of certiorari to require the municipal judge to give him a new trial in the municipal court at which he could use the tape recorder.

The appellant argued in his petition for certiorari that the Sixth Amendment and Due Process clauses of the United States Constitution guarantee him the right to record the proceedings by the system we have already mentioned. He also relied upon the case of *Davey* v. *City of Atlanta*, 204 S.E.2d 322 (Ga. 1974), for the proposition that he had the absolute right to record the testimony.

The circuit court denied the petition for certiorari and this appeal is from that decision.

The appellant did not present to the circuit court for review facts which demonstrated a plain, manifest, clear and gross abuse of discretion by the trial court. The demonstration of such an abuse of discretion by a trial court is essential before an appellate court will grant a petition for writ of certiorari. *Brown* v. *Wood, Judge*, 257 Ark. 252, 516 S.W.2d 98 (1974). Although the petitioner made numerous general statements and conclusions concerning his right to record the proceedings, he has not alleged specific facts indicating that the trial court's refusal to allow him to record the trial resulted in any prejudice to his case. Additionally, the petitioner has not demonstrated a manifest clear abuse of discretion on the part of the trial court, or that the trial court acted in a manner outside its jurisdiction.

The circuit court correctly denied the writ of certiorari.

Affirmed.

GLAZE, J., concurs.

Jerry M. WHITE, Kevin Hamilton, Jay McCuien, and Q.D. Whitaker *v.* Ronnie J. BREWER

88-7 750 S.W.2d 956

Supreme Court of Arkansas
Opinion delivered June 6, 1988

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., for appellant.

Howell, Price, Trice, Basham & Hope, P.A., for appellee Ronnie J. Brewer.

Walter A. Murray Law Firm, for intervenor Rockwood Insurance Company.

JOHN I. PURTLE, Justice. This is an appeal from judgments on two jury verdicts in the circuit court. The appellants' sole argument on appeal is that the trial court erred in instructing the jury in accordance with the bracketed second paragraph of AMI Civil 2d, 901(B). We hold that the trial court did not err in giving the instruction.

The occurrence in question took place near Alcoa Road and North Shore Drive in Saline County. Ronnie J. Brewer, Edgar

Burnell and the appellant, Jerry White, were each driving a fifteen-ton truck loaded with asphalt mix. W.L. Tumbleson was the legal owner of the truck that Brewer was driving, and the vehicle driven by White was owned by the other appellants.

Brewer was traveling south on a two-lane highway and met Burnell, who was northbound. The two drivers met at a point on the highway about 330 feet south of the crest of a hill. White, who was southbound, crested the hill and saw the two vehicles side by side, blocking both lanes of travel. The shoulders of the road, at that point, were not wide enough to accommodate a vehicle. White did not stop his truck and collided with the back of the vehicle driven by Brewer. The truck driven by Burnell was not damaged by the collision.

Brewer received personal injuries and the vehicle he was driving was severely damaged. Brewer and Tumbleson filed suit and upon trial the jury returned verdicts of $4,600.84 in favor of Brewer and $4,842.70 in favor of Tumbleson. At the close of the trial the court, over the timely objection of appellants, instructed the jury pursuant to AMI 901(B). The instruction included the bracketed portion of the second paragraph, except for the words in parentheses inside the bracketed portion of the instruction. This instruction is the basis of this appeal.

Burnell testified at the trial that when he and Brewer met on the highway they stopped to talk about the location of the construction site where the asphalt was to be delivered. He testified that: "I was occupying the northbound lane. The other driver [Brewer] was occupying the southbound lane. We were stopped. He had been talking. A third dump truck came over the hill." He identified the third truck as the one driven by White.

Appellant White stated: "Coming down the hill I probably was going a little faster than 35. . . . I came over the hill I saw two trucks down there. I didn't hit my brakes right off because I thought they were going to move. . . . They weren't rolling."

Although the above testimony was not undisputed it is sufficient to show that the instruction was proper under the facts of this case. There was other testimony both in accordance with, and contrary to, the testimony set out above.

The investigating officer, Larry Davis, testified that the point

of impact was approximately 400 feet from the crest of the hill. He stated on cross examination that the distance included 72 feet of travel after impact. Several other witnesses testified that the distance from the crest of the hill to the point of impact was about the distance of a standard city block. It is undisputed that there was no warning signal other than the vehicles stopped side by side, and that the vision of Jerry White was not obscured by other objects.

The court instructed the jury pursuant to AMI Civil 2d, 901(B) which reads:

> B. [Second] It is the duty of the driver of a motor vehicle to keep his vehicle under control. The control required is that which a reasonably careful driver would maintain under circumstances similar to those shown by the evidence in this case.
>
> [When the driver sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout (or if he is warned of approaching imminent danger) then he is required to use ordinary care to have his vehicle under such control as to be able to check its speed or stop it, if necessary, to avoid damage to himself or others.]

However, only the words in the brackets are in dispute. That part of the bracketed sentence in parentheses was not given in the present case because there was no evidence that there was any warning of imminent danger (aside from the stopped vehicles). It is undisputed that White saw the vehicles blocking the road when he was about 400 feet away. Obviously he could have observed the vehicles when his line of direct vision was no longer obscured by the crest of the hill. The exact distance is not important because he took no immediate steps to stop his vehicle. White stated that he thought the vehicles would move out of the way. By the time it occurred to him that the vehicles were not going to move, he was unable to stop his vehicle before striking the truck driven by Brewer.

The comment by the AMI Committee in the *Arkansas Model Jury Instructions* is apparently interpreted by the appellants to require warning signs or signals to be present before the bracketed second paragraph may be given. This interpretation is

proper only as to that part of the second paragraph which is enclosed in parentheses. However, it obviously does not apply to the entire second paragraph because it commences with the words: "When the driver sees danger ahead, ..." Common sense indicates that "seeing" danger is more obvious than seeing a "warning" of what you are about to see.

Appellants' reliance on *Rogers* v. *Kelly*, 284 Ark. 50, 679 S.W.2d 184 (1984), is misplaced. In *Rogers* this court held that it was proper to refuse to give the bracketed words of AMI Civil 2d, 901(B) because the driver could have seen the pedestrian, whom he later struck with his vehicle, while the pedestrian was "standing stock-still inside a line of cars and looking in both directions before deciding to continue across Main Street." The pedestrian was seen by the driver of the car while "standing in a position of apparent safety . . . ."

