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Tony ADDISON *v.* STATE of Arkansas

CR 87-176 765 S.W.2d 566

Supreme Court of Arkansas
Opinion delivered February 20, 1989

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

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

JACK HOLT, JR., Chief Justice. In three separate trials which have been consolidated for this appeal, appellant Tony Addison was convicted of three counts of rape, three counts of burglary, one count of robbery, and one count of theft of property and sentenced to a total of life plus 200 years. For reversal he argues that the trial court erred in refusing to suppress certain custodial statements made to police in that these statements were taken in violation of the fifth amendment; that it erred in refusing to suppress the statements, photographs of him, and in-court identifications because this evidence was taken in violation of the fourth amendment; and that his due process right to a fair trial was denied in that his trial proceeded despite there being a bona fide question as to his mental fitness. We find no error and affirm the trial court.

In September, October, and November of 1986, four women were raped in the area of Little Rock known as the Quapaw

Quarter. Officers who patrolled the area were given a description of the suspect based upon various victims' reports: black male, 5 feet 6 to 5 feet 8 inches tall, 135 to 160 pounds, in his twenties, a large nose, a "Jeri curl" (a wet, curly hairstyle), and wearing a gold chain.

At 10:40 p.m. on December 5, 1986, Officer Ken Blankenship, while driving in the same general area in which the rapes had occurred, spotted Addison, who fit the general description of the suspect, crossing a street. The officer turned around, stopped Addison, and noticed he wore a gold chain and had a large nose and a "Jeri curl," which was straightening out. Addison did not have any identification, gave the officer several reasons for being in the area, and could not tell him at which address he just had been. As the officer was talking with Addison, two other officers, who were on patrol in the area, walked up and also questioned him. Officer Blankenship told him that he fit the description of the rape suspect and that he was in the same area at the same time in which the rapes had occurred. The officer then asked him if he would mind going to the police station's detective division. Addison replied that he had "no problem with that" and asked if the officers would take him home later. Blankenship responded they would do so as soon as they got through with him. None of the officers informed him that he had no legal obligation to go to the station or that he was not under arrest. From the time that the officers first talked to Addison until the time he was transported to the police station was approximately fifteen to thirty minutes.

Upon Addison's arrival at the station at around 11:00 p.m., Detective Ronnie Smith advised him that he was there voluntarily. Smith then questioned him concerning the series of rapes. The only statement that he gave at this time was that he did not rape anyone. Thereafter, Addison agreed to be fingerprinted and photographed. He was then taken home. During the one-hour period in which Addison was at the station, he was never told that he was free to leave or that he was not under arrest.

Subsequently, police officers took a photo spread, which included Addison's photograph, to one of the victims, who positively identified Addison as her attacker. After an arrest warrant was prepared, the police arrested him at 1:35 a.m. at his home. The police advised him of his rights via a standard Little

Rock Police Department advice of rights and waiver form. Thereafter, the police took him to the station. From approximately 2:00 until 5:30 a.m., Addison confessed to the crimes in separate signed statements, each preceded by a standard rights warning. Later in the day, he was identified by the victims in a live lineup.

*FIFTH AMENDMENT RIGHTS*

Addison contends that his statements should have been suppressed on the grounds they were taken in violation of his fifth amendment rights under the United States Constitution as (1) the rights warning failed to inform him that he could have an attorney present even if he could not afford one and (2) under the totality of the circumstances, the statements were not freely and voluntarily given. We hold to the contrary.

Addison signed the following rights waiver form before each of his confessions was taken:

> I, Tony Addison, date of birth 01/23/67, now live at 2910 Fulton. I have been advised that I am a suspect in a rape, that I have the right to use the telephone, that I have the right to remain silent, that I have the right to talk to an attorney, either retained by me or appointed by the Court, before giving a statement, and to have my attorney present when answering questions. I have also been advised if I waive these rights, I have the right to stop the interrogation at any time. Also, that any statement I give will be used in a Court of Law against me. I have read the above statement of my rights and I understand them. No promises or threats have been made to induce me into making a statement.

In *Mayfield* v. *State*, 293 Ark. 216, 736 S.W.2d 12 (1987) (U.S. appeal pending), we held that an almost identical waiver form was deficient in that it did not advise the appellant that if he were indigent, he could have a lawyer free of charge. However, failure to give an appropriate warning does not automatically require reversal. In his motion to suppress, Addison did not question the sufficiency of the rights form. Rather, he asserted that his statements were not freely and voluntarily given after an intelligent waiver of his constitutional rights. Since this matter is

being raised for the first time on appeal, we will not consider it. *See Barnes* v. *State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

In determining whether Addison's statements were voluntarily and freely given, we make an independent review of the totality of the circumstances and will reverse only if the trial court's findings are clearly against the preponderance of the evidence. *Hurst* v. *State*, 296 Ark. 448, 757 S.W.2d 558 (1988); *McDougald* v. *State*, 295 Ark. 276, 748 S.W.2d 340 (1988); *Scherrer* v. *State*, 294 Ark. 227, 742 S.W.2d 877 (1988). The burden is on the State to show that the confessions were made without hope of reward or fear of punishment. *Duncan* v. *State*, 291 Ark. 521, 726 S.W.2d 653 (1987). Conflicts in testimony are for the trial court to resolve as it is in a superior position to determine the credibility of witnesses. *Id.*

Pursuant to the "totality of the circumstances" approach, we focus on two basic components: the conduct of the police and the vulnerability of the accused. *Scherrer, supra.* Some of the factors that we consider in making the determination of whether a confession was voluntary include the youth or age of the accused, lack of education, low intelligence, lack of advice as to constitutional rights, length of detention, repeated and prolonged questioning, and use of physical punishment. *Id.*; *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985).

Addison was nineteen at the time that he gave the statements and was able to read and write. Although he testified that he signed the statements because he was forced to and did now know he had a choice, Detective Smith testified there was no force or coercion used in the questioning process. The record is devoid of any evidence that the police punished or threatened to punish Addison, promised him leniency if he cooperated, or deceived or tricked him in any way. Although the questioning process lasted approximately three hours, this was justified considering the number of offenses to which Addison confessed.

We are troubled by the fact that law enforcement personnel continue to utilize standardized warning forms which fail to clearly advise a suspect that he has a constitutional right to have an attorney free of charge if he cannot afford one. Although lack of advice of constitutional rights is a significant factor in our determination of whether a confession was voluntary under the

"totality of the circumstances" test, it is not determinative. A confession can be voluntary even if *Miranda* warnings were omitted. *See Michigan* v. *Tucker*, 417 U.S. 433 (1971). *See also Dillard* v. *State*, 275 Ark. 320, 629 S.W.2d 291 (1982).

As noted above, the officers did not use physical force, threats of physical force, or deceit to obtain the statements, nor did they promise Addison leniency if he cooperated. In addition, there is no indication from the record that Addison was inordinately vulnerable. On balance, we cannot say that the trial court's finding that the statements were freely and voluntarily given is clearly against the preponderance of the evidence.

*FOURTH AMENDMENT RIGHTS*

Addison argues that the trial court erred in refusing to suppress his custodial statements, photographs of him, and in-court identifications by the victims on the basis that they resulted from an unlawful stopping and subsequent custodial detention in violation of his fourth amendment rights. It is his contention that these pieces of evidence were tainted fruit of the illegal stopping and detention under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and inadmissible. We disagree.

The fourth amendment guarantees the right of people to be secure against unreasonable searches and seizures. A person has been "seized" within the meaning of the fourth amendment only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. *United States* v. *Mendenhall*, 446 U.S. 544 (1980). *Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987). A seizure pursuant to an arrest or any other detention that severely intrudes upon a person's liberty, such as a custodial interrogation, must be supported either by probable cause or by clear and positive testimony that demonstrates consent. *Id. See Rose* v. *State*, 294 Ark. 279, 742 S.W.2d 901 (1988). *See also Foster* v. *State*, 285 Ark. 363, 687 S.W.2d 829 (1985), *cert. denied*, 482 U.S. 929 (1987). "[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." *Dunaway* v. *New York*, 442 U.S. 200 (1979). *See also Kiefer* v. *State*, 297 Ark. 464, 762 S.W.2d 800 (1989); *Burks, supra.*

Under Rule 3.1, a suspect may be stopped and detained for questioning on reasonable suspicion. *See Terry* v. *Ohio*, 392 U.S. 1 (1968). This rule provides as follows:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

For the purposes of Rule 3.1, "reasonable suspicion" means a suspicion based upon facts or circumstances which give rise to more than a bare, imaginary, or purely conjectural suspicion. Ark. R. Crim. P. 2.1.

The initial stopping of Addison and his detention on the street were permissible since the facts and circumstances known to the investigating officers provided reasonable suspicion that Addison was the perpetrator of the rapes. Ark. R. Crim. P. 3.1. Officer Blankenship testified that Addison fit the description of the rapist, was in the same general area at the time in which the rapes had occurred, had no identification, gave several reasons for being in the area, and could not tell the officers at which address he just had been. These circumstances provided more than a bare, imaginary, or purely conjectural suspicion that Addison was the culprit.

Addison's subsequent detention for custodial interrogation at the police station was not authorized by Rule 3.1 because the rule by its plain language does not contemplate the detention of persons at one place and a subsequent detention at a police station. Moreover, his detention was not in conformity with Ark. R. Crim. P. 2.3.

Ark. R. Crim. P. 2.3 provides as follows:

> If a law enforcement officer acting pursuant to this rule requests any persons to come to or remain at a police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

One of the officers testified that he asked Addison if he would mind going down to the station, to which Addison replied that he had "no problem with that." Addison then asked if the officers would take him home later. An officer responded, "after we get through with you." Another officer stated that he told Addison that he was at the station voluntarily. In either event, none of the officers specifically informed him that he had no obligation to be there or that he could leave if he wanted. Clearly, the officers breached the positive duty mandated by Rule 2.3. *See Burks, supra.*

In light of the authorities' failure to comply with our Rules of Criminal Procedure and the fact that detention for custodial interrogation intrudes so severely on interests protected by the fourth amendment, we conclude that Addison's detention for custodial interrogation constituted a seizure within the meaning of the fourth amendment and thus must be supported either by probable cause or consent. *See Kiefer, supra; Burks, supra.*

Probable cause exists where there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that a crime has been committed by the person suspected. *Id.; Hines* v. *State*, 289 Ark. 50, 709 S.W.2d 65 (1986). Probable cause to arrest without a warrant does not require the quantum of proof necessary to sustain a conviction. *Burks, supra.* The determination of probable cause is based upon factual and practical considerations of everyday life upon which ordinary men, not legal technicians, act. *Hines, supra.* A nontechnical approach correctly balances the competing interests of the individual and society, so that law enforcement officers will not be unduly hampered, nor law abiding citizens left to the mercy of overzealous police officers. *Id.* In making the determination of probable cause, we are liberal

rather than strict. *Sanders* v. *State*, 259 Ark. 329, 532 S.W.2d 752 (1976).

Addison was in the same general area at the time in which the rapes took place, fit the description of the rapist, did not have any identification, gave several reasons for being in the area, and could not tell the officers at which address he just had been. Although Officer Blankenship testified he did not have probable cause to arrest Addison, the issue of probable cause to arrest or detain is a matter of law for this court to determine. In this instance, the evidence established probable cause to support Addison's detention at the station. Since there was probable cause to detain Addison, it is not necessary for us to address the issue of consent.

*RIGHT TO DUE PROCESS*

Addison finally contends that his due process right to a fair trial was denied in that his trial proceeded despite there being a bona fide question as to his mental fitness. We hold to the contrary.

In January of 1987, the appellant pleaded not guilty by reason of mental disease or defect to the charges against him. Pursuant to an order of commitment and evaluation, he was admitted to the Arkansas State Hospital. After a thirty-day observation and evaluation, the hospital reported that Addison appeared to be aware of the nature of the charges brought against him, that he was capable of cooperating with his attorney, and, at the time of the commission of the alleged offense, he did not lack the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. The report also stated that Addison had an adjustment disorder with depressed moods and mixed personality traits. Following this report, Addison was tried on June 17 and July 1, 1987, in separate trials on separate counts. However, prior to a third trial, Addison's attorney indicated that since the July 1st trial, Addison had been experiencing drastic behavior changes. He was noncommunicative, unable to sleep, and having auditory hallucinations.

Based upon this new information, Addison's attorney, prior to trial, asked for a continuance so that Addison could be reexamined at the Arkansas State Hospital. The trial judge

decided he would proceed with the trial and that an evaluation should be made by Dr. Alfred Rosendale, an independent psychiatrist, over the noon hour to determine if Addison needed further evaluation. If so, the judge stated that he would grant a mistrial. Addison's counsel agreed to this procedure.

Dr. Rosendale examined Addison for about an hour and fifteen minutes during recess. Based upon this examination, Dr. Rosendale concluded that Addison was beginning to have auditory hallucinations and was becoming psychotic. However, when asked by the trial judge if Addison was aware of the nature of the charges and proceedings against him and capable of cooperating in his defense, the doctor replied in the affirmative. On cross-examination, the doctor testified that Addison did not meet the definition of insanity under Arkansas law. On the basis of this testimony, the trial judge elected to proceed.

Ark. Code Ann. § 5-2-302 (1987), formerly Ark. Stat. Ann. § 41-603 (Repl. 1977), provides that "[n]o person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist effectively in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures." The conviction of an accused while he is legally incompetent to stand trial violates due process. *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Jacobs* v. *State*, 294 Ark. 551, 744 S.W.2d 728 (1988). In order to be competent to stand trial, a defendant must have the capacity to understand the nature and object of the proceedings brought against him, to consult with counsel, and to assist in the preparation of his defense. *Drope* v. *Missouri*, 420 U.S. 162 (1975); *Jacobs, supra.*

Ark. Code Ann. § 5-2-305(a)(2) (1987), formerly Ark. Stat. Ann. § 41-605(1)(b) (Repl. 1977), provides in pertinent part that whenever a defendant charged in circuit court files notice that he intends to rely upon the defense of mental disease or defect, or there is reason to believe that mental disease or defect will or has become an issue, or there is reason to doubt his fitness to proceed, the trial court, subject to the provisions of §§ 5-2-304 and 5-2-311, shall immediately suspend all further proceedings in the prosecution. Upon suspension of proceedings, the court shall enter an order appointing at least one qualified psychiatrist to make an examination and report on the mental condition of the

defendant. Ark. Code Ann. § 5-2-305(b)(2). This report must include (1) a description of the nature of the examination, (2) a diagnosis of the mental condition of the defendant, (3) an opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense, and (4) an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged. Ark. Code Ann. § 5-2-305(d). If neither party contests the finding in the report, the court may make the determination of the fitness to proceed. Ark. Code Ann. § 5-2-309 (1987). If the finding is contested, the court shall hold a hearing on the issue. *Id.*

On appeal, we affirm where there is substantial evidence to support the trial court's findings concerning a defendant's fitness to proceed. *Smith* v. *State*, 282 Ark. 535, 669 S.W.2d 201 (1984). Substantial evidence is evidence of sufficient force and character to compel a conclusion of reasonable and material certainty. *Id.*

Since there was reason to doubt Addison's fitness to proceed, the trial judge requested that a qualified psychiatrist examine Addison during recess. As noted above, Addison's counsel consented to this procedure. After an hour and a half examination, Dr. Rosendale gave the court an examination report on the mental condition of the appellant as required by § 5-2-305. Since neither party contested the finding of his report, it was for the trial court to determine Addison's fitness to proceed. § 5-2-309. Based upon the report, the trial judge decided that he was fit for trial. We conclude that the judge was in substantial compliance with our code provisions and that there is substantial evidence to support his findings.

Pursuant to Ark. Sup. Ct. R. 11(f), we have made our own examination of all other objections made at trial and find no reversible error.

Affirmed.

Special Justice SAM PERRONI and HICKMAN and HAYS, JJ., concur.

GLAZE, J., not participating.

DARRELL HICKMAN, Justice, concurring. We are unanimous that this case should be affirmed but divided on the reasons.

I write separately, not only to make it clear I do not join the majority opinion, but also to join that part of Justice Perroni's opinion on the stop and the reasonable suspicion application of the A.R.Cr.P. Rules.

His view is essentially parallel to what the law is in this regard. I would not reach the question of probable cause.

HAYS, J., joins the concurrence.

SAMUEL A. PERRONI, Special Justice, concurring. I agree with all aspects of the majority opinion except for its finding on the Fourth Amendment issue. I do not believe there was probable cause to arrest or detain Addison. Moreover, I am of the opinion that the officer's conduct, after the initial stop and detention, did not constitute a seizure which would implicate the Fourth Amendment to the United States Constitution.

On the Fourth Amendment issue, Addison argues that his identification as the rapist and his confessions followed directly and uninterruptedly from an illegal detention by the police and therefore the evidence should have been suppressed. The grounds for suppression urged by Addison are (1) that Officer Blankenship lacked reasonable suspicion to stop him and (2) he was illegally detained after he was stopped by the officer. It is Addison's contention that the evidence sought to be suppressed was tainted fruit of his illegal stop and detention under *Wong Sun v. United States*, 371 U.S. 471 (1963).

*The Stop*

The authority in Arkansas for stopping a suspect absent probable cause is found in Rule 3.1 of the Arkansas Rules of Criminal Procedure. The rule is patterned after the United States Supreme Court's decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968). Rule 3.1 provides as follows:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons

> or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

For purposes of Rule 3.1, "reasonable suspicion" is defined in Rule 2.1 of the Arkansas Rules of Criminal Procedure as follows:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

At this point, an appreciation of the circumstances preceding Addison's stop is important.

Over a nine week period, there were four reported rapes and one attempted rape in the area where Addison was stopped. Four of the crimes were committed on Friday, Saturday or Sunday and all of the crimes were committed in the late evening or early morning.

The victims' identifications of their assailant was uniformly consistent in several respects and the incident involving one victim's husband all but confirmed the fact that the assailant was on foot and acting alone. There was also reason to believe that the assailant had used a fictitious name. Moreover, police protection in the area was obviously increased and they were interested in checking out all possible suspects.

On appeal, Addison argues that the officer lacked reasonable suspicion to stop him and that his stop was the result of a "dragnet" approach to investigating the crimes due to the fact that others were also stopped that night. I disagree.

Addison was travelling on foot and alone at 10:40 p.m. on a Friday night. He was in the general area where the crimes were committed and he fit the description of the rapist. These circumstances provided considerably more than a bare, imaginary, or purely conjectural suspicion that Addison was the culprit. Likewise, the detention of Addison on the street was lawful under Rule 3.1 because Addison had no identification, gave several different reasons for being in the area, and could not tell the officers the address of where he had just been.

It is true that the officers had stopped at least two other suspects that night. However, this can hardly be considered to parallel the type of "dragnet" investigative process outlined by the United States Supreme Court in *Davis* v. *Mississippi*, 394 U.S. 721 (1969). In *Davis*, the Supreme Court condemned a procedure where police randomly rounded up black males for the purpose of obtaining their fingerprints. The principles announced in *Davis* are simply not applicable to this case.

*The Detention*

Next, Addison argues that he was illegally detained after his stop by Officer Blankenship. He relies primarily on Rules 2.3 and 3.1 of the Arkansas Rules of Criminal Procedure and our decisions in *Meadows* v. *State*, 269 Ark. 380, 602 S.W.2d 636 (1980), and *Rodriquez* v. *State*, 262 Ark. 659, 559 S.W.2d 925 (1978), to support three grounds for this argument.

First, Addison contends that if, under Rule 3.1, the officer had reasonable suspicion to stop and detain him, the officer was required to cause his release immediately upon learning his identity. As a product of this, Addison claims that because his photograph was taken after his identity was determined by the detective, the act of obtaining his photograph was investigative in nature and in violation of Rule 3.1. Secondly, Addison argues that consent cannot be relied upon in this case. He reasons that the state failed to prove his conduct was voluntary and that Officer Blankenship did not tell him that he didn't have to go to the station. Finally, Addison maintains that his consent was merely acquiescence to a claim of lawful authority.

These arguments ignore the facts and misconstrue the law.

I have concluded that Officer Blankenship had legal justifi-

cation for stopping Addison pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. *See also, Terry* v. *Ohio*, 392 U.S. 1 (1968).

Once stopped, the officer was presented with additional factors which would have led him to reasonably suspect that Addison had committed the rapes. Moreover, the officer's attempts to verify Addison's identity, or the lawfulness of his conduct, also proved unsuccessful. As a result of this, the officer became faced with the prospect of witnessing an unknown suspect depart the area without taking any steps to satisfy himself that he could be found again.

In view of the fact that Addison's identity had not been verified, the officer's immediate release of Addison on the street was not required under the law nor expected under the circumstances.

If the scope of an investigation during a stop becomes unreasonable, the detention will be considered a formal arrest that must be supported by a probable cause. *Florida* v. *Royer*, 460 U.S. 491 (1983). However, there is nothing unreasonable, or, for that matter, surprising about the officer asking Addison if he would mind going to the station. Conversely, when Addison agreed to go it would be unreasonable, under the circumstances, to hold that the officer was required to tell Addison he didn't have to go if he didn't want to.

Rule 2.3 of the Arkansas Rules of Criminal Procedure requires only that the officer "take such steps as are reasonable" to make clear that there was no legal obligation to comply with the officer's request. It follows that the "steps" to be taken must be evaluated on a case-by-case basis considering the totality of the circumstances.

Having found that the officer's actions did not violate any provisions of the Arkansas Rules of Criminal Procedure, the next inquiry must be whether the officer's actions, after the initial detention on the street, constituted a seizure which implicates the Fourth Amendment. A seizure occurs when, under the totality of the circumstances, a reasonable person would believe he is not free to leave. See, *United States* v. *Mendenhall*, 446 U.S. 544 (1980), and *INS* v. *Delgado*, 466 U.S. 210 (1984).

In *Mendenhall*, Justice Stewart identified four circumstances that may indicate that a Fourth Amendment seizure has occurred. They are "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." 446 U.S. at 554.

None of these circumstances are present in this case.

In this case, Addison was released after his initial stop and the trial court found that the question of going to the station was more of an "afterthought" on the officer's part. In addition, when he was asked if he would mind going to the station, Addison's only question was whether the officers would take him home after he went to the station. That response was uncontradicted at the hearing and suggests that Addison knew that he was under no legal obligation to accompany the officers to the station. In addition, through all of this, according to the officer, Addison did not act as if he didn't want to go.

At the station, Addison was reminded that he was there voluntarily. Again, there was no evidence offered to negate this statement. Addison was subsequently told why he was there and he agreed to be fingerprinted and photographed to assist the police in eliminating him as a suspect. Apparently, Addison's photograph was the only piece of evidence obtained from him at the station that led in any way to his arrest and conviction of rape, burglary and theft of property.

The United States Supreme Court in *Hayes* v. *Florida*, 470 U.S. 811 (1985), outlined those circumstances under which the police may make a brief detention of a suspect in the field for fingerprinting based upon less than probable cause. The Court in *Hayes* reasoned that:

> There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch. 470 U.S. 817.

If, then, Officer Blankenship had possessed a camera with him in the field he could have taken Addison's picture without implicating the Fourth Amendment. Apparently, under *Hayes*, this could have been done without Addison's consent because the procedure was reasonable, represented a much less serious intrusion upon personal security and involved evidence of a non-testimonial nature. *Hayes* v. *Florida, supra.*

I am unable to see how the circumstances of Addison's voluntary trip to the station could rise to a constitutional level where the scope of the investigation, i.e., taking photographs and fingerprints, was not overly intrusive, was limited in nature, and was reasonable. Therefore, the officer's conduct, after the initial stop and detention, did not constitute a seizure which would implicate the Fourth Amendment to the United States Constitution.

*Consent*

Next is the issue of legal consent as it pertains to the facts of this case.

I have thoroughly examined this issue, and am convinced that the traditional standards which control a normal consent search situation are appropriate for the disposition of this case. I rely upon the totality of the circumstances test adopted by the United States Supreme Court in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

It is incumbent on the state to prove consent by clear and positive testimony, *Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987), and the state's burden is not met by showing only acquiescence to a claim of legal authority. *Burks v. State, supra; Rodriquez* v. *State*, 262 Ark. 659, 559 S.W.2d 925 (1978).

Nonetheless, based upon the testimony at the suppression hearing, including Addison's testimony, and the totality of the relevant circumstances, I believe that Addison voluntarily accompanied the police to the station and while there consented to be photographed and fingerprinted.

In *Schneckloth*, the defendant moved at trial to suppress evidence which had been obtained in a search of an automobile in which he was a passenger. A police officer had legally stopped the

car and was given permission by the driver to search it. Bustamonte argued that his consent was involuntary because the driver was not informed of his right to refuse the search. In considering the appropriate standard for determining whether the consent was voluntary, the United States Supreme Court turned for guidance to cases which deal with voluntariness of a defendant's confession under the Fourteenth Amendment. After reviewing these cases the high court concluded:

> The significant fact about all of these decisions is that none of them turned on the presence of absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See *Miranda* v. *Arizona*, 384 U.S. 436, 508 (Harlan, J., dissenting); id., at 534-535 (White, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative. (Citations omitted)
>
> Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. 412 U.S. 226-27.

Addison's claim that he believed he was required to go to the station is not determinative. The test is what a reasonable person would have believed, *United States* v. *Mendenhall, supra*, and voluntariness does not depend upon whether the police informed Addison that he could decline to cooperate. *Schneckloth* v. *Bustamonte, supra.*

Finally, Addison raises the factual issue of whether the situation on the street produced enough legally colorable coercion

to reduce his consent to "mere acquiescence to claimed lawful authority." *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

*Bumper* stands for the proposition that a search can never be justified on the basis of consent when that consent has been given after an official has asserted that he or she possesses a warrant.

I do not liken this case to one in which a search is conducted pursuant to an invalid or nonexistent search warrant. There was no misrepresentation as to what was required of Addison or the validity of the officer's actions.

I join the majority, however, in affirming the trial court.

Thomas Jeffery TACKETT *v.* STATE of Arkansas

CR 88-137 766 S.W.2d 410

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Jeff Rosenzweig*, for appellant.

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

JACK HOLT, JR., Chief Justice. Appellant Thomas Jeffery Tackett was convicted of manslaughter and sentenced to seventeen years imprisonment. For reversal he argues that the trial court erred in holding that the prosecution could impeach his testimony with evidence of prior convictions arising from the same incident and in permitting the prosecution to use these prior convictions to enhance punishment. We hold that these arguments have merit and reverse and remand.

In addition, Tackett contends that the trial court erred in refusing to give the jury instructions on lesser included offenses and that his conviction should be reversed because the information did not conform to the proof and because the State failed to prove the victim's cause of death. He also alleges that his prosecution is barred by principles of double jeopardy, speedy trial guarantees, the statute of limitations, and due process guarantees. We will address these issues since they are likely to arise on retrial.

On March 24, 1983, on U.S. Highway 65 North in the town of Jefferson, Arkansas, Tackett drove his van only two to three feet behind a car driven by Lesa Diffee. With the front of his van, Tackett began to strike the rear bumper of the Diffee car, causing Diffee to lose control of her car. In the ensuing crash, Nancy House, a passenger, was killed instantly; Lesa Diffee was injured but later recovered; and another passenger, Denise Barrentine, was injured and went into a coma. On March 30, 1983, Tackett was charged with manslaughter (Ark. Stat. Ann. § 41-1504 (Repl. 1977), currently Ark. Code Ann. § 5-10-104 (1987)) in the death of Nancy House and leaving the scene of an accident (Ark. Stat. Ann. § 75-901 (Repl. 1981), currently Ark. Code Ann. § 27-53-101 (Supp. 1987)). In September 1983 he was convicted of both offenses and sentenced to a term of eight years

imprisonment on the manslaughter conviction and a $10,000.00 fine on the leaving the scene of an accident conviction. He then appealed the manslaughter conviction. The court of appeals affirmed. See *Tackett* v. *State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984).

During this entire period, Denise Barrentine remained in a coma. On March 2, 1987, she died; on April 29, 1987, Tackett was charged with manslaughter for recklessly causing her death.

By pre-trial motion Tackett sought dismissal of the manslaughter charge on the grounds his prosecution was barred by principles of double jeopardy, speedy trial guarantees, the statute of limitations, and due process guarantees. The trial court denied the motion.

Tackett then sought a writ to prohibit the State from proceeding with his prosecution based upon the grounds stated in his pre-trial motion. We denied his petition in *Tackett* v. *State*, 294 Ark. 609, 745 S.W.2d 625 (1988), holding that neither double jeopardy nor the speedy trial rules barred his trial for recklessly causing the death of Denise Barrentine. As for his other complaints, we held that they were not yet ripe for decision. Thereafter, Tackett was convicted of manslaughter. He appeals from this conviction.

## I. IMPEACHMENT WITH PRIOR CONVICTIONS.

Tackett argues that the trial court erred in ruling that the prosecution could impeach his testimony with evidence of his prior convictions for manslaughter and leaving the scene of an accident arising from the same incident. We agree.

At a pre-trial hearing, defense counsel asked the trial court to rule that if Tackett elected to testify, the prosecution could not impeach his credibility with the convictions for manslaughter and leaving the scene of an accident arising from the same incident. Following the court's denial of this motion, Tackett elected not to testify.

Under Ark. R. Evid. 609(a)(1), a witness's credibility may be attacked by admitting evidence that he or she has been convicted of a crime only if (1) the crime was punishable by death or imprisonment in excess of one year under the law under which

he was convicted; and (2) the trial court determines pursuant to Ark. R. Evid. 403 that the probative value of admitting this evidence outweighs its prejudicial effect to a party or witness. *Pollard* v. *State*, 296 Ark. 299, 756 S.W.2d 455 (1988). A trial court has wide discretion in determining the admissibility of such evidence, and its decision will not be reversed absent an abuse of discretion. *Id.*

Under the circumstances of this case, the prejudicial effect of admitting the prior convictions for manslaughter and leaving the scene of an accident outweighs the probative value of the convictions as bearing on credibility. Since both convictions arose out of the same occurrence as the present manslaughter conviction, a juror would logically conclude that if Tackett was convicted of manslaughter and leaving the scene of an accident in the prior case, he must have committed manslaughter in the case at bar. For this reason, we find that the trial court abused its discretion in ruling that the prosecution could impeach Tackett's testimony with these prior convictions.

## II. USE OF PRIOR CONVICTIONS FROM THE SAME INCIDENT TO ENHANCE PUNISHMENT.

Tackett contends that the trial court erred in allowing the prosecution to use his prior manslaughter and leaving the scene of an accident convictions arising from the same incident as the present manslaughter conviction to enhance punishment. This contention has merit.

In *Washington* v. *State*, 273 Ark. 482, 621 S.W.2d 216 (1981), we held that a prior conviction was admissible to enhance punishment pursuant to the Habitual Offender Act (Ark. Stat. Ann. §§ 41-1001—41-1005 (Repl. 1977), currently Ark. Code Ann. §§ 5-4-501—5-4-504 (1987)) although the conviction was for an offense occurring after the offense on appeal. This holding was based upon our determination in *Conley* v. *State*, 272 Ark. 33, 612 S.W.2d 722 (1981), that the Habitual Offender Act, which provides that a prior conviction, regardless of the date of the crime, may be used to enhance punishment, was not designed to act as a deterrent, but is simply punitive.

The obvious intent of the Act is to enhance punishment of a party who has a habit of criminal conduct. The manslaughter

charge in connection with the death of Nancy House and the charge for leaving the scene of the accident for which Tackett was previously convicted and the manslaughter charge in connection with the death of Denise Barrentine in the case at bar all arose from Tackett's single act of recklessly driving his car into the victims' car. To utilize these prior convictions arising from one single act to enhance punishment pursuant to the Habitual Offender Act contravenes fundamental fairness and due process. Simply put, there is nothing habitual about the commission of a single criminal act resulting in multiple charges and convictions.

## III. ISSUES ON REMAND.

### A. LESSER INCLUDED OFFENSES.

Tackett argues the trial court erred in refusing to give the jury instructions on lesser included offenses of (1) battery in the second degree as defined in Ark. Code Ann. § 5-13-202(a)(3) (1987) and (2) battery in the third degree as defined in Ark. Code Ann. § 5-13-203(a)(3) (1987). We disagree.

The threshold question before us is whether battery in the second degree and battery in the third degree as defined in §§ 5-13-202(a)(3) and 5-13-203(a)(3) are lesser included offenses of manslaughter as defined in Ark. Code Ann. § 5-10-104(a)(3) (1987).

Before an offense will be considered a lesser included offense of a greater one, three basic requirements must be met: (1) the lesser offense must be established by proof of the same or less than all the elements of the greater offense; (2) the lesser offense must be of the same generic class as the greater offense; and (3) the differences between the two offenses must be based upon the degree of risk or injury to person or property or upon grades of intent or degrees of culpability. *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985). *See also Bishop* v. *State*, 294 Ark. 303, 742 S.W.2d 911 (1988).

Under § 5-10-104(a)(3), a person commits manslaughter if he recklessly causes the death of another person. Under § 5-13-202(a)(3), a person commits battery in the second degree if he "recklessly causes serious injury to another person *by means of a deadly weapon.*" (Emphasis added.) Under § 5-13-203(a)(3), a person commits battery in the third degree if he "negligently

causes physical injury to another person *by means of a deadly weapon.*" (Emphasis added.)

Battery in the second degree and battery in the third degree, as defined, require proof that a deadly weapon was used. In contrast, use of a deadly weapon is not necessary for the commission of manslaughter. *See Flippo* v. *State*, 258 Ark. 233, 523 S.W.2d 390 (1975). Since battery in the second degree and third degree, as defined, require proof of an element not an element of proof of manslaughter, they are not lesser included offenses of manslaughter. *See Allen* v. *State*, 281 Ark. 1, 660 S.W.2d 922 (1983), *cert. denied*, 472 U.S. 1019 (1985). *See also Rhodes* v. *State*, 293 Ark. 211, 736 S.W.2d 284 (1987). Therefore, the trial court did not err in refusing to give the jury lesser included instructions on the offenses in question.

B. CONFORMITY OF INFORMATION TO PROOF.

Tackett contends that his conviction should be reversed and dismissed because the information did not strictly conform to the proof. This contention is meritless.

Tackett was charged by information with committing manslaughter by recklessly causing the death of Nancy Denise Barrentine in Jefferson County, Arkansas, on March 2, 1987.

At trial the State introduced evidence that on March 24, 1983, in Jefferson County, Arkansas, Tackett caused the accident which subsequently caused Denise Barrentine's death in Pennsylvania on March 2, 1987.

Granted, the information would have been more accurate if it had stated that Tackett committed the offense of manslaughter by inflicting injuries upon Barrentine on March 24, 1983, in Jefferson County, Arkansas, which caused her death on March 2, 1987, in Pennsylvania. However, notwithstanding variance in the wording of an information and the proof introduced at trial, reversal is not warranted unless the variance prejudiced substantial rights of the accused. *See Hall* v. *State*, 276 Ark. 245, 634 S.W.2d 115 (1982), *cert. denied*, 459 U.S. 1109 (1983). *See also* Ark. Code Ann. § 16-85-405(a)(2) (1987). We find no prejudice in the case at bar.

## C. FAILURE TO PROVE CAUSE OF DEATH.

Tackett also argues that the State failed to prove the cause of the victim's death in that (1) the physician (Eugene Shatz) who testified as to the cause of death was not qualified to do so and (2) even if he had been qualified, his testimony was insufficient to prove the cause of death.

The standard for measuring the qualifications of an expert witness is flexible. *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988). If some reasonable basis exists from which it can be said that the witness has knowledge of a subject beyond that of a person of ordinary knowledge, his testimony is admissible. *Id. See also Harris* v. *State*, 295 Ark. 456, 748 S.W.2d 666 (1988). The determination of the qualifications of an expert witness lies within the sound discretion of the trial judge, and his decision will not be reversed absent an abuse of discretion. *Cathey* v. *Williams*, 290 Ark. 189, 718 S.W.2d 98 (1986).

A surgeon or doctor who attends a homicide victim may give his opinion on the cause of death without reference to an autopsy. *See Sims* v. *State*, 258 Ark. 940, 530 S.W.2d 182 (1975); *Stewart & McGhee* v. *State*, 257 Ark. 753, 519 S.W.2d 733, *cert. denied*, 423 U.S. 859 (1975).

The following facts can be gleaned from Dr. Shatz's testimony in a videotaped deposition admitted into evidence at trial.

(1) Dr. Shatz, who has considerable medical experience, is certified in pediatrics but not in pathology.

(2) Although Shatz does not conduct autopsies, he attends approximately three autopsies a year.

(3) In November of 1983, Dr. Shatz began treating Denise Barrentine, who was comatose as a result of an automobile accident (which occurred on March 24, 1983) in which she sustained serious injuries to many parts of her body, including her brain.

(4) Her condition, which was caused by the automobile accident, made her more susceptible to infection.

(5) During the last several months of Denise Barrentine's life, Dr. Shatz examined her on three occasions.

(6) Two weeks prior to her death, he diagnosed her as having upper respiratory congestion.

(7) On the day of her death, March 2, 1987, he examined her and determined that the immediate cause of her death was pneumonia. This conclusion was based upon her condition two weeks prior and what her mother told him had happened in the interim.

(8) It was his opinion that the motor vehicle accident was the proximate cause of her death.

(9) No autopsy was performed.

What caused Ms. Barrentine's death is a matter beyond the common knowledge of jurors. Accordingly, the trial court did not abuse its discretion in admitting into evidence Dr. Shatz's testimony concerning this issue. *See Bowden, supra.*

Tackett's contention that Shatz's testimony was insufficient to prove the cause of death is also meritless.

Causation of death may be found where the death would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient. Ark. Code Ann. § 5-2-205 (1987). Where conduct hastens or contributes to a person's death, it is a cause of the death. *See McClung* v. *State*, 217 Ark. 291, 230 S.W.2d 34 (1950); *Rogers* v. *State*, 60 Ark. 76, 29 S.W. 894 (1894). Causation may be found notwithstanding that death occurred several years after the conduct in question took place. *See People* v. *Brengard*, 265 N.Y. 100, 191 N.E. 850 (1934).

As noted above, Dr. Shatz testified that (a) Denise Barrentine's comatose condition, which was caused by the automobile accident, made her more susceptible to infection; (2) he diagnosed her as having an upper respiratory congestion two weeks prior to her death; (3) pneumonia was the immediate cause of her death; and (4) the car accident was the proximate cause of her death. In addition, there was testimony by other witnesses that Tackett caused the accident. Taken together, this evidence was sufficient to prove the cause of Ms. Barrentine's death.

Tackett's contention is essentially an attack on the credibility of Dr. Shatz. It is the jury's province, not this court's, to judge the credibility of witnesses. *Lewis* v. *State*, 295 Ark. 499, 749 S.W.2d 672 (1988).

## D. DOUBLE JEOPARDY, SPEEDY TRIAL, STATUTE OF LIMITATIONS, AND DUE PROCESS.

Tackett argues that his prosecution is barred by (1) principles of double jeopardy, (2) speedy trial guarantees, (3) the statute of limitations, and (4) due process guarantees.

In *Tackett v. State*, 294 Ark. 609, 745 S.W.2d 625 (1988), we addressed Tackett's double jeopardy and speedy trial arguments, holding that neither double jeopardy nor our speedy trial rules barred his present prosecution for manslaughter. We adhere to this position.

Tackett asserts that his prosecution is barred by the statute of limitations since his conduct occurred on March 24, 1983, and the manslaughter charges were filed on April 29, 1987, outside the three year statute of limitations established by Ark. Code Ann. § 5-1-109 (Supp. 1987) for manslaughter.

Under Ark. Code Ann. § 5-1-109(b)(3) and (e), the statute of limitations for manslaughter begins to run when "every element of the offense has occurred." Since Tackett did not commit the offense of manslaughter until Denise Barrentine died on March 2, 1987, the statute of limitations did not begin to run until that date. The manslaughter prosecution was brought on April 29, 1987, well within the statute of limitations. Accordingly, Tackett's contention is without foundation.

Tackett's due process argument is simply a rehash of his other points for reversal. Therefore, we do not address it.

Reversed and remanded.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the result reached by the majority. However, the majority opinion fails to clarify the matter of lesser included offenses. Manslaughter and battery in the *first* degree require proof of the same elements for a conviction in this case. Indeed, the appellant has already been

convicted of first degree battery on the exact same factual situation.

Jessie SCOTT *v.* STATE of Arkansas

CR 89-18 764 S.W.2d 616

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Hixson, Cleveland & Rush*, by: *David L. Rush*, for appellant.

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

JACK HOLT, JR., Chief Justice. Appellant Jessie Scott was convicted in circuit court of driving while intoxicated and driving left of center. For reversal he argues that he was denied his right to a speedy trial in that "twelve months passed before he was tried." We disagree and affirm.

The following is a chronology of significant events:

(1) February 14, 1987: Jessie Scott was arrested, charged, and convicted in Logan County Municipal Court of driving while intoxicated and driving left of center.

(2) April 13, 1987: Scott appealed to the Circuit Court of Logan County, Northern District.

> (3) May 27, 1988: He was found guilty of the charges and sentenced to twenty-four hours imprisonment in the county jail, a fine of $150.00, and suspension of his driving privileges for ninety days on the driving while intoxicated conviction and $25.00 on the driving left of center conviction.

Rule 28.1(c), as amended by per curiam dated July 13, 1987, provides as follows:

> Any defendant *charged after October 1, 1987*, in circuit court and held to bail, or otherwise lawfully set at liberty, including released from incarceration pursuant to subsection (a) hereof, shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3. (Emphasis added.)

Prior to this amendment, Rule 28.1(c) required that a defendant be brought to trial within eighteen (18) months from the time provided for in Ark. R. Crim. P. 28.2.

Under current Rule 28.1(c), a defendant charged after October 1, 1987, shall be entitled to have the charge dismissed unless brought to trial within twelve (12) months from the time provided for in Ark. R. Crim. P. 28.2. Scott was charged on February 14, 1987, well before October 1, 1987. Accordingly, the prior eighteen-month limitation, not the present twelve-month limitation, applies. *See Kain* v. *State*, 296 Ark. 123, 752 S.W.2d 265 (1988). *See also Hayes* v. *Lockhart*, 352 F.2d 339 (8th Cir. 1988).

Since Scott was tried in circuit court within eighteen months from the date the case was appealed from municipal court, his right to a speedy trial was not infringed. *See Shaw* v. *State*, 18 Ark. App. 243, 712 S.W.2d 138 (1986); Ark. R. Crim. P. 28.2(c).

Affirmed.

JONES RIGGING AND HEAVY HAULING, INC., and McConnell Heavy Hauling, Inc. *v.* HOWARD TRUCKING, INC.

88-284 764 S.W.2d 450

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Kemp, Duckett, & Hopkins*, for appellant.

*Douglas, Hewett and Shock*, for appellee.

DARRELL HICKMAN, Justice. This is an appeal from a decision of the Arkansas Transportation Commission granting a certificate of public convenience and necessity to the appellee. The circuit court affirmed the order. We affirm because we cannot say the commission's decision is against the preponderance of the evidence.

The appellants are two trucking companies which have the authority to engage in the intrastate transport of metal products. The appellee, Howard Trucking, has been an interstate carrier for some time. Howard first sought authority from the commission to become an intrastate carrier in 1983, but the request was denied. Application was made again in 1986 and, after hearing numerous witnesses testify in support of Howard, the commission found that an additional metal products carrier would benefit the general public because existing service was inadequate.

The appellants make two arguments on appeal but essentially their claim is that the commission's findings are not supported by the evidence and are contrary to the law and our decisions.

While we review these cases *de novo*, we will not disturb the findings of the commission unless they are against the preponderance of the evidence. *Batesville Truck Lines* v. *Ark. Freightways, Inc.*, 286 Ark. 116, 689 S.W.2d 553 (1985). We do not retry these cases or substitute our judgment for that of the commission. *Fisher* v. *Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967). We will accord due deference to the commission because of its expertise in passing on the fact questions involved and because of its advantage in seeing and hearing the testimony of the witnesses before it. The burden is on the appellants to prove the decision is wrong. When the evidence is evenly balanced, the commission's view must prevail. *Wheeling Pipe Line, Inc.* v. *Ark. Commerce Comm'n.*, 249 Ark. 685, 460 S.W.2d 784 (1970); *Fisher* v. *Branscum, supra.*

It is settled that a certificate may not be granted when there is existing service in operation over the route applied for unless existing service is inadequate, or additional service would

benefit the public, or the existing carrier was given an opportunity to furnish additional service. *Santee* v. *Brady*, 209 Ark. 224, 189 S.W.2d 907 (1945); *Missouri-Pacific Railroad Co.* v. *Williams*, 201 Ark. 895, 148 S.W.2d 644 (1941). That means if the commission finds any one of these factors, it can issue the certificate.

In this case, the commission found that present service was inadequate and that additional service would benefit the public. Evidence was presented to support those findings.

Afco Metals and Afco Steel are major shippers of metal products in Arkansas and are the primary customers of Jones Rigging and Heavy Hauling. Bill Morgan of Afco Steel testified that the appellants' equipment was at times inadequate to meet his needs, and he has had to ask customers to wait a day or two on orders as a result. His company has greatly increased its sales to the bridge construction industry, and he said it was especially important that those customers receive shipments in a timely manner.

Bill Rath of Afco Metals also testified that the appellants could not provide the timely service he requires. When the appellants have been unable to provide service, Rath has used an uncertified carrier. He also testified that McConnell's rates are so high that he puts his company at a competitive disadvantage when he uses them. Finally, he noted that his West Memphis branch was experiencing a large increase in business.

Both men testified they would divert little business away from Jones and McConnell should the application be granted.

Larry Norris of Razorback Steel testified the appellants did not have the particular kind of equipment he needed to ship his product, and he had lost a sale as a result. He said Howard has the necessary equipment.

Jay Dillard of Tex-Ark. Joist testified he had called McConnell several times, but they did not have equipment available. He supported the need for an additional carrier to help him make his shipping commitments.

There is no doubt that some of the testimony presented by Howard was weakened on cross-examination. Most witnesses

indicated they were generally satisfied with the existing carriers, but lack of equipment was causing delays in shipments. But the overall tone of the testimony was that existing carriers could not handle the current level of business, much less the expected increase in business.

Our role is to review the commission's decision, not to substitute our judgment for its. There is ample evidence to support the commission's finding that existing service is inadequate and an additional carrier would benefit the shipping public. Since we cannot say the decision is against the preponderance of the evidence, it stands.

Affirmed.

HOLT, C.J., not participating.

## ARKANSAS KRAFT CORPORATION *v.* BOYED SANDERS CONSTRUCTION CO.

88-236 764 S.W.2d 452

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Barber, McCaskill, Amsler, Jones & Hale, P.A.*, for appellant.

*Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A.*, by: *Ralph R. Wilson*, for appellee.

ROBERT H. DUDLEY, Justice. This case involves a question concerning the interpretation of an indemnity agreement between appellant, Arkansas Kraft Corporation, and appellee, Boyed Sanders Construction Corporation. The trial court granted appellee's motion for summary judgment, finding that the language contained in the indemnity agreement did not clearly and unequivocally show that appellee intended to indemnify appellant for appellant's own negligence. We affirm.

Appellant wanted to install a de-inking plant at its paper mill to recycle white waste paper and turn it back into useable pulp. Appellant entered into an agreement with appellee by which appellee was to provide labor and equipment as part of the construction project at the paper mill.

On September 25, 1984, Tommy Goates, an employee of appellee Sanders Construction Company, was injured while working on the construction project. Goates filed suit against appellant and another subcontractor on the job.

Appellant subsequently filed a Third Party Complaint against appellee. The complaint alleged that under the terms and conditions of a contract between the two companies, appellant was entitled to indemnity from appellee in the event that appellant was found to be liable to Goates in any amount.

At the trial of this case, the court withheld the issue of indemnity subject to the disposition of the issue of liability. The jury returned a $400,000 verdict in favor of Goates. It apportioned fault as 5% to plaintiff Goates, 50% to appellant, and 45% to the other subcontractor on the project named as co-defendant in the suit. No allegations of negligence on the part of appellee were made by the appellant before the jury was dismissed. With respect to the issue of indemnity, motions for summary judgment were filed by both appellee and appellant. The trial court granted appellee's motion, and denied that of appellant. This appeal followed.

Appellant contends that the language of the indemnity agreement was sufficiently clear and unequivocal to show that the parties intended for appellee to indemnify appellant for any and all claims for injuries arising out of the work, regardless of fault, and that the trial court erred in finding otherwise. The argument is without merit.

The language at issue in the instant case is:

> To the extent that, in performance of this order, Seller shall do any work or cause any work to be done on any premises of the Buyer, then Seller shall indemnify and hold Buyer harmless against any and all liabilities or claims for injuries or damages to any person or property arising out of such work and Seller shall, further, upon request furnish Buyer with proof that Seller is carrying adequate public liability, property damage and workmen's compensation insurance.

A contract of indemnity is to be construed in accordance with the rules for the construction of contracts generally. *Pickens-Bond Constr. Co.* v. *NLR Electric Co.*, 249 Ark. 389, 459 S.W.2d 549 (1970). If there is no ambiguity in the language of the contract, then there is no need to resort to rules of construction. *Id.* However, a subcontractor's intention to obligate

itself to indemnify a prime contractor for the prime contractor's *own* negligence must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed. *Hardeman, Inc.* v. *Hass Co.*, 246 Ark. 559, 439 S.W.2d 281 (1969). While no particular words are required, the liability of an indemnitor for the negligence of an indemnitee is an extraordinary obligation to assume, and we will not impose it unless the purpose to do so is spelled out in unmistakable terms. *Id.; Batson-Cook Co.* v. *Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958). We find no such clear and unequivocal terms in the instant case.

Appellant argues that the trial court failed to identify any portion of the indemnity agreement which created an ambiguity. The argument misses the point. The language of an indemnity agreement can be unambiguous and still not spell out in clear, unequivocal, unmistakable terms the indemnitor's intention to obligate itself to indemnify for the indemnitee's negligence.

Both parties rely upon the case of *Pickens-Bond Constr. Co.* v. *NLR Electric Co.*, 249 Ark. 389, 459 S.W.2d 549 (1970). Appellant's reliance upon the case, however, is misplaced because the indemnity language in *Pickens-Bond* is clearly distinguishable from the language at issue here. The pertinent indemnity language from *Pickens-Bond* was: "He shall specifically and distinctly assume, and does assume, all risks of damage or injury *from whatever cause* to property or persons used or employed on or in connection with his work, . . . ." (Emphasis added.) This Court found that language to be so broad and sweeping as to clearly and unequivocally show the indemnitor's intention to obligate itself, even for the negligence of the indemnitee. Even so, this Court reversed the summary judgment and remanded the case holding that there was a justiciable issue concerning whether the prime contractor's negligence was the *sole* proximate cause of the accident. In so holding, this Court found that such a broadly worded indemnity clause would cover any situation unless the damage or injury was due to the indemnitee's sole negligence. The language at issue here, however, is simply not so broad as to clearly and unequivocally show the indemnitor's intention to obligate itself to indemnify the indemnitee for the indemnitee's own negligence.

Appellant contends alternatively that if it is not entitled to full indemnity, then it is at least entitled to indemnity to the extent that appellee was at fault in causing the injuries to Goates. Appellant asks us to remand the case for a determination of that issue. We decline to do so.

Appellant filed its Third Party Complaint against appellee alleging that it was contractually entitled to indemnity from appellee in the event appellant was found to be liable to Goates in any amount. Appellant made no allegations of negligence against appellee in the complaint, and it was never amended. The theory of recovery rested entirely upon the alleged contractual obligation to pay in full any and all amounts for which appellant might be held liable for its own individual acts of negligence. In fact, the first and only time, prior to the briefs submitted in this appeal, that appellant even mentioned any fault on the part of appellee was in appellant's Brief in Support of Response in Opposition to Motion for Summary Judgment, where appellant stated: "Due to [appellee's] immunity with respect to plaintiff's claim, the fault attributable to the third party defendant [appellee] has yet to be determined." The issue was therefore not properly raised below and cannot now be raised on appeal.

Affirmed.

Mary Louise FILK *v.* Elizabeth F. BEATTY, By Her Attorney in Fact, Lloyd David Beatty

89-35 764 S.W.2d 454

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Kelley and Luffman*, by: *Eugene T. Kelley*, for appellant.

*Scott, Lashlee & Watkins, P.A.*, by: *John R. Scott*, for appellee.

ROBERT H. DUDLEY, Justice. In 1984, Elizabeth F. Beatty executed a durable power of attorney pursuant to the provisions of Ark. Stat. Ann. § 58-501 et seq. (Repl. 1971) (Ark. Code Ann. § 28-68-301 et seq. (1987)) and Ark. Stat. Ann. § 58-701 et seq. (Supp. 1985) (Ark. Code Ann. § 28-68-201 et seq. (1987)) for the purpose for having her son, Lloyd David Beatty, appointed to provide for her needs in the event she became incompetent. The power of attorney was presented to the probate judge pursuant to Ark. Stat. Ann. § 58-501 (Repl. 1971) (Ark. Code Ann. § 28-68-304 (1987)) and was signed by him under the word "approved." The approval contained no other words of rendition of judgment.

Lloyd Beatty, acting under the power, brought this action in chancery court in the name of his principal against the appellant, to collect amounts past due on a promissory note. In the chancery court action, the appellant questioned the standing of the attor-

ney-in-fact to maintain the action on the ground that the principal was incompetent at the time the probate court approved the power of attorney and at the time the suit was filed; hence, the action could not be maintained either in the principal's name or in the attorney-in-fact's name. The appellant further questioned the attorney-in-fact's standing because of an alleged excessive value in the principal's estate. The chancellor excluded all evidence of the principal's competency and of the value of the principal's estate on the ground that such evidence would only serve to collaterally attack the action of the probate court in approving the power. We affirm that ruling.

Before discussing the points of appeal raised by the appellant, we issue a caveat by noting that a judgment consisting solely of the word "approved" does not clearly specify the relief granted by the trial court, as is required for a valid judgment. *See Thomas* v. *McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967). However, the form of the probate court judgment has never been questioned.

In her two points of appeal the appellant argues that the chancellor erred in refusing to allow her to prove (1) the competency of the principal and (2) the value of the ward's estate.

The probate court has constitutional and statutory subject matter jurisdiction of persons of unsound mind and their estates. Article 7, Section 34, as amended by Amendment 24, Section 1, of the Constitution of Arkansas, and Ark. Stat. Ann. § 62-2004 (Repl. 1971) (Ark. Code Ann. § 28-1-104(a)(4) (1987)). In addition, the probate court is specifically given subject matter jurisdiction over this kind of power of attorney. Ark. Stat. Ann. § 58-501 (Repl. 1971) (Ark. Code Ann. § 28-68-304 (1987)). Thus, the probate court was clearly acting within its jurisdiction when it approved the power of attorney in this case. When a probate court has acted within its jurisdiction, its judgments are not open to collateral attack. *Sullivan* v. *Times Publishing Co.*, 181 Ark. 27, 24 S.W.2d 865 (1930). When a probate court acts without its jurisdiction, however, its judgments are void, and subject to collateral attack. *McDonald* v. *Fort Smith & Western Ry. Co.*, 105 Ark. 5, 150 S.W. 135 (1912).

Here, the appellant's argument is that the probate court's granting of the power was *erroneous* because the principal

(a) was incompetent and (b) had too large an estate. An erroneous judgment is not void, but only voidable, and may not be collaterally attacked. *McDonald, supra.* Thus, the chancellor correctly ruled that the probate court judgment could not be collaterally attacked in chancery court.

Affirmed.

Garland Maurice GIBSON *v.* STATE of Arkansas

CR 89-6 764 S.W.2d 617

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Landers and Shepherd*, by: *Michael R. Landers*, for appellant.