In *East Texas Motor Freight Lines, Inc.* v. *Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986), we upheld the trial court's instruction to the jury which included the bracketed section of 901(B). In the *Freeman* case several vehicles collided in a patch of dense smoke along an interstate highway. Justification for giving the bracketed portion, including the words in parentheses, was based upon a driver being able to see the smoke some distance before entering the smoke, where the collision occurred.

However, in *Home Insurance Co.* v. *Harwell*, 263 Ark. 884, 568 S.W.2d 17 (1978), we upheld the trial court's refusal to instruct the jury in accordance with the bracketed portion of AMI 901(B). Harwell testified that the other driver involved in the accident backed across the highway in front of her without any signal or warning. The facts in *Harwell* were not in material dispute. The other driver did the unexpected act of backing into the path of Harwell's car without warning or signal. She did not see him until it was too late to avoid the collision.

A case factually similar to the present case is *Reed* v. *McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967). In *Reed* the driver of an automobile crested a hill and observed a vehicle in front of him which had stopped to make a left turn. Two cars had stopped behind the car which was waiting to turn left, and a third car pulled to the right shoulder to avoid striking the stopped vehicles. Reed, unable to stop, veered to his left and collided with

a vehicle coming from the opposite direction. The trial judge instructed the jury pursuant to the bracketed portion of AMI 901(B), except for the words in parentheses. On appeal Reed argued that the words in parentheses should have been included in the instruction by the trial judge. We upheld the trial court's refusal to include the words in parentheses as part of the instruction to the jury.

The appellant also relies upon *Coca-Cola Bottling Co. of Blytheville* v. *Dowd*, 189 Ark. 986, 76 S.W.2d 87 (1934). In this case the driver of the Coca-Cola Bottling Company truck pulled onto the highway as another vehicle approached. The driver of the other vehicle collided with the truck and lost control of her car. The basis of the instruction by the trial court in this case was a "sudden emergency" rather than a warning of approaching imminent danger. See AMI Civil 2d, 614.

The appellant also refers to *Craighead* v. *Missouri Pac. Transp. Co.*, 195 F.2d 652 (8th Cir. 1963). *Craighead* was decided prior to the adoption of AMI, but factually supports the trial court's including the words which later became the bracketed portion of 901(B). *Craighead*, which cited *Dowd* with approval, approved the giving of an instruction similar to 901(B), including the second paragraph.

No two cases are factually identical. Each must be considered upon its own facts when determining whether the second paragraph of the instruction should be given. In the present case White obviously saw the dangerous situation as soon as he could see over the hill. The facts in the present case clearly warranted the trial court instructing the jury in accordance with the second paragraph of AMI Civil 2d, 901(B).

Affirmed.

GLAZE, J., not participating.

Walter H. LANE, M.D. *v.* Maxine Payton LANE

87-293 752 S.W.2d 25

Supreme Court of Arkansas
Opinion delivered June 6, 1988

Tatum & Sullivan, P.A., by: *Tom Tatum*, for appellant.

Peel, Eddy & Gibbons, by: *Richard L. Peel*, for appellee.

STEELE HAYS, Justice. In this medical malpractice case the only question on appeal pertains to the statute of limitations.

Appellant, Walter Lane, a physician, began treating Maxine Lane, appellee, for migraine headaches in 1966 and continued treating her until 1984. The two were married in 1974 and divorced in 1985. Mrs. Lane sued Dr. Lane in May, 1985 for malpractice for injuries received as a result of his treatment. Prior to trial, Dr. Lane moved for summary judgment claiming the action was barred by the statute of limitations. The motion was denied. At the close of the evidence, Dr. Lane moved for a directed verdict and asked the court to reconsider summary judgment based on the statute of limitations. The court denied both motions and a jury awarded Mrs. Lane $44,000.

After the verdict, Dr. Lane moved for judgment NOV, seeking a reduction to $13,000 to conform with the evidence of damages by Mrs. Lane. Mrs. Lane objected to a remittitur and elected to have a new trial. By this appeal Dr. Lane challenges the denial of summary judgment and directed verdict on the issue of statute of limitations.

Dr. Lane's treatment of Mrs. Lane's migraine headaches from 1966 to 1984 included regular injections of narcotics of one type or another. Mrs. Lane alleged the treatment was injurious, causing fibrosis of the shoulder, loss of motion of her arm, extensive scarring of her back, arms, and shoulders, drug addiction, drug dependency, drug abuse, depression and loss of ability to carry on a normal lifestyle.

Our statute of limitations for medical malpractice, Ark. Code Ann. § 16-114-203 (1987) [Ark. Stat. Ann. § 34-2616 (Repl. 1962)] provides that:

> (a) All actions for medical injury shall be commenced within two years after the cause of action accrues. (b) 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. Code Ann. § 16-114-201(3) (1987) [Ark. Stat. Ann. § 34-2613(c) (Repl. 1962)] defines "medical injury":

> "Medical injury" or "injury" means any adverse consequence 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; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

Dr. Lane maintains the evidence shows that Mrs. Lane's drug addiction and scarring began by 1978 and therefore the action is barred by the statute of limitations. Mrs. Lane counters the argument with the "continuing course of treatment" theory. The trial court ruled against Dr. Lane on this issue, finding that the action fell within the statute of limitations.

The theory of "continuous treatment" is defined:

> [I]f the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature

> as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated—unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

1 D. Louisell and H. Williams, *Medical Malpractice* § 13.08 (1982) (footnotes omitted).[1]

"Continuous treatment" is distinguishable from a "continuing tort." See *Williams* v. *Edmondson*, 257 Ark. 837, 250 S.W.2d 260 (1975); *Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); *Treat* v. *Dreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986). In *Owen* and *Treat*, the appellants argued that a single negligent act of a physician, a misdiagnosis for example, was a continuing wrong and the statute of limitations would not begin to run until the error was discovered, on the premise that the effect of the wrong was continuous. We declined to adopt that theory, holding the cause of action to accrue at the time of the wrongful act, reasoning that the proposed theory, a public policy issue, should be addressed by the legislature.

To hold otherwise would mean in effect that we would apply the "discovery of injury rule"[2] to our malpractice statute, which would change the time of the accrual of a cause of action from the time of the act to the date of discovery of the injury. This is contrary to the legislative intent plainly expressed in our statute. The limitation begins to run from the "date of the wrongful act complained of and no other time." Ark. Code Ann. § 16-114-203 (1987).

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[1] "Although the word 'discovery' is used in these cases, the principle differs from that of the true discovery doctrine. This type of discovery operates to the disadvantage of the plaintiff since it shortens the time allowable for him to sue, whereas the typical discovery rule operates to the disadvantage of the defendant, since it lengthens the time for plaintiff to sue." 1 D. Louisell and H. Williams, *Medical Malpractice* § 13.08 n. 89 at 13-36 (1982).

[2] The discovery rule finds that the cause of action accrues at the time the wrong was or should have been discovered, rather than at the time of the wrongful act. See, 1 D. Louisell and H. Williams, *Medical Malpractice* § 13.08 (1982).

In contrast to the so-called continuing tort theory, based on a single negligent act, the continuous treatment doctrine becomes relevant when the medical negligence consists of a series of negligent acts, or a continuing course of improper treatment. The basis for the doctrine is sound.

> The so-called "continuous treatment" rule has been defended on the grounds of fairness as well as on the basis of logic. Certainly it would not be equitable to bar a plaintiff, who for example, has been subjected to a series of radiation treatments in which the radiologist negligently and repeatedly administered an overdosage, simply because the plaintiff is unable to identify the one treatment that produced his injury. Indeed, in such a situation no single treatment did cause the harm; rather it was the result of several treatments, a cumulative effect. From the point of view of the physician, it would seem reasonable that if he had made a mistake, a misdiagnosis for example, he is entitled to the opportunity to correct the error before harm ensues. And, as one court has put it, "It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician.

D. Louisell & H. Williams, *supra.*

Since 1940, there has been a steady trend toward judicial acceptance of the continuing treatment approach. D. Louisell & H. Williams, *supra*; and 2 Pegalis and Wachsman, *American Law of Medical Malpractice* § 6:7 (1981), gives this summary:

> This circumstance is usually dealt with in each state by the so-called 'continuous course of treatment' doctrine. Generally, the cause of action would accrue at the end of a continuous course of medical treatment for the same or related condition even if the negligent act or omission has long since ended.

Jurisdictions adopting the doctrine include *Metzger* v. *Kalke*, 709 P.2d 414 (Wyo. 1985); *Skoglun* v. *Blandkenship*, 134 Ill. App. 3d 628, 481 N.E.2d 47 (1985); *Vinklarek* v. *Cane*, 691 S.W.2d 108 (Tex. Civ. App. 1985); *Sheldon* v. *Sisters of Mercy Health Corp.*, 102 Mich. App. 91, 300 N.W.2d 746 (1980); *Tamminen* v. *Aetna Casualty & Surety Co.*, 109 Wis. 2d 536,

327 N.W.2d 55 (1982); *Lynch* v. *Foster*, 376 So. 2d 342 (La. 1979); *Farley* v. *Goode*, 219 Va. 969, 252 S.E.2d 594 (1979); *Samuelson* v. *Freeman*, 75 Wash. 2d 904, 454 P.2d 406 (1969); *Frazor* v. *Osborne*, 57 Tenn. App. 10, 414 S.W.2d 118 (1966); *Waldman* v. *Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966); *Borgia* v. *City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962); *Hundley* v. *St. Francis Hospital*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958); *Thatcher* v. *De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943); *Hotelling* v. *Walther*, 169 Or. 559, 130 P.2d 944 (1942); *Williams* v. *Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941); *Schmit* v. *Esser*, 183 Minn. 354, 236 N.W. 622 (1931).

Even a jurisdiction which has adhered to the "time of injury rule" for the accrual of a cause of action for medical malpractice, has recognized this theory. Thus, in *Farley* v. *Goode, supra*, the Virginia court found the continuous treatment rule applicable in that instance, recognizing that the treatment should be looked at in its entirety and that within the context of the limitation problem the cause of action was "coextensive with the tortious conduct and that the whole transaction was inherently negligent." Given the rationale behind the rule, and its growing acceptance, we believe its application in appropriate circumstances is proper. Here, there is no question that Mrs. Lane's cause of action falls within this doctrine, nor does Dr. Lane dispute this point. In fact, Dr. Lane tacitly concedes the treatment was improper. The treatment, which began in 1966, was terminated in July 1984 and the action was brought in May, 1985, well within the statute of limitations.

Dr. Lane contends however that Mrs. Lane's addiction was evident in 1978 and that she was aware of the scarring in 1979. It is not enough, however, that Mrs. Lane was aware of an injury. Dr. Lane must show that she knew or should have known there was a wrong. The injury may be readily apparent but the fact of the wrong may lay hidden until after the prescribed time has passed. *Lopez* v. *Sawyer*, 62 N.J. 267, 300 A.2d 563 (1973). "In many cases [the plaintiff] will or should know at the time of or soon after the wrongful act that he has been the victim of negligent medical care; in other settings of fact it may be impossible for him, as a layman, unskilled in medicine, reasonably to understand or appreciate that actionable harm has been

done him." *Waldman* v. *Rohrbaugh, supra.* To this same effect, *see generally*, 61 Am. Jur. 2d, Physicians § 321 (1981).

Under the facts in this case, we cannot say the trial court was wrong. Initially we note that Dr. Lane has incorrectly characterized the evidence as to Mrs. Lane's addiction. There was no testimony that at some given point, she became addicted. In fact, the testimony cited by Dr. Lane underscores the difficulty of determining at what point Mrs. Lane became addicted. In any case, the witnesses could only say that after some point in time, about 1979, that appellee was in fact addicted. There is no evidence Mrs. Lane knew her condition was attributable to malpractice. And while it might be argued that she must have realized she was drug-dependent, we cannot say she knew the cause of her condition in a legal sense. Absent any testimony, expert or otherwise, on Mrs. Lane's knowledge of her addiction or its cause, particularly where her dependency occurred at the hands of a physician and was perpetuated by his treatment, we cannot say she knew, or should have known, the treatment constituted medical malpractice. Furthermore, we are not inclined to hold that a physician, aware of a patient's drug dependency, may nurture the habit and continue to be the provider over a period of years and then successfully contend the patient should have brought the action earlier.[3]

Similarly, while Mrs. Lane was aware of the scarring in 1979, there was no evidence she knew at the time it was due to negligence by Dr. Lane, nor anything to suggest she should have known it was other than a necessary consequence of the treatment she was receiving for her migraine headaches.