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

STEELE HAYS, Justice. Garland M. Gibson brings this appeal from his conviction for aggravated robbery and burglary. He received a five year sentence for the burglary conviction and a fifteen year sentence for the robbery, the sentences to be served consecutively. The single point for reversal is that the trial court erred in denying Gibson's motion for a new trial. A new trial was sought because Gibson was not represented by counsel at any stage of the criminal proceedings, nor did he knowingly and intelligently waive his right to counsel. After reviewing the arguments on appeal, we reverse the trial court.

■ The Sixth and Fourteenth Amendments to our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. *Faretta* v. *California*, 422 U.S. 806 (1975); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

In *Faretta* v. *California, supra*, the United States Supreme Court held that before an accused manages his own defense he must first "knowingly and intelligently" waive the right to counsel. Furthermore, the trial court maintains a weighty responsibility in determining whether an accused has "knowingly and intelligently" waived this right. *Johnson* v. *Zerbst, supra; Murdock* v. *State*, 291 Ark. 8, 722 S.W.2d 268 (1987). Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Philyaw* v. *State*, 288 Ark. 237, 704 S.W.2d 608 (1986).

Determining whether an intelligent waiver of the right to counsel has been made depends in each case upon the particular facts and circumstances, including the background, the experience and conduct of the accused. *Johnson* v. *Zerbst, supra*. The facts of this case reveal that on December 16, 1986, Mr. Gibson was arrested for the robbery and burglary of O.W. Stone. While in police custody Gibson signed two Miranda rights forms before giving a statement on December 17, 1986. On December 18, 1986, Gibson appeared before the trial judge. At this time Gibson was informed of the charges against him and, upon the preliminary determination of indigency, the trial court appointed Murray Armstrong as his attorney. Mr. Armstrong met with Gibson, and after discovering that Gibson was gainfully employed, he filed a motion to withdraw as counsel which was granted. Thus, Armstrong was relieved as Gibson's attorney without ever having acted in his defense.

On August 31, 1987, the trial judge set a trial date for November 2, 1987, and informed Gibson as follows:

> The Court:
>
> Alright, Now it's important sir that you get you an attorney. Do you understand?
>
> The Defendant:
>
> Yes, sir. I understand.

Yet on November 2, 1987, Gibson again appeared without counsel and went into chambers with the judge and attorneys for two co-defendants. The attorney for the co-defendants filed

motions for continuance and severance, but the trial judge decided to try Gibson. The following exchange in chambers occurred:

> The Court:
>
> Alright. Okay. Now Mr. Gibson do you have your attorney with you this morning, sir?
>
> The Defendant:
>
> No, I don't.
>
> The Court:
>
> Alright, sir. You don't plan to get one. Is that right, sir?
>
> The Defendant:
>
> No.
>
> The Court:
>
> Okay. You want to try this man Mr. Gibson? [Addressing Mr. John Frank Gibson, the prosecuting attorney].
>
> Mr. Gibson:
>
> Yes, Your Honor.

To establish a voluntary and intelligent waiver, the trial judge must explain to the accused that he is entitled as a matter of law to an attorney and question him to see if he can afford to hire counsel. The judge must also explain the desirability of having the assistance of an attorney during the trial and the drawbacks of not having an attorney. The last requirement is especially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and receives no special consideration on appeal. *Philyaw* v. *State*, 288 Ark. 237, 704 S.W.2d 608 (1986). Recently, the United States Supreme Court in *Patterson* v. *Illinois*, ___ U.S. ___, 108 S.Ct. 2389, 10 L.Ed.2d 261 (1988), held that the constitutional minimum for a knowing and intelligent waiver of the right to counsel requires that the accused be made sufficiently aware of his right to have counsel present *and of the possible consequences of a decision to forego the aid of*

*counsel.*

The trial judge complied with the requirement of advising Gibson that he had a right to counsel, and the trial judge briefly appointed counsel. Later, upon further inquiry into Gibson's financial status, the trial court relieved the appointed counsel. Admittedly, Gibson was aware of his right to counsel, and arguably realized in general the importance of obtaining a lawyer. However, at no time did the trial judge determine that Gibson made an intelligent waiver, by explaining the risks or the consequences of proceeding without counsel. From an examination of the facts and circumstances surrounding this case, it is clear that Gibson did not have the benefit of counsel at any critical stage in the criminal proceedings against him and did not waive his right to counsel. At the August 31 hearing Gibson appeared without counsel, as well as on the date of the trial, November 2nd. On November 2nd, Gibson, who had not been previously arrested and had only attended two years of college, was required to represent himself in a suppression hearing and a jury trial.

Although it is left to the sound discretion of the trial judge whether to grant a new trial, he may be reversed when there is an abuse of discretion or manifest prejudice to the complaining party. *Vasquez* v. *State*, 287 Ark. 468, 701 S.W.2d 357 (1985). We must reverse the trial judge in order to avoid manifest prejudice and injustice to the appellant who failed to receive warning of the consequences of foregoing counsel. An accused is entitled to relief from a conviction whenever the proceedings indicate the unfairness of trial without the help of a lawyer. *Philyaw* v. *State*, 288 Ark. 237, 704 S.W.2d 608 (1986); *McIntyre* v. *State*, 242 Ark. 229, 412 S.W.2d 826 (1967).

Reversed and remanded.

Dorothy WARD *v.* Donald S. DAVIS, Glidth Davis, and Nora Ruark Wells

88-251 765 S.W.2d 5

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Ed Phillips*, for appellant.

*Scott Adams*, for appellee.

STEELE HAYS, Justice. Donald and Glidth Davis owned a parcel of land in Conway County containing six acres, more or less. On September 27, 1969, the Davises conveyed a one acre portion of this property to Jimmie Wells. In 1985 the Davises conveyed to Nora Wells a 1.17 acre tract which adjoined Jimmie Wells on the south. The northern boundary of the Nora Wells tract abutted the southern boundary of the Jimmie Wells tract.

Donald S. Davis and Glidth Davis brought a quiet title suit against Jimmie Wells and Nora Wells on September 22, 1986, in Conway County Chancery Court. The parties settled the suit by stipulation, and a portion of the land previously deeded to Nora Wells was reconveyed to the Davises.

Some months later appellant Dorothy Ward acquired title to the one acre tract by warranty deed from Jimmie Wells. Subsequently she filed a petition to quiet title naming Donald Davis, Glidth Davis, and Nora Wells as defendants and alleging that the property description in the 1969 deed from the Davises to Jimmie Wells was inaccurate. She alleged that the correct description included land presently claimed by Nora Wells. The chancellor dismissed Dorothy Ward's petition, finding that it was barred under the doctrine of *res judicata*. In addition, the chancellor awarded attorney's fees of $1,590.00 to the defendants, now the appellees. Dorothy Ward appeals from these rulings.

We review chancery cases *de novo*, reversing the chancellor only when the findings of fact are found to be clearly erroneous or clearly against the preponderance of the evidence. *Milligan* v. *General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987). ARCP Rule 52. The chancellor found that the earlier quiet title suit between Jimmie and Nora Wells and Donald and Glidth Davis had determined the ownership and the boundaries of the property at issue in this case, and therefore he dismissed the appellant's suit under the principle of *res judicata. Res judicata* has been applied in quiet title cases in Arkansas. *Phelps* v. *Justiss Oil Co.*, 291 Ark. 538, 726 S.W.2d 662 (1987); *Kirby* v. *Hedgepeth*, 246 Ark. 260, 437 S.W.2d 807 (1969). After *de novo* review, we affirm the chancellor.

Recently, in *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988), we set out the elements of *res judicata* which must be present in order to hold that a prior action bars relitigation in a subsequent suit. The claim preclusion aspect of the doctrine bars relitigation in 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 a 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. At issue in this case are elements four and five.

As to the matter of privity, the first quiet title suit concerning the property in dispute was styled *Donald S. Davis and Glidth Davis* v. *Jimmie Harold Wells and Nora Wells.* Although appellant was not a party to that action, Jimmie Wells, appellant's predecessor in title, was a party to the action. We recognized in *Phelps* v. *Justiss Oil Co.*, 291 Ark. 538, 726 S.W.2d 662 (1987), that a successor in interest may be considered in privity with her predecessor so that relitigation of title to land could be barred. Quoting from the Restatement 2d, *Judgments*, § 43(b) (1980), this court noted that a judgment in an action that determines interests in real or personal property has preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself. Therefore, privity exists between the parties of both lawsuits.

Turning to whether Jimmie Wells (and, hence, the appellant) would be precluded from relitigating this action because both suits involve the same claim or cause of action which was litigated or could have been litigated in the earlier suit, the answer is clear. The quiet title decree entered in that suit concerned a deed from the Davises to Nora Wells in which Nora Wells deeded back a portion of land to the Davises.

Appellant Ward in this quiet title action alleges that the deed given to her by Jimmie Wells did not accurately describe her tract of land. However, it is clear that the portion of land now claimed by her was involved in the first lawsuit. As a defendant in the former action, Jimmie Wells made no claim to this disputed portion of land even though he was in a position to assert such a claim. In *Wilson* v. *Dyess Farms*, 74 F. Supp. 990 (E.D. Ark. 1948), the court stated that the defendant in a quiet title action should "set up every defense and every claim of title which he then has. . . ." Because the claim to the disputed property could have been litigated by Jimmie Wells in the former action, the appellant, as successor in interest to Wells, is now precluded from relitigating this issue.

The appellant also challenges the chancellor's award to the appellees of attorney fees of $1,590.00 pursuant to Act 601 of 1987 ([Ark. Code Ann. § 16-22-309 (1987)]. Act 601 authorizes attorney fees for a prevailing party where the court finds a complete absence of a justiciable issue. The appellant points out that her petition to quiet title was filed on May 6, 1987, whereas Act 601 did not take effect until July 20, 1987. Therefore, she maintains, the act has no application to a pending case.

The appellee counters with the argument that Act 601 does not disturb vested rights or create new obligations, and is therefore procedural rather than substantive in nature. Procedural statutes operate retroactively as well as prospectively. *City Machine Works* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981); *Safeway Stores* v. *Shwayden Brothers*, 238 Ark. 768, 384 S.W.2d 473 (1964); *Harrison* v. *Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). However, we note that in *Aluminum Co. of America* v. *Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982), the Court of Appeals examined this question in depth and reasoned persuasively that legislation affecting attorneys' fees in workers'

compensation cases, being remedial, operates retroactively.

It could, perhaps, be argued that the legislative history and benevolent intent behind workers' compensation distinguish it from legislation making provision for attorneys' fees where it had not previously existed and on a broad spectrum affecting litigation in general. But we need not reach that issue, because the answer is readily found in the language of Act 601. The act (Section 1) empowers the trial court to award attorneys' fees where there is a complete absence of a justiciable issue unless there is a voluntary dismissal or an amended pleading within a reasonable time after the attorney or party knew or reasonably should have known he would not prevail. Section 3 reads as follows:

> In order to find an action, claim, setoff, counterclaim or defense to be lacking a justiciable issue of law or fact, the court must find that the action, claim, setoff, counterclaim or defense was commenced, used *or continued* in bad faith, solely for purposes of harassing or maliciously injuring another, or delaying adjudication without just cause, or the party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. [Our emphasis.]

The act became effective on July 20, 1987, and at that point in time the appellees had filed their answer pleading res judicata and specifically citing the earlier litigation between the Davises and the Wellses. The case was not tried until October. Thus the appellant had ample time after the effective date of Act 601 to determine the merit, or lack thereof, of her position in light of existing law. We conclude that although the *filing* of the petition may not have triggered the application of Act 601, the *continuation* of the suit beyond a reasonable time after the act became effective rendered the appellant subject to its terms.

Finally, under the language of Act 601 we review de novo the basis for the award of attorney's fees on the record of the trial court alone, nevertheless, even in de novo review, it is our duty and practice to affirm the chancellor's decree if it is not against the weight of the evidence. *Mosley* v. *McDavid*, 250 Ark.

735, 466 S.W.2d 922 (1971). We cannot say his finding of a complete absence of a justiciable issue was clearly erroneous and, accordingly, we affirm.

H. Eugene TAYLOR *v.* Honorable Judith ROGERS

88-264 764 S.W.2d 619

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Dodds, Kidd, Ryan & Moore*, by: *Judson C. Kidd*, for petitioner.

*Wilson, Engstrom, Corum & Dudley*, by: *Wm. R. Wilson, Jr.*, for respondent.

DAVID NEWBERN, Justice. H. Eugene Taylor seeks a writ of prohibition with respect to contempt citations in the court of Chancellor Judith Rogers. He was sentenced to spend five weekends in jail for failure to make timely child support payments to his wife. The support had been ordered as a temporary measure during divorce proceedings. At the hearing he was again cited for making a profane threat to his wife while the chancellor and counsel were in the chancellor's chambers discussing the case and Mr. and Mrs. Taylor were in the courtroom. He was sentenced to an additional five weekends, thus making a total of twenty days, in jail.

A writ of prohibition may issue only when the court to which it is to be directed is wholly without jurisdiction and appeal is not an adequate remedy. *Municipal Court of Huntsville* v. *Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987); *State* v. *Nelson, Berry Pet. Co.*, 246 Ark. 210, 438 S.W.2d 33 (1969). The arguments of the petitioner do not suggest the court lacked jurisdiction to issue either of the citations. With respect to the first one, he argues the child support order was not sufficiently definite in its statement of the due date of the child support. As to the second citation, he argues he was not in the presence of the court and that the act for which he was found in contempt was not disruptive of court proceedings. Both arguments are allegations of error only.

Writ denied.

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

JOHN I. PURTLE, Justice, concurring in part; dissenting in part. Although I agree that the chancellor was justified in finding the petitioner guilty of contempt for willfully failing to make timely support payments, I would reach a different result with respect to the second citation. I would issue the writ of prohibition on the contempt citation concerning the alleged profane statement of the petitioner to his wife out of the presence of counsel or the court. I realize that prohibition is not proper when appeal is an adequate remedy. However, in the present case it is my opinion that the second citation is so unsupported by the facts that it would be an undue burden to force the petitioner to appeal this contempt citation on its merits when the matter is already before us in complete detail.

Huey Carnell WHITE *v.* STATE of Arkansas

CR 88-120 764 S.W.2d 613

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Matt Keil; Malaby & Shumaker*, by: *Rick C. Shumaker*, for appellant.

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

TOM GLAZE, Justice. A Miller County jury found the appellant guilty of capital murder and sentenced him to life imprisonment without parole. On appeal, the appellant argues that there was insufficient evidence to convict him of capital murder. In addition, he argues that he was denied equal protection because of the state's use of its peremptory challenges to strike two black jurors, and that Arkansas's capital murder and first degree murder statutes overlap and are therefore unconstitutional. We affirm the appellant's conviction.

Appellant first contends the trial court erred in failing to grant his motion for directed verdict. This contention is wholly without merit. Arkansas's capital murder statute, Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1987), provides in relevant part as follows:

> (a) A person commits capital murder if:
>
> (1) Acting alone or with one (1) or more persons, he commits or attempts to commit . . . robbery . . . , and in the course of and in furtherance of the felony, or in

> immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; . . .

Appellant concedes he joined with another, James Lee Thomas, in robbing Hamilton's AG Grocery in Stamps, Arkansas, but he argues that because he did not actually kill, or aid Thomas in the killing of, the store's clerk during the robbery, he was not an accomplice to murder. Such a contention has no basis in law. In fact, we have repeatedly held that a person need not take an active part in a murder to be convicted if he accompanies another who actually commits the murder, and he assists in the commission of the crime — in this case, the crime of robbery. *See, Shelton* v. *State*, 287 Ark. 322, 699 S.W.2d 728 (1985); *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 (1983); *Hallman & Martin* v. *State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

Here, the proof reveals the appellant and Thomas both had guns, and that, during the robbery, Thomas initially struck one clerk, Delores Cockerham, and, at about the same time, appellant struck another clerk, Lori Lemay. Although appellant admits to having seen Thomas strike Cockerham once with his gun, Lemay, who had fallen to the floor and could not see, heard Cockerham being beaten repeatedly. Appellant also admitted that, after the beatings, he placed a trash can over Cockerham's head. The medical examiner related that Cockerham died from head and brain injuries because of the blows to her head. Based upon those facts alone, we have no hesitancy in concluding that the state met its burden of proving the elements of capital murder.

Conversely, the appellant failed to meet his burden of proving his affirmative defense under Ark. Code Ann. § 5-10-101(b). Pursuant to § 5-10-101(b), appellant contended that he did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in its commission. Even if we accepted appellant's argument that he did not actually strike Cockerham, the evidence reflects that he had provided Thomas with the gun which was used to beat Cockerham and, at the very least, he assisted Thomas in Cockerham's beating by hitting Lemay, thereby preventing Lemay from going to Cockerham's aid or from obtaining help. The trial court was clearly correct in denying appellant's motion for directed verdict.

Citing *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987), the appellant next argues he was denied a fair trial because the state improperly exercised two peremptory challenges in striking two black jurors. The appellant is black and the decedent, Mrs. Cockerham, was white.

The Supreme Court in *Batson* 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. In *Ward*, we explained that such a prima facie case may be made (1) by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, (2) by demonstrating total or seriously disproportionate exclusion of blacks from any jury venires, or (3) by showing a pattern of strikes, or questions and statements by a prosecuting attorney during voir dire. *Ward*, 293 Ark. at 92-93, 733 S.W.2d at 730. Appellant has shown none of the foregoing prerequisites.

After the court initially excused seventeen jurors for cause from the original panel, the appellant and the state had fifty-three persons left on the venire, five of whom were black. The court excused one of these five prospective jurors for cause because she had talked to others about the case and her views had become prejudiced. As a consequence, only four prospective black jurors remained on the panel at the time the attorneys began using their peremptory challenges. One of the remaining four veniremen was seated as a juror although the state had peremptory challenges remaining. The state did peremptorily challenge the three remaining black veniremen, but the appellant only questioned two of them. The two prospective jurors, Mr. Junious Lindsey and Mr. Ed Trotter, were challenged by the state after both men expressed reluctance to impose the death penalty. Appellant points to nothing in the prosecutor's actions and voir dire of these two black men that would lead us to believe the prosecutor acted with purposeful discrimination in striking Trotter and Lindsey. While not conceding that appellant had made a prima facie case of discrimination, the prosecutor stated on record that the two prospective jurors were striken because of their responses to the questions posed to them concerning the death penalty.

As was true in *Ford* v. *State*, 296 Ark. 8, 753 S.W.2d

258 (1988), the record here reflects that after the jury was seated—including the one juror of appellant's race—the state had peremptory challenges remaining. No discriminatory purpose can be attributed inferentially or directly to the state because of its actions in striking the two jurors in this cause. Neither does the appellant show a disproportionate exclusion of blacks from the venire from which the state and appellant were required to select a jury. Accordingly, we hold the appellant failed to establish a prima facie case of discriminatory purpose as is required in *Batson.*

In his final point appellant urges that Arkansas's capital murder statute is unconstitutional because it overlaps the requirements or elements contained in the state's first degree murder statute. This court has already decided this issue contrary to the appellant's argument. *See Cromwell* v. *State*, 269 Ark. 104, 598 S.W.2d 733 (1980). In *Cromwell*, the defendant insisted that Arkansas's capital murder and first degree murder statutes overlapped and were void for vagueness, because the prosecuting attorney or the trier of fact may arbitrarily decide whether an accused is to be charged with or convicted of capital murder, a capital offense, or murder in the first degree, punishable by imprisonment only. This court held that it found no constitutional infirmity in the overlapping of the two statutes because there is no impermissible uncertainty in the definition of the offenses. The court explained first that it was impossible to avoid the use of general language in the definition of offenses and that the prosecutor or grand jury is often compelled to choose one or two or more offenses, no matter how precise the statute might be. As an example, the court noted that one or the other offense may be established depending upon the credibility or conflicting testimony of witnesses. The court further reasoned that the wording in the first degree murder statute may have been chosen to lighten the possible punishment that might be imposed for conduct falling within the strict definition of capital murder—a consequence that might be acceptable both to the prosecution and to the defense. We reaffirm our decision in *Cromwell* and hold Arkansas's capital murder and first degree murder statutes to be constitutional.

In accordance with Ark. Sup. Ct. R. 11(f), we have examined the record of the proceedings and have determined that

there are no other rulings adverse to appellant which resulted in prejudicial error. For the reasons set out above, we affirm the trial court's rulings and judgment.

Donald G. JACKSON *v.* Emily Joy JACKSON

88-187 765 S.W.2d 561

Supreme Court of Arkansas
Opinion delivered February 20, 1989

*Herrods of Arkansas, P.A.*, by: *E.H. ("Buzz") Herrod*, for appellant.

*Wilson & Associates, P.A.*, by: *Jack T. Lassiter*, for appellee.

TOM GLAZE, Justice. This appeal ensues from a divorce case and involves marital property issues that arise out of appellee's inheritance of certain stock and the later purchase of her sister's one-half interest in real property that she and her sister inherited from their mother. Both of these events, the inheritance and purchase of property, occurred when appellee was married to the appellant. The chancellor held appellant acquired no marital interest in either the stock or real property, and in an unpublished

opinion, the court of appeals affirmed. This court granted review pursuant to Ark. Sup. Ct. R. 29(1)(c).

We first consider the house and real property that the appellee and her sister inherited from their mother. The sisters each owned an undivided one-half interest in the property. By agreement with her sister, appellee and her husband, appellant, moved into the house, which is located in the Pleasant Valley Subdivision in Little Rock. Appellee and appellant made improvements on the property with monies appellee testified were her separate funds, which were monies from nonmarital stock inherited from her mother.

At this time, the parties were experiencing marital unrest. For that reason, appellee stated that when her sister offered to sell her one-half interest, appellee bought her sister's interest by taking title in her name alone and paying her sister $67,850.31, which were funds appellee withdrew from her separate stockbroker account. That account contained the stock that appellee had inherited from her mother. In purchasing her sister's interest, appellee concedes that she first deposited the funds drawn from her stock account into a joint checking account, bearing both appellant's and appellee's names. After depositing these funds, she wrote a check payable to her sister for $67,850.31, which was the full amount of the purchase. Appellant argues that, when appellee placed her nonmarital funds into the parties' joint checking account, appellant acquired a one-half interest in those funds, as well as the sister's one-half interest, which was purchased by with those funds.

In *McEntire* v. *McEntire*, 267 Ark. 169, 590 S.W.2d 241 (1979), the court recited the established rule that the estate by the entireties may be created in personal property. It stated, noting Ark. Stat. Ann. § 67-552 (Supp. 1965) (now Ark. Code Ann. § 23-32-1005 (1987)), that a bank account held in the names of persons who designate themselves as husband and wife is the property of such persons as tenants by the entireties and upon the death of one of the persons, the account is payable to the survivor. The court further noted that an estate by the entireties in a bank account differs in one significant aspect from an estate in real property in that the estate exists in the account only until one of the tenants withdraws such funds or dies leaving a balance

in the account and that the funds withdrawn or otherwise diverted from the account by one of the tenants and reduced to that tenant's separate possession ceases to be a part of the estate by the entireties. *See also Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940); *Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982).[1]

In *Ramsey* v. *Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975), this court further discussed tenancy by the entirety and held that the acquisition of property, whether realty or personalty, by persons who are husband and wife by an instrument running to them conjunctively, without specification of the manner in which they take, usually results in a tenancy by the entirety. The court added that there is at least a presumption that the taking in such circumstances is by the entirety. The court added that the fact that the consideration given by the property taken in the two names belong to one spouse only is of little, if any, significance where he or she is responsible for the property being taken in both names as the presumption is that there was a gift of an interest by the husband to the wife, even though the wife may have no knowledge of the transaction. Importantly, the *Ramsey* court held that the presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence, partially because the alternate is a resulting trust the establishment of which, under circumstances, requires that degree of proof.

In the present case, the chancellor concluded, correctly we believe, that appellee should be entitled to her inherited or nonmarital funds, unless she did something to destroy the nonmarital status of those funds. Clearly, appellee had the right to withdraw the funds she deposited in the parties' joint account and, as pointed out in *McEntire*, the mere depositing of those nonmarital funds into the parties' bank account did not render them forever funds owned by the entirety. The chancellor found that appellee merely "poured" her nonmarital funds in and out of the parties' checking account, so she would have a receipt and

[1] The court in *McEntire* offered a caveat that in a proper case, fraud or some other remedy may still be available to sustain an action to recover funds withdrawn or diverted by a co-tenant.

record of the real estate transaction with her sister—a record appellee deemed necessary for the Internal Revenue Service. Also, significantly, the trial judge found appellee took title to the house in her name only, and he obviously believed her testimony that she intended to keep her funds and property separately since the parties were experiencing marital discord. The appellee testified she rejected appellant's suggestion that they obtain a loan to purchase the sister's interest because, to do so, would necessitate placing the property in both her name and the appellant's. The chancellor further found the appellant exercised no dominion and control over appellee's funds, and he was convinced that appellee never intended to make a gift of those nonmarital funds and property to appellant.[2] We believe the record readily supports the chancellor's findings in these respects. Our inquiry, however, does not end at this point.

We next must decide whether the one-half interest the appellee purchased from her sister is marital property subject to division under Ark. Code Ann. § 9-12-315 (Supp. 1987). Under § 9-12-315(b), all property acquired by either spouse subsequent to the marriage is marital property, unless it falls within one of five statutory exceptions. *See Wagoner* v. *Wagoner*, 294 Ark. 82, 740 S.W.2d 915 (1987); *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984). Of course, the appellee, during her marriage to appellant, acquired the property from her sister but did so, as we concluded above, by using her inherited or nonmarital funds. Based upon the record before us, appellee's acquisition would appear to be included—if at all—within the exception set out in § 9-12-315(b)(2) which provides as follows:

> Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired

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[2] On this point, the dissenting opinion refers to *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988), and erroneously concludes that the court in *Lofton* reached a different holding to the one here. The court in *Lofton*, citing *McEntire* v. *McEntire*, 267 Ark. 169, 590 S.W.2d 241 (1979), employed the same legal analysis as we have in this case, but the *Lofton* court merely concluded that, in reviewing the record, no clear and convincing evidence was presented to overcome the presumption that certain certificates of deposit were owned by the parties as tenants by the entirety. In the instant case, we merely affirm the trial court, by holding that clear and convincing evidence was presented to overcome the presumption of ownership as tenants by the entirety.

by gift, bequest, devise, or descent.

Although our court has not directly construed or interpreted the foregoing exception, other jurisdictions, with identical provisions, have. *See* Ora Fred Harris, Jr., *The Arkansas Marital Property Statute and the Arkansas Appellate Court: Tiptoeing Together Through the Tulips*, 7 UALR L.J. 1, 44 (1984) (which, in footnote 253, lists twelve states that have statutes that embrace this same exception). In *Stevens* v. *Stevens*, 448 A.2d 1366 (Me. 1982), the Supreme Judicial Court of Maine, in considering a provision identical to Arkansas's "exchange" provision, concluded that only that portion of the property acquired during marriage in exchange for the nonmarital property should be set aside as nonmarital property. The Maine court, adhering to the tracing or source-of-funds theory adopted by that court earlier, further stated that an exchange of a nonmarital interest for other property after marriage will yield only a nonmarital interest proportionate in value in the newly acquired property. *See also Tibbetts* v. *Tibbetts*, 406 A.2d 70 (Me. 1979); *Hoffmann* v. *Hoffmann*, 676 S.W.2d 817 (Mo. 1984) (en banc).

In *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), this court, relying in part on the *Tibbetts* case where the Maine court first discussed and applied the tracing or source-of-funds theory, held Mr. Potter was entitled to a separate interest in a lot and house in the amount of $9,656.08, since that sum was directly traceable to the proceeds of the sale of property he owned prior to marriage. Later in *Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986), this court said that while the tracing of nonmarital money or property into other forms may be an important tool, or means to an end, we cautioned that tracing is not intended to be an end in itself. In further explanation, we said:

> The fact that one spouse made contributions to certain property does not necessarily require that those contributions be recognized in the property division upon divorce. It was certainly not our intention to state an opposite point of view in *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983). We have no doubt that the tracing of funds and even the acquisition of property before the marriage or by gift during the marriage might be inconsequential when considered at the dissolution of a marriage that had lasted

for many years and had left the parties with decidedly unequal means for supporting themselves in the future.

Based upon the record in the instant case, we discern no reasons why appellee should not be entitled to her nomarital property. No doubt exists that the funds used to purchase the sister's one-half interest in the house and property were directly traceable to appellee's nonmarital stock. Therefore, under the source-of-funds theory, she is clearly entitled to an award of, or to be credited with, the purchase amount, or $67,850.13, which was paid on October 30, 1986. Even so, the property, at the time of divorce in July 1987, was valued at $167,500.00 by appellant's expert witness, and in view of that unrebutted value testimony, it appears either that the appellee purchased her sister's undivided interest at a below market price or the property appreciated in value between the time of purchase and the date of the parties' divorce. Either way, in using the $167,500.00 value figure and crediting the appellee with her one-half nonmarital interest in the property and with her nonmarital funds used to buy her sister's one-half, appellant would be entitled to a one-half interest, $7,950.00, in the remaining increased value in the property which was $15,900.00.

Appellant next argues he is entitled to an interest in certain First Federal bonds and Baptist Building bonds purchased during the parties' marriage by appellee with her nonmarital funds and also to an interest in the increase in value of appellee's stock portfolio. We find no merit in either contention. Unquestionably, appellee used nonmarital funds to acquire the bonds in question, and no evidence countermands that such purchases were no more than an exchange for property and therefore excepted from the definition of marital property pursuant to § 9-12-315(b)(2). Concerning appellant's claim to an interest in appellee's stock portfolio (which he concedes is nonmarital), the evidence is far from clear that any increase in values occurred. While appellant claims the portfolio had an initial value of approximately $175,000.00 when appellee inherited the stocks, the appellee argues her account was initially worth $313,936.00, but had decreased to $300,000.00 at the time of trial. In reviewing the record with the accounts and probate petitions and matters attached, we find it impossible to conclude with any certainty regarding when the appellee's inherited stocks

gained their way into her stock portfolio. We conclude, as did the court of appeals on this point, that there is evidence which clearly supports the chancellor's failure to find this issue in appellant's favor.

Finally, appellant argues the chancellor erred in failing to state reasons for not making an equal distribution of certain personal property as is required under Ark. Code Ann. § 9-12-315. The personal property items to which appellant makes reference were listed on two sheets, only one of which has been abstracted. Without both sheets, we are unable to determine how or to whom all of the items were divided. Suffice it to say, a conflict exists between the parties as to the worth of the items each received, and based upon the record, we are unable to say the chancellor was clearly wrong.

For the above reasons, we affirm the trial court's decision except we reverse that part of its holding concerning the house and property and remand with directions to award appellant an interest in such property in the sum of $7,950.00.

HOLT, C.J., and NEWBERN, J., concur. PURTLE, J., dissents.

DAVID NEWBERN, Justice, concurring. The majority opinion reaches the correct result, however, I find the discussion about tenancies by the entireties to be unnecessary and confusing. When funds owned by one spouse are deposited in a bank account held jointly with the other spouse, there is a strong presumption that the spouse who makes the deposit has transferred an interest in the funds to the other spouse by gift. *Ramsey* v. *Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975). The presumption may be overcome by "clear, positive, unequivocal, unmistakable, strong, and convincing evidence" as Justice Fogleman wrote in the *Ramsey* case and as the majority opinion states here. We need only say that there was evidence of that type before the chancellor. As the presumption of gift was overcome, Donald Jackson owned no part of the money Emily Joy Jackson used to purchase the sister's interest in the house. That interest fell within the "acquired in exchange" exception to marital property. Ark. Code Ann. § 9-12-315(b)(2).

HOLT, C.J., joins this opinion.

JOHN I. PURTLE, Justice, dissenting. I cannot "trip it . . .

[o]n the light fantastic toe" so spryly as the majority. Neither can I turn to *Day* v. *Day* as a cure-all for every marital property question. As for me, I must turn to the law as written.

Ark. Code Ann. § 9-12-315(b) (1987) states:

> (b) For the purpose of this section "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> (1) Property acquired by gift, bequest, devise, or descent;
>
> (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (3) Property acquired by a spouse after a decree of divorce from bed and board;
>
> (4) Property excluded by valid agreement of the parties; and
>
> (5) The increase in value of property acquired prior to the marriage.

In the present case the funds in the joint bank account were obviously acquired subsequent to the marriage. Moreover, the bank account does not fit into any of the five categories excepted from the basic rule.

It seems to me that the exact issue before us at this time was considered by the Court of Appeals in *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988), where it was stated:

> [O]nce property, whether personal or real, is placed in the names of persons who are husband and wife, without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety and it takes clear and convincing evidence to overcome that presumption.

Apparently we are going to have two types of property involving joint bank accounts held by a husband and wife. One rule will apply to the Loftons and another to the Jacksons. We will thereafter have problems deciding whether it is a Lofton case or a

Jackson case.

Lofton had acquired property by inheritance from his parents. He bought his brother's half interest in the property. The purchased property was held to be marital property. In the present case the appellee inherited property from her parents. Subsequently she placed some of these funds in a joint account with her husband. These funds were in turn used to purchase the sister's half interest in the inherited residence. I can find no distinction in the facts of the two cases.

The appellee does not offer to refund to the appellant the amount of money which he had deposited in their account. The $31,000 he received was from the sale of property he owned prior to the marriage. If the chancellor felt a duty to trace the appellee's money from her separate funds through the joint checking account, he should have also felt the duty to trace the appellant's separate funds through the checking account. Either the appellant should be given credit for the $31,000 of non-marital funds he deposited in the account, or the appellee should not be given credit for the funds which she "ran through their checking account" to purchase the sister's interest in the house.

We should either accept the "source-of-funds" theory and "tracing" as recognized in *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), or reject it. We should not continue to trip the light fantastic through the law.

Nelson DROPE *v.* Vickie Eileen OWENS

88-174 765 S.W.2d 8

Supreme Court of Arkansas
Opinion delivered February 20, 1989
[Rehearing denied April 10, 1989.*]

*Purtle, J., would grant rehearing. Glaze, J., not participating.

*Smith, Jernigan, & Smith*, by: *H. Vann Smith*, for appellant.

*Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A.*, by *Ralph R. Wilson*, for appellee.

J. L. HENDREN, Special Justice. This tort action arose out of a right-angle intersection collision between appellant's south-bound motorcycle and appellee's east-bound automobile. Jurisdiction is in this court pursuant to Rule 29(1)(o).

Plaintiff-appellant Nelson Drope sued defendant-appellee Vickie Owens for personal injuries and property damages sustained by Mr. Drope when his motorcycle struck Ms. Owens' automobile within the intersection of Warren Drive and Valley Drive in the city of Little Rock. Mr. Drope appeals from a defendant's verdict returned by a Pulaski County Circuit Court jury and the lower court's denial of his motion for a new trial.

Appellant relies upon the following two points for reversal:

I. That the [trial] court erred in refusing to allow an expert reconstructionist to testify as to the speed of the motorcycle prior to the accident.

II. That the [trial] court abused its discretion in refusing to grant a new trial in that the verdict was clearly contrary to the preponderance of the evidence and law.

Appellant's first witness was Little Rock Police Officer Timothy L. Quinn who testified concerning the investigation he made soon after the accident which had happened shortly after 5:00 P.M. on March 21, 1986. Officer Quinn described the scene including some 82 feet of skid, scuff and gouge marks in the appellant's lane of traffic on Warren Drive continuing into the intersection where the impact apparently occurred. He identified photographs of the intersection made from the respective vantage points of appellant on Warren Drive and Appellee on Valley Drive immediately prior to the collision. Stating it was his normal custom to question both drivers involved in an accident and to take statements from them, Officer Quinn related comments made to him by both appellant and appellee. According to Officer Quinn, appellant stated he had been going at least 45 miles per hour before the accident. Warren Drive is posted 20 miles per hour when children are present (there is a school in the area) and 30 miles per hour when children are not present.

The record shows the trial court, having received indication that appellant's second witness would be Mr. Larry Williams as

an accident reconstruction expert, determined that a proffer of Mr. Williams' qualifications and testimony should be made before the court ruled on the admissibility of the evidence. In chambers, Mr. Williams stated impressive credentials and qualifications and appellant's counsel informed the Court Mr. Williams would testify concerning the speed of the motorcycle upon impact. Before ruling, the court inquired how many eyewitnesses were available and was told there would be four. Whereupon, the court ruled that Mr. Williams would not be permitted to testify "because I do not believe his testimony would aid the jury in making a determination that they are not capable of making based on eyewitness testimony."

In explaining the reasons for his ruling, the trial court stated his apparent belief that experts are frequently used to promote particular theories; that theories aren't needed when eyewitnesses are available; that if there were no eyewitnesses, there might be some value or use for specialist, technical, expert testimony; and that since all the expert could go on would be the physical findings of some other witness—such as the marks on the pavement made partly from the tires and partly from the gouge when the motorcycle turned on its side—it was the Court's view that it would be impossible for an expert to come up with a reasonable conclusion as to speed under the circumstances.

Appellant's counsel made the following proffer:

> Mr. Williams would testify that, based on his examination of the police report, the number of feet of skid marks, gouges and measurements of Officer Quinn, based on his conversations with Nelson Drope and the officer, that Mr. Drope was traveling between 29 and 34 miles per hour.

The record does not disclose any specific contention to the trial court on the part of appellant that Mr. Williams' testimony was necessary to help the jurors understand some matter which was otherwise beyond their comprehension.

■ This court has long held, as a general rule, that attempts to reconstruct accidents by means of expert testimony are viewed with disfavor. *B & J Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984); *Reed* v. *Humphreys*, 237 Ark. 315, 373 S.W.2d 580 (1964); *Waters* v. *Coleman*, 235 Ark. 559, 361

S.W.2d 268 (1962); *Henshaw* v. *Henderson*, 235 Ark. 130, 359 S.W.2d 436 (1962); *Conway* v. *Hudspeth*, 229 Ark. 735, 318 S.W.2d 137 (1958); and *Missouri Pac. Ry. Co.* v. *Barry*, 172 Ark. 729, 290 S.W. 942 (1927). However, this court has also consistently recognized exceptions to this general rule where it appears that a particular situation is beyond the jurors' ability to understand the facts and draw their own conclusions. *Price* v. *Watkins*, 283 Ark. 502, 678 S.W.2d 762 (1984); *B & J Byers Trucking, Inc.* v. *Robinson, supra; Wright* v. *Flagg*, 256 Ark. 495, 508 S.W.2d 742 (1974); and *Woodward* v. *Blythe, Adm'r*, 249 Ark. 793, 462 S.W.2d 205 (1971).

It has been said that under Uniform Evidence Rule 702, the question is whether specialized knowledge will assist the jury to understand the evidence or determine a fact issue. *B & J Byers Trucking, Inc.* v. *Robinson, supra.* Whether or not a particular case should be governed by the general rule or should be treated as an exception thereto, is a matter within the trial judge's discretion to be upheld on appeal absent an abuse of that discretion. *Price* v. *Watkins, supra; B & J Byers Trucking, Inc.* v. *Robinson, supra*; and *Parker* v. *State*, 268 Ark. 441, 597 S.W.2d 586 (1980).

While the general rule not favoring reconstruction of accidents by expert testimony has been liberalized somewhat since enactment of the Uniform Rules of Evidence (*e.g. Price* v. *Watkins, supra; B & J Byers Trucking, Inc.* v. *Robinson, supra*; and *Smith & Vaughn* v. *Davis*, 281 Ark. 122, 663 S.W.2d 165 [1983]), we have continued to follow it. In *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987), we said:

> The general test for admissibility of expert testimony is whether the testimony will aid the trier of fact in understanding the evidence or in determining a fact issue. Unif. R. Evid. 702; *B & J Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984). An important consideration in determining whether the testimony will aid the trier of fact is whether the situation is beyond the trier of fact's ability to understand and draw its own conclusions. *B & J Byers Trucking, Inc.* v. *Robinson, supra.* Here, lay jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse.

In *Missouri Pac. Ry. Co.* v. *Biddel*, 293 Ark. 142, 732 S.W.2d 473 (1987), we said:

> It is also notable that this court has taken the position that the opinion of an expert is not admissible if the point in issue is not beyond the comprehension of the jury. In *St. Louis S.W. Ry. Co.* v. *Jackson* [242 Ark. 858, 416 S.W.2d 273 (1967)], we said:
>
> > . . . We have consistently held that it is prejudicial error to admit expert testimony on issues which could conveniently be demonstrated to the jury from which they could draw their own conclusions. See *S & S Construction Co.* v. *Stacks*, 241 Ark. 1096, 411 S.W.2d 508 (1967). Therefore, we hold that the trial court committed reversible error in admitting the expert testimony on the abnormally dangerous crossing.
>
> We reaffirmed that view more recently in *Russell* v. *State*, 289 Ark. 533, 712 S.W.2d 916 (1986). While we upheld the admission of expert testimony in *B & J Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984), there the witness made computations which the jury could not have made on its own.

We agree with appellant that the record shows Mr. Williams is well qualified as an expert accident reconstructionist and that, contrary to the trial court's view, he could have formulated and expressed an opinion concerning the speed of the motorcycle based on the information available to him. However, these concerns are not controlling on the issue. We further note that the existence or non-existence of eyewitnesses in a given case is likewise not controlling. These matters are but factors to be considered in determining whether or not the testimony of an expert accident reconstructionist is admissible in a given case. In light of our previous holdings, we must agree with the trial court that, in this particular case, the matter of the speed of a motorcyle was not beyond the comprehension or understanding of the jurors. Further, we cannot say the trial court abused his discretion in determining, based upon the proffer and other matters before him, that Mr. Williams' testimony was not necessary to help the jurors understand the evidence and draw their own conclusions. Accordingly, we find no merit in appellant's first ground for

reversal.

As we have said before, we now say again that the determinations of the need for an expert witness and of the expert witness' qualifications are matters lying within the trial judge's discretion, to be upheld upon appeal, absent an abuse of that discretion. With regard to accident reconstruction, the general test for admissibility is whether the testimony will aid the trier of fact in understanding the evidence or in determining a fact issue. Among the considerations to be used by the trial judge in determining whether the testimony will aid the trier of fact is whether the situation is beyond the trier of fact's ability to understand and draw its own conclusions.

Appellant's second ground for reversal is that the trial court abused his discretion in refusing to grant a new trial and that the verdict was clearly contrary to the preponderance of the evidence and law.

Granting or refusing of a motion for a new trial is a discretionary act by the trial court and the appellate court reverses only where an abuse of discretion is clearly shown. *Bittle* v. *Smith*, 254 Ark. 123, 491 S.W.2d 815 (1973). Further, on appeal we must view the evidence in the light most favorable to the appellee and affirm the lower court's decision if there is any substantial evidence to support the jury verdict. *Mallett* v. *Brannon*, 246 Ark. 541, 439 S.W.2d 32 (1969).

With these rules in mind, we review the evidence in this case. The testimony of Officer Quinn has already been summarized above. There were four eyewitnesses to the collision including appellant, appellee, John Drope (appellant's brother) and Robert W. Harris (a bystander).

Appellant said he saw appellee sitting at the stop sign on Valley Drive when he stopped at a similar stop sign a block away prior to entering Warren Drive and proceeding toward the intersection where appellee already was. He stated appellee started, stopped, started and then stopped again all while he proceeded South on Warren Drive toward its intersection with Valley Drive. He stated he was unable to avoid hitting appellee because of her erratic actions and had to lock his brakes, lay the motorcycle on its side and slide into the side of appellee's

automobile. Appellant admitted telling Officer Quinn he was going between 35 and 40 miles per hour but said at the trial he felt his speed was only 25 to 30 miles per hour although there was no speedometer on the motorcycle. John Drope, who was riding a motorcycle behind appellant, testified essentially in accordance with appellant's testimony.

Appellee said she pulled up to the stop sign on Valley Drive outside the intersection with Warren Drive and then pulled up where she could see. She said she saw appellant and his brother on their motorcycles as they came on to Warren Drive a block away; that she thought she had time to get across the intersection but looked up and saw they were coming very fast and were going to hit her; and that when she saw them coming fast, it appeared appellant was trying to go in front of her car and this is why she stopped. Appellee admitted that she did not come to a complete stop at the stop sign and stated she thought that appellant was coming too fast.

Robert W. Harris testified he saw appellant turn onto Warren Drive without making a complete stop before he did so. He saw the motorcycles proceed down Warren Drive to the intersection with Valley Drive and said appellant was going so fast that he locked his brakes and lost control and there was no way he could have avoided hitting appellee. Mr. Harris testified to his opinion that appellant was driving 45 to 50 miles per hour.

There were no objections to the trial court's instructions to the jury and we cannot say the evidence in the record was not sufficiently substantial to support the jury's verdict. *Mallett* v. *Brannon, supra; Arkansas Louisiana Gas Co.* v. *Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966); and *Oliver* v. *Miller*, 239 Ark. 1043, 396 S.W.2d 288 (1965). Accordingly, we do not believe the trial court abused his discretion in denying appellant's motion for a new trial, and we find no merit in the second point for reversal.

Affirmed.

PURTLE, J., dissents.

GLAZE, J., not participating.

JOHN I. PURTLE, Justice, dissenting. I do not enjoy dissenting from an opinion so well written and so well researched. In fact,

the majority opinion correctly states the law as it has been developed in the past. However, I write with the hope of pointing out that the rationale behind these older decisions is not present in today's society.

Relevant evidence, according to A.R.E. Rule 401, is 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." Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State." Of course the trial court must have discretion in determining the qualifications of a reconstruction expert.

The speed of the vehicles was a matter in sharp dispute in the present case. The investigating officer, who did not witness the accident, gave his testimony concerning the speed of the vehicles at the time of the accident. Certainly evidence on this issue is relevant. All relevant evidence is admissible. It seems to me that if the testimony of one witness concerning speed is relevant, certainly evidence presented by another witness on the same issue is relevant.

In *Woodward* v. *Blythe*, 249 Ark. 793, 462 S.W.2d 205 (1971), this court held that expert testimony was necessary in that case for an understanding by the jurors of the physical dynamics and causal relationships involved in the accident. *Woodward* was rather an unusual case, but the reasons for allowing the testimony of a reconstruction expert are the same in the present case. In a case decided after the uniform rules were adopted, we held that it was proper to permit the testimony of a reconstruction expert. In *B & J Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984), we upheld the action of the trial court permitting an officer to testify as a reconstruction expert. The jury in the present case was not shown to have been in any better position to make computations and figure out the physical dynamics and causal relationships involved in the accident than was the jury in *Byers*.

Our cases should be controlled by the rules of evidence. If evidence is relevant, it is admissible, unless it is excluded by some other rule or law. Otherwise, our cases will continue to be in hopeless conflict.

# PINEVIEW FARMS, INC. *v.* A.O. SMITH HARVESTORE, INC.

88-205 765 S.W.2d 924

Supreme Court of Arkansas
Opinion delivered February 27, 1989

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

*Allen Law Firm, A Professional Corporation*, by: *H. William Allen* and *Sandra Jackson*, for appellee A.O. Smith Harvestore, Inc.

*Anderson & Kilpatrick*, by: *Joseph E. Kilpatrick, Jr.*, and *Frances E. Scroggins*, for appellees Southern Harvestore Systems, Inc., Gerald King, and Joe McMullen.

JACK HOLT, JR., Chief Justice. Appellant Pineview Farms, Inc. (Pineview) claims appellees A. O. Smith Harvestore, Inc. (A. O. Smith), Southern Harvestore Systems (Southern), which is a subsidiary of A. O. Smith, and Gerald King and Joe McMullen, two servicemen of Southern, were negligent in failing to properly inspect and repair Pineview's grain silo. The trial court entered judgment in favor of the appellees. We affirm.

In July 1980 Pineview, located in Cabot, Arkansas, employed Southern, located in Harrison, Arkansas, to inspect and repair its Harvestore silo. The Harvestore silo system preserves

feed by limiting oxygen that comes into contact with feed stored inside a silo. Breather bags allow temperature changes in the system to occur without affecting the vaccum. The estimate for the job was $7,500.00, which included resealing the silo, replacing the breather bags, and putting a new floor in the silo.

On July 18, 1980, employees of Southern partially resealed the silo. However, they did not replace the breather bags or the floor because they felt both were "okay." The charge for this work was $1,127.00. The silo was placed in use, and silage began spoiling shortly thereafter.

On October 27, 1981, Southern sent two servicemen to Pineview Farms in response to a call that the silo was on fire. Upon arrival, the servicemen found no evidence of fire but did find the unloader door open. They changed a valve, clamped down a top hatch, and checked the breather bags, which appeared to be in good condition. The charge for this service was $63.86.

On May 7, 1982, Southern replaced a cutter chain and hooks and conducted a pressure test. The charge was $2,412.13.

On July 13, 1982, two Southern servicemen (appellees King and McMullen) were sent to pressure check the silo and examine its foundation. They did a partial pressure check on the lower portion of the structure, replaced a bottom drain cap missing from the foundation, and fixed a faulty center hatch gasket. They also tested the breather bags, finding them to be in good condition. The charge was $141.33.

Pineview dumped spoiled silage into its fields in July or August of 1982. In November 1982 Pineview again put grain in the silo. Near this time, Robert Gordon, a representative from A. O. Smith, visited Pineview Farms. He inspected the breather bags and determined that the bags were old and "with fairly good accuracy" inoperable. However, he did not report this to Pineview, A. O. Smith, or Southern.

From November 1982 until February 1983, the silage deteriorated rapidly. Pineview called A. O. Smith in Chicago to discuss the problem. On February 9, 1983, Smith sent representatives from K-W Harvestore in Missouri to Pineview. The repairmen found four leaks in the silo and also found that the breather bags were bad. The repairmen fixed the leaks and replaced the

breather bags and breather valve flaps. Pineview was not charged for this work.

In April of 1983, A. O. Smith's representative, Bob Gordon, met with Dr. Clinton Jewett, the manager of Pineview, concerning a delinquent account to Southern. In an interoffice memo concerning this visit, Gordon stated that (1) he questioned the credibility of the work performed by Southern on July 13, 1982, in that he and K-W Harvestore people found the breather bags to be very brittle and inoperative seven months later; that (2) he agreed to give Pineview $141.33 credit on the July 13, 1982, invoice; and that (3) he agreed to give Pineview a $440.32 credit on the July 18, 1980, invoice since Pineview paid for a complete reseal but only received a partial reseal.

In May of 1983, Pineview put another crop of grain in the silo. In about a month, some of the silage spoiled. On July 15, Pineview filed a complaint against A. O. Smith Harvestore, Southern Harvestore, Gerald King and Joe McMullen, alleging that from July 18, 1980, until July 15, 1983, A. O. Smith, through its agents (Southern, King, and McMullen) was negligent in failing to inspect and repair the silo and breather bags, resulting in damage to silage and livestock and loss of milk production in excess of $10,000.00

The case was tried before a jury, which found that (1) Southern Harvestore, Joe McMullen, and Gerald King were not negligent and that (2) Pineview's negligence was the proximate cause of the occurrence. The trial court entered judgment for A. O. Smith, Southern, King, and McMullen. Thereafter, Pineview filed a motion for new trial, which the trial court denied. From this order, Pineview appeals.

*AMENDMENT OF PLEADINGS.*

Pineview argues that the trial court erred in (1) denying its motion to amend the pleadings to conform to the evidence and in (2) failing to submit the issue of the independent negligence of A. O. Smith Harvestore to the jury. We hold to the contrary.

In a deposition taken seven months prior to trial, Bob Gordon, A. O. Smith's representative, testified that he inspected the breather bags in November of 1982 and determined that they were old and "with fairly good accuracy" inoperable, but did not

disclose this fact to anyone.

Three months prior to trial, A. O. Smith filed a motion for summary judgment asking that it be dismissed from the case. In its response to this motion, Pineview asserted that Bob Gordon's inspection of the breather bags "constitutes independent inspection of the Harvestore silo by an agent of A. O. Smith Harvestore" and, "[c]onsequently, there is substantial evidence from which the jury could conclude that A. O. Smith Harvestore is guilty of an act of independent negligence."

Well into the trial, Pineview moved that the pleadings be amended to allege independent negligence on the part of A. O. Smith Harvestore to conform to the proof that Bob Gordon inspected the breather bags in 1982 and found them to be old but did not disclose this fact to anyone even though he thought they should have been replaced. The following exchange then took place:

> The Court: Somewhat in my mind, I thought that motion wasn't necessary anymore.
>
> Mr. Donovan (counsel for Pineview): Whether it is or not, Your Honor, I'd like to make it. And the allegation further is that Bob Gordon is the agent and employee of A. O. Smith Harvestore.
>
> . . .
>
> Mr. Allen: May I be heard on that, Your Honor?
>
> The Court: Yes.
>
> Mr. Allen (defense counsel): Your Honor, I offer Defendant's Exhibit 25 and Defendant's Exhibit 26, the pretrial information sheet and the supplemental pretrial information sheet filed by the Plaintiff in this case, which says, "This is a claim for negligent inspection and repair of a Harvestore silo and the resulting damage to livestock and loss of milk production as a consequence of the negligence," and the supplemental includes what each witness would testify to, and there's no testimony in there to anything other than negligent inspection or repair of the Harvestore silo.

> The Court: What is he trying to make it conform to anyway?
>
> Mr. Allen: He is trying to say now independent — independent liability on Harvestore, a claim that's never been in this case, and we move for a continuance because we didn't prepare for an independent liability case. We prepared for an agency case, and that's what he's been.
>
> The Court: Well, I think the rule is that if the motion is objected to, it's denied anyway, as I remember the rule from ten years ago. I'm not sure the motion is good anyway, right now. But anyway, it is denied at this late date.

This motion was renewed at the conclusion of the proof and denied again by the trial court. In addition, Pineview objected to the court's failure to submit the question of A. O. Smith's independent negligence to the jury.

Ark. R. Civ. P. 15 provides as follows:

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

A party who knowingly acquiesces in the introduction of evidence relating to issues that are beyond the pleadings is in no position to contest a motion to conform. *Bailey* v. *Matthews*, 279 Ark. 117, 649 S.W.2d 175 (1985). Newbern, *Arkansas Civil Practice and Procedure* § 15-3 (1985). Thus, consent is generally found when evidence is introduced without objection. *Id.* However, "a court will not imply consent merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim." *Quillen* v. *International Playtex, Inc.*, 789

F.2d 1041 (4th Cir. 1986).

It is undisputed that the appellees did not expressly consent to litigating the issue of A. O. Smith's liability, as principal, for agent Bob Gordon's negligence in failing to inform anyone after finding the breather bags to be old and inoperable in November of 1982. Thus, our only concern is whether the appellees impliedly consented to the trial of this issue. We quickly find they did not.

Granted, appellees did not object to testimony concerning this issue at Bob Gordon's deposition seven months prior to trial or at trial. Notwithstanding, since Gordon's testimony was relevant to the negligence of Southern and its employees in failing properly to inspect and repair the silo, a pleaded issue, the appellees were not put on notice of the unpleaded issue by this testimony sufficient to establish implied consent.

In addition, we are not persuaded by Pineview's contention that the appellees were put on notice of this issue by Pineview's argument in its response to the appellees' motion for summary judgment. Pineview's brief is devoid of language indicating that it was alleging negligence by Gordon in failing to inform. Pineview merely alleged Bob Gordon's inspection of the breather bags "constitutes independent inspection of the Harvestore silo by an agent of A. O. Smith Harvestore" and, "[c]onsequently, there is substantial evidence from which the jury could conclude that A. O. Smith Harvestore is guilty of an act of independent negligence."

Surely, had Pineview intended to make Gordon's negligence an issue prior to trial, it would have moved to amend its pleadings. Pineview's supplemental pre-trial information sheet indicating the expected testimony of Bob Gordon reveals its intentions were to the contrary. The sheet merely states that Gordon would testify that the Southern workmen did not perform the work indicated by the invoice and that he found the breather bags to be defective. However, it does not state that Gordon would testify that he failed to inform anyone that the bags were old or inoperable.

Absent express or implied consent, the question of whether pleadings may be amended to conform to the evidence is within the sound discretion of the trial court. *See* Ark. R. Civ. P. 15(b). A party should be allowed to amend absent prejudice.