The trial court was correct in refusing to find the statute of limitations was a bar to the action in this case.

Affirmed.

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[3] The evidence showed that Dr. Lane was aware of Mrs. Lane's dependency, prior to 1980, that in 1984 Dr. Lane did refuse to continue Mrs. Lane's treatment, and it was shortly after that that she sought outside help for drug-related problems.

HICKMAN, J., dissents.

George R. KENNEDY, Jr., d/b/a Kennedy Well Works
v. Butch KELLY

87-364 751 S.W.2d 6

Supreme Court of Arkansas
Opinion delivered June 6, 1988

Lonnie Paul Gehring, for appellant.

Raymond R. Abramson, for appellee.

DAVID NEWBERN, Justice. This is a garnishment case. The appellant, George R. Kennedy, Jr., obtained a judgment against Robert Nash. Kennedy then filed a garnishment proceeding against the appellee, Butch Kelly, to ascertain and obtain any assets of Nash in Kelly's hands. On February 18, 1986, a default judgment was entered against Kelly because he failed to answer the garnishment process in time. Execution of the judgment against Kelly was delayed while the court considered various post trial motions. On July 29, 1986, the United States District Court for the Eastern District of Arkansas decided *Davis* v. *Paschall*, 640 F. Supp. 198 (E.D. Ark. 1986).

The *Davis* case was completely separate from this one and involved other facts and other parties. There the federal court decided that, because the Arkansas garnishment law, then codified as Ark. Stat. Ann. §§ 31-501 through 31-524 (Repl. 1962 and Supp. 1985), did not provide for notice to the original debtor of garnishment proceedings to collect his debt, it violated the debtor's right to due process of law as prescribed by the Fourteenth Amendment. The judgment against Kelly remained unexecuted, and he filed a "motion for declaratory judgment" in the circuit court asking that the Arkansas garnishment law be declared unconstitutional and the proceedings against him declared void, citing the *Davis* case. The motion was granted.

The parties have argued various procedural points as well as the issue whether the *Davis* decision should have been applied retrospectively to the facts in this case. We find, however, that the case should be decided on another point argued, that is, whether the *Davis* decision did away with the entire Arkansas garnishment procedure or only affected cases in which a debtor complained of lack of notice. We reverse the decision of the circuit court because we agree with the appellant's contention that the federal court's holding was that the garnishment procedure was unconstitutional solely due to lack of notice to the debtor and that a garnishee has no standing to raise that issue.

1. The Davis decision

The rationale of the district court's opinion was that a debtor had the right to notice so he could see to it that his property in the hands of another was not being erroneously taken. The primary example used by the court was a taking despite exemption of the property from garnishment under federal law. The portion of the district court's conclusion relevant to this case was: "Defendant Marjorie Paschall [the clerk who had issued the garnishment process] is enjoined from issuing writs of garnishment which do not comply with the findings and conclusions in this Memorandum and Order, as Ark. Stat. Ann. § 31-501, *et seq.* (Repl. 1962) is unconstitutional as violative of the Fourteenth Amendment. . .[640 F. Supp. at 203]."

While the district court used the inexact reference "*et seq.*" to a number of statutes as being unconstitutional, the district court's language preceding the statutory reference shows that the injunction applied only to garnishment proceedings not in compliance with the decision. In other words, the court did not hold unconstitutional the entire Arkansas garnishment scheme. Garnishments giving proper notice to debtors were to be permitted. The district court even entered a subsequent amended consent judgment stating the notice to debtor language necessary to satisfy the Fourteenth Amendment. *Davis* v. *Paschall*, No. PB-C-85-378 (E. D. Ark., Pine Bluff Div. Sept. 10, 1986).

Before concluding this portion of our opinion, we note that the general assembly corrected the constitutional notice deficiency in the garnishment statutes. Ark. Code Ann. § 16-110-402 (1987).

2. Standing

As the district court concluded that the garnishment procedure was unconstitutional only as it affected the rights of debtors, it was error for the circuit court, on the basis of the district court's decision, to vacate the default judgment upon the motion of a garnishee. Nash, the debtor, did not raise any question about notice or unconstitutionality. Kelly, the garnishee, had no standing to assert Nash's right to due process. Constitutional rights, including due process guarantees, are personal and may not be asserted by a third party. *Broadrick* v. *Oklahoma*,

413 U.S. 601 (1973); *Ford Motor Credit Co.* v. *Rogers*, 285 Ark. 65, 685 S.W.2d 145 (1985). There is a narrow exception to the rule for cases in which the issue would not otherwise be susceptible of judicial review and it appears that the third party is sufficiently interested in the outcome that the interest of the party whose constitutional rights were allegedly deprived would be adequately represented. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Cox* v. *Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981). The exception does not apply here.

We have also recognized that a garnishee may not ordinarily plead a defense which concerns the debtor only, with respect to the validity of the garnishment proceedings or the creditor's claim against the debtor. *See Rhode Island Ins. Co.* v. *Boatright*, 186 Ark. 796, 56 S.W.2d 173 (1933).

Reversed and remanded.

Ronald Bernard WILSON *v.* STATE of Arkansas

CR 87-125 751 S.W.2d 734

Supreme Court of Arkansas
Opinion delivered June 6, 1988
[Supplemental Opinion on Rehearing July 11, 1988.]

William R. Simpson, Jr., Public Defender; *Deborah R. Sallings*, Deputy Public Defender; *Arthur L. Allen*, Deputy Public Defender; and *Didi Harrison*, Deputy Public Defender, by: *William R. Simpson, Jr.*, Public Defender, and *Deborah R. Sallings*, of counsel, for appellant.

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

DAVID NEWBERN, Justice. The appellant, Ronald Bernard Wilson, was convicted of nine felony counts including capital felony murder. All of the offenses occurred in a period of a few hours. He was given a variety of sentences in addition to death by lethal injection for the capital felony murder.

A woman was found dead in her home on July 18, 1987. Her employer had become concerned when she did not appear at her job, and her mother was notified. The decedent's mother found her in her bed. According to the medical examiner's testimony she had died of strangulation. A plastic telephone cord had been tied around her neck, and her hands and feet were bound. The medical examiner found a contusion on her tongue caused by a gag. He testified it would have taken from two to eight minutes for her to die of strangulation. There was evidence she had been raped. In a statement to the police, Wilson admitted going into the home of a woman on the evening of July 17, 1987, telling her to go to the bedroom, which he said she did without resistance, tying a plastic cord from her telephone around her neck, taking necklaces, a handgun, and her car and leaving the house.

Wilson also admitted that, in the early morning of July 18, he approached another victim who was outside a car in an apartment house parking lot. He used the handgun he had stolen to force her into the car he had stolen, drove her to another parking lot where he said she engaged in consensual sexual intercourse with him. This second victim testified that she was beaten into unconsciousness or semi-consciousness and came to while Wilson was attempting to effect intercourse with her on the hood of a car. She testified she was left naked in the parking lot and ran to a nearby building where she received help. She later underwent surgery for a blood clot on her brain which seriously threatened her life but from which she recovered.

In this appeal Wilson does not challenge any of the convictions or sentences other than the sentence to death. He contends Ark. Code Ann. § 5-4-604(8) (1987) is unconstitutionally vague and contains no guidelines to channel a jury's discretion in deciding whether an aggravating circumstance exists because the crime was "especially heinous, atrocious or cruel." He also argues that even if the statute is upheld, the evidence does not support the jury's finding that the murder of which he was convicted was

"especially heinous, atrocious or cruel." Finally, he contends the court erred in allowing the prosecutor to argue improperly in the sentencing phase of his trial.

We set aside the death sentence and reduce it to life without parole because we agree the statute is unconstitutional. As modified, the judgment will be affirmed unless, within seventeen days of this decision, the Attorney General of Arkansas moves for a new trial, in which case a new trial will be granted.

1. The statute

In *Furman* v. *Georgia*, 408 U.S. 238 (1972), the Supreme Court held that the death penalty was unconstitutionally exercised in two Georgia cases and one from Texas in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Each Justice wrote an opinion. From the five opinions concurring in the result, it appears that the court's concern was that the death penalty was being applied arbitrarily because those empowered to impose the sentence had too much discretion, resulting in the wrong kind of selectivity, *i.e.*, selectivity based on factors such as race, sex, and economic status. Thereafter state legislatures enacted statutes which narrowed the sentencing discretion. In 1975, the Arkansas General Assembly enacted laws requiring the jury which convicts one accused of capital murder to hear additional evidence. If the jury unanimously concludes that aggravating circumstances exist beyond a reasonable doubt, that they outweigh mitigating circumstances beyond a reasonable doubt, and that the aggravating circumstances justify a death sentence, then the death sentence shall be imposed. *See* Ark. Code Ann. §§ 5-4-601 through 5-4-603 (1987 and Supp. 1987). Prior to 1985, seven specific aggravating circumstances which the jury could consider were specified in a statute, now codified as Ark. Code Ann. § 5-4-604(1) through (7) (1987). They are:

> 5-4-604 Aggravating circumstances.
>
> Aggravating circumstances shall be limited to the following:
>
> (1) The capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) The capital murder was committed for pecuniary gain; or

(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

In 1985, an eighth aggravating circumstance was added as § 5-4-604(8). It permits the jury to consider whether "[t]he capital murder was committed in an especially heinous, atrocious, or cruel manner."

The jury in this case found the aggravating circumstances stated in § 5-4-604(3) and (8). Against these, it balanced its finding of mitigating circumstances which were that Wilson committed the murder while his ability to conform his conduct to the law and to appreciate the wrongfulness of his conduct was impaired by mental disease or defect, and he had demonstrated the ability to adjust to penal institutions and contribute to society though incarcerated.

The jury concluded that the aggravating circumstances outweighed the mitigating circumstances and justified a death sentence beyond a reasonable doubt. The question presented is whether, by permitting consideration of whether the murder was "especially heinous, atrocious, or cruel," and allowing a death sentence to be based upon that determination, the general assembly has taken us back to the way the law was before 1975

and permitted standardless death sentencing.

In *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the Supreme Court considered a case in which the same language as appears in our § 5-4-604(8) was used as an aggravating circumstance to justify a death sentence. The Supreme Court was apparently unwilling to say the language of the Florida statute passed constitutional muster. Rather, the court looked to the manner in which the language had been interpreted by the Supreme Court of Florida and said:

> That court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. [428 U.S. at 255-256, citations omitted]

In *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Supreme Court reached a similar decision with respect to language of a Georgia aggravating circumstance statute, relying not on the language of the statute to give guidance to the sentencer, but upon the gloss to be added by the Georgia courts. The Georgia statute provided as an aggravating circumstance that the murder was "outrageously wanton and vile, horrible and inhuman." The Supreme Court upheld the imposition of the death sentence, stating that it had no reason to fear that the Georgia Supreme Court would give the words an "open-ended" meaning. However, in *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), apparently the Georgia Supreme Court did just that and approved a death sentence upon finding that it was "outrageously wanton and vile, horrible and inhuman" without further explanation, and the Supreme Court reversed. In doing so, the Supreme Court said:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly

> vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.
>
> The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code § 27-2537(c)(2) (1978). [446 U.S. at 428-429]

We could, in the case before us now, adopt language to describe what we may think the general assembly meant when it adopted § 5-4-604(8), and perhaps that would satisfy the Supreme Court that we, like the Florida Supreme Court, will so construe the words, "especially heinous, atrocious, and cruel," as to make them meaningful to a jury in its deliberation. Perhaps we could dwell on the conscious feelings of the victim of the crime as it was being perpetrated. We might also refer to the common revulsion felt by any person when confronted by the thought of strangulation, which was the method of death in this case. Or, we might look to the perpetrator and consider whether he was engaged in a rampage, as in this case, or only committed the one crime of murder. There are any number of circumstances to which we might refer in determining what "especially heinous, atrocious, or cruel" means. That is part of the problem. If we begin to adjudicate this issue in each case at this level we are likely to wind up displaying the very sort of inconsistency the Constitution requires us to avoid, as did the Oklahoma Court of Criminal

Appeals. In *Cartwright* v. *Maynard*, 822 F.2d 1477 (10th Cir. 1987), the Oklahoma court's attempts to give meaning to these same words were reviewed and found woefully various. It was held that there must be some objective standard, otherwise "the meaning that the sentencer attache[s] to this provision 'can only be the subject of sheer speculation,' " [822 F.2d at 1486, quoting *Godfrey* v. *Georgia, supra*, at 429].