*Webb* v. *Workers' Compensation Comm'n*, 286 Ark. 399, 692 S.W.2d 233 (1985). An important consideration in determining prejudice is whether the party opposing the motion will have a fair opportunity to defend after the amendment. *T. H. Epperson, Inc.* v. *Robinson*, 274 Ark. 142, 622 S.W.2d 688 (1981).

Some of the trial court's language in denying Pineview's motion to amend was nebulous. However, in light of (1) the statement by appellees' counsel in response to Pineview's motion to amend that he had not prepared for an independent liability case and (2) the trial court's ruling immediately thereafter stating that it was denying the motion at "this late date," it is obvious that the court's holding was essentially based upon prejudice to appellees which would have resulted from amendment of the pleadings.

This ruling is well founded. The appellees appeared in court prepared to try only a negligent repair and inspection action. If the trial court had allowed Pineview to amend its pleadings late in trial with a new unpleaded claim based upon the negligence of Bob Gordon in failing to inform anyone of the condition of the breather bags, the appellees would have been faced with the task of defending a matter significantly different from that for which they originally prepared. We conclude that the trial court did not abuse its discretion in denying Pineview's motion to amend or in failing to submit the issue of the independent negligence of A. O. Smith Harvestore to the jury.

*JURY MISCONDUCT.*

Pineview contends that the trial court abused its discretion by denying Pineview's motion for new trial on grounds of jury misconduct. We disagree.

During voir dire, the following took place:

> The Court: Do we have any dairy farmers? Are you a dairy farmer?
>
> Juror Mrs. Bennie Hicks: Yes, I am.
>
> The Court: Okay. Would you identify yourself, please, ma'am?
>
> Mrs. Hicks: I'm Mrs. Bennie Hicks, and we own a dairy

farm in the Oak Grove Community.

Mr. Donovan (Pineview's counsel): Are any of you engaged in the farm equipment or supply business?

Jurors: (no response)

. . .

Mr. Donovan: Are you familiar with Pineview Farms?

Mrs. Hicks: Yes, I am.

Mr. Donovan: Okay. Are you the lady that told us you're in the dairy business?

Mrs. Hicks: Right.

. . .

Mr. Donovan: Have any of you ever worked with any silage — with silage in any way? Or a feed company?

Mrs. Hicks: (raises hand)

. . .

Mr. Donovan: Could you be fair to Pineview Farms?

Mrs. Hicks: Yes.

. . .

Mr. Allen (defense counsel): Mrs. Hicks, you're kind of in a unique position here. You're the only one that's mentioned being involved in dairy farming. Could you tell us a little about your farm and how long you have been involved in it and how many cows? Just tell us a little about your farm.

Mrs. Hicks: We've been dairying for six years tomorrow. We are located in the Oak Grove community, which is about nine miles northeast of here. Presently, we're running about sixty cows. My husband and I own it and operate it ourselves.

After trial, Pineview moved for a new trial based in part on jury misconduct. It attached affidavits indicating that (1) Bennie Hicks, Mrs. Hicks' husband, while doing some custom tractor

work for Pineview, became very upset when Pineview refused to repair his broken tractor and left without completing the job; that (2) Pineview bought silage from Hicks in May of 1981, the same silage for which Pineview claimed damages; and that (3) Mrs. Hicks endorsed the check given to her husband by Pineview for this silage.

After a hearing, the trial court denied the motion for new trial, finding that there was no direct proof that Hicks did anything wrong or committed fraud.

No verdict shall be void or voidable because any juror shall fail to possess the necessary qualifications unless the juror knowingly answers falsely or knowingly fails to respond to any question on voir dire relating to the qualifications propounded by the court or counsel in any cause. Ark. Code Ann. § 16-31-107 (1987). To obtain a new trial on the grounds of juror misconduct, a party must first demonstrate that a juror failed to honestly answer a question or deliberately concealed a matter during voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. *See McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984). *See also B. & J. Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984); *Hot Springs Street Railway Co.* v. *Adams*, 216 Ark. 506, 226 S.W.2d 354 (1950). The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial. *McDonough, supra.*

In a hearing on a motion for a new trial because of ineligibility of a juror, the complaining party has the burden of first establishing that (1) diligence was used to ascertain the desired information and that (2) he made known to the juror the specific information desired. *Lemley* v. *Fricks*, 251 Ark. 923, 475 S.W.2d 702 (1972); *Kane* v. *Erick*, 250 Ark. 448, 465 S.W.2d 327 (1971). *See also Ark. State Highway Comm'n* v. *Kennedy*, 233 Ark. 844, 349 S.W.2d 133 (1961). We affirm where there is substantial evidence to support a trial court's finding on whether a party has met its burden. *Lemley, supra.*

First, there was absolutely no evidence introduced at the hearing on the motion for a new trial that Mrs. Hicks failed to honestly answer a question or deliberately concealed any matter.

Secondly, Pineview has not met its burden of showing that it used due diligence to obtain the desired information and that it made known to Mrs. Hicks the specific information desired. In short, Pineview's argument is meritless.

*SUFFICIENCY OF THE EVIDENCE.*

Pineview asserts that the trial court erred in failing to grant its motion for new trial in that there was insufficient evidence to support the jury verdict.

When acting upon a motion for new trial challenging a jury's verdict, the trial court is required by Ark. R. Civ. P. 59(a)(6) to set aside the verdict if it is clearly against the preponderance of the evidence or contrary to law. *Dedman* v. *Porch*, 293 Ark. 571, 739 S.W.2d 685 (1987). The test on review, where the motion is denied, is whether the verdict is supported by substantial evidence. *Schaeffer* v. *McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985). It is only where there is no reasonable probability that the incident occurred according to the version of the prevailing party or where fair-minded men can only draw a contrary conclusion that a jury verdict should be disturbed. *Blissett* v. *Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970).

It is Pineview's contention that the trial court abused its discretion in failing to grant a new trial since there was overwhelming proof that the silo was improperly inspected and repaired by employees of Southern on several occasions.

Notwithstanding testimony concerning negligence on the part of the employees of Southern, the jury concluded that Southern was not negligent, apparently accepting the employees' testimony that they performed their services properly. Also, the jury could have reasonably concluded that it was Pineview's negligence that caused the damage to the feed and livestock and loss of milk production in light of testimony that (1) upon arrival at the Pineview Farms, servicemen found the door to the silo open and that (2) on one occasion the men found a drain cap missing. The verdict is supported by substantial evidence.

Pineview's argument is essentially an attack on the credibility of appellees' witnesses. The weight and value to be given to the testimony of witnesses is in the exclusive province of the jury. *Butler Mfg. Co.* v. *Hughes*, 292 Ark. 198, 729 S.W.2d

142 (1987).

*JURY INSTRUCTIONS.*

The jury was instructed on negligence (AMI 301), the standard of care (AMI 305), proximate cause (AMI 501), affirmative defenses (AMI 206), and damages (AMI 2206, 2221, and 2226). Pineview argues that the trial court erred in refusing to give the jury the following additional instruction on these matters:

> The defendants allege poor management practices. Poor management practices of Pineview Farms, Inc., if any, are not to be considered as contributory negligence in comparing fault, unless related to defendants' negligence, if any. However, you may consider management practices of Pineview Farms, Inc., in determining the amount of damages caused by defendants' negligence, if any.

This argument is meritless.

Where a party is entitled to an instruction on an issue but requests an erroneous or incomplete instruction, he may not complain of failure of the court to charge the jury on the subject. *See Williams* v. *First Security Bank of Searcy*, 293 Ark. 388, 738 S.W.2d 99 (1987). *See also Reynolds* v. *Ashabranner*, 212 Ark. 718, 207 S.W.2d 304 (1948). A trial court need not give an instruction which needs explanation, modification, or qualification. *Williams, supra.* A jury instruction must be simple, impartial, and free from argument. *Paul* v. *Safley Construction Co.,* 287 Ark. 412, 700 S.W.2d 55 (1985). A litigant is not entitled to his particular preference in the wording of instructions, and a trial judge is not required to give repetitious or redundant instructions. *Hopper* v. *Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983).

The matters embraced by Pineview's instruction are adequately covered by the instructions given to the jury. In addition, the proffered instruction is erroneous on its face in that it commingles comparative and contributory negligence principles.

Affirmed.

Arthur JURNEY *v.* STATE of Arkansas

CR 88-25 766 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*The More Head Practice*, by: *Evelyn L. Moorehead*, for appellant.

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

DARRELL HICKMAN, Justice. Arthur Jurney was convicted of cutting his mother with a knife and raping her. He was sentenced to six years imprisonment and a $10,000 fine for second degree battery and life imprisonment for the rape. We affirm the convictions.

Jurney is a 32 year old alcoholic. At trial he admitted cutting his mother but said he had no recollection of the rape. He makes four arguments on appeal, all of which we find meritless.

First, he claims he is entitled to a new trial because two pretrial hearings were not recorded by the court reporter. Jurney's lawyer did not ask that a record be made of the hearings. After an appeal was brought, we remanded the case to settle the record, and the judge did so. The appellant has not complained that the settlement of the record is inadequate. We have recognized that Rule 6 of the Arkansas Rules of Appellate Procedure is an effective tool for reconstructing the record. *Holiday Inns, Inc.* v. *Drew*, 276 Ark. 390, 635 S.W.2d 252 (1982).

Next, the appellant alleges he was entitled to have a court appointed psychiatrist observe the victim's testimony and determine her competency. Two days before trial, he filed a motion claiming his mother was suffering from mental disease or defects.

There is some support for the proposition that a court has the discretion to order a psychiatric examination of a prosecuting witness if compelling reasons are shown on the record. *See, e.g., Murphy* v. *Superior Court*, 142 Ariz. 273, 689 P.2d 532 (1984). But here, the appellant could not present any evidence to back up his claim. We cannot say the court abused its discretion in denying the motion. *See Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

The appellant remained in jail fourteen months awaiting trial. He filed a motion to be released on his own recognizance under A.R.Cr.P. Rule 28.1(a). The judge refused to release him but set a trial date. The trial was conducted within

eighteen months of his arrest, so the speedy trial provisions of the Rules of Criminal Procedure were not violated. Even if the trial judge erred in not releasing the appellant, we have held that a dismissal of the charges is not required. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). The appellant has been unable to demonstrate any prejudice to his case resulting from the delay. *See Halfacre* v. *State*, 292 Ark. 329, 731 S.W.2d 182 (1987).

Finally, the appellant argues that the victim should not have been allowed to testify about his prior violent acts. When asked if this was the first time the appellant had been violent to her and her husband, the victim said no, he had pulled a knife on her before and hurt his father several times. An objection was sustained.

When asked why she left town shortly after the incident, the victim replied that she feared her son would get out of jail and hurt her or her husband. Again, an objection was sustained.

The appellant got the relief he requested. Since he did not ask for either an admonition or a mistrial, we find no error. *Daniels* v. *State*, 293 Ark. 422, 739 S.W.2d 135 (1987).

We find the record contains no other reversible errors. Ark. Sup. Ct. Rule 11(f).

Affirmed.

Elsie HUBBARD *v.* Floyd JACKSON

88-257 766 S.W.2d 2

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*Mark S. Cambiano, P.A.*, for appellant.

*Matthews, Sanders, Liles & Sayes*, by: *Marci Talbot Liles*, for appellee.

JOHN I. PURTLE, Justice. This is an appeal from a jury verdict and judgment in the amount of $6,927.00 in favor of the appellant. For reversal she argues that the trial court erred in failing to allow her to introduce evidence of the appellee's consumption of alcohol and in refusing to grant her motion for a new trial. Neither point being persuasive, we affirm the judgment of the trial court.

On December 31, 1984, the appellant was driving a pickup truck along Highway 64 in the city limits of Morrilton, Arkansas. She stopped at an intersection to make a left turn, awaiting oncoming traffic, and was struck from behind by a vehicle driven by the appellee. The appellant testified that she was giving a left turn signal, and the appellee testified that she was not. The appellant was taken from the scene by her husband to a local hospital emergency room where she was treated and released. The appellee alleges that, prior to the time the police officers and

her husband arrived, the appellant stated she was not injured.

She was treated from the date of the accident up until the time of the trial on February 16, 1988. She had very favorable medical testimony, especially from her chiropractor. On the other hand, the appellee had the testimony of a radiologist and an orthopedic surgeon that neither x-rays nor physical examination provided evidence of injury. The overall medical testimony was in direct conflict concerning the nature and extent of the appellant's alleged injuries.

During the opening statement to the jury, the attorney for the appellant stated that immediately after the accident the appellee came up to her and said, "I'm sorry." She intended to testify that at the time he apologized she smelled the odor of alcohol on his breath. An objection by the appellee' attorney was sustained by the court on the grounds that intoxication had not been alleged in the complaint. The appellant's attorney then attempted to amend the pleadings, but the court denied his request on the grounds that it would prejudice the appellee.

The appellant then proffered testimony that she smelled the odor of alcohol on the appellee's breath. The parties then stipulated that the police officer who made the incident report was unavailable at the time of the trial. It was further stipulated that the report did not contain a check mark in the place designated "had been drinking."

The jury evidently did not find the verdict form to their liking and therefore wrote their own, awarding the appellant $5,000 disability and $1,927.18 medical expenses through May, 1985, making the judgment total $6,927.18.

The first argument for reversal is that the trial court erred by refusing to allow evidence of intoxication. In support of this argument the appellant relies on the case of *Inderrieden, Executrix* v. *Phillips*, 294 Ark. 156, 741 S.W.2d 255 (1987). It is true that the *Inderrieden* case held that evidence of intoxication was a matter to be presented to the jury. However, intoxication was pled in the answer as an act of contributory negligence. The opinion stated that "it was for the jury to resolve that issue and to decide if indeed alcohol was a contributing cause or the cause of the accident." One of the disputed issues in *Inderrieden* was whether

the injured party was intoxicated at the time of the accident. Evidence that the injured party was drunk on the date of the accident and was an alcoholic was presented to the jury along with her testimony that the she was neither an alcoholic nor drinking on the date of the occurrence. In the present appeal, there was no assertion of appellee's intoxication at the trial.

The appellant contends that she should have been able to amend her pleadings pursuant to Rule 15 of the Arkansas Rules of Civil Procedure. This rule provides: "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion." The appellant candidly admits that we would have to find that the court abused its discretion in order to reverse on this point. Under the facts of this case we cannot so hold. In the absence of even allegations of some type of impairment as a result of intoxicants, we cannot hold the trial court abused it discretion.

The second point for reversal is that the trial court committed prejudicial error by failing to grant the appellant's motion for a new trial. This argument is based essentially upon the argument presented in the first point for reversal. The chief argument in the motion for a new trial concerned the evidence about the smell of alcohol. This issue has been treated under the first point and will not be repeated now.

In her motion for a new trial, the appellant also argued the verdict was improper because it failed to award damages for pain and suffering. This is a matter which should have been taken up with the court at the time the verdict was returned. All parties were present and heard the reading of the verdict. The jury fashioned its own verdict form as follows:

> Past medical expenses through May 1985 to include all or parts of plaintiff's exhibits number 1, 6, 7, and 9.
>
> —
>
> Disability-$5,000.

Perhaps the jury thought disability included pain and suffering. They may, however, even have found that the appellant did not incur pain and suffering. The instruction given to the jury (AMI

2201) on the measure of damages included the following element: "permanency of injury, medical expenses, pain and suffering, and loss of ability to earn." The jury may have combined all or some of these elements into the award for $5,000.

It is well settled law in this state that on a motion for a new trial the jury verdict is favored and will not be set aside unless it is clearly against the preponderance of the evidence. *Millers Casualty Insurance Co.* v. *Holbert*, 253 Ark. 69, 484 S.W.2d 528 (1972). Moreover, we cannot speculate on how the jury arrived at its award. *Young* v. *Bailey*, 294 Ark. 300, 742 S.W.2d 905 (1988). Considering the dispute involving the facts and the divergence of expert medical opinion concerning the appellant's injury, we are unable to hold as a matter of law that the verdict was clearly contrary to a preponderance of the evidence.

Affirmed.

NATIONWIDE RENTALS CO., INC. *v.* Henry CARTER

88-221 765 S.W.2d 931

Supreme Court of Arkansas
Opinion delivered February 27, 1989
[Rehearing denied March 27, 1989.*]

*Hays, J., would grant rehearing.

*Sessions, Fishman, Rosenson, Bisfontaine, Nathan & Winn*; and *Shackleford, Shackleford & Phillips, P.A.*, for appellant.

*Gibson & Deen*, for appellee.

JOHN I. PURTLE, Justice. An Ashley County jury returned a verdict in favor of the appellee in the amount of $175,000 on his claim against the appellant for injuries arising out of an industrial accident. The appellant argues three points for reversal: (1) the trial court erred in refusing to grant the appellant's request for a directed verdict at the close of the plaintiff's case; (2) the trial court erred in failing to grant a directed verdict at the close of all the evidence; and (3) the trial court erred in failing to grant the appellant's motion in limine which sought to exclude testimony and evidence about prior malfunctions of the machine involved in this occurrence. Finding no reversible error, the judgment is affirmed.

The appellee was employed by Georgia Pacific, Inc., which rented the machine in question which is called a "manlift." The appellant is in the business of renting machinery and equipment to the public. The manlift was not a new machine and was delivered to Georgia Pacific on March 13, 1984. At the time of the delivery a "limiting switch" was missing from the boom on the machine. On April 14, 1984, one of appellant's employees repaired the machine's hydraulic pump system. He allegedly checked all of the switches at that time and found them in proper working order. The machine was again repaired on May 15, 1984, at which time an employee of appellant replaced the muffler. Again all functions were tested and found to be in order. The accident involved in the lawsuit occurred on May 29, 1984.

The "manlift" is simply a crate or work platform, about four feet by four feet, with a wire cage around it, on top of a boom which extends some 35 or 40 feet in any direction above or beside the base of the machine. The control box for the machine is located in the rear of the platform or basket where people stand to work. The "limiting switch" should be connected to the top of the boom at the base of the platform. The purpose of this switch is to keep the whole unit from moving at a fast speed when the boom is extended. Apparently the extension of the platform releases this switch and, when the boom is extended, the limiting switch is designed to automatically prevent the unit from traveling at a fast speed. When the boom is retracted, the manlift will again travel at a fast pace.

On the date of the occurrence the appellee was painting a pipe quite some distance above the floor when he decided to switch the work platform from one side of the pipe to the other. In order to put the working platform on the opposite side of the pipe, it was necessary to lower the platform slightly and move the machine forward several feet. He intended to then raise the platform back to a position where he could reach the opposite side of the pipe he had been painting.

The events surrounding the appellee's attempt to move the manlift form the basis of this lawsuit. The appellee testified that he hit the shift or lever which should have lowered the basket, that the machine then made a jerking motion, that he then released the lever. He said he again pushed the up/down control switch, at which time the machine traveled forward at a fast rate of speed. Since the control box was in the back of the basket, the appellee was facing away from the pipe at the time the machine moved forward. The machine traveled forward some four to six feet, and in the process, the appellee was pushed under the pipe, wedging his head between the control box and the pipe. The appellee's face was crushed and bones in his head were broken.

Suit was filed by the appellee against the appellant under several theories of liability: negligence, strict liability and breach of warranty. During the trial Nationwide moved for a directed verdict on the grounds of insufficiency of the evidence, and the trial court granted its motion to dismiss the plaintiff's breach of warranty claim and parts of the negligence claim. The court denied the motion with respect to the strict liability claim, and the allegations concerning failure to warn and failure to repair.

Appellant's first point asserts that the trial court erred as a matter of law in failing to grant its motion for a directed verdict at the close of the plaintiff's case. The second point reaches the same subject and is that the court erred in not directing a verdict at the close of all of the evidence. Both arguments will be treated together. The case went to the jury on the theories of strict liability and negligence in failure to repair and warn.

Whether there is substantial evidence to support a verdict is a question of law and should be decided by the judge. *Farm Bureau Mutual Insurance Company* v. *Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982). Negligence and strict liability are

not mutually exclusive claims. More than one theory of liability is permissible in a products liability claim. *W.M. Bashlin Company* v. *Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982). *Bashlin* involved claims of strict liability and negligence on the part of the supplier of the allegedly defective linesman's belt. The opinion stated that the jury might have found that the supplier was negligent in failing to warn on the use of the belt and in failing to warn about a particularly dangerous use called double D-ringing, or that the manufacturer had become aware of a defect and should have recalled the product. The opinion remarked that it would be mere speculation to try to decide on exactly which theory the jury based its finding of negligence. *Bashlin* further stated:

> We have attempted to define intervening negligence which bars recovery of the original wrongdoer. In the case of *Gatlin* v. *Cooper Tire & Rubber Co.*, 252 Ark. 839, 481 S.W.2d 338 (1972), we held that negligence of a third party is no defense unless it is the sole proximate cause of the injury and/or damages sustained and a plaintiff may recover from the original defendant if the negligence of such defendant was a contributing factor. Appellant also relies upon our holding in *Larson Machine, Inc.* v. *Wallace*, [268 Ark. 192, 600 S.W.2d 1 (1980)]. In *Larson* we upheld the doctrine that an independent intervening cause excludes liability for the earlier negligent acts of another party. In fact, we held that there was an independent intervening cause which shielded the manufacturer from the acts of the dealer who had rented the fertilizer spreader to the injured party. We find a substantial distinction between the facts in *Larson* and those in the present case. In *Larson* the machine left the factory with a shield to protect the power take-off shaft. The shield was intended to prevent injuries such as the one which subsequently occurred. The dealer who obtained the machine and rented it out did so with the full knowledge that the protecting shield had been removed and the power take-off gears were exposed. This was an obvious defect and dangerous condition which was known by the dealer who rented it out and the obviously negligent action on the part of the dealer was held to be an independent intervening cause.

The negligence of a third party is not a defense unless

the third party's negligence is the sole proximate cause of the injury. If the intervening act is a normal response to the situation created by the original actor's conduct, then there is no intervening cause. When the negligent acts of the parties are concurrent there is no intervening cause which bars recovery against the original actor. *Larson.* The question of intervening cause is whether the original act of negligence or some intervening act of negligence is the proximate cause of the injury and this is a question for the jury. *Hergeth, Inc.* v. *Green*, 293 Ark. 119, 733 S.W.2d 409 (1987); and *Forrest City Machine Works* v. *Aderhold*, 273 Ark. 133, 616 S.W.2d 720 (1981). Moreover, the jury in the present case was thoroughly instructed on the question of appellee's contributory negligence.

In *Forrest City Machine Works* we stated: "Manufacturers in Arkansas are not and should not be relieved of the duty to exercise due care in the design and manufacture of equipment merely because the dangerous feature is clearly exposed to those foreseeably using the machine." In view of the testimony in the present appeal, it is obvious that the missing switch was not a defect which would have been detected under ordinary circumstances. Moreover, we stated in *Forrest City Machine Works* that an open and obvious defect would not automatically serve as a defense to all allegations of liability. We then referred to *Larson Machine* v. *Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980), where we dealt with the "open and obvious" theory. In *Larson* we upheld the judgment against the dealer in the machinery but reversed the verdict as to the manufacturer because the dealer handling the tractor had modified the power take-off area by removing a protective shield, thereby creating a danger which did not exist at the time it left the factory.

In the present case there is no evidence that anyone had attempted to repair the "limiting" function after the machine left the possession of the appellant. Several witnesses, both for the appellant and the appellee, testified that the limiting switch was not working when the machinery was delivered to the Georgia Pacific plant. The evidence was very clear that if the limiting function had been working it would have prevented the machine from moving at a fast rate in any direction when the boom was extended. The appellee's testimony at trial was that when he walked to the back of the basket to push the controls he pushed the

control throttle to lower the boom. He stated that the boom then went through jerking motions, at which time he immediately released the switch. He said he then re-engaged the switch to lower the boom, but instead it went forward at a fast speed.

An instruction booklet was introduced into evidence which stated that the machine would be immobilized for fast travel so long as the boom was extended. An expert witness for the appellants, Mr. Lawrence Hopkins, admitted that in the absence of the limiting switch the machine would function in a high-speed movement while the basket was elevated.

Several other employees of Georgia Pacific testified that the manlift had not been working properly for several days. George Morgan testified that he and another employee, Mike Young, inspected the manlift on the date in question and refused to work with it because they considered it unsafe. Morgan said he called Jimmy Stafford, a supervisor, and told him that the machine had been fouling up. Morgan stated:

> "The part that I saw was on the travel of it. It didn't start off slow like it should. Once you started into forward or reverse it was just wide open. The man standing in the bucket, if he took off and he got off of it, it would almost sling you out. Even with the handrails around it, it was, you know, a jolt.

Thus, there were several eyewitnesses who testified that the machine would travel forward fast when it was not supposed to do so. The proximate cause of the accident was a matter for the jury to decide.

The abstracts do not reveal that the appellant made any effort to warn Georgia Pacific's employees that the limiting switch was absent or the consequences thereof. Also, on at least two occasions, representatives of the appellant came to the plant and repaired the machine for malfunctions not related to the switches. The appellant's representatives testified that although they had not repaired the switches, they tested them on each of the two trips and found they were properly working.

On the other hand, the appellee's witnesses testified that the machine had been deteriorating since it had been delivered to Georgia Pacific. They testified that it operated in a jerking

manner and that it went forward when it should not have. These witnesses made other comments indicating the manlift was not functioning properly. Whether it in fact traveled fast forward is in sharp dispute. Nevertheless, this was a matter which was properly considered by the jury. Because it was a question of fact, we do not reverse if there is substantial evidence to support the verdict. Even if the appellee engaged the wrong lever, the machine should not have gone fast forward. See *Otis Elevator Co.* v. *Faulkner*, 288 Ark. 344, 705 S.W.2d 428 (1986).

The appellant relies on *Williams* v. *Smart Chevrolet Company*, 292 Ark. 376, 730 S.W.2d 479 (1987), for the proposition that the appellee "failed to negate other causes of the accident." A plaintiff is only required to negate other causes if he is unable to show that the product was supplied with a defect. It is undisputed that this machine was supplied in a defective condition in that the safety switch or limiting switch was not operable. Had the switch been operable, the appellee contends that he would have been able to move out of the way of the pipe in time to avoid the injury.

In denying a directed verdict for the defendant the trial court, and this court on appeal, gives the evidence of the plaintiff its most favorable weight and probative value, taking into account all reasonable inferences deducible therefrom. *Dan Cowling & Associates* v. *Clinton Board of Education*, 273 Ark. 214, 618 S.W.2d 158 (1981). A motion for a directed verdict should be granted only if there is no substantial evidence which would support a verdict. *Cockman* v. *Welder Supply Company*, 265 Ark. 612, 580 S.W.2d 455 (1979).

The appellant correctly states that although Arkansas has adopted strict liability, the doctrine has not changed the burden of proof as to the existence of a flaw or defect in the produce. The plaintiff still has the burden of proving that a product was defective and that it caused the plaintiff's injuries. In *Higgins* v. *General Motors Corporation*, 250 Ark. 551, 465 S.W.2d 898, 900 (1971), we stated:

> [A] plaintiff must still prove a defect in design or manufacture which was a proximate cause of his injury. This imposes upon him the burden of proving that the product was in a defective condition at the time it left the hands of

> the particular seller. [Citations omitted.] In the absence of direct proof that the product is defective because of a manufacturing flaw or inadequate design, plaintiff must negate the other possible causes of failure of the product for which the defendant would not be responsible in order to raise a reasonable inference that the dangerous condition existed while the product was still in the control of the defendant. [Citations omitted.] Otherwise, proof of proximate causation would be reduced to rank speculation . . . .

Appellant's final argument is that the trial court erred in refusing to grant its motion in limine wherein it sought to exclude testimony or other evidence about previous malfunctions of this particular machine which were dissimilar to the malfunction allegedly experienced by the plaintiff. Other employees of Georgia Pacific testified that the vehicle had moved fast when it should not have. Although repairs were made to the hydraulic system and to the muffler, it was stated by the appellant's employees that they also checked out the instrument panel at the same time. Everything but the limiting switch, which was not on this machine when it was delivered, was allegedly checked by the appellant and found to be in good working order. In view of the fact that the appellant's witnesses testified that each time they came to repair the unit they also checked the control switches, the testimony concerning other malfunctions was certainly relevant to the question whether this machine was properly maintained.

Although the appellant correctly argues that it had received no notice of the specific malfunctions testified to by the other witnesses, it is undisputed that the machine did not have a limiting switch on it when it was delivered to the Georgia Pacific plant. There is no evidence that the appellant warned or even notified Georgia Pacific that the absence of the limiting switch created a possibility of injury. Certainly it cannot be argued that the defect was obvious and that therefore no warning was necessary. The jurors were instructed not to set aside their common sense in deciding the issues presented to them. A reasonable person might well have decided that the absence of the limiting switch and the failure to warn were the proximate causes of the appellee's injuries.

Affirmed.

DIXIE INSURANCE COMPANY *v.* JOE WORKS CHEVROLET, INC.

88-217 766 S.W.2d 4

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*Wright, Lindsey & Jennings*, for appellant.

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

ROBERT H. DUDLEY, Justice. This case presents a question concerning an oral binder of insurance. The appeal comes to us from the granting of summary judgment in favor of appellee, Joe Works Chevrolet, Inc. We affirm the granting of summary judgment.

On April 28, 1987, appellee, Joe Works Chevrolet, Inc., sold an automobile to Patrice and Anthony Ford. As a prerequisite for the sale, the Fords were required to have insurance coverage on the vehicle which was effective before delivery. One of appellee's salesmen accompanied the Fords to the Wayne Smith Agency for the purpose of obtaining the necessary insurance coverage.

The Fords completed the application for insurance with a

representative of the Wayne Smith Agency who told them that upon execution of the application, coverage was effective immediately. It is undisputed that the Wayne Smith Agency is appellant's agent. The financing papers were forwarded to the offices of the General Motors Acceptance Corporation, the lienholder on the vehicle. Upon receiving the papers, a senior clerk for GMAC called the Wayne Smith Agency to verify insurance coverage before releasing appellee from a floor plan financing arrangement. Coverage was confirmed by the insurance agency representative who had handled the Fords' application. She told the GMAC clerk that Wayne Smith had binding authority for Dixie Insurance Company for seventy-two hours.

Within seventy-two hours the vehicle was involved in a collision which resulted in substantial damage. GMAC made demand, but appellant refused to honor the demand. GMAC subsequently reassigned an Act of Sale and Chattel Mortgage to appellee. This lawsuit followed with both parties moving for summary judgment.

The trial court denied appellant's motion, but granted that of appellee finding that at the time of the loss there was an oral binder of insurance for collision coverage on the automobile. This appeal followed.

Appellant first contends that the trial court erred in granting summary judgment to appellee because the Fords' premium check was not honored by the bank, and payment of the premium was a necessary condition for operation of the policy. Generally, payment of the premium is a necessary condition for the operation of a policy of insurance. *Leigh Winham, Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). However, as explained in *Leigh Winham*, we recognize exceptions to that general rule. One of the exceptions is that effective oral binders are often issued prior to payment of the premium. *Id.* at 320. Therefore, appellant's first point has no merit because the trial court did not base coverage on the policy, but rather upon an oral binder.

Appellant's second point of appeal is that the trial court erred in granting summary judgment because the court's finding that an oral binder was issued was based on inadmissible evidence.

Facts stated in an affidavit must be admissible in evidence if they are to be relied upon in granting or denying summary judgment. *Organized Security Life Ins. Co* v. *Munyon*, 247 Ark. 449, 446 S.W.2d 233 (1969). Appellant argues that the statements contained in the affidavits of appellee's salesman and the GMAC senior clerk, asserting that they were told by representatives of the Smith Agency that those representatives had the authority to give an oral binder of insurance, are hearsay, and, therefore, not admissible in evidence. Appellant does not dispute the fact of an agency relationship between it and the Wayne Smith Agency. Rather, appellant asserts that inadmissible hearsay evidence was presented with respect to the *scope* of that agency relationship.

A.R.E. Rule 801(d)(2)(iv) provides in pertinent part:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if:
>
> . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, . . . .

It is undisputed that the statements in question were made by appellant's agent during the existence of the agency relationship. Therefore, in order to determine if the statements fall within the exception to the hearsay rule, and would be admissible evidence, it is only necessary to make a preliminary determination concerning whether the statements involved a matter within the scope of that agency relationship. That determination is more a matter of the substantive law of agency that the law of evidence. *See* J. Weinstein & M. Berger, 4 *Weinstein's Evidence* 801-211 to -212 (1987). Further, deciding whether the challenged statements are admissible in evidence does not involve a question of fact. Rather, it involves a question of law based upon the facts that have been presented.

Neither agency nor the extent of an agent's authority can be shown by his own declarations in the absence of the party

to be affected. *Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980). However, circumstantial evidence may be sufficient to establish the scope of agency, and the declarations of the purported agent may be used to corroborate other evidence of the scope of agency. *See id.* Further, it is no longer necessary that an agent be authorized by his principal to make a statement. *Missouri Pacific R.R. Co.* v. *Arkansas Sheriff's Boy's Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

*Restatement (Second) of Agency* § 285 (1958) provides:

> § 285. *Statements as to Authority*
>
> Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, *unless it appears by other evidence that the making of such statement was within the authority of the agent, or as to persons dealing with the agent, within the apparent authority or other power of the agent.*

(Emphasis added.) Further, in discussing the power of an agent to bind the insurer, the following explanation appears in Appleman, *Insurance Law and Practice* § 7230 (1981):

> Where an agent is furnished with indicia of authority by the insurer, it may be bound by his acts. Certainly such authority would seem to be present where the agent issues and delivers policies of the company. Where the evidence shows a holding out or apparent authority, the company is bound, if, in fact, he is an agent of the company.

Finally, we have long recognized that some statements, made by an admitted agent, are admissible as to the scope of employment. *See Golenternek* v. *Kurth*, 213 Ark. 643, 212 S.W.2d 14 (1948), and cases cited therein.

It is not disputed that the Wayne Smith Agency is appellant's agent. Appellee's salesman took the Fords to the Wayne Smith Agency for the express purpose of obtaining insurance coverage on the car that would be effective before delivery of the car. That intention was conveyed to a representative of the agency. The representative then completed an applica-

tion for the Fords that had appellant's name printed at the top and a label showing the agency's name and agent code number. The representative also inserted the date and time of April 28, 1987, 3:35 p.m., as the effective date of the policy. For the purpose of determining whether the statements would be admissible in evidence, those undisputed facts are sufficient circumstantial evidence that it was within the apparent authority of the agent to issue an oral binder of insurance. Consequently, the statements made by the representatives of the Wayne Smith Agency would be admissible in evidence, and, therefore, the trial court did not err in considering them.

Neither did the trial court err in concluding that an oral binder had been issued. The affidavits supporting appellee's motion for summary judgment established prima facie that there was no material issue of fact remaining and that an oral insurance binder had been issued which would cover the damage to the automobile. Appellant, on the other hand, offered nothing in response to the motion to show that material issues of fact remained.

Once the moving party has demonstrated prima facie that no material issue of fact remains, then the defending party must respond showing facts which would be admissible in evidence to create a factual issue. ARCP Rule 56; D. Newbern, *Civil Prac. & Proc.* 255 (1985). Since appellant did not do so, the trial court was correct in finding that a valid oral binder had been issued.

Affirmed.

Pauline CRUMLEY *v.* Morgan BERRY d/b/a Morgan Berry Appliance

88-313 766 S.W.2d 7

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*James C. Luker*, for appellant.

No brief filed.

STEELE HAYS, Justice. The only question in this case is whether a "rental with option to purchase" agreement constituted a sale and not a true lease.

Pauline Crumley, the appellant, entered into "rental with option to purchase" contracts for a used refrigerator and microwave oven with Morgan Berry Appliance, the appellee. Berry supplied form contracts which allowed for a week-to-week rental only, with no requirement that the lessee continue the contract for more than one week. There was an option to buy the specified property after an agreed number of weeks, the only consideration being the lessee's fulfillment of the obligations of the contract, i.e., the weekly payments for the specified number of weeks.

The refrigerator contract was signed on June 30, 1986, and provided for a weekly rental fee of $17.90. If Ms. Crumley chose to rent for fifty-two weeks and fulfilled the obligations of the contract for that period of time, title would be transferred to her name. The refrigerator's ticketed purchase price was $599.95. The microwave contract was signed on November 15, 1986, and provided for a weekly rental fee of $10.00, with transfer of title if

the lessee paid for forty weeks. The cash price of the microwave was $250.

Ms. Crumley made her regular weekly payments on both items until just prior to April 3, 1987. At that time she had made thirty-nine payments on the refrigerator, a total of $698.10, and nineteen payments on the microwave, a total of $190. While the record is not entirely clear, it appears Ms. Crumley stopped making payments because she thought her accumulated payments for both appliances at that time equalled the cash price of both items.

When Ms. Crumley stopped making payments, Mr. Berry made several attempts to repossess the appliances, but Ms. Crumley would not relinquish them. On October 2, 1987, Mr. Berry brought suit in municipal court and a judgment was entered in his favor.

Ms. Crumley appealed to the circuit court, and a bench trial was held on April 25, 1988. The only evidence presented was the rental contract and testimony by Mr. Berry and Ms. Crumley, each relating the basic facts of the transaction. After their testimony, Ms. Crumley moved for a directed verdict on the grounds that the rental agreement was in reality a financing arrangement for a sale and was usurious.

The trial court denied the motion, finding the agreement to be a true lease and entered judgment for Mr. Berry. Ms. Crumley appeals from that judgment, alleging that the trial court erred in finding the agreement was a true lease.

When considering whether a particular agreement constitutes a lease or a sale, we look at a number of factors to determine the nature of the contract. See *Hill* v. *Bentco*, 288 Ark. 623, 708 S.W.2d 608 (1986); *Bell* v. *Itek*, 262 Ark. 22, 555 S.W.2d 1 (1977). The agreement in this case includes one particular factor that would strongly favor an interpretation of a sale: the option to buy the items at the end of a specified period of weeks for no additional cost, or in other words, the "absence of any appreciable residual in the lessor at the end of the lease." *Hill* v. *Bentco, supra*. This factor was significant in both *Hill* v. *Bentco, supra*, and *Bell* v. *Itek, supra*.

Still, as noted in *Hill*, all factors must be considered and

looking further in this case, what is noticeably absent is any obligation on the part of the lessee to make payments equivalent to the purchase price of the items, an obligation present in both *Hill* v. *Bentco* and *Bell* v. *Itek*. Under the contract, Ms. Crumley was free to terminate the arrangement at the end of the first week, or any subsequent week. There was no obligation to continue payments for the specified periods. This course of action was completely optional with Ms. Crumley. Is such an obligation necessary to finding a contract for sale?

We have not previously considered this question, but from an examination of other jurisdictions and authorities, it appears that the greater weight of authority agrees that when the lessee has the right to terminate at any time and is under no obligation to make payments equivalent to the purchase price of the leased goods, it will generally preclude a finding that the arrangement is a sale and not a lease.

A basic test was devised by Professor Peter Coogan to distinguish a true lease from a conditional sale:

> Where the lessee has agreed to pay an amount substantially equal to the value of the goods of which he is to become the owner (or has the option to become the owner), the parties have entered into a conditional sale agreement. P. Coogan, *Leases of Equipment and Some Other Unconventional Security Devices: An Analysis of UCC Section 1-201(37) and Article 9,* Benders Secured Transactions Under the Uniform Commercial Code § 4A.07[1] (1977).

This test is discussed in Ronald M. DeKoven, Leases of Equipment: *Puritan Leasing Company* v. *August*, A Dangerous Decision, 12 Univ. San Francisco L. Rev., p. 259 (1978):

> Coogans' test established the following three elements as the *sine qua non* for determining whether a lease is a finance lease: (1) there must be an agreement by the lessee to pay the lessor a set amount; (2) such amount must be equivalent to the value of the leased goods;[13] and (3) the lessee must become the owner or have the option to become the owner of the leased goods. If any one of these elements is lacking, the lease is not a finance lease, but a true lease. The test is of great significance as it not only determines the

nature of the transaction, but it also determines the law applicable to the enforceability of the rights and remedies of the parties thereto.

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13. "[*I*]f *a lease contains an option in the lessee to terminate, then there is no obligation to pay an amount substantially equal to the purchase price and thus no conditional sale* under pre-Code law as well as no security interest under the UCC." Coogan, § 4A.01[5][c]. [Our emphasis.]

The purchase price obligation was recently discussed in *In Re Armstrong*, 84 B.R. 94 (1988 W.D. Tex.), where the court reemphasized that before any other factors are considered, it must be first determined that the lessee was under an affirmative obligation to pay the equivalent of the purchase price. *Armstrong*, citing *In Re Peacock*, 6 B.R. 922 (N.D. Tex. 1980), among several others for this proposition, notes *Peacock's* three-tier analysis for making the lease/sale distinction. The first tier is the obligation to pay the equivalent purchase price and the second tier is the "no or nominal consideration" test. *Armstrong* further notes that *Peacock* requires that that first tier must be met before proceeding with the next tier of the "no or nominal consideration" test.

In B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, § 1.5[4] (1980), the obligation to pay the full purchase price is listed as one of five key factors in the lease/sale distinction. Clark's 1988 Supplement elaborates on this issue, discussing *In Re Marhoefer Packing Co.*, 674 F.2d 1139 (7th Cir. 1982), one of the leading cases requiring the full payment obligation as a prerequisite to finding a sale over a lease. Clark writes:

> The *Marhoefer Packing* decision makes great good sense. In defining a "security interest" to include leases with nominal purchase options in § 1-201(37), the drafters of the Code were attempting to stop form from overwhelming substance. They were trying to catch disguised conditional sales and purchase money loans. But when the lessee can terminate the transaction early by returning the property, the purpose behind the definition in § 1-201(37) is gone and the transaction should be considered as a legitimate lease, even though the lease also provides that if rent is paid

> for a certain period, the lessee has an option to purchase the goods for nominal or no consideration. B. Clark, *supra*, § 1.5[3] (1988 Supp.)

While there has not been complete agreement on this issue,[1] recent developments in the Uniform Commercial Code may well minimize the significance of previous cases which have overlooked the purchase price obligation. As noted in R. Hillman, J. McDonnell, S. Nickles, Common Law and Equity Under the Uniform Commercial Code, § 18.05[3][a] (1988 Cum. Supp.), Article 2A, which governs true leases, has been added to the official uniform version of the Code. The definition of "security interest" includes the following:

> Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods *is an obligation for the term of the lease not subject to termination by the lessee, and (a) The original term of the lease is equal to or greater than the remaining economic life of the goods.* Uniform Commercial Code Article 2A, Leases, Conforming Amendment Section 1-201(37). [Our emphasis.]

Hillman, et al. comments on the changes indicated by this new addition to the Code:

> Most important, the new definition adopts the case law holding that, even when there is no option to purchase, a lease is a secured transaction if the lease term is equal to or greater than the economic life of the goods. *On the other hand, the new definition rejects the cases that allow that a lease is intended as security even though the lessee has a free right to terminate the arrangement. Id.* [Our emphasis.]

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[1] As Coogan himself notes, see P. Coogan, W. Hogan, D. Vagts, *Secured Transactions Under the Uniform Commercial Code* § 29A.05[1][a] (1987 Supp.), noting authority contrary to *Marhoefer: In re J.A. Thompson & Son, Inc.*, 665 F.2d 941 (9th Cir. 1982). See also *In re Elliott*, 18 B.R. 602 (D. Neb. 1982); *Sight & Sound of Ohio, Inc.* v. *Wright*, 36 B.R. 885 (D.C. 1983); *In re Puckett*, 60 B.R. 223 (M.D. Tenn. 1986).

In light of the foregoing, we hold that the sounder view requires as a prerequisite to finding a sale, that there be an obligation to pay the purchase price of the leased goods. There may be exceptions to this general proposition, for example, where in spite of the language of the contract, the lessor is clearly led to believe the arrangement is a sale. See *In re Puckett, supra.* Those are not the facts before us, however.

Here, there was no evidence to show Ms. Crumley was led to believe the arrangement was a sale and not a lease. While she testified that when she made the payments at the store she had told the secretary she was buying the items, there was no evidence to show, nor did Ms. Crumley even claim that anyone at Berry's store had done or said anything to give her the impression that the transaction was anything but a lease. The only evidence offered on that account was the lease itself which clearly states that the lessee may terminate the arrangement at any time. There is no language in the contract that requires or even suggests that the lessor is obligated to pay the full term of the contract.

Without any requirement to pay throughout the contract and with the corresponding right to terminate the contract at any time, we must find, as did the trial court, that under the facts and the language of the contract, the transaction was a lease and not a sale.

Affirmed.

HICKMAN, J., concurs.

PURTLE, J., dissents.

DARRELL HICKMAN, Justice, concurring. I would affirm under Rule 9 of the Arkansas Supreme Court Rules. The agreement was not abstracted, and I cannot say whether it is a sale or a lease.

JOHN I. PURTLE, Justice, dissenting. The instrument in question clearly reflects a sale and is therefore usurious. It looks like a sale; it sounds like a sale; it has all of the attributes of a sale.

The appellee admitted that at the end of the lease period the property would belong to the lessee, provided she paid him $1.00. This amount was not mentioned anywhere in the contract. Obviously, neither party anticipated that these items were to be

returned to the "seller" or "lessor" upon the termination of the contract.

The instrument in question provided that if the appellant made the total payments on her refrigerator she would have paid about $930.00. She had paid roughly $700.00 at the time she stopped making payments. The cash price of the refrigerator was listed at $600.00. The cash price of the microwave was $250.00; she paid $190.00 on the agreed price of $400.00. The duration of the contract was for fifty-two weeks on the refrigerator and forty weeks on the microwave. This transaction clearly was a sale and was consequently usurious.

The transfer instruments in this case provided that, at the end of the payment schedule, the title to the property would be transferred to the appellant. I believe that fact alone is sufficient to warrant a holding that this was a sale and not a lease. This factor appears to have been of particular significance in our decisions in *Hill* v. *Bentco Leasing, Inc.*, 288 Ark. 623, 708 S.W.2d 608 (1986), and *Bell* v. *Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977).

The instrument of agreement between the parties provided that the lessee was responsible for the loss, theft, or destruction of the property from any and all causes whatsoever. The purchaser was obligated to pay the full price, even if the property were destroyed by an act of God. Also, if the property were damaged to an extent less than its full value, the agreement provided that the renter agreed to pay the owner for partial damage or destruction to the property.

The majority opinion employs the test of Professor Peter Coogan to determine whether this is a lease or sale. Professor Coogan states:

> Where the lessee has agreed to pay an amount substantially equal to the value of the goods of which he is to become the owner (or has the option to become the owner), the parties have entered into a conditional sale agreement.

The transaction at issue in this appeal could not be more accurately described than by these words of Professor Coogan.

The majority also apply the following three point test to

determine whether a transaction is a sale:

> (1) There must be an agreement by the lessee to pay the lessor a set amount; (2) such amount must be equivalent to the value of the leased goods; and (3) the lessee must become the owner or have the option to become the owner of the leased goods.

If any one of these elements is lacking, the lease is not a financing agreement but a true lease.

None of these elements is lacking in the case before us. There was an agreement to pay a stated amount; that amount was equivalent to the value of the goods; the lessee was to become the owner at the end of the payment period. This instrument meets all three of the above requirements. In keeping with the rationale of *Hill* v. *Bentco* and *Bell* v. *Itek*, I see no reason why a sale should not be called a sale.

I would reverse and remand.

Rollie BEEBE *v.* STATE of Arkansas

CR 88-177 765 S.W.2d 943

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*Davis & Cox*, by: *Dennis J. Davis*, for appellant.

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

DAVID NEWBERN, Justice. This appeal arises from an order causing statutory forfeiture of guns owned by the appellant, Rollie Beebe. The guns were found in Beebe's house when he was arrested for possession of several types of controlled substances and possession with intent to deliver of another controlled substance. We reverse the forfeiture judgment because the state produced no evidence showing the guns fell within the description of the kind of property to be forfeited according to the statute on which the state relied.

A forfeiture of property may be ordered by the court when the court "finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist. . . ." Ark. Code Ann. § 5-64-505(e) (1987).

The only part of the forfeiture statute which might possibly permit forfeiture of the guns is Ark. Code Ann. § 5-64-505(a)(2) (1987), which provides for forfeiture of "[a]ll raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or counterfeit substance . . . ." While it can be imagined that the guns seized were used or intended for use in, perhaps, delivery of the drug Beebe was found to have intended to deliver, no evidence was produced to that effect.

Because the forfeiture statute is penal in nature and because forfeitures are not favorites of the law, we interpret the statute narrowly. *Gallia* v. *State*, 287 Ark. 176, 697 S.W.2d 108 (1985). The "hearing" consisted only of arguments by counsel upon Beebe's motion to have his property returned to him to which the state responded by seeking forfeiture. Beebe had

pleaded guilty to the criminal charges. Neither in his discussion with counsel nor in the forfeiture order did the court refer to any evidence pertinent to this issue which might have been produced at a plea proceeding. Given the state's failure to present any evidence at the hearing, the record before us contains no evidence from which the court could have concluded that the guns were equipment used in delivering controlled substances. None of the arguments in the state's brief addresses the state's failure to present evidence, therefore, we need not discuss them.

Reversed and dismissed.

IN THE MATTER OF Kimberly Anne PORTER,
An Incompetent

88-315 765 S.W.2d 944

Supreme Court of Arkansas
Opinion delivered February 27, 1989
[Rehearing denied March 27, 1989.]

*Richard B. Dahlgren*, Ass't Gen. Counsel, Department of Human Services Office of General Counsel, for appellant.

*Steve Inboden,* for appellee.

DAVID NEWBERN, Justice. This is a guardianship case. The State of Arkansas appeals a probate court decision that the guardian of the ward's estate may not use money represented by a certificate of deposit (CD) owned by the ward to reimburse medicaid payments which had been made and were to be made for the ward's care. The first issue presented is whether there was subject matter jurisdiction in the probate court to determine how the principal of the CD was to be used. We hold the probate court had jurisdiction of the guardianship and authority to approve or disapprove the guardian's expenditure of the fund represented by the CD. The second issue is whether there was sufficient evidence to support the court's decision that the fund could not be used by the guardian to reimburse the state for medicaid assistance to the ward. We find the state has misperceived and mischaracterized the decision made by the probate court. The insufficiency of the evidence argument is directed to an issue not decided and thus is unavailing. The state also argues that the guardian was estopped to assert that the fund could not be used because of her failure to disclose it when she initially applied for medicaid assistance. We decline to address that issue as it was not raised at the trial. *Polnac-Hartman & Assoc.* v. *The First Nat. Bank*, 292 Ark. 501, 731 S.W.2d 202 (1987).

Patsy Smith is the mother of Kimberly Anne Porter (Kim). Kim is a cerebral palsy victim who is severely retarded and requires extensive professional care. At the time of the proceedings below Kim was 14 years old but was described by Mrs. Smith as having the mental development of a child six months old. Mrs. Smith was appointed guardian of Kim's person and estate by the Poinsett County Probate Court. When the guardianship was established, Kim's estate consisted of the $30,000 CD in question here and a checking account containing cash accumulated from social security benefits and interest from the CD. The CD was funded from life insurance proceeds from Kim's deceased father's estate.

The guardianship order provided that Kim's social security benefits and the interest from the CD could be used by Mrs. Smith to meet Kim's needs but that the principal of the certificate of deposit could not be invaded without court approval.

When Kim grew too big for Mrs. Smith and her husband to care for at home, Mrs. Smith applied to have her placed in the Conway Human Development Center, an agency of the Arkansas Department of Human Services, and she applied for financial assistance through medicaid. Prior to 1987 she signed two application forms on which she listed Kim's assets but did not include the CD. On her 1987 application, however, she listed the CD and was told that she was not entitled to future medicaid financial assistance and would be responsible for the assistance already rendered. Some $47,000 had been spent by medicaid on Kim.

Mrs. Smith appealed the ruling through administrative channels and petitioned the probate court for a determination whether the CD principal could be used for medicaid reimbursement. The State of Arkansas, which is the medicaid provider, using state and federal funds, became a party to the petition before the probate court. Mrs. Smith's position in the probate court was that the court should rule that the CD money could not be thus used.

The probate court ruled that the CD principal is "inaccessible to the guardian for the purpose of payment to or reimbursement of the Conway Human Development Center or Medicaid for benefits provided or to be provided to the ward. . . ."

*1. Jurisdiction*

The appellant, the State of Arkansas, contends the probate court lacked jurisdiction of the issue because it was pending before administrative agencies from which an appeal to the circuit court would lie. Mrs. Smith's position is that only the probate court can decide to release the money which is the subject of the guardianship.

We have not been given references to the regulations governing medicaid eligibility. The state's argument, however, conveys the idea that one is not eligible for medicaid assistance when there are assets at one's disposal in excess of a certain value.

Testimony of an official of the Conway Human Development Center put that maximum value at $1,900. The argument specifically is that the guardian, Mrs. Smith, has not exhausted the administrative remedies she initiated to review the ruling against the estate, including appeal to the circuit court as provided in Ark. Code Ann. § 25-15-212 (1987). It is contended that, if it is allowed to stand, the probate court decision will be res judicata thus frustrating the statutory power of the circuit court to review the administrative decision. If, as we discuss below, the administrative decision whether the CD is "accessible" for medicaid reimbursement involves elements such as whether the guardian has made an effort to obtain the funds, the probate court decisions will not be a bar to that decision. We do not read the probate court's order to interpret or construe the federal law regarding medicaid reimbursement requirements.

Neither are we persuaded by the state's citation of *UHS of Arkansas, Inc.* v. *Charter Hosp. of Little Rock, Inc.*, 297 Ark. 8, 759 S.W.2d 204 (1988). There we required a chancery court to transfer to the circuit court a case in which a declaratory judgment had been sought with respect to the same issues pending in a circuit court proceeding. In that case neither court had been assigned exclusive jurisdiction by statute of the issues in question. In the case before us now, the circuit court may ultimately have to determine the issue of Kim's eligibility for medicaid. Apparently one factor in that decision will be whether the fund represented by the CD is "accessible" to Kim's guardian for the purpose of reimbursement of medicaid payments.

The circuit court's power to review and conclude, subject to appeal, whether the money in the CD is "accessible" under whatever state or federal regulations may apply does not mean that the circuit court has the authority to determine how a guardian is to use a ward's funds. That decision lies exclusively within the jurisdiction of the probate court according to Ark. Code Ann. § 28-65-107(a) (1987) which provides: "The jurisdiction of the probate court over all matters of guardianship, other than guardianships ad litem in other courts, shall be exclusive, subject to the right of appeal." Another statute, Ark. Code Ann. § 28-65-310(c)(3) (1987), deals with the probate court's authority to invade the principal of a minor ward's estate to provide for support.

In *Arkansas Dept. of Human Services* v. *Donis*, 280 Ark. 169, 655 S.W.2d 452 (1983), it was made clear that a circuit court decision with respect to the "accessibility" of funds of a ward, in the context of deciding eligibility for medicaid and food stamp benefits, may depend on a decision to be made by another court having jurisdiction and direct responsibility for expenditure of the funds in question. The mother of two children whose father was the victim of a wrongful death had been appointed conservator of the children's estates in a New Mexico proceeding. Each of the children had some $4,800 remaining from the wrongful death recovery. The Arkansas state agencies concerned determined that the children were not entitled to medicaid or food stamp assistance due to the existence of these funds and the absence of any court imposed limitations on the use of them. The only limitation imposed by the court had been the requirement that the money not be spent without a court order. The circuit court reversed the administrative ruling and held that the funds were subject to court-ordered limitations and thus not available to the mother to use for the childrens' support. We reversed the circuit court, and our opinion stated:

> No *court imposed limitations* have been placed on *her use* of those funds, other than that she must obtain court permission *to remove* them from the savings accounts. She has not sought the court's permission. The burden is upon her, the applicant, to demonstrate these funds are inaccessible. She has not met the burden of showing that the trust funds are inaccessible within the meaning of subsection ii, 7 CFR § 273(e)(8), *supra.*
>
> With respect to the eligibility for medicaid, the critical regulation is § 3332.2(13) of the appellant's Medical Services Manual, which supplements 42 CFR § 436.840. It states in pertinent part: "Whether the principal of a trust is resource depends on its availability to the applicant." As we have stated, the New Mexico court order makes the savings accounts available to the appellees upon approval of a petition for the removal from the accounts. Furthermore, a beneficiary's interest in a trust can be properly counted for the purposes of determining medicaid eligibility. See *McNiff* v. *Olmsted County Welfare Department*, 176 N.W.2d 888 (Minn. 1970). In the

> circumstances, it follows that the trial court erred in holding that the savings accounts are not available to the appellees. [Emphasis in original.]