The words "especially heinous, atrocious or cruel" can mean nearly anything. The jury in this case received no guidance whatever in defining them, and for us to give them meaning now would not only be after the fact of the sentencing in this case, but would constitute raw legislation. Even though the Supreme Court might approve this death sentence on the basis of our showing that we intend to interpret the statutory language so that it will mean something beyond the words used, we are unwilling to supplant the general assembly.

The Supreme Court has transformed the supreme courts of Georgia and Florida into legislative bodies by refusing to approve the broad language of the Georgia and Florida statutes without the limiting words added by case interpretation and simultaneously declining to disapprove the language as too vague or overbroad. The Arkansas constitution provides for three separate branches of government: legislative, executive, and judicial. While we usually have no hesitancy in interpreting the words of plain meaning used by our legislature, we must decline the invitation of the Supreme Court to bald intervention, especially when we have no better idea than the jury in this case could have had as to the meaning of the words used by § 5-4-604(8).

In Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941 (1986), it is reported that of the 37 states approving capital punishment, 24 have an aggravated circumstance provision similar to the one being considered here. Eight states have statutes with the same language as our statute. The author reviews the decisions made pursuant to those provisions and convincingly demonstrates that they provide no guidance whatever to the sentencer, as the cases show that virtually any consideration may fall within such broad language.

Unlike the Mississippi Supreme Court, *see Washington* v.

State, 361 So. 2d 61 (Miss. 1978), *cert. denied*, 441 U.S. 916 (1979), we are unwilling to say that jurors will know it when they see it when considering the "especially heinous" standard. The Mississippi Supreme Court takes the matter full circle. It cites *Gregg* v. *Georgia, supra*, in which the Supreme Court expressed its confidence in the Georgia Supreme Court's interpretation of Georgia's broad and vague aggravating circumstance statute and quotes language from that opinion approving generally the concept of jury sentencing in death penalty cases. The Mississippi court then expresses its confidence that jurors will know the meaning of the words of the statute.

We have no idea why the Supreme Court denied certiorari in *Washington* v. *State, supra*, but we cannot reconcile that decision with *Furman* v. *Georgia, supra*, or with *Godfrey* v. *Georgia, supra*. It is not even consistent with *Proffitt* v. *Florida, supra*, or *Gregg* v. *Georgia, supra*, as it does not meet the requirements of those cases that the broad, vague statutory language be narrowed and clarified by appellate judicial decision.

This court has committed itself to comparative review of death sentence cases to assure evenhandedness in the application of the death penalty in this state. *See Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), and *Collins* v. *State*, 280 Ark. 312, 657 S.W.2d 546 (1983), concurring opinion of Hickman, J., 280 Ark. at 316, (not found in S.W.2d). That review must occur after a properly instructed jury has made its decision to apply the death penalty based upon instructions it can understand which are, in turn, based upon laws which circumscribe the jurors' death sentencing discretion. If the law limiting the death penalty to cases in which the jury finds, based upon sufficient evidence, that aggravating circumstances exist, that they outweigh mitigating circumstances, and that they compose a sufficient basis to apply the death penalty, then perhaps our comparative review of death sentences will result in no reversals whatsoever. Before that can occur, however, the jurors must, in the words of *Godfrey* v. *Georgia, supra*, have their "preconceptions . . . dispelled by the trial judge's sentencing instructions."

As we are holding § 5-4-604(8) to be too broad and vague to be sustained under the Eighth and Fourteenth Amendments to the United States Constitution, we need not consider the other

points raised by Wilson except as they may be relevant in the event there is a new trial. His argument with respect to whether his conduct could be described as fitting the statute becomes moot.

2. Improper argument

In his closing argument in the sentencing phase of the trial, the prosecutor asked the jurors to impose the death penalty and to "tell Ron Wilson he will never commit another murder." The court's ruling refusing to "do anything" about the remark was discretionary, and in the absence of an abuse of discretion, will not be reversed. *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233 (1986). We find no abuse of discretion. The request was made in the context of urging the jurors to act as a group in imposing the sentence. In context, it did not suggest that there was evidence from which it could be determined that Wilson would kill again. We find no abuse of discretion.

The sentence to death by lethal injection is set aside and reduced to a sentence to life imprisonment without parole. However, if the Attorney General of Arkansas petitions for a new trial within seventeen days from this decision, a new trial will be granted.

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

HAYS, J., concurs.

STEELE HAYS, Justice, concurring. I concur in the reduction of the sentence, conditioned on the right of the State to retry the appellant, on the grounds that Ark. Code Ann. § 5-4-604(8) (1987) is unconstitutionally vague and overbroad as applied in this case.

JACK HOLT, JR., Chief Justice, dissenting. I respectfully disagree with the majority and would affirm Ronald Bernard Wilson's conviction and the sentence of death.

The majority acknowledges that in *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the Supreme Court considered a case in which the same language that appears in Ark. Code Ann. § 5-4-604(8) (1987) was used as an aggravating circumstance to justify the death sentence. However, the majority then states that the Supreme Court was apparently unwilling to say that the language

of the Florida statute passed constitutional muster. To the contrary, the Supreme Court approved the Florida statute as interpreted by the Supreme Court of Florida. In *Proffitt, supra,* the Supreme Court concluded: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." We, in Arkansas, have the same latitude as the Florida courts to interpret and construe our own statute.

The Supreme Court has approved the language of a statute identical to ours. We have a duty and a responsibility to support its ruling and to uphold our statute as noted in Associate Justice Hickman's dissent.

DARRELL HICKMAN, Justice, dissenting. The first duty and responsibility of this court is to uphold our statute, if possible. *See Phillips* v. *Giddlings*, 278 Ark. 368, 646 S.W.2d 1 (1983); *State* v. *Ruiz*, 269 Ark. 331, 602 S.W.2d 625 (1980). Rather than do that, the majority has instead chosen to be critical of the way the United States Supreme Court has dealt with the question. The majority has not even tried to uphold the constitutionality of the statute, because if it had, it would find ample authority to do so.

The United States Supreme Court has held the exact language in our statute to be constitutional, and there was no equivocation by the court in its decision. *See Proffitt* v. *Florida*, 428 U.S. 242 (1976). The Supreme Court of Florida used the following language to describe the heinous crime: "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *See Proffit* v. *Florida, supra; Alford* v. *State*, 307 So. 2d 433 (Fla. 1975).