It must be noted that our decision in the case resulted from appeal of a circuit court review of the question of accessibility of funds in the context of deciding eligibility for food stamps and medicaid under the regulations then extant. It was not an appeal from a guardianship, conservatorship, or trust order. The very point of the case was that the mother of the children had not made application to the court which had established the conservatorship to be permitted to use the funds for everyday support of the children.

While the *Donis* case is indicative that the circuit court has jurisdiction to make the accessibility decision it does not suggest that the court which had established the conservatorship was without jurisdiction to determine how the children's money would be spent. To the contrary, the suggestion of the opinion is that the circuit court's decision might well be dependent upon a decision in the court which had established the conservatorship if the conservator had made an effort to obtain permission to use the funds for the childrens' support and failed.

We have been given no reason whatever to question the statutory assignment of exclusive jurisdiction of the probate court of matters involving the guardianship of the estate of an incompetent. Given our determination that the probate court has exclusive jurisdiction to govern the release of funds in Kim's guardianship estate, we turn to focus on that court's decision.

*2. Sufficiency of the evidence*

The state's argument on this point is that our decision in *Arkansas Dept. of Human Services* v. *Donis*, *supra*, requires a showing by the guardian that she has attempted to obtain release of the funds to make them accessible for medicaid reimbursement and that she has made no such attempt here. Mrs. Smith argues she sought the appropriate court order but that it would have been hypocritical of her to have urged the release of the funds in view of her feeling that Kim would need the money in the future.

The parties have argued the issue as if the decision being made in the probate court were like the circuit court decision in

the *Donis* case, that is, whether the CD fund is "accessible" under the medicaid regulations. That question was not before the probate court, but was under consideration in administrative channels and may ultimately be decided on review in the circuit court. Again, we have not been cited to any of the current regulations or laws governing this issue, but we speculate that the issue in the administrative and circuit court proceedings may turn out to be whether Mrs. Smith has made an effort to get the funds released. In *Steinberg* v. *New York State Dept. of Social Services*, 90 Misc.2d 547, 394 N.Y.S.2d 763 (1977), a trust beneficiary, who was an applicant for medical assistance through New York social services, declined to seek an order permitting invasion of the corpus. The court held:

> Until a bona fide effort has been made by the petitioner to seek an invasion of the Trust created for her benefit as may be permitted by law, she may not be considered a person who "requires" public assistance and the respondents, rightfully, so determined. The petition is dismissed and judgment may be entered accordingly. The petitioner, of course, may again seek relief in this Court should she exhaust her remedies under section 7-1.6 of the EPTL.

We cite and quote from this case only to show the nature of the issue which may arise before the circuit court where the question may be whether there is evidence to show that an effort or a good faith effort has been made by Mrs. Smith to obtain release of the CD money for use in reimbursement of medicaid payments. The state seems to argue that that decision has been made in the probate court. It has not, and therefore we reject the state's insufficiency of the evidence argument, as it is addressed to an issue not decided by the probate court.

*Conclusion*

We conclude the probate court had exclusive jurisdiction to entertain the petition to determine how the funds of the ward would be used. We are not persuaded by the argument that the evidence was insufficient to support the probate court's decision because the state's brief misperceived the issue before the probate court. We have, therefore, been given no reason to reverse.

Affirmed.

HICKMAN and GLAZE, JJ., concur.

HAYS, J., dissents.

DARRELL HICKMAN, Justice, concurring. I think I agree with the majority opinion, but its holding is not clear to me. I fear it will not be clear to the probate and circuit judges.

At an administrative hearing, it was determined that the guardian would have to reimburse the medicaid program for $48,000.00 in benefits received. That ruling was appealed to the circuit court. Not liking that decision, the guardian petitioned the probate court to, in effect, shield the $30,000.00 CD from any circuit court order.

The general statement that the probate court has exclusive jurisdiction in guardianships is, of course, true, but it does not answer the question presented in this case. A probate court cannot interfere with the jurisdiction of another court. In this case, the circuit court has jurisdiction over the central question—whether the existence of the CD renders the ward ineligible for medicaid benefits.

I would find the probate court order in error. I think the majority does also, insofar as it would take from the circuit court the right to decide whether this $30,000.00 must be surrendered under federal regulations.

GLAZE, J., joins the concurrence.

STEELE HAYS, Justice, dissenting. On March 18, 1986, Mrs. Patsy Smith petitioned the Probate Court of Poinsett County for her appointment as guardian of the person and estate of her daughter, Kimberly, and the appointment was made on that same date. The estate included a $30,000 certificate of deposit.

Mrs. Smith's appointment was conditioned on her furnishing a corporate surety bond in the amount of $30,000 or furnishing evidence of an agreement with the bank issuing the CD that no funds would be removed from the CD without prior approval of the probate court, a routine step authorized by Ark. Code Ann. § 28-65-215 (1987).

This litigation arises because Mrs. Smith applied to the Department of Human Services (Department) to provide care

and residency for Kimberly at the Conway Human Services Center and on June 30, 1986, Kim was accepted. Mrs. Smith requested long term care and assistance and completed a questionnaire which failed to reveal that the assets of Kim's estate included the $30,000 CD. Based on the nondisclosure of the CD, Kim was declared eligible for Medicaid benefits to which the Department asserts she would not otherwise have been entitled.

When the true facts were disclosed in a second questionnaire the following year Medicaid benefits were terminated and reimbursement was requested of the guardian. Mrs. Smith asked for an administrative hearing and the denial of benefits was upheld. Mrs. Smith then appealed to the circuit court where the case is now pending.

At this stage in the proceedings, Mrs. Smith filed in the Poinsett Probate Court a pleading entitled "Petition For Order Nunc Pro Tunc" asking the court to determine "nunc pro tunc until June 30, 1986," whether the CD was available for expenses incurred by the Conway facility and for reimbursement of funds received from Medicaid.

The probate court reserved judgment on the issue of whether it could enter its order nunc pro tunc, but held without explanation that the funds were inaccessible for payment to, or reimbursement of, the Conway Human Development Center. The Department of Human Services has appealed to this court and the majority now holds that the Probate Court of Poinsett County has exclusive jurisdiction over the subject matter of this dispute, effectively leaving the primary proceedings in limbo. I respectfully disagree with that conclusion and would reverse.

It is clear that the "Petition For Order Nunc Pro Tunc" was a maneuver to deprive the circuit court of subject matter jurisdiction over a proceeding which was properly pending before it. It is equally clear that the probate court had no jurisdiction to grant the requested relief, i.e. enter an order "nunc pro tunc until June 30, 1986," under the guise of a nunc pro tunc procedure. While under ARCP Rule 60(a), clerical mistakes in orders may be corrected at any time, such corrections are plainly limited to matters which were dealt with initially but which were omitted by oversight or mistake. While courts have the inherent authority to enter orders correcting errors, the power is confined to making

them conform to the action which was in reality taken at the time. *Fitzjarrald* v. *Fitzjarrald*, 233 Ark. 328, 344 S.W.2d 584 (1961). Since it cannot be seriously contended that the probate court did anything on June 30, 1986, the date of Kimberly's admission at the Conway facility, the relief requested by the guardian, i.e. a nunc pro tunc ruling, was nonexistent under the law. Thus, the guardian's resort to the probate court was patently to head off the possibility of an adverse determination by the circuit court, which clearly had jurisdiction over the subject matter and the parties.

While I would not contend the probate court does not ordinarily have jurisdiction to determine how a ward's estate will be used, in the rather unusual context of this case, I believe the circuit court's jurisdiction was paramount, and the proper course for the probate court was to defer to the circuit court, at least until that proceeding was concluded.

In *City of Cabot* v. *Morgan*, 228 Ark. 1084, 312 S.W.2d 333 (1958), this Court has soundly criticized attempts by one court to assume jurisdiction over matters pending in another court where concurrent jurisdiction exists:

> We condemn the practice of a person after being charged with violating the law . . . then asking for a declaratory judgment in an independent cause, with the result that two cases involving the same subject matter are pending at the same time. If such a practice were permitted, it would cause an unnecessary burden on the courts and the law enforcement authorities. In the New York case of *Woollard v. Schaffer Stores Co.*, reported in 272 N.Y. 304, 5 N.E. 2d 829, 832, 109 A.L.R. 1262, 1265, the Court said: '*When, however, another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction.*' (My emphasis).

Larry Dean ROBERTSON *v.* STATE of Arkansas

CR 88-56 765 S.W.2d 936

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*Haddock & Mazzanti*, by: *James W. Haddock; Johnson & Harrod*, by: *S. Reid Harrod*, for appellant.

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

DAVID NEWBERN, Justice. Larry Dean Robertson appeals his conviction of capital murder for which he was sentenced to life imprisonment without parole. Robertson was accused of murdering Mrs. Bernice Sanderlin. The evidence showed that Robertson was released from prison and taken by a prison official to Dumas where he was to get on a bus. He went into a business establishment where he stabbed Mrs. Sanderlin with a pair of scissors. The scissors penetrated her eye and brain and caused her death. He left with Mrs. Sanderlin's purse. The judge refused at several stages of the trial to rule on whether Robertson was mentally competent to stand trial. The judge erroneously thought, and stated repeatedly, that the question of competency to stand trial was to be resolved by the jury. We have no choice but to reverse and remand for a new trial.

Robertson was committed to the state hospital for a pre-trial mental examination. The report, filed on June 10, 1987, concluded he was capable of cooperating effectively with his attorney. On August 7, 1987, the two lawyers who had been appointed to defend Robertson moved to suspend activity in the case and submitted affidavits to the effect that Robertson visualized the issues in his case in a manner incomprehensible to reasonable persons, and that he was hallucinating and unable to assist the lawyers in defending him.

A pre-trial hearing was held to consider several motions, one of which was the motion to suspend activity in the case. Dr. Paula Lynch testified she examined Robertson at the state hospital. She had access to records of other medical facilities, one of which concluded Robertson was schizophrenic and that he had been taking Thorazine, a major tranquilizer, and that Navane, an antipsychotic drug had been prescribed for him. She did not interview Robertson's family. She found him to be virtually symptom free and concluded he was competent at the time of her evaluation of him. At the close of the hearing, the court denied the motion to suspend activity.

Counsel for Robertson then took Dr. Lynch's deposition pursuant to a court order. They asked her whether she had been hospitalized for any condition other than childbirth, and she

refused to answer, citing the fifth amendment. At a pre-trial hearing on October 5, 1987, counsel asked the court to hold Dr. Lynch in contempt for her failure to respond or to strike her testimony from the record. The prosecutor said he had no objection to striking Dr. Lynch's testimony and that he had no intention of calling her as a witness at the trial. The court refused to strike the testimony, noting that Dr. Lynch's testimony had been at the request of the defense.

Also at the October 5 hearing, counsel presented testimony by Robertson's parents to the effect that Robertson had had mental problems, and tendencies toward violence, since his high school days. They also testified about periods of hospitalization for mental illness Robertson had undergone in Mississippi. Dr. Douglas Stephens testified he had interviewed Robertson on several occasions and had concluded he suffered from paranoid schizophrenia and was unable to assist counsel in his defense.

At the conclusion of the hearing, the court denied the motion to suspend the proceedings due to Robertson's inability to communicate effectively with his counsel. The court stated it would be for the jury to decide if Robertson had a defense of mental defect. The prosecutor then asked the court to make a finding whether Robertson could communicate adequately with his attorneys. The court refused, again stating it was for the jury to decide. As abstracted by the appellant, the discussion was:

> Mr. Gibson [the prosecutor]: Could I ask the court to make a finding as to whether or not Mr. Robertson is able to communicate adequately with the attorneys?
>
> The court: No, that would be making a ruling. It's for the jury to determine his condition.
>
> Mr. Gibson: I'm talking about his fitness to proceed.
>
> The court: We're going to proceed.
>
> Mr. Gibson: In other words, the Court is so finding he is.
>
> The court: Fit to proceed. The jury has certain responsibilities, and that's what they're going to do.
>
> Mr. Haddock [defense counsel]: The Court's ruling is, if I understood the Court correctly, that it's a jury question for

> them to determine whether or not he has present abilities to effectively assist counsel in his defense?
>
> The court: Well, no, I'm ruling that it's for the jury to determine or not whether he was able to conform his actions to the requirements of the law on this alleged date.

Although the appellant did not abstract the remainder of the court's remarks, they are quoted accurately in the argument portion of his brief, and at page 5. of the state's brief it is acknowledged that the court stated just after the discussion quoted above that the court was not making "any ruling" as to Robertson's mental condition. The court's statement continued as follows:

> Now, by finding that, when the jury finds that they'll be taking care of all these ancillary matters. Now, they can find whatever they find to be the facts, but I'm not going to make any rulings as to his mental condition and his abilities to consult with anybody or help anybody.

Throughout the pre-trial proceedings and during the trial, Robertson, against the advice of his counsel, insisted on making statements to the court, some of which could only be characterized as bizarre. He referred to various agencies of the federal government such as the CIA, the NSC, and the FBI, and demanded that the records kept on him by these agencies be furnished to him.

Toward the conclusion of the trial, Robertson insisted on making a statement before the jury. His counsel objected and renewed the motion to suspend the proceedings on the ground that Robertson was incapable of assisting in his defense. The prosecutor commented that the court was competent to determine whether Robertson was able to assist his counsel. The court denied the motion and again stated it would be for the jury to determine whether Robertson was competent.

The defense presented testimony of Dr. Stephens as well as testimony of Dr. Donald Gold, a psychiatrist who had visited with Robertson and studied his case while Robertson was hospitalized in Memphis for a severe burn. Dr. Gold testified that Robertson was schizophrenic and that the only way he could help his counsel would be by "overtly demonstrating to the world just how bizarre

and confused he is." After Dr. Gold's testimony, Robertson's counsel renewed the motion to suspend the proceedings. Robertson stated he wanted to exercise his first amendment right, presumably to testify. The court said: "You want to continue, Mr. Robertson?" Robertson replied affirmatively, and the court said: "All right, the trial will continue. Your motion is overruled. Denied, Mr. Haddock."

*1. The court's duty*

It is the duty of the court to rule whether an accused is competent to stand trial. The statute, Ark. Code Ann. § 5-2-309(a) (1987) provides: "If the defendant's fitness to proceed becomes an issue, it shall be determined by the court." In *Gruzen* v. *State*, 267Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852 (1980), 459 U.S. 1020 (1982), we held it was error to leave the matter to the jury. *See Lipscomb* v. *State*, 271 Ark. 337, 609 S.W.2d 15 (1980); *Westbrook* v. *State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

The court in this case proceeded correctly to a point. There was no error in refusal to suspend the proceedings after the pretrial evaluation and hospital report and after Dr. Lynch's testimony. Nor was there any necessity to obtain a reevaluation of Robertson each time his counsel moved to suspend activity in the trial. All the court was required to do, if he remained convinced that Robertson was and remained fit to stand trial, was make that ruling. Instead, he said again and again that it was a matter for the jury to decide.

The state points out that by continuing with the trial, the court could be inferred to have made the ruling. It is also argued that the question of fitness to proceed was not referred to the jury, as no instruction was given on that point. We cannot agree with those arguments. If the court thought the question was one for the jury, continuing the trial was necessary in order to let them decide the issue. Both defense counsel and the prosecutor clearly understood the issue of fitness to stand trial was for the court to determine, and that explains the fact that neither side offered an instruction on the matter. But absence of such an instruction does not cure the court's misunderstanding that by deciding the general issue of Robertson's competency the jury would be deciding the "ancillary" matter of his fitness for trial.

As we said in *Gruzen* v. *State*, *supra*, "The fact that there was a great potential for prejudice in the court's failure to rule on the issue may be easily demonstrated, if the mere failure to make a ruling cannot be said to be prejudicial in and of itself." 267 Ark. at 389, 591 S.W.2d at 347. Here, each time the issue was raised, there was additional direct evidence which could have borne on the court's decision whether Robertson was fit to stand trial. The prejudice is obvious.

*2. Dr. Lynch and the Fifth Amendment*

Robertson has raised other issues. The only one likely to arise in the event of a new trial is whether the court should force Dr. Lynch to reveal her previous medical history or strike her testimony.

If the issue here were simply whether treatment of Dr. Lynch for psychiatric disorder is privileged, we might reach the same result as was reached by our court of appeals in *Horne* v. *State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984). There it was held, based on *Baker* v. *State*, 276 Ark. 193, 637 S.W.2d 522 (1982), that evidence of medical treatment, as opposed to physician-patient communications, could not be withheld because it was not covered by the physician-patient privilege found in A.R.E. 503. Here, however, Dr. Lynch, whether advisedly or not, relied on her fifth amendment right not to incriminate herself.

The federal appellate courts have wrestled with whether the testimony of a witness must be stricken where, for example, upon cross-examination the witness refuses to answer questions citing the fifth amendment privilege. The cases hold that the ruling is within the trial court's discretion. *United States* v. *Seifert*, 648 F.2d 557 (9th Cir. 1980); *United States* v. *Star*, 470 F.2d 1214 (9th Cir. 1972). *See also United States* v. *Cardillo*, 316 F.2d 606 (2d Cir. 1963), cert. denied 375 U.S. 822 (1963). The testimony should be stricken if failure to answer deprives the party questioning the witness of the right to test the truth of the witness's direct testimony, as opposed to a collateral matter. *United States* v. *Cardillo*, *supra*.

Dr. Lynch's testimony was not before the jury. We find no error in the court's refusal to strike the testimony. The answers to the questions she was asked about her personal mental history

would not have refuted her previous report and direct testimony about Robertson's condition. Rather, the answers could only have been viewed as affecting the weight of her previous, direct testimony.

Reversed and remanded.

HICKMAN, J., concurs.

PURTLE and GLAZE, JJ., dissent in part.

DARRELL HICKMAN, Justice, concurring. I concur to update the history of our review of capital cases contained in *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986) (Hickman, J., concurring), and *Ruiz and Van Denton* v. *State*, 280 Ark. 190, 655 S.W.2d 441 (1983) (Hickman, J., concurring).

Since *Fretwell*, we have reviewed the imposition of the death sentence in thirteen cases. We have upheld the death penalty in seven cases: *Starr* v. *State*, 297 Ark. 26, 759 S.W.2d 535 (1988); *Whitmore* v. *State*, 296 Ark. 308, 756 S.W.2d 890 (1988); *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988); *O'Rourke* v. *State*, 295 Ark. 57, 746 S.W.2d 52 (1988), *petition for postconviction relief pending*; *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 202 (1987); *Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233, *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1331 (1986), *petition for postconviction relief denied*, 292 Ark. 144, 728 S.W.2d 510 (1987).

We also upheld the death penalty in the unusual case of *Franz* v. *State*, 296 Ark. 181, 754 S.W.2d 839 (1988). Ronald Gene Simmons received the death penalty but waived his right to appeal his sentence. Franz attempted to bring an appeal as next friend. We determined Franz had no standing and affirmed Simmons' competency to waive his appeal.

We have reversed and remanded the following cases in which the death penalty was imposed: *Burnett* v. *State*, 295 Ark. 401, 749 S.W.2d 308 (1988); *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987); *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Duncan* v. *State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

In *Wilson* v. *State*, 295 Ark. 682, 751 S.W.2d 734 (1988), we found an error in the sentencing phase only. We vacated the

death sentence and remanded to allow either the imposition of a life sentence or the impanelling of a new sentencing jury.

We also found error in the sentencing phase in *Pickens* v. *State*, 292 Ark. 362, 730 S.W.2d 230 (1987). We had previously upheld Pickens' death sentence, 261 Ark. 756, 551 S.W.2d 212 (1977), *cert. denied*, 435 U.S. 909 (1978). But the Eighth Circuit reversed due to ineffective assistance of counsel. *Pickens* v. *Lockhart*, 714 F.2d 1455 (8th Cir. 1983). On retrial, Pickens received the death penalty again, but we found error and reversed.

None of the above cases have been presented on a second appeal, nor have *Penelton* v. *State*, 277 Ark. 225, 640 S.W.2d 795 (1982), and *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982), which we reversed and remanded seven years ago. We reversed and remanded in *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985), the first time it was before the court, but the case was affirmed on its second appeal. *Hendrickson* v. *State*, 290 Ark. 319, 719 S.W.2d 420 (1986).

In the seven cases since *Fretwell* that have survived our review, six of the defendants are white and one is black. (Juries in these 13 cases imposed the death penalty on seven black men and six white men.)

During the period from May 12, 1986, to this date, we have reviewed 28 cases in which capital murder was the finding and the death penalty sought. The death penalty was imposed in 13 cases and life imprisonment without parole was imposed in the remaining 15.

Some cases are beginning to survive the gauntlet of the federal district court and the Eighth Circuit Court of Appeals. *Habeas corpus* relief has been denied in *Hayes* v. *Lockhart*, 852 F.2d 339 (8th Cir. 1988); *Hulsey* v. *Sargent*, 821 F.2d 469 (8th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 299 (1987), and *Fairchild* v. *Lockhart*, 675 F.Supp. 469 (E.D. Ark. 1987). But some cases seem to just disappear into the federal judicial machinery. For instance, in 1980 we affirmed the conviction of Eddie Lee Miller. Miller filed a *habeas* petition in federal district court in 1981. Eight years have passed and there has been no ruling on the petition.

Other cases have met with similar delays. The *habeas* petition of John Edward Swindler has been pending in federal court since 1981; Clay Anthony Ford since 1982; Darrell Wayne Hill since 1983; Ricky Ray Rector since 1984; and Wilburn Anthony Henderson since 1984. The question has to be asked: why have these Arkansas cases been neglected or delayed? Arkansas deserves an answer.

*Habeas* relief has been granted in *Simmons* v. *Lockhart*, 856 F.2d 1144 (8th Cir. 1988), and *Singleton* v. *Lockhart*, 653 F.Supp. 1114 (E.D. Ark. 1986).

Two cases merit special mention. In 1986 the U.S. Supreme Court vacated the Eighth Circuit's decisions in *Ruiz and Van Denton* v. *Lockhart*, 754 F.2d 254 (8th Cir. 1985), and *Woodard* v. *Sargent*, 753 F.2d 694 (8th Cir. 1985), *vacated*, 476 U.S. 1112 (1986). The Eighth Circuit had reasoned that death qualified juries are unconstitutional, but the Supreme Court later held that they are not. *See Lockhart* v. *McCree*, 476 U.S. 162 (1986).

Nevertheless, after those decisions were vacated, the Eighth Circuit set aside the death sentences again, reasoning that it is unconstitutional to use pecuniary gain as an aggravating circumstance in a robbery-murder case (known as the "double counting" argument). *Ruiz and Van Denton* v. *Lockhart*, 806 F.2d 158 (8th Cir. 1986); *Woodard* v. *Sargent*, 806 F.2d 153 (8th Cir. 1986). That was also the reasoning used to reduce the death sentence to life imprisonment in *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). But in the recent case of *Lowenfield* v. *Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1988), the Supreme Court overruled the Eighth Circuit's position on the issue.

After thirteen years of court review, the death sentence still remains unexecuted. I have kept these figures for my own information as well as for anyone else interested in how the law of capital punishment fares. One safe conclusion can be made: there seems to be no end to judicial review of these decisions.

*ADDENDUM*

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

*Starr* v. *State*, 297 Ark. 26, 759 S.W.2d 535 (1988). (Starr raped his 76 year old victim and killed her with an iron pipe.)

*Whitmore* v. *State*, 296 Ark. 308, 756 S.W.2d 890 (1988). (Whitmore stabbed his victim, cut her throat and took a small amount of money from her house.)

*Franz* v. *State*, 296 Ark. 181, 754 S.W.2d 839(1988). (Franz, as next friend, appealed the death sentence of Ronald Gene Simmons. Simmons killed two people, wounded four and took one hostage during a shooting spree in Russellville.)

*Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). (Gardner strangled a married couple and their daughter during the course of robbing their home.)

*O'Rourke* v. *State*, 295 Ark. 57, 746 S.W.2d 52 (1988), *petition for postconviction relief pending.* (O'Rourke murdered his parents.)

*Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 202 (1987). (Snell murdered a pawnshop owner in the course of a robbery.)

*Hill* v. *State*, 289 Ark. 387, 713 S.W.2d 233, *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1331 (1986), *petition for post-conviction relief denied*, 292 Ark. 144, 728 S.W.2d 510 (1987). (Hill escaped from prison, took a family hostage, and later killed a state trooper.)

The court found error in the sentencing phase in *Wilson* v. *State*, 295 Ark. 682, 751 S.W.2d 734 (1988) (aggravating circumstance "especially heinous, atrocious or cruel" unconstitutionally vague), and in *Pickens* v. *State*, 292 Ark. 632, 730 S.W.2d 230 (1987) (evidence of the appellant's behavior subsequent to the crime should have been considered as a mitigating factor.)

The court has reversed the following death penalty cases, but they have not been presented again on appeal: *Burnett* v. *State*, 295 Ark. 401, 749 S.W.2d 308 (1988); *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987); *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Duncan* v. *State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

In the following cases, capital murder was charged and found and though the death penalty was sought, it was not imposed: *Hatley* v. *State*, 289 Ark. 130, 709 S.W.2d 812 (1986); *Watson* v. *State*, 289 Ark. 138, 709 S.W.2d 817 (1986); *Baker* v. *State*, 289 Ark. 430, 711 S.W.2d 816 (1986); *Rhodes* v. *State, rev'd and remanded*, 290 Ark. 60, 716 S.W.2d 758 (1986); *Hendrickson* v. *State*, 290 Ark. 319, 719 S.W.2d 420 (1986); *Thrash* v. *State*, 291 Ark. 575, 726 S.W.2d 283 (1987); *Rose* v. *State, rev'd and remanded*, 294 Ark. 279, 742 S.W.2d 901 (1988); *Scherrer* v. *State*, 294 Ark. 287, 742 S.W.2d 884 (1988); *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988); *Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633 (1988); *McDougald* v. *State*, 295 Ark. 276, 748 S.W.2d 340 (1988); *Sellers* v. *State*, 295 Ark. 489, 749 S.W.2d 669 (1988); *Allen* v. *State*, 296 Ark. 33, 751 S.W.2d 347 (1988); *Bell* v. *State*, 296 Ark. 458, 757 S.W.2d 937 (1988); *Bowden* v. *State, rev'd and remanded*, 297 Ark. 160, 761 S.W.2d 148 (1988).

TOM GLAZE, Justice, dissenting in part. I respectfully dissent from the majority's holding that the trial court did not err in refusing to strike the testimony of Dr. Lynch after she asserted the fifth amendment. Dr. Lynch simply had no fifth amendment right to assert, yet the majority opinion allows a witness the right to refuse to testify even though that witness has no legal basis to do so.

Prior to trial, appellant's counsel obtained information that Dr. Lynch had suffered from psychiatric problems; thus, counsel requested the court to order Dr. Lynch to divulge her medical records which might reflect her professional competence and ability to testify. Both the state and defense counsel agreed to an order to require Dr. Lynch to be deposed and for her to bring her medical records to the deposition. At the subsequent deposition, Dr. Lynch, invoking the fifth amendment, refused to provide her medical information. Appellant's counsel moved to have Dr. Lynch held in contempt, or in the alternative, to strike her prior testimony concerning appellant's competency. Although the prosecutor stated that he had no objection to the striking of Dr. Lynch's testimony, the trial court still refused to grant the motion to strike or to hold Dr. Lynch in contempt.

Obviously, Dr. Lynch's testimony was an important part of

the state's case, especially concerning appellant's fitness to proceed to trial. The state was quite aware of the problem it had regarding Dr. Lynch as a witness because it decided not to call her at trial.

Clearly, the fifth amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. *Ullmann* v. *United States*, 350 U.S. 422 (1956). Its [the fifth amendment's] sole concern is to afford protection against the danger to a witness of being forced to give testimony leading to the infliction of penalties affixed to criminal acts. *Id.*

Here, defense counsel was only seeking information concerning Dr. Lynch's prior medical history so as to impeach her testimony. In other words, the defense's quest for information had nothing to do with exposing Dr. Lynch to a criminal charge. In my view, the majority court's erroneous application of the fifth amendment has caused the court to reach an incorrect result, leaving the impression that the fifth amendment can be invoked to refuse to testify even in instances where the fifth amendment was never intended to apply. It is my opinion that a witness cannot justify his or her refusal to testify based upon the fifth amendment when he or she clearly has no grounds to assert that amendment.

The issue here, which the majority chooses to ignore, is whether Dr. Lynch's medical records and history (which purportedly reveal a psychiatric disorder) are privileged. In *Horn* v. *State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984), the court of appeals, in accordance with *Baker* v. *State*, 276 Ark. 193, 637 S.W.2d 522 (1982), correctly held that the physician/patient privilege found in A.R.E. 503 only protects confidential communications between doctor and patient, as opposed to evidence of medical treatment. In the instant case, Dr. Lynch was not asked about confidential communications between herself and her doctor, but was only asked about the fact of treatment. By refusing to compel her to answer the questions or, in the alternative, to strike her testimony, the trial court has effectively denied the appellant the right to cross examine this important expert witness. This was clear error.

PURTLE, J., joins this dissent.

Dorenda Gail FRETWELL *v.* STATE of Arkansas

RC 89-7 765 S.W.2d 576

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*Jack M. Lewis*, for appellant.

No response.

PER CURIAM. Petitioner, Dorenda Fretwell, by her attorney, Jack M. Lewis, has filed a motion for rule on the clerk. Her attorney admits that the record was tendered late due to a mistake on his part in posting the filing date on his calendar.

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 (1979).

Michael O'ROURKE *v.* STATE of Arkansas

CR 87-17 765 S.W.2d 916

Supreme Court of Arkansas
Opinion delivered February 27, 1989

*Jeff Rosenzweig*, for appellant.

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

PER CURIAM. The petitioner Michael O'Rourke was convicted of the capital murder of his parents and sentenced to death by lethal injection. We affirmed the conviction. *O'Rourke* v. *State*, 295 Ark. 57, 746 S.W.2d 52 (1988). The petitioner now seeks permission to proceed in circuit court for post-conviction relief pursuant to Criminal Procedure Rule 37.

The petitioner's chief allegations claim that his counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the sixth amendment. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the trial. In making a determination on a claim of ineffectiveness,the totality of the evidence before the judge or jury must be considered. *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The petitioner first alleges that his counsel was ineffective for not introducing any evidence in mitigation during the penalty phase of the trial. At trial, the defense maintained that the petitioner did the crime but that he was not responsible because of mental disease or defect. Both the prosecution and the defense introduced evidence on that point. After the defense was rejected and the jury returned a guilty verdict, neither party put on any evidence of aggravating or mitigating circumstances. The state did not argue against mitigation during the punishment phase but did argue as one aggravating circumstance that the petitioner murdered his parents for pecuniary gain. The defense argued that the petitioner did not deserve the death penalty because of his extreme mental illness. The petitioner claims that his attorney was ineffective by simply arguing against the death penalty rather than presenting evidence in mitigation. During the guilt phase of the trial the only witness for the defense was a psychologist who testified that in his opinion the petitioner was too mentally disturbed at the time of the crime to realize the criminality of his conduct. If other witnesses were available, the burden is on petitioner to state specifically who the potential witnesses were and what evidence they would have given, and to demonstrate that the defense suffered actual prejudice by their absence such that he was denied a fair trial, the outcome of which is likely to have been different. *See Strickland* v. *Washington, supra*. As the petitioner has failed to show what other evidence the defense could have offered which would have changed the outcome of the trial, he has not met that burden.

It is true that in *Neal* v. *State*, 274 Ark. 217, 623 S.W.2d 191 (1981), we found that diminished mental capacity has different significance in the determination of guilt and in the imposition of sentence once guilt has been determined. We went further in *Neal* and found that in that case counsel was ineffective for failing to put on evidence of diminished mental capacity during the penalty phase of trial, even though such evidence was presented in the guilt phase. The distinction between *Neal* and petitioner's case is that in *Neal* there was additional evidence of

the appellant's diminished mental capacity other than that already introduced, and the closing statement was brief and failed to emphasize the significance of the appellant's diminished mental capacity. In this case, the petitioner has failed to show any evidence that could have been presented but was overlooked. Moreover, the petitioner's attorney pleaded during the penalty phase that his client not be put to death because of his mental disorder. The petitioner has not shown that his attorney's performance was deficient.

The petitioner next claims that his attorney was ineffective for failing to object prior to trial on the ground that the petitioner was incompetent to stand trial and in failing to offer evidence to support the objection. The petitioner also suggests that the court should have ordered a competency hearing *sua sponte*. The petitioner notes that his trial was delayed for three years due to his insanity, that he had not communicated with his attorney for months before the trial and that he attended the trial in short pants and bare feet. The petitioner states that his attorney should have testified as an officer of the court that his client refused to communicate with him.

Soon after the petitioner was charged he notified the court that his defense would be not guilty by reason of mental disease or defect. The trial court ordered that he be evaluated and on November 23, 1983, four months after the murders, the State Hospital submitted a report stating that the petitioner was incompetent to stand trial. The trial court committed the petitioner to the State Hospital for treatment. On July 31, 1983, the State Hospital notified the trial court that the petitioner was fit to proceed to trial. On December 13, 1984, petitioner's counsel requested a hearing on the petitioner's fitness, and the court ordered the petitioner to the State Hospital for reevaluation. On January 21, 1985, a hearing on the petitioner's fitness was held and a psychologist testified for the defense that the petitioner was unable to assist his attorney in his defense. A psychiatrist from the State Hospital agreed, testifying that the petitioner's assistance to his attorney would be severely compromised by the fact that the petitioner used paranoid beliefs in deciding whether to volunteer information to his attorney. The trial court found that the petitioner was unable to assist in his defense, and he was again committed to the State Hospital. On January 19, 1986, the State

Hospital notified the trial court that the petitioner was fit to proceed. In February 1986, the petitioner wrote the trial court, stating that he was competent and asking to proceed to trial.

On August 18, 1986, the defense again contended that the petitioner was not fit for trial and asked for further evaluation. The court ordered two physicians to examine him; they recommended that the petitioner be evaluated once again at the State Hospital. On September 19, 1986, after the evaluation was completed, the State Hospital submitted a report finding that the petitioner was fit to proceed to trial.

A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult counsel and to assist counsel in preparing his defense, may not be subjected to a trial. *Henry* v. *State*, 288 Ark. 592, 708 S.W.2d 88 (1986). In this case, the defense vigorously pursued an insanity defense and throughout the proceeding sought to have the petitioner declared incompetent to stand trial. Obviously a point came where trial counsel felt that his efforts to that end were futile and the trial should proceed. Even if the petitioner's counsel had testified and had had the defense psychologist testify at a last minute competency hearing, it is not probable that the result would have been different. At such a hearing the psychiatrists at the State Hospital would no doubt have opined that the petitioner was fit to stand trial and the psychologist for the defense would have disagreed. Moreover, there is nothing provided to support the assertion that counsel should have sought additional psychiatric testimony. The trial court was aware of the lack of cooperation by the petitioner as it was also aware that previously the petitioner himself had asked to proceed with the trial. The petitioner has failed to show that his counsel's conduct deprived him of a fair trial.

The petitioner contends that his counsel was ineffective for failing to object to the order and form of psychiatric testimony. He states that his counsel should have objected to the state's calling one of the psychiatrists at the State Hospital in its case-in-chief before the defense had embarked upon a strategy. Although the petitioner asserts that this allowed the state to unfairly bolster its case, petitioner makes no real statement of prejudice. Furthermore, the defense had stated its intention to

pursue a defense of insanity.

The petitioner claims next that his attorney prejudiced him by stating in opening argument that he was not sure whether his client would testify. He contends that the same prejudice resulted when his counsel elicited on cross-examination of the state's psychiatrist his opinion that if the petitioner was called as a witness he would probably not cooperate. In closing argument, counsel said he wished he could have gotten his client to testify. Counsel was obviously trying to show that his client was being silent not in an effort to hide something, but because he was so mentally disturbed that he could not or would not cooperate in his own defense. Again, as it was purely a matter of strategy, the allegation provides no basis for relief under Rule 37.

The petitioner makes the conclusory claim that his attorney had no real strategy. The record clearly shows that the defense was based on insanity and a plea for mercy. Therefore, the point is without merit.

The next allegation is that the petitioner's counsel should have sought an accomplice instruction. The petitioner and Dennis Meadors, the petitioner's roommate, killed the petitioner's parents. Meadors testified to the way the murders happened and claimed that the petitioner forced him to participate. The petitioner argues that the lack of an accomplice instruction severely prejudiced the petitioner although he does not say how. A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Code Ann. § 16-18-111(e)(1) (1987) [Ark. Stat. Ann. § 43-2116 (Repl. 1977)]. The state presented ample evidence tending to connect the petitioner to the crime. A shop owner testified that the petitioner sold her coins that had been stolen during the murder and the petitioner was also identified as being present when a handgun used in the murders was purchased by Meadors. In light of the evidence, the lack of an accomplice instruction did not prejudice the petitioner.

The petitioner was charged with three forms of capital murder. He was charged with killing two persons in the same episode, with committing murder in the course of a robbery, and with entering into an agreement to commit murder. See Ark.

Code Ann. § 5-10-101(a)(1)(3)(7) (1987) [Ark. Stat. Ann. § 41-1501(1)(a)(c)(g) (Repl. 1977)]. The petitioner claims that his counsel should have forced the state to narrow its allegations or that counsel should have requested jury forms that would allow the jury to specify of which charge the petitioner was found guilty. The form only required a finding of guilty or not guilty. The petitioner claims that there was insufficient evidence to convict him of the charge of hiring someone to commit murder. However, because there was ample evidence to sustain the first two theories, the petitioner has failed to demonstrate prejudice. Moreover, the allegation constitutes an attack on the sufficiency of the evidence. Such a challenge presents a direct, rather than collateral, attack on the judgment and must be made at trial and on direct appeal. *McCroskey* v. *State*, 278 Ark. 156, 644 S.W.2d 271 (1983). Furthermore, a petitioner may not reach the issue of the sufficiency of the evidence by alleging ineffective assistance of counsel.

The petitioner makes the conclusory allegation that his attorney failed to conduct a proper voir dire of the jury. He states that counsel failed to question the jury sufficiently on insanity, the death penalty, and homosexuality, but he does not state what prejudice arose from the failure to explore any particular area in voir dire. On direct appeal we held that the record reflects that a fair and impartial jury was seated by the trial judge, and the allegation offers no facts from which a different conclusion could be reached now.

The petitioner alleges that his counsel was ineffective in failing to make an adequate record to support his motion for a change of venue. On appeal we held that the affidavits supporting his motion failed to show the requisite prejudice because they failed to allege the prejudice was county-wide, and while the affiants alleged prejudice in the Dardanelle district, their later testimony belied their earlier allegations. The petitioner names no one that could have alleged county-wide prejudice. As stated, we found on appeal that the jury panel was fair and impartial.

At various times in argument the petitioner's counsel referred to petitioner as a monster and compared him to Jack the Ripper, the Mad Hatter, and Lizzie Borden. A reading of the arguments in their entirety reveals that counsel was simply trying

to convince the jury that the petitioner was so insane that it would be merciless to put him to death. Other learned counsel might debate the trial tactics used, but lack of success with trial tactics does not equate with ineffective assistance of counsel. *See Fink* v. *State*, 280 Ark. 281, 658 S.W.2d 359 (1983).

The petitioner next claims that his attorney was ineffective in not objecting to the prosecutor's statement in his closing argument during the penalty phase that if the jury finds aggravating circumstances which outweigh the mitigating circumstances, they should sentence him to death. While Ark. Code Ann. § 5-4-603(1) (1987) [Ark. Stat. Ann. § 41-1302(1) (Repl. 1977)], actually provides that to sentence a defendant to death, the jury must also find that the aggravating circumstances must justify a sentence of death, the petitioner has failed to prove that he was prejudiced by the omission. It is unlikely that the addition of the omitted phrase would have resulted in a different sentence.

The petitioner alleges that the Arkansas death penalty statute is unconstitutionally mandatory and that his attorney was ineffective for not making an objection on that ground. This precise argument has been rejected to us. *Pickens* v. *State*, 292 Ark. 362, 730 S.W.2d 230 (1987). Therefore, the petitioner's attorney cannot be said to have been ineffective for failing to pursue the argument.

The petitioner claims that his counsel was ineffective for not moving for a dismissal because his ability to defend himself was compromised from the delay due to his incompetence. Although the petitioner alleges prejudice, he does not state what that prejudice is or how the delay affected his ability to defend himself. It is incumbent on the petitioner to show actual prejudice so serious as to deprive him of a fair trial. *Neff* v. *State*, 287 Ark. 88, 696 S.W.2d 736 (1985).

The petitioner states that under the doctrine of comparative review, his death sentence cannot stand. The petitioner's accomplice received a sentence of ten years probation in exchange for his plea of guilty and testimony in the petitioner's case. However, the evidence against the petitioner, which showed that he brutally murdered his parents for insurance proceeds, would clearly justify a sentence of death when compared with other cases in which the death penalty has been allowed to stand.

Moreover, this is an issue that should have been raised at trial or on appeal. Since it was not and is not so fundamental as to render the conviction void, we will not consider it. *White* v. *State*, 290 Ark. 77, 716 S.W.2d 203 (1986).

The petitioner argues that the death sentence rendered is illegal as violative of the eighth amendment "double counting prohibition." This argument was rejected on direct appeal. Rule 37 does not provide an opportunity to reargue points settled on appeal. *Swindler* v. *State*, 272 Ark. 340, 617 S.W.2d 1 (1981).

The petitioner next claims that the Arkansas statutory definitions of capital and first degree murder unconstitutionally overlap and give the prosecutor unbridled discretion. These arguments should have been made at trial or on appeal and are not sufficient to void the conviction. *White* v. *State*, *supra*.

The petitioner argues that the jury ignored the evidence in mitigation and, therefore, the death sentence may not stand. This is a challenge to the sufficiency of the evidence and is a direct, rather than a collateral, attack on the conviction. Such attacks are not cognizable under Rule 37. *McCroskey* v. *State*, *supra*.

The petitioner also claims that his attorney should have asked for an additional instruction on the affirmative defense set forth in Ark. Code Ann. § 5-10-101(b) (1987) [Ark. Stat. Ann. § 41-1502(2) (Repl. 1977)], which states that it is an affirmative defense to any prosecution under the felony murder provision in section 5-10-101(a)(1) for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission. There would have been no rational basis for this instruction since there was absolutely no evidence that the petitioner did not kill his parents or aid in the commission of the murders.

The petitioner has made two allegations which require an evidentiary hearing. He claims that he was prejudiced by his counsel's failure to ask for instructions on lesser included offenses of capital murder. While there was sufficient evidence to convict the petitioner of capital murder, the instructions only

gave the jury the option of acquitting the petitioner or convicting him of capital murder. Since there were no instructions on lesser offenses, a rejection of the insanity defense gave the jury no alternative but to find the required premeditation and deliberation or set the petitioner free. *See Robinson* v. *State*, 269 Ark. 90, 598 S.W.2d 421 (1980). A court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the petitioner of the offense charged and convicting him of the included offense. Ark. Code Ann. § 5-1-110(c) (1987) [Ark. Stat. Ann. § 41-103(3) (Repl. 1977)]. In this case the jury could have found that because of the petitioner's mental disease or defect he was incapable of acting with premeditation and deliberation and, therefore, convicted him of second degree murder. Ark. Code Ann. § 5-10-103 (1987) [Ark. Stat. Ann. § 41-1503 (Repl. 1977)]. Therefore, the petitioner was entitled to instructions on lesser included offenses. Counsel of course may have had some reason in mind when he did not ask for instructions on lesser offenses; therefore, we grant permission for an evidentiary hearing in a circuit court to determine whether counsel was ineffective under the standard set out in *Strickland* v. *Washington, supra*, and our case law, in failing to request instructions on lesser included offenses.

The petitioner also alleges that his attorney should have objected to testimony that the petitioner invoked his constitutional right to counsel. The following took place during the state's examination of Sgt. F. V. Kimery of the Arkansas State Police:

> Q. (Prosecuting Attorney) Mr. Kimery, I believe that you have had some other contact with Mr. O'Rourke. Is that correct? Other than the initial investigation?
>
> A. (By Kimery) Yes, sir, I talked to Michael O'Rourke on July 30. I interviewed him as a suspect, and I believe you have a copy of that, on August 4, 1983.
>
> Q. What did he tell you when you interviewed him as a suspect?
>
> A. He stated that he did not want to make a statement at this time on the counsel of his attorney. As I recall, he had an attorney present.

The state also admitted a transcript of a taped

conversation between the petitioner and Sgt. Kimery. The petitioner claims that inquiry and the admission of the taped conversation allowed the use of his silence and insistence on counsel as proof that he was not insane at the time of the crime in violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). In *Doyle* the United States Supreme Court held that the state may not use a defendant's post-*Miranda* silence to impeach his trial testimony. In *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986), the Court held that the state's use of the defendant's post-*Miranda* silence as evidence of sanity violated the defendant's constitutional right to due process. In the petitioner's case, as in *Wainwright*, the state argued in closing that the defendant's invocation of his right to counsel was proof that the defendant was sane. Since the petitioner's silence was used against him in that it was used to rebut his affirmative defense of insanity, the trial court should determine whether the petitioner's counsel was ineffective for failing to object to the inquiry of Sgt. Kimery, to the closing argument, and to the admission of the transcript of the phone call.

Petition granted in part and denied in part.

GLAZE, J., would grant only as to relief related to issue involving *Wainwright* v. *Greenfield*.

L.J. CAMPBELL *v.* STATE of Arkansas

CR 89-36 769 S.W.2d 730

Supreme Court of Arkansas
Opinion delivered March 3, 1989

PER CURIAM. Petition for Writ of Prohibition is denied.

GLAZE, J., concurs.

PURTLE, J., dissents.

TOM GLAZE, Justice, concurring. Petitioner files a petition for writ of prohibition a week before trial and alleges the Newton County Circuit Court has violated his speedy trial rights. He files what might charitably be called a "partial transcript" which is

certified by the Newton County Circuit Clerk. The partial transcript contains duplicate copies of the petitioner's petition and motion to dismiss which he filed both in this court and the court below. Except for a copy of the information filed in this cause, the few other instruments contained in the circuit clerk's transcript pertain to matters that are wholly irrelevant to his petition for writ of prohibition. In sum, the petitioner offers no transcript of any of the court proceedings held below and includes no docket sheet which reflects the events that have occurred in this case. There simply is nothing before this court that would allow it to do anything but deny the petitioner's request for a writ.

JOHN I. PURTLE, Justice, dissenting. The temporary writ of prohibition should be granted because it is obvious the time for a speedy trial has run. At most a temporary writ would delay a trial for the time being. However, a trial would needlessly cost the state and county a considerable amount of money.

The zeal to do justice can sometimes do much harm and it seems to me it has done so here. To cause a person the trouble and expense of a trial, and possibly a prison sentence, without good cause is surely an injustice. In my opinion such an injustice has been done in this case.

Petitioner was arrested on the pending charge on March 19, 1987 and posted bond. He was sentenced to the Arkansas Department of Correction on an unrelated charge on November 3, 1987, and has been imprisoned continuously since that date. He has been incarcerated for more than fifteen months. Almost two years have elapsed since his arrest. He filed this petition for prohibition in this court on January 6, 1989. The record was tendered to this court on February 22, 1989.

I find no excludable periods. Therefore, the time has expired and the petition should be granted.

George WILCOX d/b/a George Wilcox Construction Company *v.* William SAFLEY, Sr., d/b/a SAFLEY CONSTRUCTION COMPANY and American States Insurance Company

89-42 766 S.W.2d 12

Supreme Court of Arkansas
Opinion delivered March 6, 1989
[Supplemental Opinion on Denial of Rehearing
April 24, 1989.]

*Howell, Price, Trice, Basham & Hope, P.A.*, by: *Carey E. Basham* and *Max Howell*, for appellant.

*L. David Stubbs*, for appellee.

JACK HOLT, JR., Chief Justice. This appeal involves the interpretation of Ark. Code Ann. § 17-22-101 (Supp. 1987).

Jurisdiction is pursuant to Ark. Sup. Ct. R. 29(1)(c).

In 1982 appellee William Safley d/b/a Safley Construction Company was awarded a contract as the prime contractor for the construction of a sewer system in Faulkner County, known as the "Mayflower Wastewater Collection System." Construction of the system required that the serviced area be dug up, lines installed, and trenches backfilled and graded level.

Appellant George Wilcox d/b/a George Wilcox Construction Company orally agreed with Safley to provide bermuda sod on a per yard basis for the job and place it on areas disturbed in the construction of the system. The agreed price was $2.32 per square yard of sod based upon an estimated need of 33,000.00 square yards.

At various intervals, Wilcox and his employees placed 34,015.58 square yards of sod on the job site. In addition, they did a small amount of seeding and sprigging. Wilcox received partial payment of $22,895.86 for this work; however, Safley refused to pay the balance due. Wilcox then filed suit against Safley for $31,556.31 — the balance due. Safley denied liability for this sum on the grounds that Wilcox was not a licensed contractor and, therefore, was not entitled to bring an action to recover the sum due under Ark. Code Ann. § 17-22-103 (Supp. 1987). Wilcox stipulated at trial that he was not licensed but alleged that he was not a contractor and, therefore, not required to be licensed. The trial court found that the failure of Wilcox to be licensed precluded him from maintaining an action to recover the balance due and entered judgment for Safley and American States Insurance Company. From this order, Wilcox appeals.

For reversal, Wilcox contends that the trial court erred in finding he was a contractor and, therefore, prohibited from maintaining an action. We agree and reverse and remand for proceedings consistent with this opinion.

Ark. Code Ann. § 17-22-101 (Supp. 1987) provides in pertinent part as follows:

> (a) As used in this chapter, unless the context otherwise requires, "contractor" means any person, firm, partnership, copartnership, association, corporation, or other organization, or any combination thereof, who, for a fixed

> price, commission, fee, or wage, attempts to or submits a bid to construct, or contracts or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, or manages the construction, erection, alteration, or repair, or has or have constructed, erected, or repaired, under his, their, or its direction, any building, apartment, condominium, highway, sewer, utility, grading, or any other improvement or structure on public or private property for lease, rent, resale, public access, or similar purpose, except single-family residences, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including, but not limited to, labor and materials, is twenty thousand dollars ($20,000) or more.

Ark. Code Ann. § 17-22-103(a)(1) (Supp. 1987) provides in relevant part that any contractor who engages in the business of contracting without first having procured a license "shall be deemed guilty of a misdemeanor and shall be liable for a fine of not less than one hundred dollars ($100) nor more than two hundred dollars ($200) for each offense, with each day to constitute a separate offense." In addition, Ark. Code Ann. § 17-22-103(d) provides that "[n]o action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this chapter."

Code provisions imposing penalties for noncompliance with licensing requirements, such as §§ 17-22-101 and 17-22-103, must be strictly construed. *Bird* v. *Pan Western Corp.*, 261 Ark. 56, 546 S.W.2d 417 (1977); *Davidson* v. *Smith*, 258 Ark. 969, 530 S.W.2d 356 (1975); *Arkansas State Licensing Board for General Contractors* v. *Lane*, 214 Ark. 312, 215 S.W.2d 707 (1948). Accordingly, if the language of such provisions is not clear and positive, or if it is reasonably open to different interpretations, every doubt as to construction must be resolved in favor of the one against whom the enactment is sought to be applied. *Id.* Where a provision is clear and unambiguous, the intention of the legislature must be determined from the plain meaning of the language of the provision. *Klinger* v. *City of Fayetteville*, 293 Ark. 128, 732 S.W.2d 859 (1987); *Hinchey* v. *Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987).

The language of § 17-22-101(a) is not clear and

unambiguous. Under § 17-22-101(a), a contractor is a person who attempts to or submits a bid to construct, contracts or undertakes to construct, or manages the construction, erection, alteration, or repair of a building, apartment, condominium, highway, sewer, utility, grading, or any other improvement. In narrowly construing this language, we conclude that it is reasonably open to different interpretations, particularly when we examine the actions of Wilcox in sodding, sprigging, and seeding the land in question. These activities do not fall within the definition of construction, erection, alteration, or repair. Resolving doubt in his favor, which we must do, we find that Wilcox was not a contractor for purposes of § 17-22-101(a) and is entitled to maintain an action to recover his losses.

Reversed and remanded.

DUDLEY and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The majority opinion correctly states that we do not indulge in statutory interpretation when the meaning of the words used in the statute under consideration is clear. The statute, Ark. Code Ann. § 17-22-101 (Supp. 1987), defines "contractor" as, among others, one "who, for a fixed price . . . undertakes to . . . repair . . . any . . . grading. . . ." Contrary to the majority of the members of the court, I do not find these words to be ambiguous.

The first definition of the verb "repair" found in Webster's Third New International Dictionary (Unabridged, 1968) is, "to restore by replacing a part or putting together what is torn or broken." The same dictionary notes that the word "grading" is the gerund of "grade." The third definition of the verb "grade" is "to reduce (as the line of a canal or roadbed) to an even grade whether on the level or in a progressive ascent or descent." The third definition of the noun "grade" includes the following: "c. : level or elevation esp. of a land or water surface; as (1): a datum or reference level (2) : the contemplated level of the ground when the work or erecting a building is completed: ground level. . . ." The Random House Dictionary of the English Language (Unabridged, 1970) includes among the definitions of "grade" the following: "*Building Trades.* [T]he ground level around a building."

The majority opinion declares the statute to be ambiguous, but it does not say how or why. The opinion notes that the statute is subject to varying interpretations but does not say what they are. Given the dictionary definitions of the words used, it seems clear to me that the statute applies to one who contracts to replace damaged sod on ground torn up in a sewer project. Wilcox was repairing a grading. The only explanation given by the majority opinion is that "the actions of Wilcox in sodding, sprigging, and seeding the land . . . do not fall within the definition of . . . repair." I suspect that the reason no authority whatever is cited for that conclusion is that none exists. Therefore, I respectfully dissent.

DUDLEY, J., joins this opinion.

## SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 24, 1989

771 S.W.2d 741

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

*L. David Stubbs*, for appellee.

JACK HOLT, JR., Chief Justice. On rehearing, Safley contends our decision effectively overrules *Bird* v. *Pan Western Corporation*, 261 Ark. 56, 546 S.W.2d 417 (1977). In support of this contention he states as follows:

> In *Bird*, this court found that the legislative intent of the wording of the statute in question was meant to broaden,

rather than narrow, the application of the statute. This court, however, declares that it must now narrowly construe the language of the statute.

In *Bird*, we addressed the issues of whether a person must contract with an owner or assume charge in a supervisory capacity to be considered a "contractor" under § 71-701 (Supp. 1975) (currently § 17-22-101). In reaching our decision, we first recognized that licensing statutes such as § 71-701 are to be strictly construed. We then held that because the legislature substituted the term "contractor" for "general contractor" and inserted the words "in a supervisory capacity or otherwise," its intent was to broaden the application of the act so its application would not necessarily be limited to one who contracted with an owner or one who assumed charge in a supervisory capacity.

Whereas *Bird* recognized that the legislature broadened the application of our statute by inserting and substituting certain words in the statute, it did not change our long-standing rule that language contained in licensing statutes must be strictly construed. *See Arkansas State Licensing Board for General Contractors* v. *Lane*, 214 Ark. 312, 215 S.W.2d 707 (1948).