Since that definition or standard has been approved by the Supreme Court of the United States, it simply makes good sense for us to adopt it as our standard. Just as we compare death sentences on appeal, we could apply this standard to each case in which the jury finds the aggravating circumstance in question to exist. *See Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977). Mississippi easily found that its juries could understand what an especially heinous crime is, and I have no doubt that Arkansas juries can also decide if a crime is especially heinous, atrocious, or cruel. *See Washington* v. *State*, 361 So. 2d 61 (Miss. 1978), *cert. denied*, 441 U.S. 916 (1979).

The majority says if it attempts to do its duty, it might end up like the Oklahoma court with inconsistent decisions. The majority also engages in a good deal of intellectual wool gathering and has created an intellectual legal fog where none exists. The fact is that the majority's decision is without precedent and contrary to every decision every court has made regarding the question, which is: can the phrase "especially heinous, atrocious, or cruel" be understood and applied by jurors, and applied according to some acceptable standard by the courts? The answer in every case thus far has been yes. The majority's decision seems to be based on a law review article, a federal appeals court decision saying Oklahoma will not do what it said it would do, and a refusal to face the fact that the United States Supreme Court has said this language is not unconstitutionally vague.

The law cannot always be tied into a neat package for display in the parlor of nice people; sometimes it has raw edges. Our duty is to take it as we find it, not as we would like it to be. We should remember we are an appellate court, not a debating society. This is not a matter of what this court cannot do, it is what this court will not do, which I respectfully submit is its duty.

Regarding the crime committed by Wilson in this case, it was undoubtedly especially heinous, atrocious and cruel. Wilson casually strangled his victim after he raped her. She did not die instantly but lived for several minutes. Her suffering had to be immeasurable with her brain exploding in fear, terror, and pain; her last moments were cruel beyond comparison. It was by any measure a pitiless crime and the victim was unnecessarily tortured. Within hours, Wilson sought out another victim, beat her senseless and raped her.

Ronald Wilson received a fair trial and was sentenced to die under laws that are constitutional. By all rights he should pay the penalty the law requires.

I would affirm his conviction and the sentence of death.

GLAZE, J., joins in the dissent.

SUPPLEMENTAL OPINION ON REHEARING
JULY 11, 1988

752 S.W.2d 762

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

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

DAVID NEWBERN, Justice. The state has asked whether our decision to vacate the death sentence unless a new trial were sought within seventeen days meant a request for a full new trial or a resentencing only. Our opinion contemplated a request by the state to be made in this court for a full new trial. However, in its petition the state has called to our attention the provisions of Ark. Code Ann. § 5-4-616 (1987) which permit this court to remand to the trial court when a death sentence is vacated solely on the ground of error in the sentencing proceeding. The statute provides, in pertinent part:

> Notwithstanding § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply:
>
> (1) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced. No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony. When a capital case is remanded after vacation of a death sentence, the prosecutor may:

(A) Move the trial court to impose a sentence of life without parole, and the trial court may impose such sentence without a hearing;

(B) Move the trial court to impanel a new sentencing jury.

As we found no error other than in the sentencing phase of the trial, it is appropriate to follow the statute. We therefore modify the mandate of our opinion as follows: The sentence of death is vacated, and the case is remanded to the trial court.

Howard D. DAVIS *v.* STATE of Arkansas

RC 88-31 750 S.W.2d 60

Supreme Court of Arkansas
Opinion delivered June 6, 1988

Robert Meurer, for appellant.

No objection.

PER CURIAM. Petitioner Howard D. Davis, by his attorney, has filed a second motion for a rule on the clerk. His attorney, Robert Meurer, 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.

William ROBINSON, Jr. *v.* STATE of Arkansas

CR 86-108 751 S.W.2d 335

Supreme Court of Arkansas
Opinion delivered June 6, 1988

[redacted]

William Robinson, Jr., pro se.

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

PER CURIAM. The petitioner, William Robinson, Jr., was convicted of two counts of aggravated robbery and sentenced to two concurrent terms of forty years. We affirmed. *Robinson* v. *State*, 291 Ark. 212, 723 S.W.2d 818 (1987). The petitioner has filed a petition and a motion to amend the petition, seeking permission to proceed in circuit court for postconviction relief.

The petitioner has alleged fifteen grounds for postconviction relief. In a thirty-nine page petition, the following grounds could have been raised in trial or on appeal but were not: Points one, two and three, which allege that the petitioner was illegally arrested and denied counsel at a critical stage of the proceeding; point eight, which alleges that it is unconstitutional to force him to choose between his right to testify and the state's burden to prove the existence of his prior convictions beyond a reasonable doubt; points nine and ten, which allege the unconstitutionality of the trial court's determining the number of prior convictions for sentence enhancement purposes; and point thirteen, which alleges that three of the four convictions used to enhance his sentence were invalid. Rule 37 does not provide a remedy when an issue could have been raised in the trial court or on appeal, unless the issue presents a question so fundamental that the judgment of conviction is rendered absolutely void. *White* v. *State*, 290 Ark. 77, 716 S.W.2d 203 (1986); *Collins* v. *State*, 271 Ark. 825, 611 S.W.2d 182, *cert. denied*, 452 U.S. 973 (1981).

Points four, five, and six all allege that the state presented insufficient evidence to prove the crimes charged. The

petitioner also claims his attorney was ineffective in not challenging the insufficiency of the evidence. Challenges to the weight and sufficiency of the evidence are direct attacks on the conviction and, consequently, may not be raised in Rule 37 petitions. *McCroskey* v. *State*, 278 Ark. 156, 644 S.W.2d 271 (1983). Nor can the argument be raised by way of an allegation of ineffective assistance of counsel. *Guy* v. *State*, 282 Ark. 424, 668 S.W.2d 952 (1984).

In point eleven the petitioner alleges that after the trial he learned from a juror that during the deliberations the jury speculated as to why the petitioner did not testify. Without discussing the impropriety of attempting to go behind the jury's verdict, we note that the petitioner has not demonstrated that the jury considered any extraneous prejudicial evidence.

In point twelve, the petitioner challenges our standard of review on appeal with respect to several points including circumstantial evidence and the credibility of witnesses. Rule 37 is not the equivalent of either a second appeal or a petition for rehearing.