Petition denied.

Dorsey McRae WHITE *v.* STATE of Arkansas

CR 88-134 765 S.W.2d 949

Supreme Court of Arkansas
Opinion delivered March 6, 1989

*Baxter, Eisele, Duncan & Jensen*, by: *Ray Baxter* and *Karen Wallace Duncan*, for appellant.

*Steve Clark*, Att'y Gen., by: *Jeannette Denhammcclendon*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Dorsey McRae White, a 68 year old widower and cattleman, was convicted of six counts of possession of marijuana with intent to deliver and one count of criminal use of an illegal weapon, a sawed-off shotgun. Finding no error, we affirm the convictions.

The most important question we consider is whether the appellant was entrapped into committing the drug offenses. The Hempstead County sheriff's office approached Vercina Lindsey, a black female, to cooperate in making a drug buy from Dorsey White. At the time, Ms. Lindsey had charges pending against her involving stolen credit cards and, according to her, she and the appellant had an ongoing sexual relationship. She agreed to cooperate with the sheriff's office. Thedford White, a black Texarkana police officer, was recruited to serve as an undercover officer and to pose as a friend of Ms. Lindsey.

Officer White made five separate purchases of marijuana from the appellant over a six week period. The first sale took place on October 2 and involved about 1.5 ounces of marijuana for $200.00; the second sale occurred on October 14 and involved 6.2 ounces for $425.00; the third sale on October 22, 7.7 ounces for $550.00; the fourth sale on November 3, 6.9 ounces for $550.00; and the final sale on November 12, 1.75 pounds for $1,900.00.

The appellant told the jury that Vercina said her "friend" (Officer White) was a preacher who needed marijuana for medicinal purposes but could not be seen buying it. He testified that when Officer White first came to his home to ask for marijuana, he told him, "that if he was in that shape, he was a preacher . . . I would try to help him."

Officer White's and Ms. Lindsey's testimony was different.

Ms. Lindsey said she merely told the appellant she had a friend who wanted some "dope." She also testified that the appellant had given her marijuana for her own use. She said, "he would take some out of [a bag] and put it in a paper towel. I asked him why don't you give me a little more, and he said *no, it's for somebody else.*" (Italics supplied.) She also said that after Officer White made the first buy, the appellant called her and asked, "does your buddy need any more smoke, because I will get him some more."

Officer White testified he never told the appellant he was a preacher or why he wanted the drugs, and he never heard Ms. Lindsey offer any explanation to the appellant. When he told the appellant he wanted marijuana, the appellant told him he could supply him with whatever he needed.

In addition, another officer testified that the appellant's statement given after his arrest contained no explanation for the drug sales.

Was the appellant entrapped? The trial judge refused to rule as a matter of law that the appellant was entrapped. He gave the issue to the jury for a decision and he was right. Ark. Code Ann. § 5-2-209(b) (1987) defines entrapment as follows:

> Entrapment occurs when a law enforcement officer or any person acting in cooperation with him induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

While we primarily focus on the conduct of the officers, the defendant's conduct should not be disregarded. In *Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978), we said the following:

> [A] defendant's conduct and predisposition, both prior to and concurrent with, the transactions forming the basis of the charges are still material and relevant, on the question [of] whether the government agents only afforded the opportunity to commit the offenses with which he is charged.

Entrapment does not occur when government agents

merely afford the opportunity to do that which a person already has a predisposition to do. *See Jackson* v. *State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984). Entrapment as a matter of law is established only if there is no factual issue to be decided. Ordinarily, it is a question of fact. *Walls* v. *State*, 280 Ark. 291, 658 S.W.2d 362 (1983).

The appellant had the burden of proving he was entrapped. He had to convince the jury that he was telling the truth and that Vercina and Officer White were not. He was the only one to testify that he was persuaded by the "sick preacher" story. Officer White and Vercina Lindsey said no such story was told to the appellant. The jury chose to believe Officer White and Vercina Lindsey.

The argument that the interracial relationship between the appellant and Ms. Lindsey had a bearing on the jury's verdict ignores the state's evidence. The appellant made five separate sales to Officer White involving about three pounds of marijuana over a six week period. Undoubtedly, the jury was convinced that the appellant was not a naive cattleman but was a dealer in drugs who deserved serious punishment.

The appellant also complains about his conviction for possession of 1/7th of an ounce of marijuana with the intent to deliver. He argues the small amount is not enough to prove it was intended for a sale, citing Ark. Code Ann. § 5-64-401(d) (1987), which states that at least an ounce must be possessed to create a presumption of intent to deliver. Furthermore, he claims that if it had been intended for sale, he would have included it in the last sale to Officer White.

The jury could consider the fact that the appellant had sold drugs in deciding he also intended to sell the small amount. That fact combined with the appellant's testimony that the marijuana was not for his own use, and the testimony of officers that such quantities were sometimes sold in a form known as "dime bags," supports the jury's determination the marijuana was intended for sale.

Two arguments made by the appellant will not be considered because they were not preserved for appeal. The appellant claims repeated inflammatory remarks by witnesses

and by the prosecuting attorney denied him a fair trial. Not one objection was made to the remarks about which the appellant complains. We will not consider an argument on appeal unless it is made below. See *Hughes* v. *State*, 295 Ark. 121, 746 S.W.2d 557 (1988); Ark. Code Ann. § 16-91-113(b)(3) (1987). Appellate counsel, who did not defend Dorsey White at trial, makes a passionate argument about the conduct of the prosecuting attorney, but we are not convinced that any one statement or the cumulative statements were so flagrantly prejudicial that the trial court should have intervened. See *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

The same is true regarding the argument that the search warrant was defective. The search of the appellant's home resulted in the seizure of the 1/7th ounce of marijuana and the sawed-off shotgun. None of the arguments made on appeal were made to the trial court so we will not consider them.

Though the shotgun was not listed on the warrant, the trial judge ruled its seizure was proper, and we agree. The weapon is prohibited by law. Ark. Code Ann. § 5-73-104(a) (1987). The officer testified that discovery of the shotgun was inadvertent. An officer, who, in the course of otherwise lawful activity, observes the nature and location of things which he reasonably believes to be subject to seizure, may seize such things. A.R.Cr.P. Rule 14.4; *see also Johnson* v. *State*, 291 Ark. 260, 724 S.W.2d 160, *cert. denied*, ___ U.S. ___, 108 S.Ct. 101 (1987).

Essentially, the appellant lost his case to the jury. We find no properly preserved error that would warrant reversal.

Affirmed.

HOLT, C.J., and PURTLE and NEWBERN, JJ., dissent.

JACK HOLT, JR., Chief Justice, dissenting. I do not agree with Justice Purtle that the appellant, Dorsey McRae White, was "entrapped" by law enforcement officials to commit six offenses relating to the sale of marijuana. The defendant was in the drug business and got caught. I do join him, however, in finding that the record is saturated with prejudicial remarks by the prosecutor which were not related to matters of evidence, but were injected into the trial for the obvious purpose of creating prejudice in the minds of the jury. In addition, I feel there is insufficient evidence

to convict the defendant on the charge of possession with intent to deliver one-seventh ounce of marijuana since the record is devoid of any proof of intent to deliver.

As noted by Justice Purtle, the conduct of the prosecutor was sufficient to deny the appellant a fair trial. However, I limit my concern to the impact of the prosecutor's prejudicial remarks to the jury in regard to sentencing of the defendant.

Under our criminal justice system, we call upon the jury to make findings of guilt and to assess punishment in the same proceeding, Ark. Code Ann. § 5-4-103 (1987), unless there is an exception which calls for bifurcation. *See e.g.,* Ark. Code Ann. § 5-4-602 (1987) (dealing with capital felony murder cases). In evaluating the remarks made by the prosecutor during the course of the trial, we should view his comments in light of what effect, if any, they may have had upon the jury's finding of guilt or innocence and also, what effect, if any, *they may have had upon the assessment of punishment.*

Since the evidence is overwhelming as to the appellant's overall guilt, except for the sale of one-seventh ounce of marijuana, the comments of the prosecutor, set out in detail in Justice Purtle's dissent, though prejudicial, should not require us to reverse and remand this case for retrial. However, when I see that the jury assessed the maximum period of confinement on each count of possession of marijuana with intent to deliver, including the charge of possession of one-seventh of an ounce, it is obvious that the remarks of the prosecutor had a telling effect on the jury in assessing punishment.

Although the trial court mitigated the sentences in part by ordering that three of the ten year sentences run concurrently with the other three, I do not feel its actions were sufficient under the circumstances. For this reason, I would order each sentence reduced to the minimum authorized by law. *See Dandridge* v. *State*, 292 Ark. 40, 727 S.W.2d 851 (1987). Cases of prosecutorial abuse should not go untreated.

NEWBERN, J., joins this dissent.

JOHN I. PURTLE, Justice, dissenting. I could not sleep tonight if I failed to dissent in this case.

Dorsey White is a 69 year old resident of Hempstead County; he has lived there since he was a teenager. He never had a criminal record until he was charged in this affair. Dorsey White is now serving what at his age could amount to a life sentence. It is my belief that these charges resulted from entrapment by the sheriff.

The appellant was sentenced to ten years each on six counts of sale or possession of marijuana with intent to sell. He was also sentenced to six years imprisonment for the offense of criminal use of prohibited weapons. Finally, he was fined $70,000. The weapons were handguns taken from his home in a search during the marijuana investigation. There was no evidence that he had ever intended to use the weapons for any illegal purpose. Indeed, the one gun which seemed to be illegal was a family heirloom.

Before getting into the question of entrapment, I wish to discuss certain prejudicial remarks made by the prosecutor. I believe they warrant a reversal of this case or at least a reduction to the minimum length of sentence required. The prosecutor's misconduct commenced with the opening statement when he said:

> The defendant is a well known man of mature years. He had lived in Hempstead County for a long time. He has never been convicted of a crime before. Certainly, not a serious crime, and I hope this isn't a problem.

There was no evidence that the appellant had been convicted of any crime, serious or otherwise. The prosecutor continued with the statement:

> The defendant is white. The confidential informer is black. The drug problem doesn't know those colors. I don't think it will be a problem with you all. We talked about Ms. Lindsey, and I am sorry we had to use a criminal to get another criminal, but it takes a thief to make a thief sometimes. And that is better than letting it go.

Such remarks were not based on anything the prosecutor intended to prove but rather were made solely for the purpose of prejudicing the minds of the jury. There was no reason to emphasize that the informant was a young black woman and the accused was an older white man.

The remarks made here, and throughout the trial, were sufficient to deny the appellant a fair trial. In *King* v. *State*, 9 Ark. App. 295, 658 S.W.2d 434 (1983), the Court of Appeals reversed a case because the officer testified: "I was very well aware that he is a known narcotics dealer." The Court of Appeals was simply following precedent set by this court in *Dean* v. *State*, 272 Ark. 448, 615 S.W.2d 354 (1981); and *Sharron* v. *State*, 262 Ark. 320, 556 S.W.2d 438 (1977). We have on many occasions held that when prejudicial and inflammatory remarks of a state's witness or the prosecutor rise to the level of prejudice, an admonition to the jury to disregard the remarks will not suffice, and a new trial must be granted or the sentence reduced. *Dandridge* v. *State*, 292 Ark. 40, 727 S.W.2d 851 (1987); and *Meadows* v. *State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

Another one of the many instances during the trial, which in combination warrant a reversal or reduction, was when Thedford White, an "imported" officer from Texas, referred in the jury's presence to: "About three major drug dealers and Dorsey White was one of those." There was no evidence that Dorsey White was ever a major drug dealer. Indeed, according to the defendant's testimony, the only drugs he ever sold were to Thedford White pursuant to the misrepresentation that Officer White was a minister and in need of the marijuana for medicinal purposes.

Many questions asked by the prosecutor did not relate at all to the sale of marijuana. One question elicited the following testimony from the main witness: "Cause I had been fooling around with Dorsey . . . I had been going to bed with him. I could get anything I wanted. He would give me food to take home. Anything I wanted." Neither sex nor color were relevant to the question which was before this jury.

The prosecutor told the jury: "It is a sad, sad state of affairs when you masquerade marijuana sale in the guise of the good Samaritan, just trying to help the woman with her utility bills or food. That's sad. But it's sacrilege when you say you are doing it to help a preacher." There had been testimony by the accused that the undercover agent had represented himself, or at least had been represented by Ms. Lindsey, as a preacher who needed to buy the marijuana for a chest problem.

Concerning the weapon, the prosecutor said, "Well, he had

an illegal weapon for years. That weapon, if we believe him, is older than Ms. Lindsey is." The prosecutor described the .22 revolver, the 12-gauge shotgun, the 9 millimeter pistol, and the 12-gauge sawed-off shotgun. He then stated:

> When you deal with the kind of people a dope dealer deals with you have a lot of guns because you need more protection than the rest of us. The sawed-off shotgun, just like Tommy Pope told you, is just like something they see in the drug case a lot. You can handle it in short quarters and it spreads everywhere. That's why its illegal, because there is no legitimate purpose for it.

There was not one bit of evidence that the appellant had ever used any of the guns for anything but legal purposes. Some of them were heirlooms, others were no doubt for his own protection in his home.

Most prejudicial of all was this statement:

> Men like Dorsey White in the past time sold men and women's bodies. In the present, they sell their minds and their emotional well-being. That's the kind of a man he is . . . That's the kind of thing we have got to stop.

The chief reason for reversing the appellant's conviction is that Dorsey White was, in my opinion, entrapped by the sheriff and his agents. It is necessary to examine some of the circumstances surrounding this case. It must be remembered that Vercina Lindsey is the principal actor here. She had been charged and convicted of a felony concerning credit cards and was charged and convicted a second time; prior to being sentenced, she inquired of the sheriff whether there was anything she could do to keep from going back down to the Department of Correction. The exact date of her second conviction is not known, but she stated:

> My last conviction was five or six months ago. I did not do any time for that because I made a deal to keep from going. I had a choice between serving my sentence, and I made a deal. I did that by helping the police with trying to bust the dope. I made that deal with Don Worthy. I told him that I could help him out with the dope dealers. He mentioned Dorsey White's name in that conversation. At first he

> asked me if I could make a buy for him, and I told him I thought I could. The simple truth of the matter is that I never bought anything from Dorsey White before in my life. When Don Worthy requested that I see if I could make a buy from Dorsey White, I was not paid money to do it, I did it to save myself from going up. The result was that I did not spend any time for the charge that I was under. I did not get a probated sentence; it was throwed out. In order to fulfill my end of the bargain, I went in and talked to Dorsey and got a buy from him.

Ms. Lindsey was placed in contact with an undercover officer from Texas and together they approached the appellant. On the first trip the appellant did not sell any marijuana. Neither did he promise to get them some. His testimony was that Ms. Lindsey introduced Officer White as her boyfriend or "dude." The officer stated he was a minister and needed marijuana for a breathing problem. After several contacts, the appellant did produce a small amount of marijuana. These parties kept coming back and over a period of five weeks persuaded him to sell them five different amounts of marijuana. They tried to get him to sell five pounds at the last meeting, but he was able to come up with less than half that amount. On that same date, they searched his house and found a residue of marijuana which was measured at 1/7 of one ounce. For this marijuana he was found guilty of an additional count of possession with intent to sell and sentenced to another ten years and fined an additional $10,000.

The undercover officer testified that when he first met the appellant he was with Vercina Lindsey and that "[s]he told me that he was a major drug dealer." Vercina Lindsey's testimony was not at all in keeping with this version of events. Her testimony was a denial of Officer White's testimony and a statement that she had never known Dorsey White to sell marijuana. Apparently the state feels it can bootstrap this "set-up" deal into qualifying the appellant as a major drug dealer. There is no evidence that he had ever been a drug dealer before this time, and all of the evidence shows that these were the only drugs he ever sold. Therefore, it seems to me that such a statement was completely unjustified and that the officer, who had worked with Arkansas officers previously, should have known not to deliberately make such a prejudicial statement.

Ms. Lindsey further stated under oath that the appellant "had not in the past requested for me to find him buyers for marijuana. . . . I knew he would have marijuana if I needed it. It wasn't a lot, but he would have a little bit of it." Although some of her testimony was at the very least confusing, her bottom line was: "I never bought any marijuana from him. I do not know of him selling any prior to that time."

It is a little strange, but the sheriff could not remember anything about the set-up. I cannot find from the abstracted testimony where the sheriff made any denial of the statements by Vercina Lindsey that she agreed to "set-up" the appellant for these drug buys. He "wouldn't be surprised," the sheriff said, if the state police paid Ms. Lindsey something for what she did. He could only say that he didn't pay her anything at that time. The testimony of the informant was undisputed that she was working as an agent for the sheriff. Therefore, the sheriff is charged with knowledge of her statements that indicated she helped entrap the appellant. The reason the sheriff "went after" the appellant is not explained, but it is clear that the sheriff initiated the action. It is also clear that the appellant had never been known to sell marijuana before.

The appellant never denied that he procured the marijuana and delivered it to the police officers. However, he named the persons who supplied it to him and stated that he made no profit but simply charged the undercover agent the amount he had paid for it. On most of the occasions, the officers would either have to wait or come back while the appellant went to get the marijuana or arranged to have it delivered. The appellant was trying to help Vercina Lindsey and her "preacher friend." It was the appellant's duty to show entrapment, and I am persuaded that he did. See *Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

As for the one-seventh ounce which was seized at the time of the appellant's arrest, it was less than the "one ounce presumption" and this fact clearly supports the view that the substance was not held with the intent to deliver. Certainly there was not one grain of evidence to indicate that Dorsey White intended to sell that little scrap of marijuana. The presumption was ignored in this case.

It is interesting to note that there were no recorded conversa-

tions between the appellant and the purchasers of this marijuana. If the police possess modern equipment, they are capable of making a record of a controlled buy at any time. It seems to me that, when they are trying to obtain evidence about a 68 year old person who has never before been convicted of a crime, they should take some care to record at least some of the conversation.

An examination of the facts, as related by the officers and the appellant, clearly indicates to me that the appellant was tricked into these sales. Even if that were not so, he did not get a fair trial because of the prosecutor's and state's witnesses' snide remarks and innuendoes that this old man was sleeping with this young black woman.

This case is among the most unjust I have reviewed during my entire tenure on this court. I believe the decision is wrong. Either the case should be reversed and dismissed because of the entrapment, or the penalty should be reduced to the minimum.

Stacy Maurice BALLEW *v.* STATE of Arkansas

CR 88-140 766 S.W.2d 14

Supreme Court of Arkansas
Opinion delivered March 6, 1989

*Slagle & Rhodes*, for appellant.

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

JOHN I. PURTLE, Justice. The appellant was charged with capital murder, aggravated robbery, and theft of property. He was convicted by a jury of first degree murder, aggravated robbery, and theft of property. The sentences were 15 years, 25 years, and 10 years, respectively, with the terms to run consecutively. For reversal the appellant argues that his sentencing for both first degree murder and aggravated robbery violates the double jeopardy clause of the United States Constitution and Ark. Code Ann. § 5-1-110 (1987). We agree with the contention that the conviction and sentence for aggravated robbery should be set aside.

The facts in this case are not in dispute, and the sufficiency of the evidence is not challenged. Therefore, we will not set out the facts in detail but state only that there was sufficient evidence to support verdicts of first degree murder, aggravated robbery, and theft of property.

The sole issue before this court is whether the sentence for aggravated robbery should be set aside. In order to determine the answer to this question, it is necessary only that we consider the provisions of Ark. Code Ann. § 5-1-110(a)(1) and the prior decisions of this court. According to the statute under consideration:

> (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:
>
> (1) One offense is included in the other, as defined in subsection (b) of this section . . . .
>
> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged . . . .

In the present case, the appellant was charged with capital felony murder in furtherance of the underlying crime of aggravated robbery. He also was charged with theft of property. The conviction was for first degree murder, sometimes called felony murder, which is committed by the killing of another person in the commission of any felony. The court instructed the jury on both the capital felony murder and the lesser included offense of murder in the first degree. There is no argument in this appeal that the instructions were not properly given. As the charges went to the jury, aggravated robbery was the supporting felony for the capital murder charge. Even though the appellant was convicted only of first degree murder, this conviction required proof of an underlying felony. Here, the underlying felony was aggravated robbery, as it was in the original charge of capital felony murder.

In a long line of cases going back to *Swaite* v. *State*, 272 Ark. 128, 612 S.W.2d 307 (1981), we have held that when a criminal offense by definition cannot be committed without the commission of an underlying offense, a conviction cannot be had for both offenses. See Ark. Stat. Ann. § 41-105(1)(a) (Repl. 1977), now Ark. Code Ann. § 5-1-110(a)(1) (1987); and *Akins* v. *State*, 278 Ark. 180, 644 S.W.2d 273 (1983). In other cases strikingly similar to the present one, where the accused was convicted of both capital murder and aggravated robbery, we have vacated the sentence imposed by the trial court for the lesser included offense of aggravated robbery. *Singleton* v. *State*, 274 Ark. 126, 623 S.W.2d 180 (1981). See also *Barnum* v.*State*, 276 Ark. 477, 637 S.W.2d 534 (1982); *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982); and *Brewer* v. *State*, 277 Ark. 40, 639 S.W.2d 54 (1982).

In a more recent case, *McClendon* v. *State*, 295 Ark. 303, 748 S.W.2d 641 (1988), we noted that aggravated robbery was one of the seven felonies which may support a charge of capital felony murder. It was argued that only robbery was one of the seven named felonies. In *McClendon*, we held that either aggravated robbery or robbery would support a charge of capital murder. The opinion stated that armed robbery "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." See also *Carmichael* v. *State*, 296 Ark. 479, 757 S.W.2d 944 (1988).

The convictions and sentences for first degree murder and theft of property are affirmed. The sentence for aggravated robbery is vacated. The case is remanded to the trial court with instructions to proceed in a manner consistent with this opinion.

Affirmed as modified.

HAYS, J., dissents.

GLAZE, J., would affirm.

STEELE HAYS, Justice, dissenting. I respectfully dissent to the majority opinion for two reasons: first, I can find no objection before the trial court to appellant's conviction of aggravated robbery and theft of property as included offenses of first degree

murder. We have held repeatedly that if such arguments are to be raised on direct appeal, they must first be presented to the trial court. *Stephens* v. *State*, 293 Ark. 366, 738 S.W.2d 91 (1987); *Wilson* v. *State*, 272 Ark. 361, 614 S.W.2d 663 (1981); *Swaite* v. *State*, 274 Ark. 154, 623 S.W.2d 176 (1981); *Crafton* v. *State*, 274 Ark. 319, 624 S.W.2d 440 (1981). While we make exception in death cases, that rule has no application here. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982).

Second, the appellant does not contend that he cannot be convicted for first degree murder and either aggravated robbery *or* theft of property. The argument is that he cannot be convicted of both, because one of the two felonies is an element of first degree murder and, hence, an essential element of that offense. The problem is that we cannot tell which of the two felonies the jury treated as included in first degree murder. However, it was the appellant's responsibility to preserve that point in the record so that reversible, prejudicial error could be demonstrated on appeal. *Snell* v. *State*, 290 Ark. 503, 512, 721 S.W.2d 628 (1986).

Under our decisions, I believe the appellant's recourse, if any, is by post-conviction relief rather than by direct appeal.

TRANSPORT COMPANY, INC., Frank Thompson Transport, Inc., and Miller Transporters, Inc. *v.* CHAMPION TRANSPORT, INC.

88-285 766 S.W.2d 16

Supreme Court of Arkansas
Opinion delivered March 6, 1989

*Harper, Young, Smith & Maurras*, and *Kemp, Duckett & Hopkins*, for appellant.

*Douglas, Hewett & Shock*, for appellee.

JOHN I. PURTLE, Justice. This case involves an appeal from a decision of the Pulaski County Circuit Court affirming an order of the Arkansas Transportation Safety Agency, Transportation Regulatory Board. The Board's order granted the appellee a permit to operate as a contract carrier for Fina Oil and Chemical Company in intrastate commerce. The appellants argue that the Board and the circuit court erred in holding that the appellee, as an applicant for a contract carrier's permit, had a lesser burden of proof than an applicant for a common carrier's certificate. We hold that the Board and the circuit court did not err in their rulings.

Appellee Champion Transport, Inc., applied to the Arkansas Transportation Safety Agency, Transportation Regulatory Board, for a permit to operate as a contract carrier to transport crude oil, condensate, and casing-head gas over irregular routes between points in Miller County and the rest of the state, south of Interstate 40. The appellee would be under exclusive contract to Fina Oil and Chemical Company. Appellants Transport Company, Inc., Frank Thompson Transport, Inc., and Miller Transporters, Inc., all intervened and protested the granting of a permit to the appellee. The Board granted the application, and the appellants appealed the matter to the Pulaski County Circuit Court, which affirmed the Board's decision by order entered September 2, 1988.

At the hearing before the Board, representatives of Fina Oil and Chemical Company testified that the company had an urgent and immediate need for a contract carrier and that the appellee could supply exactly the services required. A witness for Fina stated that in October 1988 the company lost $7,672.50 due to the fact that the appellee was not authorized to transport Fina's

material from the plant to various points throughout the southern part of the state. The oil company also testified that it had tried to use common carriers in the past but had found them to be unsatisfactory primarily because one day service, dedicated equipment, and company-trained drivers were unavailable.

Fina's representatives further testified that, unless the applications were granted, the company would be forced to sell its crude oil to an independent purchaser because it could not afford the prices demanded by the existing carriers. Moreover, Fina stressed that it needed service available on demand, dedicated equipment, and drivers trained according to the standards of the oil company's rules and regulations. The required service includes the use of transports with pumps, centrifuges, hydrometers, gauge lines, and other necessary equipment for hauling crude oil. The company also needs drivers who will maintain the strictest confidentiality with respect to customers and price of product.

Thompson Transport, Inc., furnished testimony that it had only one truck currently available to transport crude oil in Miller County but that it did have other equipment on hand. This carrier indicated it could dedicate two pieces of equipment to Fina but acknowledged it could not haul exclusively for the oil company.

Miller Transporters' testimony was that while it already hauled other products intrastate for Fina every day, it had extra equipment which could be dedicated to Fina. Miller did not have any equipment dedicated exclusively to transporting crude oil.

Representatives of Transport Company, Inc., testified that their company had eleven trailers and thirteen to fifteen drivers available. They testified that these drivers and equipment had been utilized to transport crude in the past but were presently idle because some fields were closed. This carrier asserted that the equipment and service it offered met the requirements of Fina as stated at the hearing on the appellee's application. Transport's posted rate is forty-four and one-half cents per barrel, Thompson's fifty-three and eight-tenths cents per barrel, and Miller's seventy-one cents per barrel. The Board specifically found that Transport Company, Inc., as a common carrier, could not haul exclusively for Fina but could dedicate some equipment and drivers.

The question presented to the court is whether the Board and the circuit court erred in finding that a lesser burden of proof is required for approval of a contract carrier's application for a permit than a common carrier's application. Arkansas Code Annotated § 23-2-425(b)(3) (1987), providing for appellate review, states in part: "[A]ny finding of fact by the circuit court shall not be binding on the Supreme Court, and the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper, and equitable."

In the case of *Batesville Truck Lines* v. *Arkansas Freightways, Inc.*, 286 Ark. 116, 689 S.W.2d 553 (1985), we held that in appeals of decisions of the Arkansas Transportation Commission (now Transportation Regulatory Board), we were not bound by determinations of fact made by the circuit court. There we stated: "In a case such as this, the factual question is whether there is a preponderance of evidence supporting a finding that any one of the criteria for granting a certificate in areas already being served by trucking companies was shown to have been satisfied." More recently, in *Jones Rigging and Heavy Hauling, Inc.* v. *Howard Trucking, Inc.*, 298 Ark. 33, 764 S.W.2d 450 (1989), we stated that "we will not disturb the findings of the commission [Board] unless they are against the preponderance of the evidence."

The Board found that the appellee had met its burden of proof as required by the Arkansas Motor Carrier Act and issued a certificate. In the present case, the Board relied on a decision by the Interstate Commerce Commission, *James A. Sproul, Contract Carrier Application*, 1 M.C.C. 465 (1937), and held that the requirement of Ark. Code Ann. § 23-12-224(a) (1987) that a proposed contract carrier operation "will promote the public interest" imposes a lesser burden on contract carriers than that imposed on common carriers under Ark. Code Ann. § 23-13-220(a)(1) (1987). This latter section of the code provides that the Board must find that the issuance of a common carrier's certificate is "required by the present or future public convenience or necessity." Neither the phrase "promote the public interest" nor the phrase "public convenience or necessity" are defined in the code provisions.

This court has many times discussed the matter of "public convenience or necessity" and, in one case, *Santee* v. *Brady*, 209 Ark. 224, 189 S.W.2d 907 (1945), quoted the rule as follows:

> The general rule is that a certificate may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless the existing carrier has been given an opportunity to furnish such additional service as may be required.

A "common carrier" is defined in Ark. Code Ann. § 23-13-203(7) (1987) as:

> [A]ny person who or which undertakes, whether directly or indirectly, or by lease of equipment or franchise rights, or any other arrangement, to transport passengers or property or any classes of property for the general public by motor vehicle for compensation whether over regular or irregular routes . . . .

On the other hand, a "contract carrier" is defined in Ark. Code Ann. § 23-13-203(8) (1987) as:

> [A]ny person not a common carrier included under subdivision (7) who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights or any other arrangements, transports passengers or property by motor vehicle for compensation . . . .

In *Craig, Contract Carrier Application*, 31 M.C.C. 705 (1941), the function of a contract or private carrier was described as "nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited number of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization."

The relevant provisions of the Arkansas code are obviously patterned after the federal statutes, the Interstate Motor Carriers Act of 1935, as amended, 49 U.S.C. § 301 et seq., as the Arkansas legislation and the federal legislation are almost identical. Both the federal and state regulatory agencies governing common carriers and private carriers make distinctions

between the two classes of carriers. The latest amendments in both statutory schemes continue to carry similar definitions and standards of proof.

The Arkansas code provision governing the issuance of permits for contract carriers, Ark. Code Ann. § 23-13-224 (1987), states that:

> [A] permit for a contract carrier by motor vehicle shall be issued to any qualified applicant if it is found that the applicant is fit, willing, and able to properly perform the service of a contract carrier by motor vehicle and to conform to the provisions of this subchapter and the lawful requirements, rules, and regulations of the Arkansas Transportation Commission, and the proposed operation . . . will promote the public interest and the policy declared in § 23-13-202; otherwise the application shall be denied.

The code also enumerates the considerations which shall be used by the Board in granting permits. The considerations are: (1) the financial condition of the applicant and his sense of responsibility towards the public; (2) the transportation service already being maintained by any railroad, street railway, or motor carrier; and (3) the likelihood of the proposed service being permanent and continuous throughout twelve months of the year and the effect which the proposed transportation service may have upon existing services. The Board is also authorized to consider "any other matters" tending to show the necessity or need for granting the application.

Traditionally, the criteria for establishing the need for common carriers have been broader in terms and scope than the requirements for granting permits for contract carriers. Therefore, the burden of establishing the need for the restricted authority sought by contract carriers has consistently been less than that required for the broader authority of a common carrier. The common carrier serves the public at large while the contract carrier is restricted to serving the contracting parties.

Speaking for the Court in *Interstate Commerce Commission* v. *J-T Transport Company, Inc.*, 368 U.S. 81 (1961), Justice Douglas discussed the presumption that "the services of

existing carriers will be adversely affected by a loss of 'potential' traffic" and further stated that the Commission, by reading this phrase into the law, in essence attempted to amend the act by insertion of a "provision that the Commission sought unsuccessfully to have incorporated into the Act." The opinion also held that "the adequacy of existing facilities or the willingness or ability of existing carriers to render the new service is not determinative. The 'effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements' have additional relevance." The opinion went on to state that a contract carrier furnishes services which are designed to meet the distinct needs of his individual customers. It was this need that weighed most heavily against the protests of the existing carriers. The opinion continued:

> We see no room for presumption in favor of, or against, any of the five factors on which findings must be made under § 209(b). The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining on balance where the public interest lies.

The interest of protesting carriers and the effect of an application upon the carriers are to be considered in the balancing process undertaken by the Board when reviewing an application. That interest must not, however, be considered as something to protect the status quo. Rather, the objective is to establish a regime in which additional contract carriers could be approved upon a showing of distinct need on the part of individual shippers. By their nature, the interests of proposed shippers and existing carriers are in conflict.

In the case before us the Board and the circuit court found that the granting of the permit would not diminish the revenue of any of the existing common carriers. Indeed, some of the common carriers are presently hauling for Fina and will continue to haul for it whether or not the permit is granted to the appellee. The Board examined the competing interests with as much diligence as possible. While we need not accept the findings of the Board, we hold that they are not contrary to the preponderance of the evidence. We agree with the opinion in *J-T Transport Company*, supra, which concluded that the applicant must first

demonstrate that the undertaking proposed is specialized and tailored to the shipper's distinct needs. Thereafter, the protestants may present evidence to show that they have the ability as well as the willingness to meet that specialized need. If the existing carriers discharge that burden, it is then the responsibility of the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.

We believe that a distinct need by the shipper was shown in this case. Moreover, it was demonstrated that specialized equipment was required for the conduct of its business. Given the testimony in this case, it is questionable whether the existing carriers could, either singularly or in combination, furnish the distinct services required by Fina. After considering the facilities and personnel available, the Board considered the cost to the shipper. Moreover, the need appears to have been clearly established, among other things, by the testimony of the shipper that it would have to discontinue shipping by motor carrier if the application were not approved.

We give due deference to the expertise of the Board. It is the Board, not the courts, that, in the first instance, must bring their expertise to bear on making findings and granting or denying applications. However, this expertise must be supported by evidence of the considerations enumerated in the act. We hold that the decisions by the Board and the circuit court were not against the preponderance of the evidence. Therefore the decision of the circuit court affirming the order of the Transportation Board is affirmed.

Affirmed.

Myron WITT and Ralph Heyman as Executor of the Estate of Ruth Witt Margolis *v.* Brooks ROSEN, Executor of the Estate of Sidney M. Brooks

88-266 765 S.W.2d 956

Supreme Court of Arkansas
Opinion delivered March 6, 1989

*Pope, Shamburger, Buffalo and Ross*, by: *Robert D. Ross* and *Brad A. Cazort*, for appellant.

*Rose Law Firm, A Professional Association*, by: *Vincent Foster, Jr.* and *James H. Druff*, for appellee.

STEELE HAYS, Justice. Mr. Sidney M. Brooks died on May 1, 1985, leaving a 1978 will which bequeathed $20,000 to Ruth Witt Margolis (Paragraph Third) and $15,000 to Myron Witt (Paragraph Fourth), a niece and nephew by marriage. However, a few months before his death Mr. Brooks executed a codicil which reads:

> I hereby revoke Paragraphs Third and Fourth of my said will since I have in the interim made *inter vivos* gifts to Myron Witt and Ruth Witt Margolis.

The estate was closed on September 17, 1985, but since Mr. Witt and Mrs. Margolis had received no notice, their motion to set aside the order was granted for the limited purpose of hearing their contest to the validity of the codicil. The probate judge

upheld the codicil and Mr. Witt and Mrs. Margolis's executor have appealed.[1]

Appellants have renewed their argument to the trial court, i.e., that the codicil is void due to a mistake of fact on which it is expressly conditioned. They presented evidence below that from the date of Mr. Brooks's original will in 1978, until the codicil in 1985, Mr. Witt received no gifts from Mr. Brooks. Mrs. Margolis's executor reported that she had received $500 from Mr. Brooks for her seventy-fifth birthday.

The appellants moved for summary judgment on the premise that the codicil was based on a mistake of fact, rendering the codicil void. The appellee also moved for summary judgment contending that there was no mistake of fact, or alternatively, if a mistake occurred it was not the type which would void the codicil. The Pulaski County Probate Judge granted summary judgment for the appellee, holding that he could not reasonably conclude that the language of the codicil was a mistake, but even if Mr. Brooks labored under a mistake, it was not the kind of mistake which allows the court to rewrite the will. The appellants appeal from this ruling.

Probate and chancery cases are reviewed *de novo* on appeal, but the appellate court will not reverse the findings of the probate judge unless clearly erroneous. *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). Also in an appeal from a motion for summary judgment, all the facts and circumstances are viewed in a light most favorable to the party against whom the motion is directed, the appellant in this case. After considering the arguments on appeal, we affirm the probate court.

Generally, a will may not be set aside for mistake where the testator knew and approved its contents. Moreover, a revocation absolute on its face, the words of which the testator knows and approves, will not be set aside because the reasons which induced it are found to be based upon false assumptions or facts. The policy underlying this general rule is that death has silenced the testator, and determining the intent behind the

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[1] Mrs. Margolis survived Mr. Brooks but died prior to the institution of this litigation.

revocation is too uncertain.

Some courts, however, have created an exception. When the grounds upon which the testator proceeded in revoking a bequest appear in the instrument itself, some courts allow parol evidence to show that the error upon which the revocation was based is the nonexistence of that fact, and refuse to recognize the revocation. *Campbell* v. *French*, 3 Ves. Jr. 321 (1797). In *Campbell*, the testator, a resident of England, made a codicil revoking all legacies and bequests to his sister's grandchildren, who resided in America. The revocation provision mistakenly declared that the grandchildren were dead, when in fact they were not. Lord Loughborough held that no revocation occurred, "the cause being false." Since the testator was erroneously advised of the death of the grandchildren, it was reasonable to conclude that but for the misinformation, no revocation would have occurred.

Even so, when the misstatement is one which is *peculiarily within the testator's knowledge or determination*, the falsity of such assertion will not prevent the operation of the clause of revocation. Where it appears from the instrument of revocation that the testator intended to determine for himself the existence or nonexistence of the stated grounds of revocation, and was not assuming the truth of information given to him by others, but acted notwithstanding his doubt as to the verity of the reason given, or where he must have known whether or not the ground of revocation was true, the revocation is effective. *Hayes' Executors* v. *Hayes*, 21 N.J. Eq. 265 (1871); *Appeal of Mendenhall*, 124 Pa. 387, 16 A. 881 (1889); *Giddings, Exr.* v. *Giddings et al.*, 65 Conn. 149, 32 A. 334 (1894).

The appellants argue that this court should adopt an exception allowing the invalidation of provisions in wills based upon a mistake of fact when the mistake appears in the will itself, and when the disposition that would have been made, had the truth been known, also appears in the will. The appellants rely on cases from Oregon, *Estate of LaGrand*, 47 Or. App. 81, 613 P.2d 1091 (1980), and Tennessee, *Union Planter National Bank* v. *Inman*, 588 S.W.2d 757 (Tenn. Ct. App. 1979), supporting this exception. *See also Gifford* v. *Dyer*, 2 R.I. 99, 57 Am. Dec. 708 (1952).

Mr. Brooks revoked paragraphs third and fourth of his original will giving the appellants $15,000 and $20,000 respectively, "since I have in the interim made *inter vivos* gifts to Myron Witt and Ruth Witt Margolis." On its face, the codicil is express and unambiguous. However, the appellants argue that it is expressly conditioned on their having received inter vivos gifts. The only evidence presented demonstrating that Mr. Brooks labored under a mistake was testimony from the interested parties. An affidavit from Mr. Myron Witt stated that he did not receive any gifts from Mr. Sidney Brooks after the date of the execution of the will. Furthermore, an affidavit from Mr. Ralph Heyman, executor of the estate of Ruth Witt Margolis, stated that from a review of the available records of Mrs. Margolis, no record of her having received from Mr. Brooks any substantial amount of money or property exists. Yet, the records show that Mrs. Margolis received a $500 cash gift on her seventy-fifth birthday.

Arkansas case law, though not precisely on point, indicates an unwillingness to allow extrinsic evidence to demonstrate mistake and to reform the testamentary instrument. In *LeFlore* v. *Handlin*, 153 Ark. 421, 240 S.W. 712 (1922), the testatrix died leaving only $100 to her son, Louis LeFlore. The will declared the testatrix's reason for the small bequest was that he had inherited a larger share of his father's estate, and that his financial condition was better than his brothers. Testimony showed that the testatrix was mistaken in assuming that Louis received a larger share of his father's estate. The opinion states:

> Where the intention is plainly expressed in the will, that intention must prevail and cannot be defeated by testimony *aliunde*, showing that the testator had in his mind a different intention from that expressed in his will, or that he would have expressed by his language a different intention if he had not been mistaken in some fact, financial or otherwise. . .

In *Lavenue* v. *Lewis*, 185 Ark. 159, 46 S.W.2d 649 (1932), the court refused to invalidate a testamentary instrument when extrinsic evidence showed that the testatrix was mistaken as to the amount of advancements given to her sons. Item six of the will declared:

> I have heretofore made advancements out of my property to my sons Bert B. Johnson and to J.O. Johnson, now deceased which advancements have been fully equal to their respective interests in all of my estate, and because of such advancements . . . neither son are to receive any share of my estate.

Although the will was contested on grounds of undue influence, the court refused to allow extrinsic evidence showing that the testator was mistaken as to the amount of the advancements offered for the purpose of reforming the instrument. By analogy, since the codicil clearly stated Mr. Brooks' intention to revoke the monetary bequests to the appellants, that express and unambiguous provision should not be defeated by the affidavits of Mr. Witt and Mr. Heyman.

In light of the evidence from interested parties, the chancellor held that there was insufficient evidence of the testator laboring under a mistake. In *Driver* v. *Driver*, 187 Ark. 875, 63 S.W.2d 274 (1933), this court held that "the mere making of a codicil gives rise to the inference of a change in intention." Mr. Brooks could do with his money as he saw fit for whatever reason or for no reason. As the court stated in *Lavenue* v. *Lewis*, 185 Ark. 159, 46 S.W.2d 649 (1932), "the testator had the right to disinherit the . . . heirs for the reason assigned in the will, or for any other reason, or without assigning any reason." Arguably, this conditional language served as an excuse for a disposition clearly intended, but which the testator did not feel inclined to explain. The trial court deemed Mr. Brooks competent to execute a codicil and, therefore, the appellants failed to meet the burden of persuasion that a mistake was indeed committed by the testator.

Even if it could be determined that the testator's revocation was induced by mistake, this type of mistake does not fall within the exception which allows a court to reform the instrument. If the codicil resulted from a mistake of fact, it was a mistake which was peculiarly within the knowledge of the testator. Whether or not Mr. Brooks gave the appellants inter vivos gifts was certainly knowledge within his ken. Therefore, despite the mistake, the clause of revocation would have been effective.

AFFIRMED.

Ronald Gene SIMMONS *v.* STATE of Arkansas

CR 89-45 766 S.W.2d 422

Supreme Court of Arkansas
Opinion delivered March 10, 1989

*John C. Harris* and *Robert E. Irwin*, for petitioner.

No response.

PER CURIAM. The petitioner, Ronald Gene Simmons, has filed his petition requesting expedited review of his waiver of direct appeal. On February 10, 1989, a Johnson County jury convicted the petitioner of capital murder and sentenced him to death by lethal injection, on March 16, 1989, at 7:00 o'clock a.m. Following the trial, the petitioner notified the trial judge of his desire to waive his appeal and after an evidentiary hearing held on March 1, 1989, the trial judge found the petitioner was competent to waive his right to a direct appeal. In accordance with this court's decision in *Franz* v. *State*, 296 Ark. 181, 754 S.W.2d 839 (1988), petitioner now submits to this court a transcript of the lower court's proceedings along with his petition, and requests we

review those proceedings in accordance with the rule established in the *Franz* case. After careful review of those lower court proceedings, we grant petitioner's request.

In *Franz*, we held that when a defendant sentenced to death declines to exercise his unqualified right to appeal, we will not automatically acquiesce to his desire. We stated that a defendant sentenced to death will be able to forego an appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence. This court further held that we must review a lower court's determination on the issue of the waiver of an appeal in a capital case, and that the state has the burden of bringing the lower court's record on this issue to this court for review. We added that the record must be lodged at least seven days before execution date. All of these requirements have been met.

In sum, we would note that the trial court considered, and made a part of this proceeding, the same psychological evaluations that were introduced in *Franz*. Since those evaluations were alluded to in detail there, we need not reiterate those findings in this opinion. In addition, the trial court added to the record before us a forensic evaluation which was filed in a proceeding before the United States District Court, Eastern District of Arkansas. The federal court proceeding concerned the issue of whether Mr. Simmons was presently competent to waive habeas corpus relief. From our review of this recent forensic evaluation, we find nothing that diminishes in any way the earlier psychological evaluation submitted in the state proceedings.

The trial judge and petitioner's counsel performed an exceptional job in examining and exploring the petitioner's capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, petitioner's counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and petitioner responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal. Petitioner further acknowledged that the execution date was set for March 16, 1989, and that he had thirty days in which to appeal his conviction judgment.

After a careful review of the record and exhibits, we affirm the trial court's decision that the petitioner has knowingly and intelligently waived his right to appeal. Accordingly, we direct that this court's mandate be issued at the time this opinion is handed down.

HAYS, J., dissents for the reasons stated in *Franz* v. *State*, 296 Ark. 181, 754 S.W.2d 839 (1988).

DELTA SCHOOL OF COMMERCE, INC., d/b/a Delta Career College, and Steve McCray *v.* Earlene WOOD

88-276 766 S.W.2d 424

Supreme Court of Arkansas
Opinion delivered March 13, 1989
[Supplemental Opinion on Denial of Rehearing
May 1, 1989.*]

*Glaze, J., concurs.

*Rose Law Firm, A Professional Association*, by: *Tim Boe* and *Jess Askew III*, for appellants.

*Everett O. Martindale*, for appellee.

JACK HOLT, JR., Chief Justice. Appellee Earlene Wood (Wood) filed suit against appellants Delta School of Commerce, Inc. (Delta), and Steve McCray (McCray), alleging that they fraudulently induced her to enter a course in nursing by making false representations that the course would lead her to a position of employment similar to that of a Licensed Practical Nurse. Delta and McCray denied making any false statements or fraudulently inducing Wood to enter a course of study. The jury found in favor of Wood and assessed compensatory damages of

$3,064.00 and punitive damages of $50,000.00 against Delta and McCray. The trial court entered judgment accordingly. From this order, Delta and McCray appeal. We find no error and affirm.

Wood testified that in May or June of 1986, she read a newspaper article concerning a course of study at Delta leading to a diploma as a nursing assistant. Shortly thereafter, she made an appointment to talk with McCray, president of Delta, concerning the program. During their meeting, she asked him if a nursing assistant was the same thing as a nurse's aide. McCray replied that it was not. He also told her that "they are phasing out the LPNs" and that "she would not get rich as a nursing assistant but that the pay would be comparable to that of an LPN." Based upon these statements, she enrolled at Delta the next day. In addition, she got a student loan for $3,064.00. After completing seven months of the eight or nine-month program, she dropped out because she discovered she was studying to be a nurse's aide. Wood further testified that the training for nursing assistants and LPNs is quite different: Nursing assistants learn to make beds, empty bed pans, and take vital signs; LPNs learn to assist in surgery and give medication and injections.

Although McCray denied that he told Wood "they are phasing out LPNs in the State of Arkansas, so the nursing assistants will be taking the place of the LPNs," he acknowledged an awareness of the issue by stating that "the question that keeps coming up, whether or not LPN's are being phased out, I've heard before." Maxine Ottey, Director of Nursing Practice with the Arkansas Board of Nursing, testified that "a nursing assistant certainly cannot and does not take the place of an LPN."

## EXCLUSION OF EVIDENCE

The appellants contend that the trial court erred in excluding nursing magazine and journal articles concerning a debate in the nursing profession on phasing out the existing levels of entry into nursing practice (Registered Nurse, Licensed Practical Nurse, and nurse's aide) and replacing them with two levels of entry into practice: professional nurse, which would contain persons entitled Registered Nurse, and technical nurse, which would contain persons entitled associate nurse or registered associate nurse. These articles were tendered at the close of the

trial for the limited purpose of "showing the credibility" of Wood, "that the statements she relied on may have come from others and not Delta Career College." After an exchange with appellants' and appellee's counsel, the court refused to admit the articles into evidence, stating in part that "the authenticity of a statement he never stated would not seem to be relevant."[1]

The appellants apparently have abandoned their "credibility" argument made to the trial court as they now contend on appeal that by excluding these relevant articles, the trial court denied them the opportunity to present their theory of the case that the representations were true and that McCray did not know the representations were false.

As enunciated in *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987), *see also McWilliams* v. *Zedlitz*, 294 Ark. 336, 742 S.W.2d 929 (1988), the essential elements of an action for deceit are as follows:

> (1) a false, material representation (ordinarily of fact) made by the defendant;
>
> (2) scienter — knowledge by the defendant that the representation is false, or an assertion of fact which he does not know to be true;
>
> (3) an intention that the plaintiff should act on such representation;
>
> (4) justifiable reliance by the plaintiff on the representation; and
>
> (5) damage to the plaintiff resulting from such reliance.

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[1] Attention is directed to Ark. Sup. Ct. R. 9(d), which provides in pertinent part that "[t]he appellant's abstract or abridgment of the records should consist of an impartial condensation, without comments or emphasis, of *only* such material parts of the pleadings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision." The appellants' abstract of the exchange between counsel and the trial court concerning the articles is incomplete and biased. First of all, material portions of appellants' counsel's statements concerning the purpose for which he was proffering the articles and significant parts of the trial court's ruling on the admissibility of the articles are omitted. Secondly, the statement in the abstract that "Mr. Woods proffered evidence tending to show that the alleged representation was in fact true . . . ," is a biased factual conclusion which is unsupported by the record.

Contrary to the assumption made by appellants' counsel, the articles in question contain nothing showing that the representations made by McCray were true. They merely show that there is a debate in the nursing profession concerning phasing out the existing levels of entry — professional and technical nurses. Furthermore, the theory of appellants' case at trial was not, as they now allege on appeal, that the representations were true or that McCray believed them to be true, but rather that he did not make the representations. In fact, his testimony at trial (as well as in a pre-trial deposition) indicates he did not know whether LPNs are being phased out in Arkansas or what the future is for LPNs.

The admissibility of evidence is a matter within the sound discretion of the trial court. *Missouri Pacific R.R.* v. *Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988). Under the circumstances, we find no abuse of discretion by the trial court in excluding the articles.

## EXPRESSIONS OF OPINION/PREDICTIONS OF FUTURE EVENTS

The appellants argue that the representations in question were expressions of opinion and predictions of future events, not representations of fact, and therefore not actionable. We disagree.

In general, an expression of opinion, i.e., a statement concerning a matter not susceptible of accurate knowledge, cannot furnish the basis for a cause of action for deceit or fraud. *Grendell, supra. See also Vickers* v. *Gifford-Hill & Co., Inc.*, 534 F.2d 1311 (8th Cir. 1976); *St.Paul Fire and Marine Insurance Co.* v. *Hundley*, 354 F. Supp. 655 (E.D. Ark. 1973); *Ryan* v. *Batchelor*, 95 Ark. 375, 129 S.W. 787 (1910). However, an expression of opinion that is false and known to be false at the time it is made is actionable. *Horn* v. *Ray E. Friedman & Co.*, 776 F.2d 777 (8th Cir. 1985). The general rule only applies where the person expressing his or her opinion does so in good faith. *Anthony* v. *First National Bank of Magnolia*, 244 Ark. 1015, 431 S.W.2d 267 (1968).

In *Grendell, supra*, we held that statements by the defendant that an oil investment was a "good thing" and would "make money" and that the wells would pump "fifty barrels a day" were

in the nature of puffing and constituted mere expressions of opinion. In *Cannaday* v. *Cossey*, 228 Ark. 1119, 312 S.W.2d 442 (1958), we held that a statement by a vendor that he had a "good house" was also a statement of opinion.

In the case at bar, the statements made by McCray to Wood that "they are phasing out the LPNs in the State of Arkansas, so the nursing assistants will be taking the place of the LPNs" and that "she would not get rich as a nursing assistant but that the pay would compare to that of an LPN" were representations of fact, not expressions of opinion. Unlike the loose general statements made by sellers in commending their products which we found to be expressions of opinion in *Grendell* and *Cannaday*, the statements made by McCray were specific and definite.

Even if McCray's statements were construed to be expressions of opinion, it does not automatically follow, as appellants erroneously assume, that such expressions cannot form the basis of a cause of action for fraud or deceit. It is clear from *Anthony* and *Horn* that expressions of opinion which are false and known to be false when made are actionable. From the testimony and other evidence presented at trial, the jury reasonably could have concluded that the statements made by McCray were false and that he knew them to be false at the time he made them.

Appellants' contention that the statements made by McCray were predictions of future events is also without merit.

In general, an action for fraud or deceit may not be predicated on representations relating solely to future events. *See Anthony, supra; Lawrence* v. *Mahoney*, 145 Ark. 310, 225 S.W. 340 (1920); *Harriage* v. *Daley*, 121 Ark. 33, 180 S.W. 333 (1915); *Conoway* v. *Newman*, 91 Ark. 324, 121 S.W. 353 (1909). However, the general rule is inapplicable if the person making the representation or prediction knows it to be false at the time it is made. *See Anthony, supra; Greenwood* v. *Dittmer*, 596 F. Supp. 235 (W.D. Ark. 1984). *See also Victor Broadcasting Co., Inc.* v. *Mahurin*, 236 Ark. 196, 365 S.W.2d 265 (1963).

The statements in question were not predictions of future events, but statements of existing situation. Moreover, even if the statements were considered to be predictions, the appellants would still be liable if McCray believed them to be false when he

made them to Wood. *See Anthony, supra; Greenwood, supra.* Again, in light of the testimony and other evidence presented at trial, the jury reasonably could have concluded that McCray knew the statements were false at the time he made them.

## JURY INSTRUCTIONS

The appellants assert that one of the trial court's instructions to the jury was erroneous in that the instruction omitted an essential element of the tort of deceit. We do not reach this issue.

Prior to trial, defendant-appellants submitted, among other instructions, an instruction on deceit (noted as defendants' requested instruction # 11). At the conclusion of trial, the trial judge instructed the jury on deceit, apparently utilizing the submitted instruction. However, in reading the instruction to the jury, the trial court omitted one of the essential elements of deceit (scienter) contained in the submitted instruction. Neither party objected to the instruction as read by the trial court.

No party may assign as error on appeal "the giving or failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the manner to which he objects and the grounds of his objection." Ark. R. Civ. P. 51. *See also Hill Construction Co.* v. *Bragg*, 291 Ark. 386, 725 S.W.2d 538 (1987); *Wallace* v. *Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984). Since appellants voiced no objection when the instruction was given to the jury, they cannot now complain.

## MOTION IN LIMINE

Finally, the appellants contend that the trial court erred in denying their motion in limine. We disagree.

Before trial, the appellants filed the following motion in limine:

> Comes now the Defendants, Delta Career College, et al., by their attorneys, Wood Law Firm, and move the Court to restrict and prohibit testimony of witnesses of Plaintiff which is not contemporaneous or occurring prior in time to the allegation of Plaintiff and which purports to confirm statements made by Delta Career College by any of its officers, directors, agents, or employees, more partic-

> ularly described as: "The LPN program is being phased out and nursing assistants will be taking their place." The presentation of such testimony would be extremely prejudicial to the Defendants.

The trial court denied their motion with the understanding that the questioned testimony would be admissible under certain circumstances, depending on how the proof developed.

Thereafter, Kristie Woody, who was an instructor at Delta from May of 1986 to June of 1987, testified that while she was teaching at Delta, she heard McCray tell students that "they would be phasing out LPNs and there would be RNs and nursing assistants in hospitals." Gladys Adair, who was in the same class as Wood, testified that when she applied for admission to Delta, Kathy McCray, Steve McCray's wife and an employee of Delta, told her "that they are phasing out the LPN program and, as nursing assistants, we will be taking their place." Joetta Flowers, also a classmate of Wood, testified that after classes had started, a female representative of Delta informed her that "they were phasing out LPNs, that the nursing assistant would take the place of an LPN, and that we would be making the same rate of pay of an LPN." Debbie Oliver, who worked as an admissions representative for Delta from October 1986 until May of 1987, testified that Steve McCray told her that "LPNs were to be phased out and nursing assistants were taking over." The appellants did not object to any of this testimony.

We have held that where a motion in limine is made to specific evidence and denied, no further objection is necessary to preserve the issue for appeal. *See Schichtl* v. *Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987). However, this rule should not apply where, as in the case at bar, the judge does not make a final or determinative ruling on the motion in limine but, rather, conditions the admissibility of the evidence on "how the proof develops." By failing to object at trial to the testimony in question, the appellants cannot now raise this issue on appeal.

Affirmed.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
MAY 1, 1989

769 S.W.2d 738

*Rose Law Firm, A Professional Association*, by: *Tim Boe* and *Jess Askew III*, for petitioner.

*Everett Martindale*, for respondent.

JACK HOLT, JR., Chief Justice. On rehearing, appellants contend that we erred in holding that they waived their right to challenge the jury instruction on deceit because they did not object to the instruction at the time it was being read to the jury by the trial court. We adhere to our position that appellants' failure to object resulted in a waiver. However, we do wish to clarify our holding.

In our original opinion we stated that no party may assign as error on appeal "the giving or failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the manner to which he objects and the grounds of his objection," quoting the language of Ark. R. Civ. P. 51. In utilizing Rule 51 as a basis for our decision, we do not intend to imply that the appellants were barred from challenging the

failure to instruct on this issue because they did not object *at the time the instruction was read to the jury.* (Emphasis added.)

To the contrary, had the appellants objected to the giving of this instruction by the trial court before the case was submitted to the jury, such objection would have been sufficient to preserve the issue on appeal. It is well settled that failure to object to the giving of an erroneous jury instruction before the case is submitted to the jury is a waiver of any error committed by the court in giving it. *Tinsley* v. *Cross Development Co.*, 277 Ark. 306, 642 S.W.2d 286 (1982); *Willis* v. *Elledge*, 242 Ark. 305, 413 S.W.2d 636 (1967).

The record does not reveal that the appellant objected to the court's giving of this particular instruction to the jury at any time during the course of the proceedings. This issue is raised for the first time on appeal. Accordingly, they are in no position to challenge the instruction as given by the trial court.

Petition denied.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I agree the appellants' petition for rehearing should be denied, but I would add that the instruction proffered by the appellants was insufficient and incorrect. In *Higgins* v. *Hines*, 289 Ark. 281, 711 S.W.2d 783 (1986), the court set forth the five elements required to constitute the tort of deceit, and in setting out element two, we adopted a rule which requires "knowledge or belief on the part of the defendant that the representation is false *or that he has not a sufficient basis of information to make it.*" (Emphasis added.) *See also* AMI Civil 3d, 405.[1] Appellants' proffered instruction in this cause omitted the foregoing, emphasized language. This omission, in my view, was a vital one, especially when considering the evidence that this court, in pertinent part, reviewed and recited in its majority opinion. Regardless of whether appellants had made a timely objection to the instruction given by the trial court, they simply failed to proffer a correct instruction in its stead—a duty required of them in order to prevail on this point on appeal.

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[1] In *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987), this element was worded as follows: [S]cienter — knowledge by the defendant that the representation was false, or an assertion of fact which he does not know to be true.

Bobby R. DEPOYSTER *v.* Lamar COLE, Executive Director, Arkansas Activities Association; Leon Wigginton, President, Arkansas Activities Association, d/b/a Executive Committee of Arkansas Activities Association

88-182 766 S.W.2d 606

Supreme Court of Arkansas
Opinion delivered March 13, 1989

*Rose Law Firm, A Professional Association*, by: *David L. Williams* and *B. Michael Bennett*, for appellant.

*McMillan, Turner & McCorkle*, by: *Ed McCorkle*, for appellee.

JACK HOLT, JR., Chief Justice. This appeal is from the trial

court's determination that certain voting methods employed by the Executive Committee of the Arkansas Activities Association ("AAA") did not violate the Arkansas Freedom of Information Act, Ark. Code Ann. §§ 25-19-101—25-19-107 (Supp. 1987). Also at issue is the court's refusal to grant appellant Bobby Depoyster a new trial. We reverse and remand.

The AAA is an organization of approximately 500 public and private secondary schools in this state and is responsible for the administration of the rules and regulations governing interscholastic athletic competitions among member schools. Appellee Lamar Cole is the executive director of the AAA; appellee Leon Wigginton is the president. The executive committee of the AAA is the association's governing body at all times when the overall governing body composed of the member schools is not in session. The executive committee is made up of sixteen principals and superintendents from eight districts around the state.

On January 20, 1988, the executive committee met to select the sites for 22 regional and state basketball tournaments for the B, A, AA, and other classifications from bids which had been submitted by those schools interested in hosting a tournament. The tournaments were to begin on February 29, 1988.

Notice of the January 20 meeting was given to member schools and to the press. Principals, superintendents, and members of the public were present at the meeting. Appellant Bobby Depoyster, superintendent of the Newark School District, an AAA member, did not attend.

At the meeting, members of the executive committee discussed and voted for the various tournament locations. In those cases where only two bids had been received for a particular site, the vote was by a show of hands. In cases where more than two bids had been received, the vote was by unsigned written ballot. As to those votes, each member was asked to record his choices on a slip of paper — the sites to be listed in preferential order. The votes were then somehow tallied on a blackboard in view of those in attendance at the meeting. The slips of paper were discarded.

Thirteen sites were selected by show of hands; nine sites required written ballots due to the number of bids received. At the time of the meeting, no objection was made by anyone present as

to the site selections or the manner in which the sites were voted upon.

Following the January 20 meeting, appellant Depoyster contacted the AAA on several occasions objecting that the voting method violated the FOIA in that utilization of unsigned written ballots amounted to the use of secret ballots contrary to the spirit and intent of the Act. He also claimed destruction of the ballots violated the Act. Upon filing an FOIA request, Depoyster was furnished with the January 20 vote results.

Subsequently, Depoyster brought suit seeking: (1) a declaratory judgment that the actions of the executive committee had violated the FOIA; (2) an injunction to prevent the AAA from taking similar actions in the future; and (3) costs and attorney's fees. In response, the AAA maintained that its general procedure on other matters was to use written mail-out ballots which were signed and retained. Since the January 20 meeting was a public meeting, it was deemed sufficient to vote by a show of hands — with the exception that for those sites reflecting multiple bids written ballots were considered a more objective method of determining tournament sites. No thought had been given to signing the ballots or retaining them.

The trial court determined that there had been no violation of the FOIA. Depoyster moved for a new trial, and the AAA responded by affidavit that on March 24, 1988, the executive committee voted unanimously that all written ballots would in the future be signed and would be retained for a period of one year. In denying Depoyster's motion for a new trial, the court found that the balloting method employed on January 20 was not intended to and had not prevented public inquiry or examination of the results of the committee's actions.

The FOIA was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved. *Arkansas Gazette Co.* v. *Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975); *Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). The issue before us, simply put, is whether the trial court correctly concluded that the executive committee of the AAA did not violate the Arkansas Freedom of Information Act when it used unsigned written ballots which were disposed of in a manner making their review impossible.

It was conceded at trial, and on appeal, that the AAA is subject to the provisions of the FOIA as an organization in this state supported "wholly or in part by public funds or expending public funds." *See* Ark. Code Ann. § 25-19-103(2) (1987). *See e.g., North Central Assn. of Colleges and Schools* v. *Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977). A review of the provisions of the FOIA makes clear that neither the use of unsigned written slips as ballots nor the failure of the AAA to retain voting records can be condoned and that the actions of the executive committee clearly violated the overall intent of the Act, if not specific sections. Ark. Code Ann. § 25-19-102 (1987) provides:

> It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. *Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.* [Emphasis ours.]

Looking about us, we readily see that the decisions of this court, as well as those of the legislature, city council, and other governmental agencies are all made public to the extent of each individual's vote. There can be no doubt that the use of unsigned written slips as ballots which are not retained as part of an organization's records does little to assist the public in being advised as to the performance of the organization's members or the decisions reached by those individuals. Obviously, it makes it impossible, rather than possible, for concerned citizens or their representatives to learn and report fully the activities of the officials of such organizations. Section 25-19-102, *supra.*

To bring about the intent and purpose of the FOIA, section 25-19-106(a) provides that, as to those organizations subject to its provisions, all meetings, formal or informal, special or regular, shall be public meetings except as otherwise specifically provided by law. While the January 20 meeting was no doubt open to the public, the balloting method employed was such that there was no way to determine which member of the executive committee voted for any particular site. It would be sheer speculation on our

part to suggest or assume that the defect could have been remedied in that those in attendance at the meeting were in a position to inquire as to each member's vote. We have no idea whether such inquiry would have been permitted or, if permitted, whether any responses would have been forthcoming. In short, the voting should have been handled in such a way that the public was, or could have been, advised of the performance of the individual members of the AAA's executive committee.

Moreover, section 25-19-103(1) of the FOIA requires that all writings or data compilations in any form, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by any agency supported by public funds, "shall be public records". The recorded votes of individual members of the executive committee of the AAA obviously constitute a record of the performance or lack of performance of official functions carried out by the AAA, and there was testimony that it was the general practice of the AAA to retain mail-out ballots used in voting on matters coming before the AAA. The vote slips at issue, being records generally or otherwise kept by the AAA, therefore constituted public records which should have been retained.

Finally, those records must be open to inspection and copying by any citizen of this state, except as otherwise specifically provided in the FOIA. Section 25-19-105(a). *See e.g., Arkansas Highway & Transp. Dep't.* v. *Hope Brick Works, Inc.*, 294 Ark. 490, 744 S.W.2d 711 (1988). As the ballot slips were not retained it would have been impossible for those not in attendance to have determined a committee member's vote even if the ballots had been signed. Section 25-19-105(a) envisions that public records will be retained and made available for all citizens to examine.

While we find nothing in the record to suggest it was the intent of the executive committee to operate in a clandestine manner by making use of "secret" ballots or that the ballots were destroyed in order to prevent their review, this does not alter our conclusion that the balloting method employed at the January 20 meeting prevented the public from determining the performance of the AAA's executive committee and thus violated the FOIA.

Accordingly, the judgment of the trial court is reversed and remanded with directions to enter a declaratory judgment that the appellee executive committee's use of unsigned written ballots which were not retained as part of the AAA's records violated the FOIA. In light of evidence of record that the executive committee has voted that all future ballots would be signed and retained, we find it unnecessary at this juncture to address Depoyster's claim for injunctive relief as to future conduct on the part of the executive committee.

Depoyster claims that this case is proper for the invalidation remedy suggested in *Rehab Hospital Services Corp.* v. *Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). We disagree. Furthermore, our disposition of the issues on appeal makes it unnecessary for us to address the trial court's refusal to grant a new trial.

Depoyster also maintains that he is entitled to an award of attorney's fees and costs. Ark. Code Ann. § 25-19-107(d) (Supp. 1987) provides that in any action to enforce the rights granted under the FOIA, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed "*unless the court finds that the position of the defendant was substantially justified or that other circumstances make an award of these expenses unjust.*" (Emphasis ours.)

Notwithstanding that we are reversing the trial court's judgment, we find that the circumstances surrounding the January 20 vote would make an award of attorney's fees and costs unjust. In a well-reasoned article, one authority discusses the FOIA provision for litigation expenses and states in part:

> [T]he court "shall assess" attorney's fees and other costs against a defendant in an FOIA case if the plaintiff has "substantially prevailed," unless the court finds that the defendant's position was "substantially justified" or that other circumstances would make such an award unjust. *The court need not, therefore, make a fee award in every FOIA case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records.*

[Emphasis ours.]

Watkins, *Recent Developments Under the Arkansas Freedom of Information Act*, 1987 Ark. L. Notes 59, 64.

We do not imply by this opinion that an award of litigation expenses under the FOIA will always be defeated in the absence of arbitrary or bad faith conduct on the part of the defendant. However, we do find that test decisive under the circumstances of this case.

Public notice of the January 20 meeting was given to member schools and to the press, and the voting was conducted in public. As to most of the site selections, the vote was by a show of hands. Those votes involving written ballots were tallied on a blackboard subject to inspection by anyone in attendance at the meeting. Upon request, the AAA furnished appellant Depoyster with whatever records it had as to the vote totals. Only a few months after the meeting, the AAA took measures to guarantee that in the future all written ballots would be signed and retained. In sum, the circumstances do not suggest either arbitrary or bad faith conduct.

While we recognize the salutary purposes underlying the FOIA and its sanctions, the facts before us simply do not warrant an award of fees and costs.

Reversed and remanded.

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

TOM GLAZE, Justice, dissenting in part. While I agree with the majority that the appellees' use of unsigned and unretained written ballots violated the FOIA, I disagree with the court's first-time interpretation of the Act's provision that provides for attorney fees and costs. That statutory provision, Ark. Code Ann. § 25-19-107(d) (Supp. 1987), provides as follows:

> (d) In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court *shall assess* against the defendant *reasonable attorney fees and other litigation expenses* reasonably incurred *by a plaintiff who has substantially prevailed unless* the court finds that *the position of the defendant was substantially justified or that other circumstances make an award of these ex-*

> *penses unjust.* However, no expenses shall be assessed against the State of Arkansas or any of its agencies or departments. If the defendant has substantially prevailed in the action, the court may assess expenses against the plaintiff only upon a finding that the action was initiated primarily for frivolous or dilatory purposes. (Emphasis added.)

Here, the appellant has prevailed on appeal, so the appellant clearly has met the first prong set forth in the law above — he substantially prevailed in his suit to enforce a right granted under FOIA. The only issue left, then, is whether the appellees' position was substantially justified or other circumstances make an award of attorney fees or costs unjust. I believe that the appellees' actions were unquestionably contrary to the terms and spirit of the FOIA and that appellant is entitled to an award of fees and costs.

In denying attorney fees and costs, the majority, relying on language contained in an article by a University of Arkansas Law School associate professor, concludes that the circumstances in this case do not suggest either arbitrary or bad faith conduct on the appellees' part. *See* Watkins, *Recent Developments Under the Arkansas Freedom of Information Act*, 1987 Ark. L. Notes 59, 64. From my reading of the article relied upon by the majority, I find nothing to support the "arbitrary or bad faith conduct" test that this court now wishes to impose. The article, itself, suggests the purpose of the Act's attorney fee provision is to assess fees and costs where public officials have acted "arbitrarily or in bad faith" in withholding records, but the author cites no legal authority for such a proposition. In my opinion, such a bad faith test is far too restrictive to apply to an Act that is to be liberally construed. If this court decides to engraft a "bad faith" requirement onto the FOIA as a prerequisite for an award of attorney fees, I fear such awards will be as rare as the dodo bird.

Language similar to that employed in Arkansas's FOIA attorney fee provision can be found in certain federal acts which have been construed in some federal court cases. The case of *Natchez Coca-Cola Bottling Co., Inc.* v. *N.L.R.B.*, 750 F.2d 1350 (5th Cir. 1985), concerned the Equal Access to Justice Act which provided that a party shall receive attorney fees and other

expenses "unless the adjudicative officer of the agency finds that the position of the agency as a party . . . was substantially justified or that special circumstances make an award unjust." In its opinion, the court recognized the rule that the government bore the burden of proving that the General Counsel's action *had a reasonable basis in both law and fact*. In applying that rule, the court held that the General Counsel was substantially justified in its action and that attorney fees were precluded. In *Fenster* v. *Brown*, 617 F.2d 740 (D.C. Cir. 1979), the court addressed the federal FOI provision which states that a court may assess attorney fees and litigation costs "in any case . . . in which the complainant has substantially prevailed." The circuit court mentioned the following four criteria to consider in deciding whether an attorney fee award should be made:

> (1) the benefit to the public, if any, derived from the case;
>
> (2) the commercial benefit to the complainant;
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> (3) the nature of the complainant's interest in the records sought; and
>
> (4) whether the government's withholding of the records had a reasonable basis in law.[1]

These federal cases, of course, do not control the attorney fee issue before us, but in a limited way we might find some guidance. For example, if a reasonable legal basis exists for a public official's having violated the FOIA, a court would be correct in awarding no fee or costs because the official was "substantially justified" in his or her actions. In my opinion, this "reasonable legal basis" position should, at the very least, be the threshold requirement in refusing or awarding attorney's fees in FOIA cases. In other words, if a public official has no reasonable legal basis upon which he or she denies access to public meetings or records that are held or kept pursuant to the terms of the FOIA, then the courts should award attorney fees and costs. Whether other circumstances may exist that would cause such an award to be unjust would necessarily be determined upon a case-by-case

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[1] These four criteria were reported in Senate Report 19, reprinted in Legislative History 171.

basis.

The FOIA attorney fee and costs provision serves to encourage a person to file suit when a violation of that Act occurs. In this respect, the provision ensures the enforcement of the Act's requirements, and, indirectly, fosters compliance with the Act, as well. While I can and will presume the appellees are well intentioned in the instant case, they have offered no valid justifications — legal bases — for having violated the FOIA. In fact, the appellant has brought to this court's attention that the Arkansas Attorney General's office previously had issued opinions to certain officials concerning the use of ballots and indicating such ballots must be signed and retained subject to inspection under the FOIA. See Ark. Op. Att'y Gen. File No. 149-A Op. No. 74-72 (May 23, 1974); Ark. Op. Att'y Gen. File No. 149-A (Nov. 22, 1971). Apparently appellees were unaware of these opinions and had failed to request advice on this matter from either the Attorney General or other legal counsel.

Appellees did, however, prevail at the trial level which does, in my view, present a circumstance in favor of their argument that no award of attorney fees is justified in this cause. Of course, a trial court's decision favoring a public official's action under the FOIA is certainly one circumstance for this court to consider when deciding if attorney fees or costs should be awarded, but that factor alone is not, and should not be, binding. When I review the facts and law of this case, I believe the majority's decision to deny attorney fees in this case is wrong.

The trial court clearly was wrong in holding the appellees did not violate the FOIA because they did not *intend* to prevent public inquiry or examination of the results of the AAA Committee's actions. None of this court's prior decisions can be read to suggest a person or official must intentionally violate the FOIA before a complaint, seeking to enforce the Act, can prevail. In *Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968), this court considered the penal provision contained in the FOIA and held very clearly that such a provision does not make the entire Act penal. The court in *Laman* was emphatic in stating that it had no hesitation in asserting its conviction that the FOIA was passed wholly in the public interest and is to be liberally interpreted to the end that the Act's praiseworthy purposes may be achieved.

The court added that the language of the Act is so clear, so positive, that there is hardly any need for interpretation. *Id.* at 405, 432 S.W.2d at 755. That, surely, is the situation at bar.

Here, appellant brought suit seeking declaratory relief that the appellees' actions had violated the FOIA, but, in order to obtain such relief, he was required to appeal, having received an adverse decision below. Appellees did — much to their credit — vote to sign and retain written ballots at future meetings. However, as noted above, that action was not taken until after trial. The parties reached no settlement of their differences, and no court order was entered below so as to reflect the appellees' intent to comply with the FOIA in the future. Under such circumstances, the appellees were free to follow the same practice in casting unsigned ballots in future meetings even though I am sure they would have met their pledge not to do so in the future. In any event, an appeal was required in order to resolve the respective parties' dispute as to whether appellees' actions violated the FOIA.

In sum, the present case is the first for this court to construe the Act's new attorney fees and costs provision, but before reaching the attorney fee issue, the court held that the FOIA may be violated even though a person or public official never actually intended to do so. Situations will exist — including situations where the Act was not intentionally violated — when attorney fees and costs will be justified and this court should not adopt a test that requires a showing of bad faith before such awards can be granted. Such a test is not called for under the terms of the FOIA, and this court's requirement of bad faith is too restrictive and will serve only to prevent the Act's enforcement.

I also disagree with the majority's decision not to address the appellee's injunctive request. This court declines to reach the injunction issue because, after the trial below, the executive committee voted that all future ballots would be signed and retained. Appellant says his request is still viable based on the appellees' past illegal decision. Of course, appellant is correct to the extent that while the appellees apparently voted not to violate the FOIA in the future, that vote or decision was never stipulated or made a part of any court order; to the contrary, appellant was required to pursue his right of appeal in order to obtain a holding

that appellees had violated the FOIA.

In my view, appellant is certainly entitled to have this court reach the issue of whether he is entitled to injunctive relief. This request, however, would be unavailing, because, in my opinion, the circuit court simply has no power to issue an injunction. *See, Cummings* v. *Fingers*, 296 Ark. 276, 280-281 n.2, 753 S.W.2d 865, 868 n.2 (1988); *Id.* at 281, 753 S.W.2d at 868 (Newbern, J., concurring). I believe the appellant is entitled to a decision on this issue now. Certainly, our decision, one way or the other, would serve to eliminate future confusion on this subject.

HICKMAN and HAYS, JJ., join this dissent.

Ricky SCOTT *v.* STATE of Arkansas

CR 89-17 766 S.W.2d 428

Supreme Court of Arkansas
Opinion delivered March 13, 1989

*Ronald C. Wilson*, for appellant.

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

JOHN I. PURTLE, Justice. The appellant was convicted of DWI in the Wynne, Arkansas municipal court. He then appealed the conviction to the circuit court for Cross County. The circuit court jury found him guilty, and the court sentenced him to six months in jail and assessed a one thousand dollar fine. The only issue that we need consider is whether the appellant gave a voluntary and intelligent waiver of his right to trial counsel. The record does not disclose that he waived this right. Consequently the conviction is reversed and the case is remanded to the circuit court.

The record is silent so far as the appellant's waiver of the right to counsel is concerned. In resolving this issue, we will first examine our own precedents and then turn to a consideration of decisions of the U.S. Supreme Court and the federal Circuit Courts of Appeals. We consider this same subject in *Philyaw* v. *State*, 288 Ark. 237, 704 S.W.2d 608 (1986). There we stated:

> The right to counsel . . . is a personal right and the accused may knowingly and intelligently waive counsel either at a pretrial stage or at the trial. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Barnes* v. *State*, [258 Ark. 565, 528 S.W.2d 370 (1975)]. [H]owever, every reasonable presumption must be indulged against the waiver of fundamental

> constitutional rights. *Franklin & Reid* v. *State*, 251 Ark. 223, 471 S.W.2d 760 (1971).

Discussing the waiver of fundamental constitutional rights in *Stephens* v. *State*, 295 Ark. 541, 750 S.W.2d 52 (1988), we quoted from *Carnley* v. *Cochran*, 369 U.S. 506 (1962), as follows:

> 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.

Whether there has been an intelligent waiver of the right to counsel depends upon the facts in each case. The burden is upon the state to show that an accused voluntarily and intelligently waived this fundamental right. In *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988), we held that "the state did not meet its burden of showing an intelligent and voluntary waiver by Bowden of his right to counsel." The issue of a knowing and intelligent waiver of the right to counsel has been discussed by this court many times. In *Costillo* v. *State*, 292 Ark. 43, 728 S.W.2d 153 (1987), we stated:

> Mr. Costillo was not represented by counsel at his trial and there is no showing that he knowingly and intelligently waived this right. The state concedes error. We agree. Accordingly, the decision of the Rule 37 trial court must be reversed and the case remanded for a new trial on the merits.

The United States Court of Appeals for the Eighth Circuit has expressly set forth rules to be followed in determining whether the Sixth Amendment right to counsel has been waived. In *Tollett* v. *United States*, 444 F.2d 622 (8th Cir. 1971), the court stated:

> The law is clear that the sixth amendment guarantee of the right to counsel in a federal criminal trial can only be waived after a careful explanation of the defendant's rights by the court and an intelligent exercise of the choice by the defendant. We must indulge every reasonable presumption against the waiver, and we cannot presume acquiescence in the loss of fundamental rights.

A very recent federal decision which arose in Arkansas is that of *Meyer* v. *Sargent*, 854 F.2d 1110 (8th Cir. 1988), wherein the court stated that "a specific warning on the record of the dangers and disadvantages of self-representation is not an absolute necessity in every case *if the record shows that the defendant had this required knowledge from other sources.*" (Emphasis added.) The *Meyer* opinion continued:

> Our holding, that a specific on the record warning of the dangers and disadvantages of self-representation is not an absolute necessity in every case for a valid waiver of counsel, should in no way be interpreted as any indication that we disfavor such a policy. Exactly the opposite is true. At best, requiring appellate courts to search through voluminous records for evidence of knowledge of this type is a time-consuming effort and a waste of judicial resources not because it is a frivolous inquiry, but because it could be avoided with a relatively short and simple colloquy on the record. . . . Thus, we are hopeful that all courts will voluntarily pursue this practice and that government prosecutors will see the benefit in encouraging courts with other practices to change them.

*Meyer* makes it quite clear that in the Eighth Circuit the recommended practice is that the courts make a relatively short and simple record concerning the waiver of the right to counsel. Other Circuit Courts of Appeals decisions have held that a waiver may not be presumed from a silent record. See *Piankhy* v. *Cuyler*, 703 F.2d 728 (3rd Cir. 1983); and *United States* v. *Edwards*, 716 F.2d 822 (11th Cir. 1983).

The United States Supreme Court discussed waiver of the right to counsel in *Patterson* v. *Illinois*, ___ U.S. ___, 108 S.Ct. 2389 (1988). That opinion stated that "[t]he constitutional minimum for determining whether a waiver was 'knowing and intelligent' is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forego the aid of counsel." *Patterson* reemphasized the holding in *Miranda* that a proper warning, prior to waiver of rights, is necessary before the police may question an accused. The opinion cited *Johnson* v. *Zerbst*, supra, and also relied on the holding in *Faretta* v. *California*, 422 U.S. 806 (1975), which

approved the right of an accused to waive his Sixth Amendment right to counsel and represent himself. *Faretta* requires that a defendant "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' "

The record in this appeal is completely silent on waiver of counsel. There is no recorded specific warning of the dangers and disadvantages of self-representation. Moreover, there is no record showing that the defendant possessed such required knowledge from other sources. In view of the fact that the trial court did not make a record on the appellant's waiver of counsel, the case is remanded for a new trial.

Reversed and remanded.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. This case troubles me because, according to appellant's testimony, he appeared before the trial court one week prior to trial (January 11, 1988) and asked for an attorney. If the appellant made such an appearance, the record before us fails to reveal it. The circuit clerk's and court reporter's certificates reflect we have the full record. In addition, the Attorney General's office has not requested remand of this cause so the record can be settled. As a consequence, we can only speculate that a hearing was held on January 11, 1988, and that the trial court may have considered appellant's request for an attorney. Of course, if such a hearing occurred, the trial court, at the same time it considered appellant's request, may have warned the appellant concerning his rights and the advantages and disadvantages of proceeding *pro se*. Nevertheless, since the state does not question the record, I presume this court has all of it. That being the case, I join in the decision reached by the majority.

Mercedes McCAMBRIDGE and Richard L. Lawrence, Executor of the Estate of John Lawrence Markle *v.* The CITY OF LITTLE ROCK; Arkansas Gazette Company; Attorney General Steve Clark; Little Rock Newspaper, Inc., Intervenors

87-352 766 S.W.2d 909

Supreme Court of Arkansas
Opinion delivered March 13, 1989
[Rehearing denied April 17, 1989.*]

*Purtle, J., would grant rehearing.

*Bell, Bilheimer & Associates, P.A.*, by: *Harvey L. Bell* and *Stephen P. Bilheimer*, for appellant Mercedes McCambridge.

*William L. Owen*, for appellant Richard L. Lawrence.

*Mark Stodola, City Attorney*, for appellees City of Little Rock and Sgt. Edward Alexander.

*Rose Law Firm, A Professional Association*, by: *Phillip Carroll*, for intervenor The Arkansas Gazette Company.

*Steve Clark*, Att'y Gen., by: *Jeffery A. Bell*, Deputy Att'y Gen. and *Connie C. Griffin*, Asst. Att'y Gen., for intervenor Attorney General Steve Clark.

*Wright, Lindsey & Jennings*, for intervenor Little Rock Newspapers, Inc.

ROBERT H. DUDLEY, Justice. The primary issue in this case is whether the constitutional right to privacy should bar disclosure of public records which would otherwise be available for public inspection under the Arkansas Freedom of Information Act.

## I. *FACTS*

Richard Lawrence, an attorney, testified at trial that he received a telephone call from his client, John Markle, at four o'clock on the morning of November 16, 1987. Lawrence disclosed to the police what Markle had said, but, asserting the attorney-client privilege at trial, refused to testify to more than that Markle asked him to come to his residence at 1820 Main Street in Little Rock. After Markle hung up, Lawrence tried to call him back, but was unsuccessful. Although we do not know from the trial testimony what Markle told Lawrence, it must have been alarming for it caused Lawrence to call the police to request that a patrol unit meet him at the Markle residence. Markle was in serious financial trouble and possibly faced criminal charges. When Lawrence arrived at the house, he found no policemen, so he circled the block and then noticed two patrol cars at a Safeway store at 17th and Main Streets. Lawrence described his plight to the officers, and Patrolman Armstrong agreed to go with Law-

rence to the Markle house. They approached the house together. An outer storm door was unlocked. The main door was ajar about half an inch. Lights were on inside the house. Lawrence could see a black briefcase inside the house, and taped to it was a piece of paper bearing Lawrence's name and address in red ink. Patrolman Armstrong went in and saw Markle's body in an office which was just off the front hallway to the house. Markle had been shot. Patrolman Armstrong radioed for assistance and asked Lawrence to go back to the front porch. Another policeman came quickly, and they carefully began to search the house. They found the bullet-riddled bodies of Markle's wife, Christine, and their young daughters, Amy and Suzanne. The two policemen secured the crime scene and called for detectives.

In conducting the crime scene search the detectives seized items they thought might constitute evidence in a criminal trial. This included guns found inside the house, and the black briefcase. In addition, crime scene and pathologist photographs were taken.

The detectives found a note from Markle stating that he had murdered his wife and daughters and committed suicide. The detectives photocopied the contents of the black briefcase and returned the briefcase and its original contents to Lawrence. Those photocopies are now in the Little Rock Police Department's official files and include copies of:

1. two handwritten letters from Markle to his attorney, appellant Lawrence;
2. a diary containing Markle's notes;
3. a handwritten letter from Markle to his mother, appellant McCambridge; and
4. miscellaneous notes.

Subsequent scientific tests proved that Markle had fired a gun, or guns, just before his death, and that the guns found at the scene were the ones that fired the bullets which killed the victims. The Little Rock Police Department considers the matter a closed case.

Appellants Lawrence and McCambridge filed suit against both the City of Little Rock and the Little Rock Police Depart-

ment seeking to restrain the department from releasing the items listed above and the photographs from the department's official files. Appellant McCambridge, Markle's mother, is an Academy Award winning actress, and as such she is a public figure. The Little Rock Police Department asked the trial court to rule that it did not have to release information gained from informants. The trial court ruled that all of the items mentioned must be disclosed under the Arkansas Freedom of Information Act. We granted a temporary stay which prevented disclosure of any of the items. We dissolve that stay. For clarity, we discuss separately the points of appeal asserted by Lawrence, McCambridge, and the police department.

## II. *LAWRENCE'S POINTS OF APPEAL*

Both of Lawrence's points involve state law only. First, he argues that the police and pathologist photos are not public records under the act. The argument is without merit. As originally enacted, the act applied only to "records made, maintained or kept by any public or governmental body." Act 93 of 1967, Section 3. The definition of "public records" has now been broadened to provide that public records are those "required by law to be kept" or "*otherwise kept* and *which constitute a record of the performance* or lack of performance of *official functions*. . . ." Ark. Code Ann. § 25-19-103(1) (1987).

Police crime scene photographs and pathologist photographs are obviously "otherwise kept" for evidence in criminal cases as an "official function" of a police department. A citizen could examine crime scene photographs and pathologist photographs and, to some extent, evaluate the performance of a police department. The photos are public records and subject to the act. *City of Fayetteville* v. *Rose*, 294 Ark. 468, 743 S.W.2d 817 (1988).

Second, appellant Lawrence argues that the attorney-client privilege precludes disclosure of the two letters written to him by his client, Markle, and left in the briefcase. This argument is also without merit.

Appellant is attempting to create an exemption to the act other than those listed in Ark. Code Ann. § 25-19-105(b) (Supp. 1987). Twice previously, we have rejected such arguments.

*Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968); *Scott* v. *Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987).

There are two reasons for the rejection of the argument. First, the Freedom of Information Act should be broadly construed in favor of disclosure, and exceptions construed narrowly in order to counterbalance the self-protective instincts of the governmental bureaucracy. Second, the attorney-client privilege, A.R.E. Rule 502, is an evidentiary rule limited to court proceedings. A.R.E. Rule 101. It has no application outside of court proceedings and, therefore, cannot create an exception to a substantive act. *Scott* v. *Smith*, 292 Ark. at 176.

## III. *McCAMBRIDGE'S POINTS OF APPEAL*

McCambridge asserts nine (9) points which in turn contain twenty-eight (28) subpoints based upon both state and federal law. She seeks to prevent release of Markle's two letters to Lawrence, Markle's letter to her, Markle's diary, and the photographs. Many of the subpoints are so wholly without merit that we treat them summarily.

Appellant McCambridge contends that the Arkansas Freedom of Information Act is unconstitutional (a) on its face, and (b) as applied in this case. She contends that the act violates the Constitution of Arkansas, Article 2, Sections 2, 3, 6, 8, 15, 18, 21, 22, and 29. She also contends that the act violates the first, fourth, fifth, ninth and fourteenth amendments to the Constitution of the United States.

Her constitutional arguments can be reduced to five basic assertions. They are: (A) the Arkansas Freedom of Information Act provides for a warrantless search and seizure without probable cause; (B) it provides for a taking of property without due process; (C) it violates the doctrine of equal protection; (D) it unduly chills free speech; and (E) it violated her constitutionally protected right to privacy.

### A.

First, McCambridge lacks standing to raise the search and seizure issue, for fourth amendment search and seizure rights are personal and may not be vicariously asserted. *Rakas* v. *Illinois*, 439 U.S. 128 (1978). She had no expectation of

privacy in the place searched, which was not her house, or the things seized, which did not belong to her. Second, the act, on its face, simply does not provide for searches or seizures. Third, the search and seizure did not violate either the federal or state constitutions.

An emergency or dangerous situation, described in our cases as "exigent circumstances," will justify a warrantless entry into a house for the purpose of either arrest or search. Here, Markle's personal attorney invited the patrolman to accompany him into his client's house because he stated some danger or harm may have come to the family based upon the call from Markle. Once inside, the patrolman found Markle in a pool of blood. It was reasonable for the patrolman to see if the killer was still on the premises, and if the other family members were safe or needed help. The United States Supreme Court has held:

> [W]hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

*Mincey* v. *Arizona*, 437 U.S. 385, 392-93 (1978). The briefcase was in plain view and its seizure as evidence was not unlawful. Therefore, the act, as applied, did not amount to an unconstitutional seizure.

B.

The Freedom of Information Act, on its face, does not provide for the taking of property without due process. Further, there is no taking under the act, as applied. A "seizure" of evidence by the police does not constitute a "taking" in the constitutional sense. *Porter* v. *United States*, 473 F.2d 1329, 1337 (5th Cir. 1973). Neither does the release of information pursuant to the Freedom of Information Act. There was no denial of due process in this case.

C.

The Freedom of Information Act provides for ten (10) exemptions from disclosure. Appellant McCambridge complains

about number seven (7) which is for: "Unpublished memoranda, working papers, and correspondence of the Governor, Legislators, Supreme Court Justices, and the Attorney General;" Ark. Code Ann. § 25-19-105(b)(7) (Supp. 1987). She argues that it violates equal protection. No "suspect class" or "fundamental right" is involved in the exception to the act. Hence, the proper test is whether a rational basis exists for the legislation. *Clements* v. *Fashing*, 457 U.S. 957 (1982). Certainly, there is a rational basis for protecting the working papers of the Governor, the legislators, and the Supreme Court Justices from public disclosure. Such protection promotes and encourages free exchange of thought in each of the three branches of government.

D.

Appellant McCambridge alleges that the act chills free speech because citizens refuse to give statements to the police for fear that their statements will be made public under the act. However, she has no standing to challenge the act on free speech grounds as she does not assert that her speech has been chilled.

E.

McCambridge does, however, have a valid privacy argument. The Little Rock Police Department has completed its investigation of the crimes and now considers the case closed. The department is now ready to release the photographs and copies of items which were in the briefcase. Appellant McCambridge contends that the photographs and copies of writings are personal to her and are potentially embarrassing and harmful if disclosed. She argues that their release will violate her constitutional right of privacy.

In *Paul* v. *Davis*, 424 U.S. 693 (1976), the Supreme Court held that the constitutional right to privacy does not prevent disclosure of "a record of an official act such as an arrest." *Id.* at 713. The holding does not extend to information off the public record. *Fadjo* v. *Coon*, 633 F.2d 1172 (5th Cir. 1981). In *Whalen* v. *Roe*, 429 U.S. 589, 598-600 (1977), the Court recognized a right to nondisclosure of personal matters: "Appellees contend that the statute invades a constitutionally protected 'zone of privacy.' The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of

interests. *One is the individual interest in avoiding disclosure of personal matters*, and another is the interest in independence in making certain kinds of important decisions." (Emphasis supplied.) In a footnote to the above quote the Court cited with approval an article by Professor Philip Kurland which identifies one facet of constitutional privacy as "the right of an individual not to have his private affairs made public by the government." The Court further expressed sensitivity to the need for nondisclosure privacy protection:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and *the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.*

*Id.* at 605 (emphasis supplied).

Since then, the majority of the federal courts have interpreted *Whalen* v. *Roe, id.*, as recognizing a constitutional right to nondisclosure of personal matters. Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. vs. DeSanti, 653 F.2d 1080 (6th Cir. 1981)*, 71 Geo. L.J. 219 (1981).

In *Nixon* v. *Administrator of Gen. Serv.*, 433 U.S. 425, 455 (1977), the Court expressly discussed the topic under the heading "Privacy," and said even the President of the United States was entitled to at least a limited right of privacy:

> One element of privacy has been characterized as "the individual interest in avoiding disclosure of personal matters. . . ." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977). We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.

*Id.* at 457.

In *Paul* v. *Davis*, 424 U.S. 693, 713 (1976), the Court expressly stated that fundamental privacy interests include family relationships. In addition, the right to nondisclosure by the government is "independent of the question of ownership of the materials. . . ." *Nixon* v. *Administrator of Gen. Serv.*, 433 U.S. at 458. In summary, appellant McCambridge has a right to avoid disclosure by the government of some personal matters.

The obvious next question is, do the items at issue in the instant case involve personal matters? In that part of *Whalen* v. *Roe*, quoted previously, the Court indicated that a personal matter was a matter "personal in character and potentially embarrassing or harmful if disclosed." Falby, in his *Georgetown Law Journal* comment, writes that a "personal matter" ought to be information: (1) that the individual wants to and has kept private or confidential, (2) that, except for the challenged government action, can be kept private or confidential, and (3) that to a reasonable person would be harmful or embarrassing if disclosed. 71 Geo. L.J. at 240. Falby's test for determining "personal matters" is a fair standard. The first part of the test encompasses information the individual wants to keep and has kept private. One should not expect to keep private information he has indiscriminately exposed in public. The items in the case at bar satisfy this part of the test as appellant McCambridge has not disclosed anything, and, in fact, has filed this lawsuit to prevent disclosure.

The second part of the test excludes matter which is already on the public record. The items at issue here were not already a part of the public record.

The third part of the test involves an objective test, whether the matter would be highly offensive to a reasonable person. This third part of the test is satisfied with respect to: (1) the two letters from Markle to his attorney; (2) the diary containing Markle's notes; (3) the letter from Markle to his mother; and (4) the photographs. The reasons therefore will be apparent in the discussion of balancing of interests below. Accordingly, we hold that those items are personal matters. The third part of the test, however, is not met with respect to the six pages of miscellaneous notes written by Markle. We can summa-

rily say that appellant has no privacy interests in them as they cause her no harm or embarrassment.

Having determined the items that involve personal matters, the final question is whether the governmental interest in disclosure under the Freedom of Information Act outweighs the appellant's privacy interest in the nondisclosure of the personal matters. *Nixon* v. *Administrator of Gen. Serv.*, 433 U.S. 425, 458 (1977).

The strength of appellant McCambridge's individual privacy interest in nondisclosure varies among the items. The police crime scene photographs and pathologist photographs are horrible and sickening, as are all such multiple murder photographs. Appellant will naturally be sensitive to the pictures, but balanced against the appellant's interest in preventing dissemination of the photographs are the government's strong interests in depicting how the multiple murders occurred, why the police consider the case closed as a triple murder-suicide matter, and why no further action should be taken. This is a highly valued governmental interest. Accordingly, we hold that the photographs should be released under the Freedom of Information Act.

Similarly, appellant will be sensitive to the matters revealed in her son's diary because the diary reflects Markle's serious financial troubles, possible criminal charges against him, and his thoughts of suicide. However, these are probative and relevant to the nature and course of the crime. Again, this is a highly valued governmental interest, and it outweighs McCambridge's interest in nondisclosure.

In the briefcase, Markle left two letters to his lawyer, appellant Lawrence. Again, McCambridge's sensitivity to some of the information contained in these letters is understandable, but the State's interest in disclosure is very strong. The first paragraph of the first letter is a "Review of Conversation" of the telephone call to Lawrence at four o'clock on the morning of November 16. It states, "I murdered my wife, and 2 children and committed suicide." Further, the letters direct Lawrence about how to close Markle's personal and business affairs. The information confirms the conclusions reached by the police. The public has a strong interest in the announced solutions to crimes.

The last item in the briefcase is the letter from Markle to appellant McCambridge. The letter is from an angry son to his mother. For the most part it deals with their lives and relationships and is most sensitive. While public figures cannot expect the same degree of privacy as private citizens, they can reasonably expect privacy in personal letters to or from their children. Even the President of the United States has a privacy interest. Accordingly, McCambridge's interest in nondisclosure of this letter is very high.

However, the letter also discloses Markle had traded McCambridge's stock market account on a discretionary basis and apparently did the same for Stephens, Inc., an investment banking company. In the letter Markle admits, "I added funds to your account; I added losses to the Stephens' account." The letter does not disclose the exact amount Markle shorted Stephens, but the figures given indicate it was well over a million dollars. It reveals that he had been caught "so now I and my whole family are dead — so you can have the money. . . ." The information bears on the suicide-murders and is relevant in determining a solution to the homicides. The public has a very strong interest in announced solutions to crime, and, here, the public's interest outweighs McCambridge's privacy interest.

Aside from her five constitutional arguments, appellant McCambridge asks us to construe the act under state law in such a way that police records are exempt from disclosure. We summarily reject the request because the appellant does not present a convincing argument nor authority, and the merits of the argument are not readily apparent. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

## IV. *LITTLE ROCK POLICE DEPARTMENT'S POINTS OF APPEAL*

The Arkansas Freedom of Information Act contains a "law enforcement" exemption. Ark. Code Ann. § 25-19-105(b)(6) provides that "undisclosed investigations by law enforcement agencies of suspected criminal activity" are not subject to public inspection. See J.Watkins, *The Arkansas Freedom of Information Act* 67 (1988) for discussion.

The police file in this case included statements from confi-

dential informants. The department does not want to release those statements and argues that such disclosure will detract from effective law enforcement to such a degree that it will operate in derogation, and not in support, of the public interest. Included among the reasons for providing this exemption by interpretation are the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative so that police officers might be completely candid in recording their observations, hypotheses, and interim conclusions. The argument could be well addressed to the General Assembly. We can only interpret the exemption as it is written.

The only purpose of the exemption, as written, is to prevent interference with ongoing investigations. When a case is closed by administrative action, as this one was, the reason for the exemption no longer exists, and the trial court correctly ordered the statements released. Accordingly, we affirm the ruling of the trial court that the police reports are to be released.

HICKMAN, HAYS, and NEWBERN, JJ., concur.

PURTLE and GLAZE, JJ., concur in part and dissent in part.

DARRELL HICKMAN, Justice, concurring. I agree with the result reached by the majority, but I write to emphasize two things.

First, I don't find the "letter" to Ms. McCambridge to be a document in which she has any constitutionally protected interest, whatever this right to privacy may be. The letter undoubtedly aided the police in determining the fact that Markle murdered his family and then killed himself. It also shed light on his motive for doing so. While the letter was addressed to Markle's mother, it was not delivered. She has never seen it. It was found at the scene of the crime. It was legitimate evidence, lawfully gained and properly used in the investigation of a crime. It was not, therefore, a purely personal document entitled to any privacy that the constitution may grant. *See Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), where the Court spoke of personal letters "unrelated to any acts done . . . in [a] public capacity."

That means that under Arkansas law, the document is subject to public examination. *City of Fayetteville* v. *Rose*, 294 Ark. 468, 743 S.W.2d 817 (1988). When Markle killed his family and then himself, he made his actions a public matter; he opened the door to an investigation of what happened and why. With that comes the right to examine all the available evidence relative to his motive and actions. The police copied all the documents in the briefcase and have those copies in their official files. The officers testified they found these documents relevant to the crime. Under Arkansas law, they are public documents.

Second, the City of Little Rock wants us to rewrite the Freedom of Information Act. It clearly states that all public records of law enforcement agencies shall be available for inspection except for those contained in "undisclosed" investigations of suspected criminal activity.

The word "undisclosed" is not vague or hard to interpret — it is just not the word the city wants. *See City of Fayetteville* v. *Rose, supra.* The city and law enforcement officials should take up this question with the legislature.

DAVID NEWBERN, Justice, concurring. I join the majority opinion but wish to write separately to state my views on the right of privacy.

There is no doubt that the document in question here, the letter from Mr. Markle to Ms. McCambridge, is being maintained in a public office and is presumed to be a public record. Ark. Code Ann. § 25-19-103 (1987). Thus, it is open to inspection and copying, Ark. Code Ann. § 25-19-105 (1987), unless it falls within a statutory exception or disclosure of it would violate a constitutional right. None of the exceptions of Ark. Code Ann. § 25-19-105 (1987) applies, so the only question is the constitutional one.

The majority opinion is correct in stating that the United States Supreme Court recognized the right to non-disclosure by government of private matters in *Whalen* v. *Roe*, 429 U.S. 589 (1977). It is also correct in pointing out that it was again recognized in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). However, the recognition came as *obiter dicta* in those cases. The *Whalen* case held that New York's laws

safeguarding the release of drug treatment information contained in state computer information banks were sufficient to protect whatever privacy interest patients may have had in the information. In stating that which the court did not decide, Mr. Justice Stevens wrote: "We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions." 429 U.S. at 605-607. To me it is clear the Supreme Court would have protected the information at stake had it not been for the safeguards. The only basis for the protection would have been the privacy right not to have the information disclosed. The court was hardly disavowing the privacy right by making that statement. The *Nixon* case held the former president's privacy interest would not preclude a limited invasion for the purpose of separating personal from public materials.

Neither of the cited cases, when limited to its holding, can stand for the proposition that there is a right of privacy requiring the government not to disclose sensitive, personal, private, information. Realizing that there is no holding supportive of the right of privacy where it was asserted to prevent governmental disclosure of personal information, we could refuse to recognize it, knowing full well that the right is there. We should, however, do as the majority opinion has done and ascertain the law on the basis of our prediction as to how the United States Supreme Court would determine this issue.

*Griswold* v. *Connecticut*, 381 U.S. 479 (1965), is typical of the cases recognizing the right of privacy citizens have in making decisions with respect to their intimate personal conduct. That statement of constitutional protection of the privacy right is clear. In *Stanley* v. *Georgia*, 394 U.S. 557 (1969), it was held that the power of a state to regulate pornography did not extend to condemning possession of it in one's home. The court quoted with approval Mr. Justice Brandeis's dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438 (1928), in which he wrote that the authors of the Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. [227 U.S. at 478]." What a citizen chooses to think or to expose himself or herself to is

also protected. The right of privacy thus was held to extend beyond the personal conduct to which it applied in the *Griswold* case.

Here we are not balancing the right of the state to regulate a perceived evil against the right of privacy. Rather, we are balancing the right of the citizens to information which reveals the nature and operation of government against the right of a citizen not to have intimate personal matters disclosed. If that right did not exist, the Supreme Court would have simply said so in the *Whalen* and *Nixon* cases and would not have scrutinized the schemes designed to protect it. Instead, the court wrestled the right of government to have the information in question against the right of the citizen not to disclose it to the government, and the ultimate discussion was about whether the government procedures would protect sufficiently the right of the citizen not to have the information disclosed publicly. Neither case held the right existed, but both of them found it necessary to discuss it, and I find that to be a clear recognition of it.

The right to be let alone must, of course, yield to the police power when overbalanced by it. It should, likewise, yield to the interest and right of the citizenry to know and understand how their government is being conducted when overbalanced by that right. If the letter from John Markle to his mother had contained nothing relevant to the four homicides, I believe this court would protect Ms. McCambridge's privacy right and not allow it to be disclosed. While the document is subject to the provisions of the Arkansas Freedom of Information Act, sections of which were cited at the outset of this opinion, the governmental interest protected by that act must be balanced against Ms. McCambridge's constitutional right to privacy. We have engaged in the same sort of balancing conducted by the Supreme Court in the *Whalen* and *Nixon* cases and concluded the public's right to know must prevail.

HAYS, J., joins this opinion.

JOHN I. PURTLE, Justice, concurring in part and dissenting in part. The circumstances of this case have convinced me that the letter from the deceased to his mother and the letters and other material specifically addressed to the attorney should be treated as though they had been delivered. The right of an individual not

to have his personal and private affairs made public by the government unquestionably protects the privacy of these highly personal papers. It is my opinion that the "zone of privacy" is broad enough to cover a communication with one's attorney and a letter to one's mother.

Clearly the material in the briefcase was not a public record prior to being seized by the government. It was never intended to be a part of the public domain. The mere fact that the police may have had the right to look at these papers in the course of their investigation did not, by some process of governmental alchemy, transform this personal and private material into public property. The majority, by judicial fiat, wrongly converts the character of the briefcase contents and the final letter to Mr. Markle's mother from the property of the mother and the attorney to the property of the police department. Although the police had the right to examine everything they discovered at the scene of the crime, they did not, in consequence, automatically have the right to keep everything they examined and make those items a matter of public record. The rationale behind the procedure endorsed today by the majority would, if carried to its logical conclusion, render the utmost secrets of a victim the property of the police department, and thus subject these secrets to public scrutiny and commercial exploitation.

The majority derives strength from the fact that personal and confidential letters and papers are not expressly exempted from disclosure under the Freedom of Information Act. The most compelling reason for not expressly excluding such information from the mandate of the F.O.I.A. is that the concept is so basic that it was not thought that anyone would claim such material was not privileged. There is no legitimate state purpose in releasing such material to the public.

To read the statute so broadly is not in keeping with the intent of the act. The majority's interpretation would appear to allow the police to confiscate everything on the scene, including books, papers, articles, pictures, and other secret and personal effects, thereby making them available for public inspection. At the very least, I believe the majority should have exempted the letter from Markle to his mother from disclosure under the provisions of the Freedom of Information Act. The "zone of

privacy" exception is also broad enough to include the material in the briefcase which was intended only for the deceased's attorney. Every bit of information in this record indicates that John Markle fully expected privacy in these circumstances. When we allow personal and confidential letters to enter the public record after seizure by the authorities, we have taken a step toward becoming a police state. "The makers of our Constitution," as Justice Brandeis observed in his dissent in *Olmstead* v. *United States*, 277 U.S. 438 (1928), ". . . conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."

My strongest objection to the majority decision concerns the release of the photographs of the victims of this tragedy. If these gruesome photographs ever served any purpose, that purpose has long since been accomplished. The photographs should then become, like witnesses, no longer a part of the record. There can be no legitimate expectation on the part of the media or the public to examine the horrendous and sickening photographs of every homicide case. All that need be said publicly about these photographs and this material is contained in the majority and concurring opinions.

The majority quotes from *Whalen* v. *Roe*, 429 U.S. 589 (1977), which holds that even public officials have a constitutionally protected privacy right in matters of their personal life unrelated to their function in their public capacity. An individual citizen certainly has a greater expectation of privacy and should be protected from governmental disclosure of purely personal matters. I do not understand how it can be asserted that the letter and the attempted communication with the attorney are not "personal in character and potentially embarrassing or harmful if disclosed."

It is obvious that: (1) the deceased wanted to keep these matters confidential; (2) except for the government action, the material would have been kept confidential; and (3) the contents would be harmful or embarrassing to relatives and friends if they were disclosed. This material consequently meets the privacy test as stated in *Whalen* v. *Roe*, *supra*. Death has sealed the lips of John Markle and his wife and children. The media should not now be given license to expose every facet of his personal life and that

of his family. Hopefully, those now entrusted with public disclosure of these materials will use common sense and respect the dignity of the surviving members of the family. The matter is in their hands.

There is of necessity a balancing of interests in this case. The items under consideration are obviously matters of a deeply personal nature which would never have been disclosed had it not been for their seizure by the state. The right of the public to know must be balanced against the right of the individual to privacy, even in cases of great notoriety. See *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). The photographs add nothing to the government's explanation of the murders and suicide. There is no doubt about what happened, and the pictures and personal letters and instructions add not one scintilla to the strength of the state's conclusions. Nothing about the photographs would remotely assist the members of the public in evaluating the duties of the police department.[1]

For the very reasons set out in the majority opinion, I would hold the personal diary to be protected by the constitutional right of privacy. The diary may have some remote relevance to the other materials to be released under the majority opinion, but it does not in any way aid in the solution of the crime. Nor does release of the diary enhance any legitimate expectation of commercial enterprises to delve into the gory details of this sad event.

In my opinion, neither the deceased's letter to his mother nor the contents of the briefcase intended for his lawyer are items covered by the Freedom of Information Act. Moreover, common decency and respect for the dead and the living surely demand that this material not be commercialized. I read the material and looked at some of the photographs only because it was my duty to

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[1] It may be worth noting that the federal Department of Energy, in dealing with an FOIA request, under 5 U.S.C. 552(b)(6), 10 C.F.R. 1004-10(b)(6), for the release of grisly photographs of the bodies of three persons killed in a reactor explosion, held that while disclosure would not invade the privacy of the deceased victims, the privacy protection of exemption 6 of the act extends to the individual's immediate family. Thus, "release of the photographs would constitute a substantial invasion of the privacy of the victims' families." *Independent Documentary Group, San Francisco, California*, 7 DOE 80, 174 (1981). See also *KUTV, Inc.*, 4 DOE 81, 150 (1979).

do so. Having done so, I am absolutely persuaded that there is no valid reason to reveal this information to the public. Even if there should be any such reason, its validity is far outweighed by the reasonable expectation of privacy existing at the time the writings were committed to paper. So far as I am concerned, there is no right to exhibit gruesome photographs of dead people.

TOM GLAZE, Justice, concurring in part and dissenting in part. I depart from the majority in its holding that Ms. McCambridge has a valid privacy argument. The majority relies largely on the Supreme Court's decision of *Whalen* v. *Roe*, 429 U.S. 589 (1977), when concluding McCambridge has a right to avoid disclosure by the government of a personal letter left her by her son. In my view, the court's reliance is misplaced.

In this case, police officers obtained the Markle letter, which was directed to his mother as a result of a criminal investigation. The Little Rock Police Department later closed its investigation, finding that Markle killed his family and then committed suicide. At that point, the information gathered by the police became subject to disclosure under the Arkansas Freedom of Information Act (FOI Act), as we recently interpreted that Act in *City of Fayetteville* v. *Rose*, 294 Ark. 468, 743 S.W.2d 817 (1988). Although the majority suggests that, irrespective of the FOI Act, the disclosure of a personal letter from Markle to McCambridge is subject to the privacy right of McCambridge, I submit that the court in *Whalen* never intended to extend such a right to this type of fact situation.