In point seven, the petitioner claims that his attorney was ineffective in advising him not to testify. He states that his attorney told him that if he testified that he would be cross-examined as to his prior felony convictions. He claims that he would have testified except for this advice, and that if the state was allowed to impeach him with prior felonies, that would be unconstitutionally relieving the state of its burden of proving the existence of prior felonies beyond a reasonable doubt for purposes of sentence enhancement.

To prove ineffective assistance of counsel, the 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. 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. *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The state has the right to impeach a witness's credibility with prior convictions. A.R.E. Rule 609. Such ques-

tions would not shift the burden of proof. The questions are used to impeach credibility not to prove the existence of prior convictions. For purposes of sentence enhancement, prior convictions are proven by judgments during the punishment phase of the trial. Ark. Code Ann. § 5-4-502 (1987) [Ark. Stat. Ann. § 41-1005 (Repl. 1977)]. The accused has the right to choose whether to testify in his own behalf. *Moore* v. *State*, 244 Ark. 1197, 429 S.W.2d 122 (1968). Counsel may only advise the accused in making the decision. *Watson* v. *State*, 282 Ark. 246, 667 S.W.2d 953 (1984). The decision to testify is purely one of strategy and therefore, not reviewable under Rule 37. *Isom* v. *State*, 284 Ark. 426, 682 S.W.2d 755 (1985).

The petitioner also faults his attorney for not objecting to the circumstances of his arrest. He states that his arrest warrant was not issued by a magistrate, that he was denied an attorney at the probable cause hearing, and that a statement he gave was the product of the illegal arrest. The arrest warrant is not in the record nor were any facts testified to with regard to the arrest or the probable cause hearing. However, the only fruits of the arrest were the petitioner's two statements and both of those were exculpatory. Therefore, even if the petitioner's allegations are true he has shown no prejudice.

The petitioner claims that his attorney should have objected to the following jury instruction:

> [The petitioner] is charged with two counts of the offense of aggravated robbery. To sustain these charges the state must prove the following things beyond a reasonable doubt as to each count:
>
> First: That, with the purpose of committing a theft, [the petitioner] employed or threatened to immediately employ physical force upon another; and
>
> Second: That [the petitioner] was armed with a deadly weapon or represented by words or conduct that he was armed with a deadly weapon.

The petitioner argues that the jury should have been instructed to find guilt only if it found that he was actually armed with a deadly weapon since that was what the information charged. He contends that merely representing that one is so armed is a totally

different offense and that he was "surprised" by the instruction. The instruction tracks AMCI 2102 and the armed robbery statute, Ark. Code Ann. § 5-12-103(a)(1) (1987) [Ark. Stat. Ann. § 41-2102(1)(a) (Repl. 1977)]. One victim testified that his assailant was armed with a knife and the other was threatened with a hammer. Therefore, there would have been no basis for an objection by counsel.

The petitioner claims that his counsel was remiss in not seeking a continuance in order to interview certain witnesses who could have offered alibi testimony and explain why there was a hammer and knife missing from the petitioner's home. The petitioner fails to provide us with the names of the witnesses or the substance of what their testimony would have been; therefore, we will not consider the argument. *See Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984).

Finally, the petitioner alleges that our determination of the merits of his claims in this petition denies him due process and equal protection and that we should only determine whether his claims are cognizable under Rule 37. The petitioner does not provide convincing argument or authority for this novel theory. There is no constitutional right to a postconviction proceeding; but when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. *Pennsylvania* v. *Finley*, 481 U.S. ___, 107 S. Ct. 1990 (1987). Our requirement that a petition meet certain threshold requirements to gain permission to proceed in circuit court is fundamentally fair.

The petitioner asks that allegations of ineffective assistance of counsel be attached to all of the grounds in his petition. As we stated before, to warrant relief on allegations of ineffective assistance of counsel, the petitioner must show prejudice to the degree that the outcome of the trial was unreliable. A petitioner must meet the heavy burden of showing that counsel's conduct was outside the wide range of reasonably professional assistance and sufficiently deficient to have denied petitioner a fair trial. *Strickland* v. *Washington, supra.* The petitioner's broad request fails to shows, within each of the grounds, how counsel's conduct was deficient and how that deficiency affected the outcome of the trial.

The petitioner has filed a motion to amend asking that he be allowed to supplement or amend if there is a technical deficiency which would foreclose a hearing on any of the issues. The motion does not provide us with any additional support for his claims which would convince us to grant the petition.

The petitioner has also filed a motion asking that he be appointed counsel. Since postconviction proceedings under Rule 37 are civil in nature there is no constitutional right to appointment of counsel to prepare a petition under Rule 37. *Fretwell* v. *State*, 291 Ark. 221, 718 S.W.2d 109 (1986). Rule 37.3 provides for the appointment of counsel by the circuit court where a hearing is granted and where the petitioner is unable to afford counsel.

Petition and motions denied.

Michael SMITH *v.* STATE of Arkansas

CR 87-123 750 S.W.2d 61

Supreme Court of Arkansas
Opinion delivered June 6, 1988

PER CURIAM. A Show Cause Order was issued by this court ordering appellant's counsel, Roger T. Jeremiah, to appear and show cause why he should not be held in contempt of this court for failing to comply with this court's order to file appellant's brief by a specified time.

The record in this matter was filed on June 19, 1987, and appellant's brief was originally due on July 29. On July 27, appellant's counsel filed a motion to extend the brief time due to his considerable case load. That motion was granted, and appellant was given until August 31 to file his brief. Between August 1987 and January 1, 1988, counsel filed a total of eight motions to extend brief time. Each was granted.

Between January and April 1988, counsel filed eight additional motions to extend. This court entered an order on April 27, 1988, granting a final extension until May 9, 1988. Counsel admits receiving a copy of the court's order of April 27, 1988, granting a final extension until May 9, 1988, yet counsel failed to file his brief within the required time. On May 9, 1988, counsel responded by filing another motion to extend. The brief was tendered to the clerk of the court on May 26, 1988.

Counsel Roger T. Jeremiah appeared before this court Tuesday, May 31, 1988, and admitted the facts stated in the Show Cause Order issued by this court were true and correct. He further stated that he neglectfully failed to file his brief within the time specified by the court and extended to the court his apology.

The appellant's counsel, Roger T. Jeremiah, is held in contempt of this court and fined $250.00.

[redacted]

[redacted]

[redacted]

[redacted]