Here, police officers conducted a proper fourth amendment search and seizure of the Markle residence, and as a result, they acquired Markle's letter along with the other items and evidence found at the crime scene. Thus, we have no one's privacy and security being arbitrarily invaded in violation of the fourth amendment. While we do not have the same concern that the court addressed in *Katz* v. *United States*, 389 U.S. 347 (1967), the court there did make it clear that the right of privacy under the fourth amendment cannot be translated into a general constitutional "right of privacy." On this point, the majority court and the parties in this cause have failed to cite any cases that involve a privacy right to avoid disclosure of personal matters which the government acquired as a result of a criminal investiga-

tion. By the same token I am aware of none.

From my reading of the cases in this area, and I would be the first to admit that they are far from clear, I find no indication that the right of privacy applies to the disclosure of information obtained through a valid search and seizure. In my view, state law controls the disclosure issue before us, not the constitutionally protected right of privacy. McCambridge simply has no privacy right in this cause. The sole issue, in my judgment, is whether the Markle letter is subject to disclosure under the FOI Act, and considering this court's recent decision in *Rose*, I have no doubt that it is.

Jackie Mitchell BATTLE and George Mitchell *v.* James A. (Al) HARRIS, Sheriff of Clark County

88-231 766 S.W.2d 431

Supreme Court of Arkansas
Opinion delivered March 13, 1989

*Christopher C. Mercer, Jr.*, for appellant.

*Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd.*, by: *David M. Fuqua* and *James D. Lawson*, for appellee.

TOM GLAZE, Justice. This controversy centers on a writ of

execution which was issued on the basis of a chancery court judgment for child support arrearages. Judy Battle obtained the judgment against her former husband, Willie Joe Battle, who is presently married to appellant Jackie Battle. Appellee's office served the writ on Jackie Battle, and subsequently seized 140 personalty items to which Jackie, along with her father, George Mitchell, claimed ownership. Jackie claims that, after the items were seized, she gathered information to prove that she, not Willie Joe, owned the seized items, but before she could garner the information and petition to stay the execution, appellee sold all the items. The appellee sold the items twenty-nine days after they had been seized.

Jackie and her father filed suit in circuit court against appellee, alleging the denial of their rights of due process and seeking compensatory and exemplary damages for appellee's wrongful, malicious and illegal taking and sale of their personalties. Appellee filed a motion to dismiss pursuant to ARCP Rule 12(b)(6). First, appellee argued that the appellants' exclusive remedy to suspend or set aside the writ of execution was provided under Ark. Code Ann. §§ 16-66-301 to -304 and 16-66-401 to -409 (1987), and that appellants had failed to avail themselves of that remedy. Second, he claimed that, as a public official, he was immune from liability for damages pursuant to Ark. Code Ann. § 21-9-301 (1987). In finding merit in appellee's argument, the trial court concluded the appellants' due process rights had not been violated and granted appellee's motion to dismiss the appellants' action. We reverse.

We first note that Rule 12(b)(6) provides for the dismissal of a complaint for failure to state facts upon which relief can be granted. *Harvey* v. *Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). In *Guthrie* v. *Tyson Foods*, 285 Ark. 95, 685 S.W.2d 164 (1985), we further noted that it is improper for the trial court to look beyond the complaint to decide a motion to dismiss pursuant to ARCP Rule 12(b)(6), unless it was treating the motion as one for summary judgment, and even if the court treated the motion as one for summary judgment, it is incorrect to base the decision on allegations in briefs and attached exhibits. Here, the trial court made no mention of treating the appellee's Rule 12(b)(6) motion as one for summary judgment. Therefore, in considering a motion for judgment on the pleadings for failure

to state facts upon which relief can be granted under ARCP 12(b)(6), the facts alleged in the complaint are treated as true and viewed in the light most favorable to the party seeking relief. *McAllister* v. *Forrest City St. Imp. Dist.*, 274 Ark. 372, 626 S.W.2d 194 (1981).

We next look to the appellants' complaint, which, among other things, alleges that Jackie Battle and her father were the owners of the 140 items of personal property that were unlawfully seized by the appellee from the appellants' house. Appellants claimed that a deputy of appellee's demanded and received the appellants' keys to their house after the deputy threatened to "kick the door down." Appellants further alleged that their home was stripped of all furniture and that the appellee refused to return the items after the appellants explained that the property solely belonged to the appellants. Appellants asserted they received no notice from the appellee before or at the time the appellee sold the 140 items of personal property at an auction twenty-nine days after the property was seized. Appellants further alleged the appellee and his agents had been specifically told that the seized items did not belong to the judgment debtor, Willie Joe Battle, and that, despite all protestations, objections and warnings, appellee deliberately and willfully seized and sold the appellants' properties without just cause and in violation of their due process rights.

In view of the foregoing factual allegations, appellants' complaint, at the very least, sets forth a cause of action based upon their claim that their due process rights had been violated. Although appellee's counsel in oral argument indicated the appellants had received proper notice and had been afforded due process regarding the sale of the seized items, we find nothing in the record to substantiate that view.

Appellee answers the cause of action set out in appellants' complaint by arguing the appellants were required to pursue only the remedy provided in §§ 16-66-301 to -304 and 16-66-401 to -409, which permits a person to stay, quash or set aside an execution, levy or sale. We agree that this statutory procedure or method of *staying or vacating* writs of execution on judgments appears to be exclusive. *See Taylor* v. *O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932). However, this procedure does not preclude a

person from seeking recovery for damages when, pursuant to a writ of execution, a sheriff intentionally or willfully takes property from persons who are in no way connected with the suit and judgment from which the execution ensued. *See Wright* v. *Husband*, 193 Ark. 347, 99 S.W.2d 583 (1936); *Williams* v. *Brooks*, 269 Ark. 919, 601 S.W.2d 592 (Ark. App. 1980).

Appellee also argues that the appellants' action at best states a claim that appellee was negligent in the performance of his duties and that the trial court properly dismissed such a claim because the appellee is immune from tort liability under Ark. Code Ann. § 21-9-301. Of course, our earlier consideration of the appellants' complaint in view of ARCP Rule 12(b)(6) disposes of appellee's premise that the appellants' claim is based only upon negligence. Aside from what the proof might eventually show, we must, in this appeal, view the facts alleged in the appellants' complaint as true and in the light most favorable to the appellants. In doing so, the appellants assert the sheriff or his agents intentionally violated the appellants' due process rights by seizing properties that the appellee knew belonged to Jackie Battle and George Mitchell, not Willie Joe Battle, and by selling the properties without notice and in violation of the appellants' due process rights. In sum, although we have held that the public officials named under § 21-9-301 are immune from tort liability, *viz.*, negligent acts committed in the performance of their official duties, *Autry* v. *Lawrence*, 286 Ark. 501, 696 S.W.2d 315 (1985), we have never interpreted that immunity to include intentional torts committed by those officials. We reject any suggestion to do so now.

Because the appellants' complaint states a cause of action for intentional or willful tort, we reverse and remand the case for further proceedings consistent with this opinion.

Robert P. MALAKUL and Orathai Malakul *v.* ALTECH ARKANSAS, INC., Djaya Kusuma and Pauline Kusuma, and Ivan Spiker

88-247 766 S.W.2d 433

Supreme Court of Arkansas
Opinion delivered March 13, 1989
[Rehearing denied April 10, 1989.]

*Roy Whitehead, Jr.*, for appellant.

*Sutterfield Law Firm, P.A.*, by: *Dennis C. Sutterfield*, for appellees Altech Arkansas, Inc., Djaya Kusuma, and Pauline Kusuma.

*Randall W. Dixon*, for appellee Ivan Spiker.

TOM GLAZE, Justice. This case arises out of a partnership agreement between Mr. Malakul and Mr. Kusuma to develop fuel-alcohol plants. A corporation, Altech Arkansas, Inc. (Altech), was formed for carrying out the venture. Mr. and Mrs. Kusuma, individually and in behalf of Altech, filed suit in Johnson County Circuit Court against Mr. Malakul and his wife for fraudulently inducing the Kusumas to enter the aforementioned contract.[1] The Kusumas alleged that the Malakuls refused

[1] Along with this case, a lawsuit was filed against all the parties by Reece Brothers

to account for the monies the Kusumas invested in the parties' venture. They sought the return of their monies and also requested punitive damages. Appellee, Ivan Spiker, subsequently intervened filing suit against all of the foregoing parties, alleging he incurred damages by furnishing material, labor and supplies in constructing equipment for the parties' pilot plant which is located in Clarksville, Arkansas.

On the day of trial, the Kusumas narrowed their seven-page, six-count complaint, by explaining to the court that they were seeking equitable rescission of the parties' contract based upon the Malakuls' fraudulent misrepresentations. After all parties presented their respective cases, the chancellor awarded judgment against the Malakuls in favor of the Kusumas in the sum of $115,398.56, which represented the monies the Kusumas invested in the venture. In addition, Altech received a judgment against the Malakuls in the amount of $25,000, and the intervenor, Spiker, received a judgment of $50,450 against the Malakuls and Altech. Mr. Kusuma obtained a separate award against Altech in the sum of $54,681.91. The chancellor awarded no punitive damages. The Malakuls appeal from those judgments entered against them, raising seven points for reversal. We find none of the points have merit, and therefore affirm.

For the sake of clarity, we initially consider the four issues raised concerning whether the Kusumas' judgment against the Malakuls should be set aside. Mrs. Malakul first contends the Kusumas' complaint failed to state a cause of action against her, and for that reason, should be dismissed. We summarily dispose of this argument because it was never presented to the trial judge below. *See Britton* v. *Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987).

Next, both Malakuls argue that the Kusumas failed to meet their burden of proof in showing that either Mr. Malakul or Mrs. Malakul fraudulently induced the Kusumas to invest in the parties' venture and further urge that the chancellor erred in determining damages. We again disagree.

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Apiaries, Inc. The circuit judge severed the present case and transferred it to the Johnson County Chancery Court.

A review of the evidence supports the finding that both Mr. and Mrs. Malakul played a role in fraudulently inducing the Kusumas to invest in a worthless venture. Mr. Kusuma was deputy director of the Accounts Division of the United Nations at the New York headquarters, and Mrs. Malakul was a member of his staff of 125 people. Kusuma actually first met Mrs. Malakul and her husband at a Christmas party on December 18, 1981. At this meeting, Mr. Malakul told Kusuma that he had succeeded in inventing a low pressure distillation system and had discovered a special enzyme to produce alcohol from waste. Kusuma testified that Mr. Malakul had suggested that Kusuma should invest in the project, indicating that a demand existed for Malakul's invention because it would lessen the dependence of countries on foreign oil. Malakul said that a large amount of money would be made once the machines producing the enzyme were manufactured. Kusuma further stated that Malakul represented (1) he had a degree in engineering and a masters degree in science from London College in England, (2) he had continued his research with a professor of Cornell University and had a company called Energy Development Systems International, (3) he had sold thirty-four pieces of his equipment to farmers in the United States, and (4) his machine would cost $18,000.00 and would be available on the market for $75,000.00.

Kusuma asserted that Mrs. Malakul corroborated her husband's representations by saying he had spent a lot of time and money in discovering and producing his special enzyme. Mrs. Malakul attended some of the meetings held to discuss the venture, encouraged Kusuma to invest and said that Dr. Ward, an authority in his field, would be willing to give a letter of recognition of her husband's work. Mrs. Malakul also gave Kusuma a brochure which assertedly compared Mr. Malakul's system with others. Based on the foregoing and other information provided by the Malakuls, Kusuma said that he signed a partnership agreement to join in Mr. Malakul's venture and invested substantial monies over the next few years in doing so. Sometime after signing the agreement, Malakul and Kusuma formed Altech for the purpose of manufacturing the equipment to be used to produce the fuel alcohol.

After signing the parties' agreement and giving money to both Malakuls on a number of occasions, Kusuma made repeated

demands for an accounting, which were refused. Kusuma said that he discovered that many of the representations previously made by Malakul were false. In particular, Kusuma finally received a letter from Dr. Ward, the expert mentioned earlier by Mrs. Malakul, and the letter reflected that Mr. Malakul did not possess the appropriate engineering credentials and experience to pursue the venture and that the brochure (which purportedly compared Malakul's system with other systems) contained a series of unrelated graphs and charts. The Ward letter also revealed that Malakul's patent related to ethylene glycol rather than alcohol. Spiker testified that Malakul had not developed the special enzyme, which was the integral part of the venture, but instead he had purchased the enzyme from another company. Spiker also revealed that when Kusuma's attorney asked for Spiker's "paper" on building the equipment for the pilot plant, Malakul wanted Spiker to prepare invoices that falsely reflected expenses not incurred so Malakul could use the invoices to get money from Kusuma.

Preponderance of the evidence is required to establish fraud in obtaining a contract by fraudulent representation. *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972). To prove an action for deceit, one must show: (1) the defendant made a false, material representation (ordinarily of fact); (2) he had knowledge the representation was false or asserted a fact which he did not know to be true; (3) he intended the plaintiff should act on the representation; (4) the plaintiff justifiably relied on the representation; and (5) plaintiff was damaged as a result of such reliance. *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987). Here, we conclude the Kusumas clearly met their burden of proof. The Malakuls specifically argue the evidence is insufficient as to Mrs. Malakul. We cannot agree. Mrs. Malakul was employed under Mr. Kusuma's supervision, and she assisted in convincing Mr. Kusuma that her husband was an expert in this field of producing alcohol. Her statements regarding her husband's research and discovery of the enzyme were shown to be false. Combined with this evidence, we note that most of the money Kusuma contributed to the venture was given to Mrs. Malakul who transferred those sums through her checking account. The evidence also reflects that Mr. Malakul's presence in this country was due to a visa he obtained by virtue of Mrs.

Malakul's employment at the United Nations. From these facts, one could reasonably conclude that Mrs. Malakul played an important role, albeit supportive, in inducing the Kusumas to invest in Malakul's venture. In sum, we are unable to say the chancellor was clearly erroneous in entering judgment against both Malakuls.

We also find no merit in the Malakuls' assertion that the trial court erred in determining the measure of damages awarded the Kusumas. As noted earlier, the Kusumas sought restitution by their action and were apparently satisfied to recover their restitution in the form of money. In this respect, a plaintiff may sue in equity to rescind and if equity acquires jurisdiction for this purpose, it can proceed to order such monetary restitution as may be appropriate. *See* Dobbs, *Remedies*, § 9.4, p. 632 (1973); *see also Massey* v. *Tyra*, 217 Ark. 970, 234 S.W.2d 759 (1950). In *Massey*, the plaintiffs, the Tyras, sought rescission in equity of a contract for the purchase of land, requesting recovery of their down payment and reimbursement of expenses on the land. Tyras' ground for rescission was misrepresentation. The court held that the Tyras, in rescinding the contract for the vendor's fraud, could recover the amounts expended in good faith before discovering their right to rescind. *See also Carter* v. *Matthews*, 288 Ark. 37, 701 S.W.2d 374 (1986); *Troxell* v. *Sandusky*, 247 Ark. 898, 448 S.W.2d 28 (1969); *Blythe* v. *Coney*, 228 Ark. 824, 310 S.W.2d 485 (1958); *Ballard* v. *Carroll*, 2 Ark. App. 283, 621 S.W.2d 484 (1981).

In the instant case, the record reflects that the Kusumas gave the Malakuls checks totalling $115,509.56 and Kusuma testified that he had advanced the Malakuls $115,000.00 before the Clarksville plant was opened. Kusuma also testified that Altech had given Malakul $25,000.00. Based upon our review of the evidence, we believe the record fully supports the chancellor's award of $115,398.56 to the Kusumas and $25,000.00 to Altech.

The Malakuls next argue that Mr. Kusuma signed a release which was a valid settlement of all claims asserted by Altech and the Kusumas.[2] Such an argument ignores the rule

[2] Because we hold the release invalid for other reasons, we need not address the effect of Kusuma's signing a release for his wife and Altech.

that misrepresentations amounting to fraud may be shown to set aside a release. *Creswell* v. *Keith*, 233 Ark. 407, 344 S.W.2d 854 (1961). It has also been held plaintiffs are entitled to assert the fraud they claim if the entire transaction fatally infects the release upon which the defendants rely. *Schine* v. *Schine*, 254 F. Supp. 989 (S.D. N.Y. 1966); *see also Fitzwater* v. *Lambert & Barr, Inc.*, 539 F. Supp. 282 (W.D. Ark. 1982). Here, Kusuma testified that when he signed the release, he still believed Malakul's representations that he had been putting his share of the money into the venture, that the equipment was free from debt, and that the plant which had been constructed was a commercial production facility. In short, these misrepresentations, and others, typified the entire transaction or venture which also led to Kusuma signing the release now in issue. Thus, the evidence supports the view that the release was fatally infected by the Malakuls' overall fraudulent scheme, and we believe the chancellor was correct in deciding the release was not a valid settlement of the claims of Altech and the Kusumas.

The final two issues for consideration involve intervenor Ivan Spiker. Mrs. Malakul contends the court erred in awarding Spiker judgment against her because Spiker's proof failed to show that she fraudulently induced him to participate in the venture, since he had never met her. Spiker counters, saying the evidence showed that Mrs. Malakul participated in her husband's scheme and, for that reason alone, his judgment against her should stand. We agree. In *White River Prod. Credit Ass'n* v. *Fears*, 213 Ark. 75, 209 S.W.2d 294 (1948), this court recognized the rule that one who accepts the fruit of fraud, knowing the means by which they were obtained, is liable therefore even though he did not personally participate in the fraud. As discussed previously, the evidence shows not only that Mrs. Malakul obtained money from the Kusumas which she deposited in her personal account, but also that she actually participated in the scheme by selling the venture idea to the Kusumas and writing checks to Spiker and others whenever necessary.

Lastly, the Malakuls raise for the first time the argument that if Spiker was aware that Malakul was an agent for Altech or Kusuma, then Altech or Kusuma should be liable for the $50,450.00 judgment given Spiker, not the Malakuls. We

dispose of this matter merely by noting this argument was not pled or argued below, therefore, we need not address it on appeal. See, e.g., *Read* v. *Alcoholic Beverage Control Div.*, 295 Ark. 9, 746 S.W.2d 368 (1988).

Because we find no merit concerning the points raised by the Malakuls, we affirm.

HICKMAN, DUDLEY and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The decision should be reversed and dismissed because the chancery court lacked jurisdiction of the subject matter of the action. The circuit court has jurisdiction of a civil action if jurisdiction has not been vested in another court established by the Arkansas Constitution. Ark. Const. art. 7, § 11.

The complaint in this case was plainly one for damages for deceit. Punitive damages were sought. As the majority opinion points out, the complaint was filed in the circuit court but, for reasons not disclosed by the record, transferred to the chancery court. At the outset of the hearing, the chancellor was apparently exploring with counsel the nature of the remedy sought.

> BY MR. SUTTERFIELD [counsel for the plaintiffs Altech and Kusuma]: . . . . Your Honor, if I could make a very brief opening statement. Your Honor, essentially the claim being brought by my clients against Mr. Malakul is one based on equitable rescission of contract due to . . . fraudulent misrepresentation.

Counsel then explained the facts surrounding the entry of the agreement including misrepresentations on which the plaintiffs relied. He also explained the position of plaintiff Spiker who was one of the creditors and who allegedly had been asked by Malakul to participate in the fraud.

After responses by Mr. Whitehead, who represented the defendants, and Mr. Dixon representing Mr. Spiker, the court inquired of Mr. Dixon whether Spiker's lien had been filed on time. Dixon replied that there was no lien, and that Spiker's action was on his agreement with Malakul.

> BY THE COURT: You are suing for debt then?

BY MR. DIXON: Yes, sir. That's basically what it is.

BY THE COURT: Let me ask one other thing. How did this get out of Circuit Court? Why is it out?

BY MR. SUTTERFIELD: It's out based on —

BY THE COURT: Thickness of the file?

BY MR. SUTTERFIELD: Probably, your honor.

From that point on, the case became a jurisdictional charade which continues unabated in this court.

The complaint of the Kusumas sought compensatory damages and punitive damages. The proof went to their losses rather than to the restitutionary award which would have been proper had this truly been a rescission action. Although the trial court's judgment and the majority opinion here both avoid use of the term "damages" (and no punitive damages were awarded), there is no other legitimate description for the money judgments which were sought and granted. The answer filed by the Malakuls stated that Mrs. Malakul was not a party to the "dealings" between Robert Malakul and Mr. Kusuma and it sought dismissal of the complaint against her. Not only was she not dismissed, the judgment, which can only be characterized as one for damages, was awarded jointly and severally against Mr. and Mrs. Malakul. There was not even an allegation that Mrs. Malakul was a party to the contract, although it was alleged, and there was evidence from which it could have been concluded, that she was a party to the tort of deceit. It is difficult to imagine how the court could award restitution against a person on the basis of rescission of a contract to which it was not even alleged she was a party.

In *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), and *Carter* v. *Phillips*, 291 Ark. 94, 722 S.W.2d 590 (1987), we noted that we would not raise the question of a chancery court's jurisdiction on appeal unless it was wholly incompetent to have heard the case. That is the situation here. No equitable remedy was sought in the pleadings, and the weak statement of counsel that this was a rescission case is to no avail. If it were not clear enough at the trial that this was a deceit action, it becomes eminently so upon reading the majority opinion's references to and reliance on the elements of a deceit action set out in *Grendell*

v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987), which was clearly a tort action for deceit tried properly in the circuit court.

While I can understand the temptation to overlook the jurisdictional issue when the parties are unconcerned about it, and when raising it may seem to upset a fair result, we have held that "[w]hen a trial court enters an order without jurisdiction over the subject matter, the question cannot be overlooked even if not raised." *Larey* v. *Continental Southern Lines, Inc.*, 243 Ark. 278 at 286, 419 S.W.2d 610 at 615 (1967).

We have gone as far as we can or should go in effacing the jurisdictional lines between our chancery and circuit courts by our liberal interpretation of the cleanup doctrine. *See, e.g., Liles* v. *Liles, supra*. This case does not involve the cleanup doctrine. If the courts of law and equity are to be merged, leaving only the matter of jury trial dependent on the form of action or remedy sought, the constitution must be changed. It should not be done by judicial fiat.

HICKMAN, J., and DUDLEY, J., join this opinion.

Ronald Gene SIMMONS *v.* STATE of Arkansas

CR 89-45 766 S.W.2d 423

Supreme Court of Arkansas
Opinion delivered March 13, 1989

*Allen & O'Hern*, by: *Arthur L. Allen*, for petitioner.

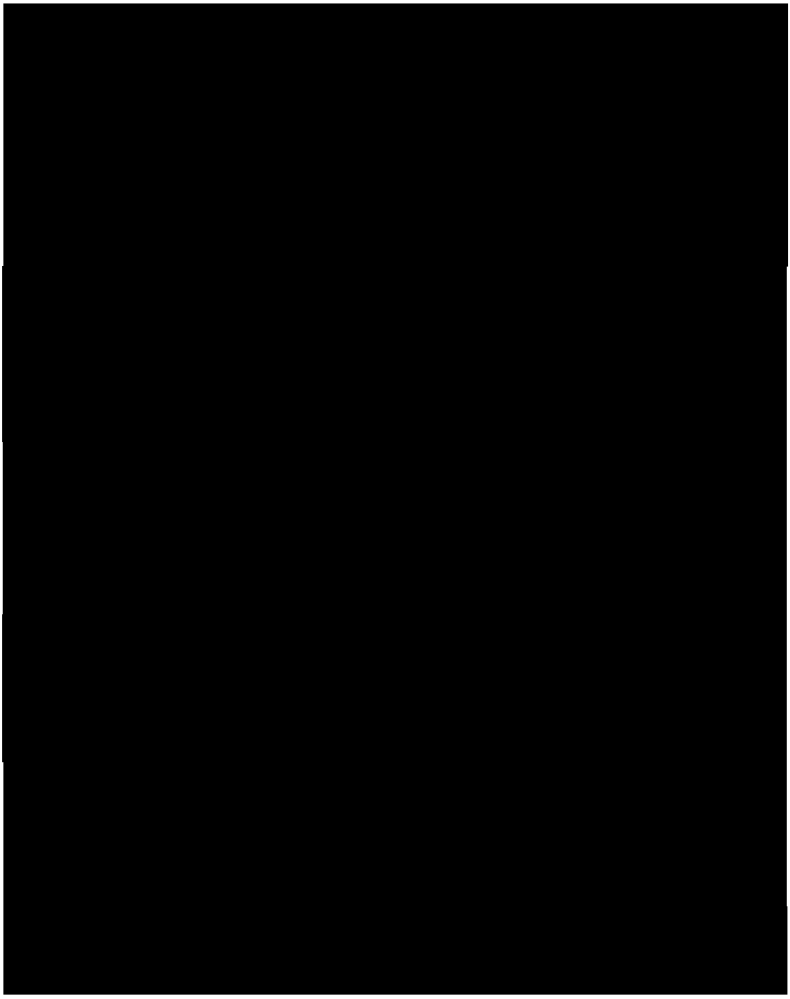
No response.

PER CURIAM. Petitioner has failed to show that he has standing to intervene in this cause. *Franz* v. *State*, 296 Ark. 181, 754 S.W.2d 839 (1988).

Charlene Diane HUTTON, Mother, David Edward Hutton, Father *v.* Michael SAVAGE, as Representative of the Arkansas Department of Human Services, Division of Children and Family Services

88-274 769 S.W.2d 394

Supreme Court of Arkansas
Opinion delivered March 20, 1989



*Jim Johnson*, for appellant.

*Diane C. Boyd*, Ass't Gen. Counsel, for appellee Arkansas Dep't of Human Services.

JACK HOLT, JR., Chief Justice. This appeal is from an order of the probate court finding that the two minor children of appellants Charlene and David Hutton ("Huttons") continue to be dependent-neglected, that it is in the best interest of the children to have custody continue in the appellee Arkansas Department of Human Services ("Human Services") for foster care placement, and that Human Services should petition for guardianship with authority to consent to adoption. The Huttons argue: (1) the juvenile master's findings and conclusions, as adopted by the probate judge, are against a preponderance of the evidence; (2) the order of the probate court is void because the juvenile master acted in excess of the powers granted him by our code; and (3) the exercise of jurisdiction over dependent-neglected juveniles is not a permissible function of the probate courts under the Arkansas Constitution.

We agree with the Huttons' second point that the participation of the juvenile master appointed to preside over this case exceeded that authorized by law. This raises the far more

fundamental issue of the power of the probate court to vest in the master the right to preside over all juvenile cases in probate court. We conclude that the legislation which permits the use of masters and referees in juvenile cases, Act 14 of 1987, § 6, Ark. Code Ann. § 9-27-310 (Supp. 1987), contravenes the delegation of judicial powers and duties as set forth in our constitution and constitutes an unauthorized grant of legislative authority. We reverse and remand for proceedings consistent with this opinion and address only such other issues as may arise on remand.

In December 1984 a petition was filed in the Benton County Juvenile Court on behalf of Arkansas Social Services requesting court ordered supervision of the home environment of the Huttons' children, Christina and Lisa. The petition alleged that, in order to protect the health and well being of the children, the Huttons should be required to attend parenting classes and should make their home safe and clean.

Subsequently, on January 22, 1985, Christina and Lisa were adjudicated dependent-neglected. It was determined that reasonable efforts had been made by social service agencies as of 1982 to provide supportive care and preventive services in order to keep the children in the home of their parents but that it was necessary to place the children in protective foster care in order to secure their health and welfare.

From February 1985 until May 1988, at least thirteen orders were entered reflecting hearings on the issue of the Huttons' care of Christina and Lisa. Prior to January 1987 it was determined at each hearing that custody of the children should remain with the Department of Human Services and that Human Services should continue to provide rehabilitative services and attempt to return custody to the Huttons.

On January 20, 1987, this court held that the exercise of exclusive jurisdiction over juveniles was not a permissible function of the county courts under the Arkansas Constitution. *Walker* v. *Arkansas Dep't. of Human Services*, 291 Ark. 43, 722 S.W.2d 558 (1987). The legislature immediately responded by transferring jurisdiction of all matters pertaining to juveniles in need of supervision and dependent-neglected juveniles to the probate courts. Act 14 of 1987. As a result, the case at bar was transferred to the Benton County Probate Court.

On February 27, 1987, the Benton County Probate Court entered an order appointing a master to hear all juvenile cases in the probate court as provided in § 6 of Act 14. Between January and November 1987, at least four hearings were conducted by the master concerning the care of Christina and Lisa. During that period custody was returned to the Huttons in light of improvements in the home situation.

On April 15, 1988, a motion was filed by Human Services which requested that custody of the children be returned to them because the Huttons had failed to comply with the terms and conditions of the court's orders and a change of custody was necessary to protect the health and welfare of the children due to a rapidly deteriorating home situation. Custody was temporarily returned to Human Services on April 19, 1988.

On May 24, 1988, the juvenile master of the probate court conducted a hearing. An order was entered on July 29, 1988, signed by the master and by the probate judge finding that custody should continue with Human Services for foster care placement and that Human Services should proceed with a petition for guardianship with authority to consent to adoption. From that order comes this appeal.

*Use of the Juvenile Master*

The Huttons argue that the order appealed from is void and of no effect as it was in form and substance a final order by the juvenile master, which is contrary to the directive in § 6 of Act 14 of 1987 [Ark. Code Ann. § 9-27-310 (Supp. 1987)] that all masters and referees appointed to hear juvenile cases shall only submit recommendations to the probate judge and shall in no event have the authority to issue a final order with respect to any matter referred to them. We agree that the master exceeded the powers which probate courts may vest in juvenile masters. Likewise, we note that his participation went beyond that contemplated by ARCP Rule 53 and our decisions in *State* v. *Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969), and *Gipson* v. *Brown*, 295 Ark. 371, 749 S.W.2d 297 (1988).

It is also clear to us that § 6 of Act 14 of 1987, which grants judges the right to appoint juvenile masters with such powers as the judges direct and which purports to vest in the

masters the full authority of the judges of their respective divisions, constitutes an unauthorized grant of legislative authority and the impermissible creation of what amounts to substitute judges.

Because the grants of power found in § 6 of Act 14 go to the very essence of the exercise of jurisdiction over juvenile matters, we address the permissible use of masters and the provisions of Act 14 even though the parties did not present these issues at the trial level. It is well settled that on appeal this court may raise the issue of lack of jurisdiction notwithstanding that the parties did not question jurisdiction below. *Miles* v. *Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988).

Act 14 of 1987, § 6, provides in part as follows:

> The judge or judges of the juvenile division of the circuit court and the juvenile division of the probate court of each county may, by joint agreement, designate and appoint a referee or master . . . *who shall have such power as may be granted by the judges of said divisions to hear juvenile cases* within the jurisdiction of their respective courts, and *submit recommendations to the judges* . . . .
>
> *A referee (or master) so designated shall have all the authority and powers of the judges of their respective divisions, but all orders arising from cases referred to the referee (or master) shall be issued by the judges* of their respective divisions, *and in no event shall the referee (or master) have the authority to issue a final order* with respect to any matter referred to them. Provided, however, that the respective judges of the juvenile division of the . . . probate court may authorize the referee (or master) to enter temporary orders in emergencies or under special circumstance, as authorized by such judge, which shall become final only on the approval and signature of the judge of the court from which such order is issued. [Emphasis ours.]

It was pursuant to § 6 of Act 14 that the Benton County Probate Court issued its order of February 27, 1987, appointing the juvenile master who presided over the Huttons' case. The order provided in part as follows:

> The Master shall have power to hear juvenile cases and make recommendations to the judges of their respective courts, pursuant to Act 14 of 1987. He shall have authority to enter temporary order in emergencies . . . but such order shall become final only on the approval and signature of the judge of the court from which such order is issued.

The order tracks the language of § 6, except it fails to set out that all orders arising from cases referred to referees or masters shall be issued by the probate judge and in no event shall the referees or masters have the authority to issue a final order with respect to any matter referred to them.

Following the master's first hearing in this matter in March 1987, he filed "Findings of Fact and Conclusions of Law," which were followed by an order signed by the probate judge which read, "The Court finds that the above findings of fact and conclusions of law should be and are hereby adopted." However, as to all subsequent hearings the record is completely lacking in findings of fact or conclusions of law *by the master*, and nowhere in the record do we find that the master ever made "recommendations" to the probate judge.

In fact, the only documents of record which relate to the issues presented at subsequent hearings are final orders. Each order fully recites the findings and conclusions pertaining to the Huttons' care of the children, decrees the rights of the parties, and concludes with the following (or substantially similar) language which appears at the conclusion of the order now on review:

> THE COURT DOES, THEREFORE, CONSIDER, ORDER, ADJUDGE AND DECREE the above and foregoing.
>
> IT IS SO ORDERED.
>
> Blaine A. Jackson
> JUVENILE REFEREE
> BENTON COUNTY PROBATE COURT
> JUVENILE DIVISION
>
> Oliver A. Adams
> PROBATE JUDGE

In determining whether we have before us an order of the probate judge which was merely signed by the master but indicates an appropriate review by the probate judge, or whether the order was a final order entered by the master and merely co-signed by the probate judge, we look to the comments of "the master" at the conclusion of the hearing which resulted in the order of July 29 and quickly find the answer.

> [The Master]—The Court finds that some of the original conditions which necessitated removal from the home have not ever been removed since the filing of the Petition of December 13, 1984, and . . . [the] Court finds that Mr. and Mrs. Hutton are at this time unwilling and, even if willing, probably unable to make the changes necessary to properly care for, protect, train, educate and discipline their children, and continued removal of the children is necessary to provide the proper care for the children. *The Court will, therefore, order that the children will continue in foster care at the present time; that the Arkansas Department of Human Services shall petition the Probate Court for guardianship with the right to consent to adoption as quickly as possible.*
>
> . . . If [appellants] can . . . straighten things up and make the improvements, *then this Court will entertain a Motion to Vacate that Order for Petition for Guardianship.* [Emphasis ours.]

Obviously, we are dealing with a final order entered by the master reflecting his findings and judgments rather than those of the probate judge.

This situation brings us to the more significant issue—the propriety of the legislature's vesting circuit and probate judges with the power to appoint masters or referees to preside over juvenile cases who shall have all the authority and powers of the judges of their respective divisions. In *Jansen* v. *Blissenbach*, 214 Ark. 755, 217 S.W.2d 849 (1949), this court discussed the validity of Act 448, § 4, of 1941, which authorized chancellors to appoint a "referee in probate" in each county who would have the power to admit wills to probate and make:

> proper orders in all cases where no contest or exceptions are filed, and make his report to the Court of his finding[s] of law and fact, for the further action of the Probate Court, in all cases where contests or exceptions are filed and heard by such Referee in Probate, and to do such other acts and perform all such other duties as may be ordered by the court appointing him.

The Act further provided that if no petition for review was filed within ninety days from entry of the referee's order, the order would become final as if performed by the chancellor.

In discussing the validity of section 4 of Act 448, this court noted that Ark. Const. art. 7, § 34, as amended by § 1 of Amendment 24, provided that the *judge of the probate court* shall try all issues of law and fact arising in causes or proceedings within the jurisdiction of the court. We went on to note that it was clear from the constitutional provision that exclusive original jurisdiction over matters relative to the probate of wills was vested in the "judge" of the probate court. 214 Ark. at 758. In concluding our discussion of the constitutionality of Act 448, we said,

> To say the Legislature had such power would clothe that body with authority to create a second or deputy probate judge in the several counties and this it may not do under the Constitution. It follows that § 4 of Act 448 of 1941 is an unauthorized grant of legislative authority and, therefore, unconstitutional and void.

*See also Mills* v. *Latham*, 215 Ark. 128, 219 S.W.2d 609 (1949). The conclusions reached in *Jansen* apply with equal force to our consideration of § 6 of Act 14 of 1987.

We recognize that to facilitate the handling of juvenile matters, § 6 of Act 14 granted the circuit and probate courts the right to appoint masters or referees to aid judges in the performance of specific judicial duties as they arise. It was not the intent of the legislature to displace the judges of the respective courts, and with that limitation in mind, § 6 of Act 14 was drafted to provide that all orders arising from cases referred to the referees or masters should be issued by the circuit or probate judges and that the referees or masters should *only submit recommenda-*

*tions* and should in no event have the authority to issue final orders with respect to any matter referred to them.

However, the Act went further and gave the masters and referees authority and powers commensurate with the judges of their respective divisions, including "such power as may be granted by the judges of said divisions to hear juvenile cases." Whether intended or not, the net effect, as evidenced by the order of the probate court appointing the master in this case, and by the facts of record, was to create substitute judges contrary to the provision in Ark. Const. art. 7, § 34, that the *judge of the probate court* shall try all issues of law and fact arising in causes or proceedings within the jurisdiction of that court. Accordingly, § 6 of Act 14 of 1987 is unconstitutional and void. Since § 6 applies with equal force to the use of masters in juvenile cases pending in circuit court, a similar conflict arises with respect to those courts.

In *State* v. *Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969), this court discussed the permissible functions of special masters.

> [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 [the] 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.

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. The same statements ring true in this case. *See also Gipson* v. *Brown*, 295 Ark. 371, 749 S.W.2d 297 (1988).

Excessive utilization of masters has been a serious concern of this court as recently noted by Justice Hickman in his concurring opinion in *Walker, supra.* "Referees and masters are simply substitutes for the judge, and there is no place in our judicial system for permanent substitutes for judges." 291 Ark. at 54. In that same vein, this court promulgated Rule 53(b) of the Arkansas Rules of Civil Procedure which 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.

Having reviewed the record in this case, we are convinced that the participation of the juvenile master in the case before us far exceeded that permitted by our constitution, our case law, and ARCP Rule 53(b). Additionally, § 6 of Act 14 of 1987 impermissibly authorizes circuit and probate judges to appoint masters or referees to hear juvenile cases with such powers as may be granted by the circuit and probate judges and purports to vest those masters or referees with all the powers and authority of the judges. As such, § 6 of Act 14 of 1987 is unconstitutional.

Our opinion in *Fortin* v. *Parrish & Reeves*, 258 Ark. 276, 524 S.W.2d 236 (1975), contains *dicta* on the use of juvenile masters. We overrule *Fortin* to the extent that it is inconsistent with the position adopted in this opinion.

We recognize that in *Fortin* it was determined that the master would, in any event, be considered a *de facto* judicial officer whose acts would be valid even though his "title" might be derived from legislation found to be unconstitutional. Notwithstanding that the master might have the position of an officer *de*

*facto* whose acts are binding as though done by one in office *de jure*, we have already determined that the case before us must be reversed in any event since the acts of the master were otherwise invalid once his participation exceeded that permitted by law.

Finally, it is well settled that where a statute or code provision is unconstitutional in part, the valid portion of the act will be sustained if complete in itself and capable of execution in accordance with apparent legislative intent. *Jansen, supra. See also* Ark. Code Ann. § 1-2-117 (1987). Since the remaining portions of Act 14 of 1987 are complete and capable of execution, they are not affected by this opinion.

In light of the foregoing, we reverse and remand to the probate court for such proceedings before the probate judge as are warranted under the circumstances to best serve the health, well being, and best interest of Christina and Lisa Hutton. In that regard the probate judge may, of course, employ the services of the master to the extent permitted by Rule 53 and should, pursuant to subsection (e), accept the master's findings of fact unless clearly erroneous or, after a hearing, adopt, modify, or reject the master's report as provided in subsection (e)(2). As in *Walker, supra*, it would be desirable to make our ruling prospective, but we do not have the power to hold a constitutional mandate in abeyance. *City of Hot Springs* v. *Creviston*, 288 Ark. 293-A, 713 S.W.2d 230 (1986).

*Jurisdiction of the Probate Court*

The Huttons' next point is that the exercise of jurisdiction over dependent-neglected juveniles is not a permissible function of the probate courts under the Arkansas Constitution. We disagree.

As noted previously, this court held in *Walker* v. *Arkansas Dep't. of Human Services*, 291 Ark. 43, 722 S.W.2d 558 (1987), that the exercise of exclusive jurisdiction over juveniles is not a permissible function of the county courts under the Arkansas Constitution. Our opinion specifically noted that Act 215 of 1911 had established a new court, known as the "Juvenile Court," to be administered by the county judges, in contravention of Ark. Const. art. 7, § 1, which prohibits the creation of courts other than those provided for in the constitution. Further, the jurisdiction of

county courts as set forth in Ark. Const. art. 7, § 28, did not encompass the jurisdiction of juvenile matters.

In *Walker*, we overruled former case law which conflicted with our new position, and we concluded with the statement that the matter of achieving a constitutional system for the administration of juvenile matters would be left to the legislature—the body equipped and designed to perform that function. 291 Ark. at 51.

In response to the decision in *Walker*, the legislature found that the impact of our decision upon the administration of the juvenile justice system of this state created a state of urgency necessitating the immediate designation of an appropriate court or courts within the judicial structure of the state to exercise jurisdiction over juvenile matters formerly vested in the juvenile court, until such time as more permanent provisions could be made. Act 14 of 1987. The Act provided that all jurisdiction, powers, functions, and duties of the juvenile court and of the county judge as judge of the juvenile court, as provided in the Arkansas Juvenile Code of 1975, and laws amendatory and supplemental thereto, would be vested in a juvenile division of the circuit courts of this state with respect to juvenile delinquents, and in a juvenile division of the probate courts with respect to juveniles in need of supervision and dependent-neglected juveniles.

■ The Arkansas Constitution, article 7, § 34, as amended by Amendment 24, provides that in each county the judge of the court having jurisdiction in matters of equity shall be the judge of the court of probate, and shall have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, *or may be hereafter prescribed by law*. The italicized words distinguish the jurisdiction of the probate courts from that of the county courts in the critical sense that the jurisdiction which may be vested in the probate courts can be altered by act of the legislature.

Accordingly, in *Carpenter* v. *Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984), and *Hilburn* v. *First State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976), this court empha-

sized that the jurisdiction of the probate court extended only to such matters as were expressly conferred by the constitution, *or by statute*, or as were necessarily incidental thereto. To that effect, Ark. Code Ann. § 28-1-104 (1987) now provides that the jurisdiction of the probate courts of this state extends, for example, to matters of adoption and to the persons and estates of minors. Ark. Code Ann. § 16-10-126 (1987) provides that the chancery and circuit courts of this state may authorize the Arkansas Department of Human Services to provide investigative assistance to the probate courts as to actions in probate concerning the guardianship of minors.

While we might resolve this issue on the basis of the express power of the probate courts to exercise jurisdiction over matters concerning the guardianship of minors, or over the persons of minors, we need only observe that the legislature has the power to enlarge upon the jurisdiction of the probate courts of this state. As such, it was within the power of the legislature to transfer the jurisdiction of matters touching upon juveniles in need of supervision and dependent-neglected juveniles to the probate court of each county.

At this juncture, we find it appropriate to note that Ark. Const. amend. 67, which deals with the jurisdiction of matters relating to juveniles and bastardy and which became effective as of January 1, 1989, reads in part as follows:

> SECTION 1. The General Assembly shall define jurisdiction of matters relating to juveniles . . . and matters relating to bastardy and may confer such jurisdiction upon chancery, circuit or probate courts, or upon separate divisions of such courts, or may establish separate juvenile courts upon which such jurisdiction may be conferred, and shall transfer to such courts the jurisdiction over bastardy and juvenile matters now vested in county courts by Section 28 of Article 7 of this Constitution.

We conclude that jurisdiction of the case before us was proper in the probate court of Benton County. Having determined that this case must be reversed and remanded because the master's participation exceeded that permitted by law and because § 6 of Act 14 of 1987 is unconstitutional and void, we do no respond to the Huttons' other point challenging the sufficiency

of the evidence.

Reversed and remanded.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I respectfully disagree with the majority that Section 6 of Act 14 of 1987 is unconstitutional.[1] The majority ignores a cardinal rule of appeal and error in addressing points not first presented to the trial court, but rather decides a constitutional question sua sponte. We have repeatedly declined to consider even constitutional issues which are not first presented to the trial court. *Chapin* v. *Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985); *Pope County* v. *Street*, 284 Ark. 416, 682 S.W.2d 749 (1985); *Scottish Union & National Ins. Co.* v. *Wilson*, 183 Ark. 860, 39 S.W.2d 303 (1931). And what of the attorney general? Ark. Code Ann. § 16-111-106 (1987) requires that the attorney general be given the opportunity to defend a statute against constitutional attack, and failure to do so is error. *Prather* v. *St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987).

The majority characterizes the constitutionality question as one of subject matter jurisdiction so as to provide this court with the proper avenue for raising this issue on our own. Although it is a well settled rule that subject matter jurisdiction may be raised for this first time on appeal, *Venhaus* v. *Hale*, 281 Ark. 390, 663 S.W.2d 930 (1984), subject matter jurisdiction involves a court's competence to hear a particular category of cases and the facts of this case involve the allocation of power. This appeal is from the orders of the probate judge. Surely the majority is not holding that orders of the probate court entered pursuant to Act 14 are rendered void by the retroactive operation of today's holding. If so, I venture that will prove to be a difficult precedent to live with.

There is another compelling reason why the case should be affirmed. From the outset in 1984, the orders (and there are many, eighteen by actual count) were all signed by a referee or master and, following Act 14, were then approved by the probate judge. At no time until they reached *this court* did appellants ever

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[1] Why Section 6 is singled out is not clear. The removal of Section 6 renders the act meaningless.

object to the procedure or complain about the case being heard by a master or referee, or object that the master was exceeding his authority. No objection on any basis now argued on appeal appears throughout this entire record. The rule is almost universally recognized and followed that a party waives objection to the functioning of the master where not timely made. "If a party appears and participates in the taking of evidence before a master without objection, he cannot question the authority of the master to act, although the order or reference is defective or although no offer referring the case to the master has been entered." Corpus Juris Secundum, Vol. 30A, § 531, p. 570. "If facts are known, parties are bound to make objections to disqualification of a master before issues are joined and before hearing commences, otherwise they will be deemed to have waived objection." *DeMoville* v. *Merchants & Farmers Bank*, 186 So. 704 (Ala. 1939); *Goodrum* v. *Merchants & Planters Bank*, 102 Ark. 326, 144 S.W. 198 (1912). *Proctor* v. *Bank of New Hampshire*, 123 N.H. 395, 464 A.2d 263 (1983); *Nystrom* v. *Nystrom*, 105 So.2d 605 (Fla. Dist. Ct. App. 1958).

Appellants also complain *in this court* that the master failed to comply with ARCP Rule 53(e) in that he did not submit a report. However, the appellants registered no such complaint before the trial court. The master announced his findings and conclusions at the end of the hearing and the final order was not entered until some three months later, thus, appellants had ample opportunity to file objections. No objection on this, or any other ground, was ever offered in the trial court.

The majority concludes that the case must be reversed because the participation of the juvenile master exceeded that authorized by law. The majority states the issue to be whether the probate judge appropriately reviewed the master's findings, or merely co-signed a final order entered by the master. What is important is whether the judge recognized that the master's findings were merely advisory and that *he alone* gave finality to the case. The appellants have not even attempted to show that the orders were not the final product of the probate judge. He approved each order and there is nothing to suggest he did not fully concur in them.

The majority states that "all masters and referees appointed

to hear juvenile cases shall only submit recommendations to the probate judge." In fact, § 6 of Act 14 of 1987 also provides that a referee or master so designated (to hear juvenile cases) shall also have "all the authority and power of the judges of their respective divisions." Surely such power encompasses more than submitting mere recommendations. However, § 6 of Act 14 quite definitely prohibits masters or referees from issuing final orders. The legislature's intent as to what constitutes the "issuance" of a "final" order may be gleened from the paragraph discussing the master's ability to issue temporary orders. A temporary order issued by a master becomes a "final" order after receiving the judge's approval and signature. Therefore, the essence of the issuance of a final order does not then turn on who drafted the order, but rather on who reviews, approves, and signs the order. Although the master drew up the order in this case, by signing the order the judge reviewed and approved such and thus issued the final order.

I do not see any objection to a statutory scheme providing for permanent masters, so long as a judge is the final arbiter. Masters have been recognized as a useful arm of the courts from an early date at common law.[2] The ongoing demands of following the progress of a family involving dependent-neglected children through rehabilitative regimens are far better suited to a master or referee than to a judge. I find no authority cited in the majority opinion for this abrogation of legislative authority.

Therefore, I would affirm the probate judge's orders.

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2 Beginning with the reign of Edward III. Cyclopedic Law Dictionary, 2d Edition.

Harry COPLEN *v.* STATE of Arkansas

CR 88-126 766 S.W.2d 612

Supreme Court of Arkansas
Opinion delivered March 20, 1989
[Rehearing denied May 1, 1989.]

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

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

DARRELL HICKMAN, Justice. The trial court denied the appellant's petition for a writ of habeas corpus and other post-conviction relief. We affirm.

Harry Coplen was convicted of two counts of battery involving the young children of his girlfriend. He originally advised his attorney to appeal his conviction, but he changed his mind. After the time for filing the record had passed, he changed his mind again and decided to appeal. He filed a motion for rule on clerk and two motions for a belated appeal, which we denied.

Coplen now attempts, by use of a postconviction relief petition, to obtain a review of an alleged evidentiary error that occurred at trial, as well as a review of our denial of his belated appeal requests. At the time Coplen filed his petition with the trial court, he was not in custody.

The trial court ruled that the petition stated no grounds for either habeas corpus relief or A.R.Cr.P. Rule 37 relief, and we agree. First of all, Coplen is not entitled to a writ of habeas corpus because his petition did not state that his commitment was invalid on its face or that the convicting court was without jurisdiction. *George* v. *State*, 285 Ark. 84, 685 S.W.2d 141 (1985). Second, Rule 37 is not meant to be a substitute for direct appeal and is not designed for review of a mere error that occurred at trial. *Neff* v. *State*, 287 Ark. 88, 696 S.W.2d 736 (1985); *Neal* v. *State*, 270 Ark. 442, 605 S.W.2d 421 (1980).

We have reviewed Coplen's request for a belated appeal three times. He claimed he was under a great deal of stress and was not thinking clearly when he decided not to pursue his appeal.[1] He cites no convincing authority for his claim that we have denied him due process of law by refusing to docket his appeal.

We also note that Coplen was not in custody when his petition was filed, a prerequisite for Rule 37 relief. A.R.Cr.P. Rule 37.1; *Malone* v. *State*, 294 Ark. 376, 742 S.W.2d 945 (1988).

Affirmed.

Purtle, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I concede that the majority is technically correct on the "in custody" provision of A.R.Cr.P. Rule 37. However, I cannot agree that the appellant should be foreclosed from pursuing any relief under Rule 37. It is truly a technicality to require a convicted person to be behind bars before he may pursue post-conviction relief. After all, he stands convicted in the circuit court. He may have already been sent to the Department of Correction, in which case he has current "standing" to bring this petition. In my opinion Rule 37 should be available to any person convicted by a circuit court, provided no direct appeal is pending.

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[1] Coplen's attorney has not taken responsibility for the late filing of the record. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

Wilbur Gerome WEATHERFORD and Lynne Huovinen Weatherford *v.* Richard L. WOMMACK and Mark Lindsay

88-252 766 S.W.2d 922

Supreme Court of Arkansas
Opinion delivered March 20, 1989

*R.J. Brown* and *David E. Smith*, for appellant.

*Davis, Cox & Wright*, by: *Constance G. Clark*, for appellee.

JOHN I. PURTLE, Justice. The appellants seek to overturn a judgment by the Washington County Circuit Court entered upon the jury verdict in a malpractice action against their former lawyers. The appellants argue that the court erred in giving two nonstandard jury instructions and reading an interrogatory to the jury. Although we have concluded that it was not necessary for the trial court to have given these instructions or to have read the interrogatory, we do not find prejudicial error.

This malpractice action against the attorneys grew out of their representation of the appellants at an earlier bankruptcy proceeding. The appellees represented the appellants in the filing of a Chapter 7 bankruptcy action in November of 1980. At the first meeting of the creditors, objections were made to the discharge of the appellants on the basis that they had concealed property with the intent to hinder, delay, or defraud the creditors.

The creditors amended the objection to include a claim that the appellants had knowingly made fraudulent statements under oath. The specific objection was that the appellants failed to list an antique piano and a secretary on their inventory sheet in the bankruptcy court. On May 19, 1981, the bankruptcy judge granted the creditors' petitions and dismissed the appellants' bankruptcy proceeding. The bankruptcy opinion denying the discharge was filed on March 8, 1982. The court found that "the Weatherfords knowingly and frauduently made a false oath in connection with their case by omitting the piano and secretary from Schedule B, the statement of financial affairs, and by failing to mention these items at the first meeting of the creditors." In sustaining the objection to the discharge, the court further stated: "The Weatherfords have not been honest with the Court, the Trustee or their creditors." The bankruptcy judgment was made a part of the trial record in the present action.

On July 15, 1986, the appellants filed a complaint in Washington County Circuit Court, asserting legal malpractice against both of their former attorneys. It was the contention of the appellants that the attorneys were negligent in failing to file a Federal Rules of Civil Procedure Rule 12(b)(6) motion to dismiss the objection to discharge and in failing to challenge the amended complaint as untimely. The appellees responded that they were not negligent in any respect and that if the appellants suffered damage, it was a result of their own omissions and misrepresentations. Attorney Wommack filed a counter-complaint in the amount of $7,851.11 for legal services rendered.

During the trial of the malpractice suit the appellees maintained that their decision not to file a Rule 12(b)(6) motion was a question of trial strategy and supported this position by insisting that the bankruptcy court would have perceived such motion as a technical defense and therefore highly suspect. The attorneys also frequently pointed out the bankruptcy judge's finding that the appellants committed fraud on the court. At the close of the trial the court instructed the jury in terms of standard Arkansas Model Instructions and gave non-AMI instructions numbers 13 and 16. Instruction number 13 dealt with "the duty of the [appellants] . . . to use ordinary care to insure the information provided in the petition was not false." Instruction number 16 was to the effect that the Weatherfords were bound by those

findings and rulings made in prior court proceedings.

The trial court also read the interrogatories to the jury. Interrogatory number 6, which was objected to by the appellants, is as follows:

> A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled.
>
> Do you find from the facts in this case that the plaintiffs committed the above acts and that the defendants reasonably relied thereon?

Although this interrogatory was read to the jury, no response was required because the jury answered another interrogatory adversely to the appellants.

The appellants rely heavily on the case of *Rutland* v. *P.H. Ruebel and Co.*, 202 Ark. 987, 154 S.W.2d 578 (1941), which states in part:

> The appellant at the time specifically called to the court's attention the objectionable feature of said instruction through his specific objection thereto, and insisted that it unduly emphasized this strong circumstance, and in singling it out in such a manner, amounted to an instruction on the weight of the testimony. We think that under the facts in this case the giving of said instruction, over the specific objection of the appellant, was prejudicial and constituted reversible error.
>
> The courts generally have held that it is improper for a trial judge to single out any one circumstance and give it undue emphasis. This is for the reason that it is well known that a jury is ordinarily influenced by the opinion expressed by the court. It is to guard against such a tendency and to guarantee an even contest on the facts that appellate courts have condemned this practice. Reversals have not always

resulted, because in some instances no prejudice could be shown. Where there is prejudice a reversal is proper. Whether there is prejudice depends upon the particular conditions as reflected by the record under consideration.

The court held in *Rutland* that the practice of giving instructions which single out or unduly emphasize specific aspects of the case is not commendable and in many cases calls for reversal. "But," the court stated, "the giving of such an instruction is not prejudicial error where the court in the whole charge directs the jury to consider all of the facts and circumstances provided in the case." The opinion further pointed out that the trial court failed to tell the jury that they should consider all the facts and circumstances in evidence and not single out any particular instruction or phase of the evidence. The general rule concerning the giving or failure to give an instruction is stated in *Purnell* v. *Missouri Pacific Railway Co.*, 235 Ark. 957, 362 S.W.2d 674 (1962): "It is well settled that when the correctness of an instruction to a jury is a question, the instruction complained of must be examined in conjunction with all the instructions given."

A case strongly favoring the argument of the appellants is that of *Harlan, et al.* v. *Curbo, Guardian*, 250 Ark. 610, 446 S.W.2d 459 (1971). The *Harlan* opinion concerned personal injuries received by several people as a result of an automobile collision. The court gave an instruction concerning the failure to use seatbelts when it had already given AMI 305(b), which explains the duty of all persons involved to use ordinary care for their own safety. The opinion held that the additional reference to the failure to use seatbelts was unnecessary and duplicative and also served to single out the particular fact for undue emphasis. The only evidence concerning seatbelts in the *Harlan* case was that belts were available but were not fastened at the time of the collision. The *Harlan* opinion reversed the action of the trial court as to one party and affirmed as to another. Thus, the facts of the case were considered not only as to the accident itself, but also as they related to each party claiming injuries. As to one party the facts required a reversal, and as to another an affirmance. This decision points out the necessity for considering the facts and circumstances of each case when it is alleged that an erroneous instruction was given or a correct instruction refused.

The assumption of a disputed fact in a jury instruction is prejudicial error. *Porter* v. *Lincoln*, 282 Ark. 258, 668 S.W.2d 11 (1984); and *Thiel* v. *Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958). Even if one instruction does include the assumption of a disputed fact, it is not necessarily reversible error if another instruction leaves the fact question to be decided by the jury. *Porter* v. *Lincoln*, supra. We also held in *Porter* that "the instruction was a correct statement of the law and we will not reverse on the objection made." Instructions are not viewed in isolation but are considered together as a whole to ascertain whether the law applicable to the case at bar was correctly declared by the court. *Peters* v. *State*, 248 Ark. 134, 450 S.W.2d 276 (1970).

It is argued by the appellants that the instructions given over their objections incorporated essentially the same material as that included in other instructions already given. It is argued that the restatement of these same principles was prejudicial to the appellants. During the instruction conference, the court, considering proposed instruction number 16, stated: "I'm not telling the jury in this instruction that they are bound by the findings of those courts; I'm telling them the Weatherfords are bound by those findings." The essence of this instruction was that the Weatherfords were bound by the bankruptcy court's order concerning the bankruptcy and that they could not relitigate the issue before the present jury. We do not view these instructions as having bound the jury on any fact issue involved in this suit. Nor do we view the instructions or the interrogatory as a comment on the evidence by the trial court.

The appellants concede that instructions 13 and 16 were legally sound and expressed correct principles of law. That being so, we examine the record to determine whether the instructions amounted to comments by the trial court. A jury is ordinarily influenced by the opinion expressed by a trial judge. It is for that reason that a trial court is legally and morally bound not to express an opinion about the evidence in the case. To allow a comment by the trial court on the weight of the evidence or credibility of a witness would, in all probability, hinder the jury in its search for the truth.

At most, instructions 13 and 16 were repetitious because the

instructions were correct statements of the law. The objective of the trial court in the present case seems to have been directed at obtaining a trial which was an even contest on the facts of the case. The jury was specifically told not to consider one instruction to the exclusion of all others but rather to consider the instructions as a whole. The court further admonished the jury to apply the instructions to the facts in evidence. Moreover, the court instructed the jury: "I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified."

The giving of the disputed instructions in addition to other instructions on the same subject is a matter within the discretion of the trial court when AMI Civil 2d instructions fail to cover an issue. See *Center* v. *Johnson*, 295 Ark. 522, 750 S.W.2d 396 (1988). We have carefully read the abstracts and briefs and are unable to find that the trial court abused its discretion in giving these instructions or that any prejudice resulted from them. The record reveals some factual basis for the giving of the two instructions in controversy. Although the two instructions were not taken from the model instructions, the court stated its reasons for giving them. Even though the court did not follow the required procedure exactly, we are able to understand why the instructions were given. The model jury instructions do not contain instructions relating to attorney malpractice or bankruptcy cases. Therefore, in order to fully apprise the jury of the law as it relates to these facts, the court decided the instructions should be given.

The per curiam by this court dated October 17, 1973, adopting the model instructions, states that when an AMI instruction cannot be modified the instruction on that subject should be simple, brief, impartial and free from argument. We are unable to say that the giving of the instructions, or the reading of the interrogatory, resulted in prejudice to the appellants. The action of the trial court consequently is affirmed.

Affirmed.

Sylvia KNOLES, Personal Representative of the Estate of Larry Moore, et al. *v.* Jesus SALAZAR, Anders Salazar, Orange Porter Hillard, and Orange Porter Hillard, d/b/a Hillard Farms

88-242 766 S.W.2d 613

Supreme Court of Arkansas
Opinion delivered March 20, 1989

*Hixson, Cleveland & Rush*, for appellant.

*Roy & Lambert*, by: *David E. Morris*, for appellee.

ROBERT H. DUDLEY, Justice. The primary point of appeal in this case is the alleged inadequacy of a jury verdict. The facts, when viewed most favorably to appellees, as we must do, are as follows: Appellee Orange Porter Hillard authorized his farm employee, appellee Jesus Salazer, to use his pickup truck, but he instructed Salazar not to let his teenage son, appellee Anders Salazar, drive the truck. Anders Salazar had flunked his driver's license exam at least eight times. Hillard saw Anders Salazar driving his truck on two or three occasions and told Jesus Salazar several times not to let his son drive the truck. On the day of the accident the farm employee, Jesus Salazar, contrary to instructions, authorized his son, Anders Salazar, to use the truck to take a freezer from the farm to a vocational-technical school. Anders later went to his parents' home and got permission from his mother to drive the truck to softball practice. On the way to practice he picked up two of his friends, Larry Moore and A.C. Thompson, Jr. After practice Anders drove the truck in a negligent manner and, in a one vehicle accident, wrecked the truck. The passengers, Moore and Thompson, were both killed.

Moore's estate, his mother, stepfather, and sisters filed suit against Anders Salazar, Jesus Salazar, and Orange Porter Hillard. The jury returned a verdict in favor of the Moore estate and against Anders and Jesus Salazar in the amount of $5,211.40, the exact amount of the funeral expenses. The jury did not make a finding against the owner of the truck, appellee Orange Porter Hillard, and did not give an award for mental anguish to decedent Moore's survivors. The appellants moved for

a new trial. The trial court denied the motion. We affirm the trial court's ruling.

Under ARCP Rule 59(a)(5), the inadequacy of the recovery can be a ground for a new trial. When the primary issue in a motion for a new trial is one of liability, as distinguished from the inadequacy of the award, we sustain the trial judge's denial of a new trial when the verdict is supported by substantial evidence. But when the primary issue is the alleged inadequacy of the award, we sustain the trial judge's denial of a new trial unless there is a clear and manifest abuse of discretion. *Fields* v. *Stovall*, 297 Ark. 402, 762 S.W.2d 783 (1989). The trial judge in this case did not clearly and manifestly abuse his discretion.

In a review of the trial court's discretion in denying a new trial because of alleged inadequacy, an important consideration is obviously whether a fair-minded jury might reasonably have fixed the award at the challenged amount. The verdict in this case is understandable and defensible.

The appellants argue that the verdict is inadequate because the decedent's beneficiaries were not given an award for mental anguish. However, before one can recover for mental anguish, he must prove more than normal grief. *St. Louis S.W. Ry. Co.* v. *Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977). With one exception, all of the testimony on mental anguish came from the appellants themselves. The one exception was the testimony of a deputy sheriff who testified about the mother's and stepfather's reaction when he notified them of the decedent's death. All of the other testimony on mental anguish was offered by one of the appellants, either for himself or for one of the other appellants. They were interested parties, and the testimony of an interested party is taken as disputed as a matter of law. *Waterfield* v. *Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982). A fair-minded jury could reject the testimony of the interested parties and find that the beneficiaries did not suffer more than normal grief. Similarly, in *Harris* v. *Damron*, 267 Ark. 1141, 594 S.W.2d 256 (Ark. App. 1980), the Court of Appeals affirmed a jury verdict for partial funeral expenses, but no mental anguish award, for the death of an 80 year old woman.

The appellants' next two arguments deal with future mental anguish. An award for mental anguish may cover not only

the mental suffering prior to trial, but also the suffering which is reasonably probable to occur in the future. 22 Am. Jur. 2d *Damages* § 252 (1988). *See also Davis* v. *Green*, 188 F. Supp. 808 (W.D. Ark. 1960). The trial judge obviously thought that future mental anguish was not a recoverable element of damage. As a result, he erroneously ruled that the appellants could not introduce a mortality table showing the probable life expectancies of the appellants, and directed the jury not to consider appellants' attorney's closing argument about future mental anguish.

However, we do not reverse because of those errors. The refusal to allow the mortality table into evidence was an erroneous evidentiary ruling. Pursuant to A.R.E. Rule 103(a), we do not reverse a case because of an erroneous evidentiary ruling unless a substantial right of the party is affected. Here, the appellants were not prejudiced by the ruling. First, the jury found that the appellants did not suffer more than normal grief up to the time of trial, and, second, there was no proof that they would suffer more than normal grief in the future. Thus, common sense dictates that the erroneous ruling on the mortality tables was harmless error.

In addition, the trial court, by a cautionary instruction, directed the jury not to consider the appellants' closing argument asking for damages for future mental anguish. The cautionary instruction was an erroneous statement of the law, but the trial judge, pursuant to AMI Civil 2d, 2216, had already instructed the jury that the appellants could recover only for mental anguish which they had "endured." The appellants did not object to this part of the instruction and even proffered their own instruction which asked only for "mental anguish they have endured." No objection was made to the jury instruction which included only past mental anguish. When, in the closing argument, the appellants' attorney asked the jury to award damages for future mental anguish, the trial court correctly acted in requiring the jury to follow the instructions which had been given.

The appellants next contend that the trial judge erred in refusing to allow their economic expert to testify about the present value of the decedent's future services and contributions and also in refusing to instruct the jury on the element of damages for future services and contributions. Our law on the

subject is clear. Parents who have been deprived of the services and contributions of a minor during his minority are entitled to the present value of those services, reduced by the reasonable and necessary expenses of providing for the minor through minority. AMI Civil 2d, 2216. If the child as a minor had made contributions to the parents and evidence supported an intention to continue to make them after reaching majority, the parents may recover as well for such future and anticipated contributions. *Missouri Pac. Transp. Co.* v. *Parker*, 200 Ark. 620, 140 S.W.2d 997 (1940); Brill, *Arkansas Law of Damages* § 28-10 (1984).

At the time of his death the decedent was sixteen years old. He had a part time job at a small grocery store where he earned $3,000.75 in 1983 and $877.50 in 1984, the year he was killed. His stepfather testified that, before his death, the decedent spent most of the money he made on himself and his car; that he helped the family a little, but he didn't look to the decedent for support. His mother testified similarly. Neither witness stated that the decedent had expressed a hope or desire, or demonstrated an intention or disposition, to be of financial assistance to the parents after reaching majority. In fact, the stepfather testified that he did not expect the decedent "to get out of school and start sending money."

The appellants' attorney did ask the decedent's mother the following question: "Was Larry the type of boy that, had he survived, and, had you been in financial need, would he give you money, do you think, to provide support for you?" The court sustained an objection to the question on two bases: (1) it called for speculation by the witness and, (2) the issue was whether there were future anticipated contributions, not possible contributions contingent upon the parents' financial needs. Appellants now argue the ruling was erroneous. They do not give us a reason the ruling was erroneous, nor any citations of authority, and no reason is readily apparent to us. Therefore, we do not consider the issue. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Appellants next argue that the trial court erred in refusing to allow their economic expert to testify that the present value of the parents' loss of future contributions was $534,113.86. The short answer to the argument is that the trial court correctly

ruled that the appellants failed to establish a factual basis showing that the decedent would have made future contributions to his parents; therefore, the economic expert's testimony was not relevant and would only confuse the jury.

The appellants' last argument is that the jury made a mistake when it did not find Orange Porter Hillard guilty of negligent entrustment of his truck to Anders Salazar. The statement of facts set out in the opening paragraph of this opinion shows there was substantial evidence to support the jury's finding.

Affirmed.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION of Paragould *v.* David K. DRAKE, Bettye J. Drake, Bob Berry and Karin Berry

88-288 766 S.W.2d 617

Supreme Court of Arkansas
Opinion delivered March 20, 1989

*Fulkerson & Todd, P.A.*, by: *Michael E. Todd*, for appellant.

*Osmon & Wilber*, by: *David L. Osmon*, for appellee.

STEELE HAYS, Justice. On March 18, 1986, the appellees, David K. Drake, Bettye J. Drake, Bob Berry, and Karin Berry executed a real estate mortgage to the appellant, First Federal

Savings & Loan Association of Paragould. This mortgage was filed on July 31, 1986, in the Mortgage Records of Greene County, Arkansas. Paragraph 2(h)(7) of this mortgage provided that the maturity of the principal indebtedness which the mortgage secured could be accelerated by the appellant "if the mortgagor or assignee sells or conveys (or contracts to sell or convey) all or any part of the mortgage property without the written consent of the holder of said note."

On February 17 and 25, 1988, the appellees David Drake and Bettye Drake, executed additional estate mortgages to Bruce M. Smith and Rollin M. Smith on the property previously mortgaged to the appellant. After informing the appellees by letter of their decision to accelerate their mortgage, the appellant filed a Complaint in Foreclosure on September 17, 1988, alleging that the subsequent mortgages to the Smiths breached paragraph 2(h)(7) of the mortgage agreement. Also named as defendants in the foreclosure action were John and Elaine Newsom. The Newsoms possessed a leasehold interest in the mortgaged property and thereby asserted a counterclaim against the appellant alleging their leasehold interest to be superior to the appellant's mortgage. In addition, the Newsoms asserted a cross-claim against defendants/appellees, Drake and Berry, for delinquent accounts. Because the Newsoms' leasehold interest was mortgaged to Security Bank of Paragould, the bank was also named as a defendant as well as Waterfurnace International and Shannon King, judgment lien holders against the defendants/appellees, Drake and Berry.

The appellees filed a motion for summary judgment contending that the appellant had no right to accelerate the note based on the appellees' issuance of subsequent mortgages on the property. The chancellor held that the language contained in paragraph 2(h)(7) of the appellant's mortgage did not provide the appellant with a right to accelerate and foreclose and granted the appellees' motion for summary judgment.

■ We dismiss this appeal because the order does not meet the requirements of ARCP Rule 54(b). *Tackett* v. *Robbs*, 293 Ark. 171, 735 S.W.2d 700 (1987); *Kilcrease* v. *Butler*, 291 Ark. 275, 724 S.W.2d 169 (1987). ARCP Rule 54(b) provides:

When multiple parties are involved, or where more than

> one claim is presented, the trial court may direct the entry of a final judgment as to one or more but fewer than all of the parties and claims only upon an express determination that there is no just reason for delay and upon the express direction for the entry of the judgment.

There are multiple parties as well as multiple claims present in this action. The chancellor granted the appellees' motion for summary judgment, but other defendants in the action remained. The chancellor's order does not make a determination that there is no just cause for delay, and thus, the requirements of ARCP Rule 54(b) were disregarded.

We have issued numerous reminders that the rules of civil procedure do not permit an appeal in such cases except in accordance with Rule 54(b). *McClendon* v. *State*, 293 Ark. 173, 735 S.W.2d 700 (1987); *Earl* v. *Mosler Safe Co.*, 291 Ark. 276, 724 S.W.2d 169 (1987); *Arkhola Sand & Gravel Co.* v. *Hutchinson*, 289 Ark. 313, 711 S.W.2d 474 (1986); *Sherman* v. *G & H Transportation, Inc.*, 287 Ark. 25, 696 S.W.2d 832 (1985); *Tulio* v. *Arkansas Blue Cross and Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984); *3-W Lumber Co.* v. *Housing Authority of Batesville*, 287 Ark. 70, 696 S.W.2d 725 (1985); *Vermeer Manufacturing Co.* v. *Vandiver Equipment Co. and Ford Motor Co.*, 279 Ark. 248, 650 S.W.2d 244 (1983).

Appeal dismissed without prejudice to an appeal from a final judgment.

Anthony L. HURVEY *v.* STATE of Arkansas

CR 88-173 766 S.W.2d 926

Supreme Court of Arkansas
Opinion delivered March 20, 1989
[Rehearing denied April 17, 1989]

*Darrell F. Brown & Associates, P.A,* for appellant.

*Steve Clark*, Att'y Gen., by: *Ann Purvis*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Anthony Lavell Hurvey has appealed from a judgment of conviction on three counts of delivery of cocaine and one count of possession of cocaine with intent to deliver. Hurvey received ten year sentences for each conviction, the sentences to run consecutively. Two points for reversal are argued, neither of which has merit.

I

Appellant contends the verdict of guilty on each count of delivery of cocaine is not supported by substantial evidence. Several police officers testified to buying cocaine from an individual known to them only as "Malt Stand," but later identified as the appellant. The transactions occurred at different times and places and the officers' estimate of the height of the individual ranged from 5'3" to 5'9". As the appellant denied ever selling cocaine, credibility of the witnesses is the heart of the issue.

To determine the sufficiency of the evidence we need to consider only that evidence which supports the verdict. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Working through an informant, the police met appellant at a K-Mart parking lot in North Little Rock where they purchased a packet of cocaine for

$165. Two officers, Baker and Sipes, identified appellant as the person who sold them the cocaine. A few days later Officers Sipes and Schlalchlin met appellant at a Kroger parking lot and again purchased cocaine for $165. A final purchase of cocaine for $165 was made on June 11 behind the sea wall.

Appellant maintains that because of inconsistencies in the officers' testimony, the jury's verdict was not based on substantial evidence. Some of the discrepancies were explained, some were not. None was of sufficient scope to defeat the verdict. In *Parker* v. *State*, 290 Ark. 94, 717 S.W.2d 197 (1986), we held that minor discrepancies were for the jury to consider in weighing the verity of the testimony. In *Barnes* v. *State*, 258 Ark. 565, 528 S.W.2d 370 (1975), we said:

> Where the testimony is conflicting, this court does not pass upon the credibility of any witness after the jury has given it full credence, at least where, as here, it cannot be said with assurance that it was inherently improbable, physically impossible or so clearly unbelievable that reasonable minds could not differ thereon.

II

Appellant argues the jury's verdict of guilty of possession with intent to deliver is not supported by substantial evidence. Officer Sipes testified that while appellant was being admitted to jail following his arrest he was asked to remove a cap he was wearing. A small packet of cocaine fell out and, on inspecting the cap, five other packets of cocaine were found inside the band.

Since the amount of cocaine did not equal one gram, the presumption of an intent to deliver pursuant to Ark. Code Ann. § 5-64-401(d) (1987), does not arise. Even so, intent to deliver may be proved by circumstantial evidence. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978). Intent to commit a crime is not ordinarily susceptible of direct proof and may, therefore, be inferred from the circumstances. Circumstantial evidence is sufficient to constitute substantial evidence. *Altes* v. *State*, 286 Ark. 94, 689 S.W.2d 541 (1985). Those circumstances include the packaging of the cocaine in small individual packets and the fact that appellant was shown to have sold cocaine on prior occasions. *Lincoln* v. *State*, 285 Ark. 107, 685 S.W.2d 166

(1985).

The judgment is affirmed.

Gary Jerome RILEY *v.* STATE of Arkansas

CR 88-13 766 S.W.2d 921

Supreme Court of Arkansas
Opinion delivered March 20, 1989

*Marc Aaron Kline*, for appellant.

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

STEELE HAYS, Justice. On January 11, 1984, the Chief Gas Station in Pine Bluff was robbed by three men using a sawed-off shotgun. A few days later two men wearing ski masks and using a sawed-off shotgun robbed the Riverside Motel. A description of the car used in the robbery was broadcast by police radio and appellant Gary Jerome Riley and a companion were promptly arrested. They had ski masks and a sawed-off shotgun in their possession.

Appellant pled guilty to the aggravated robbery of the motel and was tried and convicted for the gas station robbery. As a habitual offender he was sentenced to consecutive terms of twenty

and ten years for aggravated robbery and theft. Riley appealed and on September 18, 1985, the Arkansas Court of Appeals affirmed the judgment, *Riley* v. *State*, (CACR 85-64).

Appellant then petitioned this court for permission to proceed under criminal procedure Rule 37, alleging that his trial counsel was ineffective for failing to move to suppress custodial statements he gave following his arrest. We granted the petition (See Per Curiam, *Riley* v. *State*, CR 86-173, February 23, 1987). At a hearing in the Jefferson Circuit Court appellant and three police officers testified concerning several statements given by Riley shortly after his arrest. The net effect of the officers' testimony was that Riley's statements implicated him in both robberies. While Riley's testimony disputed the state's proof in some respects, his own version had several contradictions. Riley testified that he immediately requested an attorney. The officers said he gave the statements readily after the Miranda warnings were given and did not ask for a lawyer until the following day when told he would be charged with the robbery of the gas station.

The circuit court denied the requested post-conviction relief and made findings of fact which included the following:

> The testimony is in conflict as to when Petitioner requested the assistance of an attorney, and whether or not that request for assistance related only to written statements or to oral statements as well. However, Petitioner's version conflicted within itself, and it was in conflict with the police version.
>
> Petitioner contends that he requested the assistance of an attorney as soon as he executed the Rights Form. But in his testimony he relates several voluntary statements to the police concerning the gun, the motel robbery, and the Chief Gas Station robbery.
>
> Petitioner has failed to overcome the presumption of effective assistance of counsel because he has failed to "show by clear and convincing evidence that the (alleged) prejudice resulting from the representation of trial counsel was such that he did not receive a fair trial." *Blackmon* v. *State*, 623 S.W.2d 184 (1981).

Gary Jerome Riley has appealed. Appellant's brief

recognizes that the issue is largely one of credibility. Counsel for appellant has filed a brief in accordance with *Anders* v. *California*, 386 U.S. 378 (1976), in which he concedes there is no merit to the appeal. Though given the opportunity to file a brief pro se, appellant has not done so and has not challenged the position of his counsel as to the absence of merit. The state's brief concurs and, pursuant to Rule 11, asserts that the record is devoid of errors which might dictate a different result. Finding nothing to the contrary in the record, we affirm.

Harold SPEER *v.* Carolyn SPEER, Deceased, by J.D. Campbell, Administrator

88-220 766 S.W.2d 927

Supreme Court of Arkansas
Opinion delivered March 20, 1989
[Rehearing denied April 17, 1989.]

*Fendler, Gibson & Bearden*, by: *Oscar Fendler; Barbara Halsey*, for appellant.

*Knauts & Cole*, by: *C.W. Knauts*, for appellee.

STEELE HAYS, Justice. This appeal has been certified to us under Rule 29(1)(p) as involving the construction of a deed. It is the second appeal of a divorce case between Harold Speer, appellant, and Carolyn Speer. The parties were divorced by a decree entered in 1985, from which Harold Speer appealed. The Court of Appeals affirmed on direct appeal and modified and remanded on cross-appeal. See *Speer* v. *Speer*, 18 Ark. App. 186 (1986). Carolyn Speer died while that appeal was in process and her interest was pursued by her father as special administrator.

Harold Speer's contentions in the first appeal included an unsuccessful challenge to a finding by the trial court that a tract referred to as "The Glenn Farm" was marital property. Carolyn Speer's argument on cross-appeal was that the trial court should have awarded her one-half of a joint checking account containing $4,672. That argument was sustained by the Court of Appeals and the case was remanded with directions to make an appropriate award of those funds.

Following remand other disputes arose and Harold Speer has again appealed on three points of error. The first involves a lien on the Glenn Farm, which was sold at public auction to appellant Speer. The order for sale provided, among other things, that the property was to be sold free of any liens. But when appellant became the purchaser the chancellor directed that a lien be impressed on the property in the amount of $6,906.94, the balance due Carolyn Speer as a result of the divorce. Appellant does not challenge the amount of the lien, but rather, contends it was error to apply a lien at all, citing the order of sale as stating the property was to be sold "free of any liens."

We find no merit in the argument. Obviously, the provision for a sale free of liens was intended to apply in the event a third party became the purchaser and does not preclude the chancellor from imposing a lien on the property as part of the divorce proceedings. It cannot be seriously urged that the order of sale was intended to render the property lien-proof. Furthermore, appellant ignores the fact that a judgment lien attaches in any case by operation of law under Ark. Code Ann. § 16-65-117 (1987). Appellant has cited no authority and has offered no convincing argument to support his claim. See *HCA Health*

*Services of Midwest, Inc.* v. *National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988); *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Appellant's second point concerns certain expenditures he incurred in connection with the Glenn Farm and a ski boat, both of which were found to be marital property in the original divorce decree. On remand, appellant claimed he had incurred expenses on both properties and requested a set-off. As to the boat, appellant claimed marina storage charges for the two years following the decree. As to the farm, he claimed taxes and insurance for the same period. The trial court disallowed these expenses as a set-off, finding that appellant paid them as a volunteer, in the nature of an "officious intermeddler."

As appellant and Carolyn Speer were co-tenants of the properties in question when these expenses were incurred, we disagree with the trial court's reasoning. See, e.g., *Adkins* v. *Adkins*, 258 Ark. 852, 529 S.W.2d 144 (1975). However, we think the decision was correct in any event and will uphold the trial court if it reached the right result, even if it did not enunciate the right reason. *Tisdale* v. *Seavey*, 286 Ark. 222, 691 S.W.2d 144 (1985).

It is clear from the record that the expenses claimed by appellant were regularly incurred and capable of being anticipated. Appellant does not claim otherwise. The farm and the boat were both matters in litigation in the original divorce proceedings, yet appellant made no request for reimbursement of these expenses, either during or after the original trial of the case, nor, consequently, were these issues raised in the first appeal. The decision on the first appeal becomes the law of the case and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been but were not presented. *Morris* v. *Garmon*, 291 Ark. 67, 772 S.W.2d 571 (1987). Clearly, the matter of these expenses raised by appellant on remand were issues that could have been raised in the original trial. As appellant failed to raise these claims in the original proceeding, he is precluded from doing so at this stage.

Appellant also sought expenses on engine repairs of the ski boat that were made in 1984. These expenses were properly excluded by the trial court as expenses incurred prior to

the decree. *Goodlett* v. *Goodlett*, 209 Ark. 297, 190 S.W.2d 14 (1945). Nor do we find error in the trial court's disallowance of post-trial expenses made on well repairs at the Glenn Farm. The matter of post-trial expenses had not been mentioned by appellant in his petition for the hearing on remand and when appellant attempted to introduce proof on the issues, appellee objected on the basis of surprise. See ARCP 15. The trial court questioned both attorneys and determined that prior to the hearing, the parties had had conversations or negotiations which would have put the appellee on notice as to most of these expenses, but not as to the well repairs. On that basis, those repairs were excluded. ARCP 15 vests broad discretion in the trial court and from an examination of the record we cannot say that discretion was abused. See *Wingfield* v. *Page*, 278 Ark. 276, 644 S.W.2d 940 (1983).

The trial court also excluded leveling expenses paid on the Glenn Farm, on the ground that the issue had already been litigated. When the court had heard evidence on post-trial expenses at the hearing after remand, there was no mention of leveling expenses. Several months later, appellant requested a second hearing and attempted to introduce the leveling expenses. As the issue of post-trial expenses had already been litigated, the trial court did not err in excluding appellant's evidence.

The final point concerns the effect which the death of Carolyn Speer had on these proceedings. As noted previously, Carolyn Speer's father, J.D. Campbell, had been appointed administrator of her estate and was substituted on appeal to represent her interests. See *Speer* v. *Speer, supra*, at 187. After remand, no additional action was taken to establish Mr. Campbell's status as a substituted party.

Appellant argues that because of appellee's death, the action after the decree abated or, alternatively, there being no motion for revivor, all subsequent proceedings after the appeal were void. We find no merit to these contentions.

Our cases hold that a court will lose jurisdiction to award a divorce when one party dies prior to a decree, *Childress* v. *McManus*, 282 Ark. 255, 668 S.W.2d 9 (1984), as well as to decide matters relating to alimony or to the custody of children upon the oath of one party after the decree. See *McLaughlin* v.

*Todd*, 201 Ark. 348, 145 S.W.2d 725 (1940); *Day* v. *Langley*, 202 Ark. 775, 152 S.W.2d 308 (1941); *Kupers* v. *Kupers*, 20 Ark. App. 198, 726 S.W.2d 686 (1987). The death of a party will not, however, result in the court's losing jurisdiction in all matters. We have specifically held that the court will retain jurisdiction to settle property rights when one of the parties dies after a decree is entered and an appeal is pending. In *Owen* v. *Owen*, 208 Ark. 23, 184 S.W.2d 808 (1945), a decree of divorce was granted and property rights were adjudicated. The wife appealed and prior to a decision in this court the husband died. We stated that while death abates a divorce suit, even so, where property rights are involved it becomes our duty as an appellate court to review the decree. We said:

> Where the party seeking a divorce appeals from a judgment, simply denying it, and pending the appeal either party dies, the appeal and the action abate absolutely and cannot be reviewed, there being no one living who can legally have any interest in the same. . . . We do not have for decision the question whether an appeal could be prosecuted where no property rights were involved, for property rights were adjudged here; and there appears to be no division of authority as to the existence of the right of appeal when the decree also adjudicates property rights.

See also, *Bradshaw* v. *Sullivan*, 160 Ark. 547, 254 S.W. 1064 (1923); *Strickland* v. *Strickland*, 80 Ark. 451, 97 S.W. 659 (1906).

The same reasoning is found in 33 A.L.R. 4th 47, Divorce-Death Pending Appeal (1984), i.e., that a divorce action is purely personal and consequently terminates on the death of either spouse, but a different result is effected when property rights are involved: "This proposition [that the action is purely personal] is to be distinguished from the view taken in cases in which the death occurs after the final decree of divorce but during the time when an appeal may be taken. The general rule applied in cases involving such appeals is that the action abates with respect to the issue of the marital status of the parties but not with respect to the determination of property interests which may be affected by the divorce." *Id.*, at § 2. To the same effect see 24 Am. Jur. 2d, *Divorce and Separation* § 177 (1983).

In this case, all the issues considered in *Speer I*, and on remand, were purely matters of property rights, and consequently jurisdiction was properly retained as to those issues. The post-trial proceedings were not void as to those issues of property rights. Finding no error, we affirm.

The one issue of question in *Speer I* was an argument by appellee that the trial court's award of child support was inadequate. Our cases would indicate that because of appellee's death, this question was not properly before the Court of Appeals. See *McLaughlin* v. *Todd, supra.* We note initially that the Court of Appeals took no action on this point, but simply affirmed the trial court's award. But even if it had been otherwise, it would not alter our holding that the Court of Appeals and the trial court on remand did not lose jurisdiction on the issues of property rights. There is no basis to contend that the child support issue in any way affected the property issues joined with it and we find no authority that even suggests such a possibility.

Neither do we have any question on the effect of the absence of any motion for revivor after the appeal. When a motion for revivor is not timely made and a representative continues the action without objection, it has generally been held to be deemed a waiver of such a motion. 1 Am. Jur. 2d, *Abatement* § 117 (1962). And we have so held. *Short* v. *Stephenson*, 239 Ark. 287, 388 S.W.2d 912 (1965); *McDonald, Ex'x* v. *Petty*, 254 Ark. 705, 496 S.W.2d 365 (1973); and see *Obennoskey* v. *Obennoskey*, 215 Ark. 358, 220 S.W.2d 619 (1949). Furthermore, the burden to have the action properly revived is on the party seeking the relief from the court. *McDonald* v. *Petty, supra.*

Here, there can be no doubt but that any objection to a failure of revivor had been waived by appellant. Following the appeal, there were not one but two further hearings concerning matters after remand. Both hearings were made at the request of appellant, and in both instances, it was the appellant seeking relief from the court. It was not until nineteen months after appellee's death, on the very morning of the second hearing, that appellant first raised the issue of abatement by filing a motion to that effect. The trial court dismissed the motion.

Finding the issue was clearly waived, we can find no

error on the trial court's dismissal of appellant's motion on this point.

ARKANSAS PUBLIC SERVICE COMMISSION and Arkansas Western Gas Company *v.* ARKANSAS CHARCOAL COMPANY and TXO Production Corporation

89-13 766 S.W.2d 931

Supreme Court of Arkansas
Opinion delivered March 20, 1989

*George C. Vena*, Ass't Gen. Counsel, for petitioner Arkansas Public Service Commission.

*Keck, Mahin & Cate*, by: *Robert Y. Hirasuna* and *Jeffrey L. Dangeau*, for petitioner Arkansas Western Gas Company.

*Steve Clark*, Att'y Gen., by: *Paul Cherry*, Asst. Att'y Gen., for petitioner Consumer Utility Rate Advocacy Division.

*Preston, Thorgrimson, Ellis & Holman*, by: *Carol S. Arnold*; and *Rose Law Firm, A Professional Association*, by: *Herbert C. Rule III*, for respondent TXO Production Corp.

PER CURIAM. On February 6, 1989, we granted review of the decision of the Arkansas Court of Appeals in which it was held that the Arkansas Public Service Commission could not regulate a pipeline from a TXO facility to Arkansas Charcoal Company except to the extent of requiring an environmental impact statement.

The Commission and Arkansas Western Gas Company have moved to stay the mandate of the court of appeals. TXO and Arkansas Charcoal Company oppose the motion for fear that staying the court of appeals mandate will reinstate cease and desist orders issued by the Commission which were the subject of the appeal to the court of appeals. They suggest that if the court of appeals mandate is stayed, the only way to retain the status quo is

to stay the cease and desist orders of the Commission as well.

The Commission and Arkansas Western Gas Company have responded that they have no objection to staying the Commission's orders.

The court of appeals mandate in this case is stayed as are the orders of the Commission.

Paul Edward JULIAN *v.* STATE of Arkansas

89-11 767 S.W.2d 300

Supreme Court of Arkansas
Opinion delivered March 27, 1989

*Maxie G. Kizer*, for appellant.

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

DAVID NEWBERN, Justice. This is an appeal of a burglary conviction. Paul Edward Julian, the appellant, contends he should not have been convicted of burglary because the building

he was charged with entering for the purpose of committing theft was not an "occupiable structure" as defined by Ark. Code Ann. § 5-39-201(a) (1987). We find that the structure, which was a twelve by fifty-five foot "trailer" or mobile home was an occupiable structure, and thus the conviction is affirmed.

Julian and two others were found by the owner of the trailer, Johnny Davis, in the process of removing items such as door knobs, brass water faucets, and bathroom faucets from the trailer. The trailer was one of a number of trailers located together. The other trailers were rented by Davis to tenants as dwellings. The one in which Davis found Julian was not and had not previously been rented but was used as place for storage of items used by Davis in his business, such as aluminum window frames and door knobs. Davis testified that he had never set the trailer up for occupancy by attaching utilities, although it contained a bathroom, kitchen, and bedroom.

Section 5-39-201(a) provides: "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." Ark. Code Ann. § 5-39-101 (1987) gives three definitions of "occupiable structure" as a vehicle, building, or other structure:

> (A) Where any person lives or carries on a business or other calling; or
>
> (B) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
>
> (C) Which is customarily used for overnight accommodation of persons whether or not a person is actually present. Each unit of an occupiable structure divided into separately occupied units is itself an occupiable structure.

The appellant cites no cases or other authority helpful in interpreting the statute. His sole argument is that the state proved only that Julian was guilty of the lesser included offense of breaking or entering, as that offense is defined in Ark. Code Ann. § 5-9-202 (1987), and thus should have been given a lesser sentence. His contention is that the trailer was a building which was not occupiable. We disagree and hold the trailer fell within

the definition found in § 5-39-101(C).

Among the definitions of the word "customary" in Webster's Third International Dictionary (Unabridged, 1968) is the following: "commonly practiced, used or observed." We have no doubt that it is a common practice for persons to be in mobile homes overnight.

In *Barksdale* v. *State*, 262 Ark. 271, 555 S.W.2d 948 (1977), it was contended that breaking into the Baptist Student Union at the University of Arkansas at Pine Bluff at night when no one was present was not burglary because it was not an occupiable structure at the time the entry occurred. We held the structure was occupiable and wrote:

> Under the statutory definition of 'occupiable structure,' whether anyone is physically occupying the structure is irrelevant. The determinative factor is the nature of the premise, that is, not whether it was *occupied* at the time of the crime, but rather whether it was *occupiable* [emphasis in original, 262 Ark. at 274, 555 S.W.2d at 950].

Just as the definition of "occupiable" does not depend on the presence of a person in a building, it does not depend on whether it is being used for some other purpose as long as "the nature of the premise" is that it is "occupiable." A mobile home or trailer of the sort described in the testimony here is a premise the nature of which is occupiable.

The obvious reason for the distinction between our burglary and breaking and entering statutes is the intent of the general assembly to punish burglary more severely because it involves entering a place where people, as opposed to mere property, are likely to be. *Barksdale* v. *State*, *supra*. The appearance of the trailer in question was apparently distinguishable from that of the other trailers rented as dwellings only by the fact that it was numbered "8." The building was thus one in which a person planning to enter could have anticipated finding a person or persons, absent any evidence that the trailer was uninhabitable, and thus entering it could have endangered human life or health. It was the sort of building to which the burglary statute was intended to apply.

Affirmed.

GLAZE, J., concurs.

PURTLE, J., dissents.

TOM GLAZE, Justice, concurring. I concur. As noted in the majority opinion, Ark. Code Ann. § 5-39-201(a) (1987) provides that 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. Ark. Code Ann. § 5-39-101(1)(A) (1987) defines "occupiable structure" as a building or structure where any person lives or *carries on a business* or other calling.

In *Barksdale* v. *State*, 262 Ark. 271, 555 S.W.2d 948 (1977), this court explained the term "occupiable structure" by saying that whether anyone is physically occupying the structure is irrelevant; the determinative factor is the nature of the premises, that is, not whether it was occupied at the time of the crime, but rather, whether it was occupiable. In the present case, the issue is whether Mr. Davis used the trailer—which appellant unlawfully entered to commit theft—to carry on his business. Clearly, the answer is yes. The appellant and others broke into the trailer which was owned by Davis and used by him as a storage facility for his business. Davis testified that he operated a business as a maintenance person for the Federal Home Administration and that he stored windows, doorknobs and other things in the trailer as a part of his business. The fact that Davis was not inside the trailer at the time the appellant and others actually entered it is of no relevance.

For the foregoing reasons, I would affirm the trial court.

JOHN I. PURTLE, Justice, dissenting. The majority opinion is nothing less than judicial legislation. The crimes of burglary and breaking or entering have previously been clearly established by the General Assembly and may be found at Ark. Code Ann. §§ 5-39-201(a) and 5-39-202(a) (1987). These two laws, as written, are perfectly compatible and fairly easy to understand, or were until today.

Burglary is defined as occurring when "a person enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment." On the other hand, "a person commits the

offense of breaking or entering if for the purpose of committing a theft or felony he enters or breaks into any building, structure, vehicle, vault, safe . . . ." Obviously a "structure" as mentioned in the burglary statute includes a mobile home if it is occupiable. At the same time it is obvious that the breaking or entering statute applies to a mobile home if it is not occupiable. The distinction between breaking and entering and burglary is determined by the facts of each case.

At common law and under our earlier statutory law, the offense of burglary was designed to prohibit the invasion of premises under circumstances likely to inspire terror or constitute a physical threat to the safety of other persons. Historically the offense of burglary consisted of *breaking* into or *entering*, at *nighttime*, the *dwelling* of *another*, with the *intent to commit a felony*. The earlier statutory laws defining burglary required a breaking or entering of a *dwelling*. Burglary laws are designed primarily to protect people and secondarily to protect property. Breaking or entering laws have always been directed at crimes against property.

This court considered what acts were necessary to constitute burglary under the present law in *Barksdale* v. *State*, 262 Ark. 271, 555 S.W.2d 948 (1977). At that time burglary was defined in Ark. Stat. Ann. § 41-2002 (Repl. 1977). There has been no change in the law since *Barksdale* was decided. The opinion stated:

> Under the statutory definition of 'occupiable structure,' whether anyone is physically occupying the structure is irrelevant. The determinative factor is the nature of the premise[s], that is, not whether it was *occupied* at the time of the crime, but rather whether it was *occupiable*. The fact the building was used for social activities, religious sessions, and classroom meetings clearly demonstrated that the building was an "occupiable structure." Thus there was no issue on this point to go to the jury. [Emphasis in original.]

The foregoing quotation is a common and ordinary interpretation of the phrase "occupiable structure." Certainly a mobile home used as a residence and having a room for storage would be an occupiable structure. Even a storage unit with a portion of it

occupiable would still meet the definition of occupiable structure. However, a building used exclusively for storage is clearly not an occupiable structure within the meaning of this provision of the code. The facts related in the majority opinion clearly establish that this structure was not an occupiable one.

According to the express words of the present code an "occupiable structure" means a vehicle, building, or other structure where any person lives or carries on a business or where people assemble for some purpose or which is customarily used for the overnight accommodation of persons. The acts ascribed to the appellant in the present case simply did not occur in an occupiable structure. It would be painful indeed to see this court caught up in the hysteria of anti-crime paranoia by dividing every criminal act into as many offenses as possible and to mete out the utmost punishment under each element of the offense. I would much prefer that this body stand back and evaluate the law and the facts as each case comes before it.

We ought not to blindly accept the assertion by the state that this is an occupiable structure simply because the state said it was in the information. Sometimes the state argues merely to fulfill its "presumed" obligation. Just because the state says something is so does not make it so. It should be the goal of the state to imprison the guilty and free the innocent. No one pretends that only the guilty are charged. Sometimes the innocent suffer as a result of our criminal justice system. One of our goals should be to eliminate such instances of injustice. However, in doing so we should be careful not to create more. I cannot condemn the appellant for not offering some authority on his behalf. Obviously, the reason no authority was cited is that we have not heretofore reached the outer fringes of statutory and common law construction. Under these circumstances there is no precedent to quote. Now, alas, there will be.

Since both statutes make it an offense to break into a structure it is obvious that only one statute is needed if we are going to allow the word "structure" to be used as the state sees fit. Fair minded men can only conclude that the statute as it exists today requires that for a person to commit the offense of burglary, there must be an entry into an "occupiable structure" with the purpose of committing a crime punishable by imprisonment. This

phrase by its own terms clearly means a place where people sometimes assemble or where people reside. By no stretch of the imagination can it be said that the structure in this case was an occupiable one, if we give the word its plain meaning. There is no evidence that anyone other than the owner ever visited this property, except for the thieves. The majority opinion in effect gives the prosecuting attorney his choice of charging a person with burglary or breaking or entering. I do not believe it was the intent of the legislature to confer such power upon the state's agent. If, however, it can be said that this was the intent of the legislature, then I am of the opinion that such unbridled discretion is violative of the United States Constitution.

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

89-27 766 S.W.2d 935

Supreme Court of Arkansas
Opinion delivered March 27, 1989

*Dodds, Kidd, Ryan & Moore*, by: *Greg Alagood*, for appellant.

*Wallace, Hamner & Arnold*, for appellee.

DAVID NEWBERN, Justice. This is the second appeal in a

divorce case. By our earlier decision we remanded the case because the property of the parties had been divided unequally without the chancellor having stated reasons as required by Ark. Code Ann. § 9-12-315(a)(1)(B) (Supp. 1987). We also reversed an alimony award to the former wife, S.L. Harvey, of $1000 per month because we could not tell whether the alimony award was related to the unequal property distribution, and we intended to give the chancellor flexibility in refashioning the decree if necessary. *Harvey* v. *Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988).

After our decision was rendered, S.L. Harvey filed a motion for alimony. A hearing was held on August 9, 1988, resulting in an order reinstituting the original decree, including the $1000 per month alimony. The order recited that the original decree had divided marital property unequally and that the alimony award was intended to compensate S.L. Harvey for the disparity. The order also recited the reasons for the unequal property distribution.

At the hearing counsel for V.E. Harvey moved orally for a reduction in the amount of alimony because he was unable to pay. The chancellor refused to hear V.E. Harvey's evidence because the motion had not been made in writing and because she and opposing counsel were not prepared to go into the issue of changed circumstances or V.E. Harvey's current ability to pay. The chancellor noted that she had set aside time for a further hearing in October, 1988, at which counsel could present evidence on that issue.

V.E. Harvey argues now that the chancellor abused her discretion in reinstituting the $1000 per month alimony award without taking evidence on the elements we said should be considered in *Sutton* v. *Sutton*, 266 Ark. 451, 587 S.W.2d 67 (1979). While it is true the chancellor took no evidence at the August 9, 1988, hearing, she based the reinstitution of the original decree, with the appropriate explanation of the unequal property distribution, upon evidence taken at the previous hearings in the case. In support of his argument that he is unable to pay alimony, V.E. Harvey recites some of the evidence from the earlier hearings. Much of the evidence recited came from his own testimony which the chancellor clearly said she did not believe.

V.E. Harvey does not argue that the original decree was improper because an indefinite alimony award should not be used to equalize property distribution, and we do not reach that issue. His only arguments are that the record shows his inability to pay and the chancellor reinstituted her decree without hearing further evidence. His additional evidence could have been presented at the scheduled hearing, but he chose to appeal instead. We find no fault in the reinstitution of the original decree, as corrected, and no error in refusing to take evidence immediately on Mr. Harvey's oral motion.

Affirmed.

Donald COUSINS, Father and Next Friend of Tracy Cousins, A Minor, and Donald Cousins, Individually *v.* L. D. DENNIS, Terrance Mitchell, Huntsville School District #1, Jointly and Severally

88-297 767 S.W.2d 296

Supreme Court of Arkansas
Opinion delivered March 27, 1989

*Odom, Elliott & Martin*, by: *Don R. Elliott, Jr.; Bill E. Bracey, Jr.*, for appellant.

*W Q Hall*, for appellee.

TOM GLAZE, Justice. This appeal involves a tort case which requires this court's interpretation of several statutes that bear on (1) whether the appellees are immune from liability under the concept of governmental immunity and (2) whether the appellee Huntsville School District #1 was required to insure the vehicle that caused the injury sustained by one of the district's students, appellant Tracy Cousins. The trial court, holding appellees were immune from tort liability and were not required to insure the vehicle in question, granted the appellees' motion for summary judgment and dismissed the appellants' suit.[1] We affirm.

On April 11, 1984, Tracy was attending school and walking to the coach's office when he was struck in the left eye by a rock which was thrown by a bush hog mower being pulled by a tractor. Appellee L. D. Dennis was operating the tractor at the time and was mowing grass on the school premises under the direction of the school maintenance supervisor, appellee Terrance Mitchell. Donald Cousins filed suit, on behalf of his son and individually, against Dennis, Mitchell and the school district alleging, among other things, that the appellees' negligence caused Tracy's injury

[1] A related case was previously before us and was dismissed pursuant to ARCP 54(b). *Cousins* v. *Farm Bureau Mut. Ins. Co.*, 296 Ark. 552, 758 S.W.2d 707 (1988).

that blinded him in his left eye.

Cousins first challenges the trial court's decision that appellees were immune from suit under Ark. Code Ann. § 19-10-305 (1987), a statute that immunizes state officers and employees from civil liability for certain acts and omissions occurring within the scope of their employment. Cousins is correct that § 19-10-305 is inapplicable to the facts here. However, since a school district and its employees are involved, not state employees, we still affirm the trial court's holding because the court's decision is supported by Ark. Code Ann. § 21-9-301 (1987), which provides as follows:

> It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, *school districts*, special improvement districts, and all other political subdivisions of the state *shall be immune from liability for damages. No tort action shall lie against any such political subdivision because of the acts of their agents and employees.* (Emphasis added.)

In considering § 21-9-301 in *Matthews* v. *Martin*, 280 Ark. 345, 658 S.W.2d 374 (1983), we held that the immunity granted to the political subdivisions named in the statute extends to the officials and employees of that governmental entity. Because Dennis and Mitchell were performing their official duties for the school district at the time of their alleged acts of negligence, they and the school district are immune from any such tort liability under § 21-9-301. *Id.* at 346, 658 S.W.2d at 375.

Although the school district is immune from tort liability under § 21-9-301, we must still consider whether the district was required, pursuant to Ark. Code Ann. § 21-9-303 (Supp. 1987), to insure the vehicle that was involved in Tracy Cousins's injury. When a political subdivision named under § 21-9-303 fails to carry motor vehicle liability insurance, it becomes a self-insurer, if found liable, in an amount not to exceed the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act. *Thompson* v. *Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984).

Section 21-9-303 in relevant part provides as follows:

> (a) All political subdivisions shall carry liability

> insurance on their motor vehicles or shall become self-insurers, individually or collectively, for their vehicles, or both, in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 *et seq.*

Cousins argues that the tractor used by the appellees is a motor vehicle, and the school district was required to insure it. To support his argument, he cites Ark. Code Ann. § 27-19-206 (1987), which, in relevant part, defines motor vehicle to mean every vehicle which is self-propelled. Cousins further argues that, in the *Thompson* case, this court found the Dardanelle School District liable for negligence that resulted from its employee's use of a tractor on the highway when it struck a motorcycle driven by Sanford. The rationale in *Thompson*, Cousins submits, should apply here.

In *Thompson*, we never discussed or decided the issue of whether a tractor is a motor vehicle under § 21-9-303(a). Here, however, the school district's main argument is that the tractor owned and used by the school district is not a motor vehicle that is required to be insured under § 21-9-303(a). The Huntsville School District reasons that § 21-9-303(a) requires insurance on motor vehicles in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 *et seq.* By referring to § 27-19-101 *et seq.*, the General Assembly obviously intended that the insurance coverage required of political subdivisions under § 21-9-303(a) should be subject to all of the provisions of the Motor Vehicle Safety Responsibility Act. In this respect, Ark. Code Ann. §§ 27-19-605 and 27-19-713 (1987) provide the minimum amounts of liability insurance coverage for a security deposit or proof of further financial responsibility required under the Act. As we noted earlier, a school district becomes a self-insurer, if found liable, in an amount not to exceed those minimum amounts. *See Thompson*, 281 Ark. at 367, 663 S.W.2d at 934. The minimum liability insurance amounts required under these statutory provisions, subject to certain exceptions, apply to the driver and owner of *any vehicle of a type subject to registration under the motor vehicle laws of this state*, Ark. Code Ann. § 27-19-601 (1987), and to persons who have been convicted of or forfeited bail or who have failed to pay judgments upon causes of action arising out of ownership, maintenance, or use of *vehicles of a type subject to registration*

*under the laws of this state.* Ark. Code Ann. § 27-19-702 (1987).

Under Arkansas's motor vehicle registration laws, particularly Ark. Code Ann. § 27-14-703(3) (1987), an implement of husbandry is not required to be registered. Arkansas law defines implements of husbandry as being every vehicle designed and adapted exclusively for agricultural, horticultural, or livestock raising operations, or for lifting or carrying an implement of husbandry, and, in either case, not subject to registration if used upon the highways. Ark. Code Ann. § 27-14-212 (1987). In the case at hand, the motor vehicle in issue was a tractor pulling a bush hog mower. A tractor clearly falls within the definition of an implement of husbandry, and, as such, is not required to be registered under Arkansas law. Therefore, we agree with the Huntsville School District that it was not required to insure its tractor under § 19-10-303(a) because the vehicle is not required to be registered under Arkansas law.

In construing § 21-9-303(a), it is tempting to conclude that since the General Assembly failed to mention the vehicle registration statutes, those registration laws do not apply and, thus, a political subdivision should insure every motor vehicle it owns, registered or not. Such a construction would be erroneous for several reasons. One reason is that the language in § 21-9-303(a) specifically refers to the entire Motor Vehicle Responsibility Act, which, as we previously have discussed, relies, in turn, upon Arkansas's vehicle registration and licensing laws. Another, and more important reason, is if Arkansas's vehicle registration laws are not considered when construing § 21-9-303(a), absurd results would be reached. For example, if we limited the construction of § 21-9-303(a) to require political subdivisions to carry liability insurance on all motor vehicles meeting the definition found in § 27-19-206, a self-propelling riding lawn mower would qualify, thereby requiring the school district to include its mowers under liability coverage. This same rationale would include any self-propelled vehicle even though it is not designed or used primarily for transportation of persons or property. If we were to construe § 21-9-303(a) without considering all relevant provisions of Arkansas's vehicle registration laws and Motor Vehicle Responsibility Act, another absurdity would arise by requiring political subdivisions to acquire liability insurance coverage on vehicles, which no one else in the state would be required to

insure. We decline any interpretation of § 21-9-303(a) that would result in an absurdity or injustice. *Ragland* v. *Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391 (1985).

We believe the General Assembly, in requiring political subdivisions to purchase motor vehicle liability insurance, never intended non-registered vehicles to be covered. In passing § 21-9-303, the legislature undoubtedly was aware of how Arkansas's Motor Vehicle Responsibility Act and vehicle registration laws worked together in requiring security deposits and liability insurance coverage only on those vehicles which are subject to registration. In keeping with this view, we have held that in construing any statute, we should place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole. *City of Fort Smith* v. *Brewer*, 255 Ark. 813, 502 S.W.2d 643 (1973).

In sum, in applying Arkansas's registration laws, we find, as may reasonably be expected, that mowers and other vehicles not designed for transportation purposes are designated as special mobile equipment and exempted from registration. Ark. Code Ann. §§ 27-14-703(4) and 27-14-211 (1987). Thus, self-propelling mowers and other equipment not designed or intended for transportation purposes—being exempt from registration—are not required to comply with the security deposit or liability insurance provisions required under the Act. For the same reason, the Huntsville School District in the present case was not required to insure its tractor, because the vehicle is an implement of husbandry, which is specifically excluded from vehicle registration under § 27-14-703(3).

For the reasons stated above, we affirm.

Mark STONE *v.* STATE of Arkansas

CR 84-175 767 S.W.2d 299

Supreme Court of Arkansas
Opinion delivered March 27, 1989

*Appellant*, pro se.

No response.

PER CURIAM. The movant Mark Stone was found guilty by a jury of murder in the first degree and sentenced to forty years imprisonment in 1984. We affirmed. *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986). We also denied a petition for writ of error coram nobis which had been filed in the case after the appeal record was lodged. *Stone* v. *State*, 290 Ark. 203, 718 S.W.2d 108 (1986). Stone now requests pursuant to the Freedom of Information Act, 5 U.S.C. § 552, a copy of all files and documents held by the clerk of this court. He states that he will be unable to prepare a defense properly without the production of the documents.

The federal statute cited by Stone does not apply to this court. Even if we treat the motion as a motion for transcript pursuant to our post-conviction rule, Criminal Procedure Rule 37, however, there is no basis to grant the relief requested.

A petitioner is not entitled to a free copy of the trial

transcript on file with this court or any other document in possession of the clerk unless he demonstrates some reasonably compelling need for specific documentary evidence to support an allegation contained in a petition for postconviction relief. *See Austin* v. *State*, 287 Ark. 256, 697 S.W.2d 914 (1985); *see Chavez* v. *Sigler*, 438 F.2d 890 (8th Cir. 1971); *see also United States* v. *Losing*, 601 F.2d 351 (8th Cir. 1979). Indigency alone does not entitle a petitioner to a transcript at public expense. *Washington* v. *State*, 270 Ark. 840, 606 S.W.2d 365 (1980). As the petitioner here has cited no specific reason for requiring a copy of the trial transcript or other items on file here, his motion is denied.

It should be noted that when an appeal has been lodged in either this court or the Court of Appeals, the appeal transcript and other documents filed with this court remain permanently on file with the Clerk of the Supreme Court. Counsel may check a transcript out through the Clerk's office for a period of time, and persons who are not attorneys may review a transcript in the Clerk's office and photocopy all or portions of it. An incarcerated person desiring a photocopy of pages from a transcript or other documents on file with the clerk may write this court and request that the copy be mailed to the prison. All persons, including prisoners, must bear the cost of photocopying. *Austin* v. *State, supra.*

Motion denied.

Garry WILLIAMS *v.* STATE of Arkansas

CR 88-188 766 S.W.2d 931

Supreme Court of Arkansas
Opinion delivered March 27, 1989

*John Wesley Hall*, for petitioner.

*Steve Clark*, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for respondent.

PER CURIAM. The petitioner Garry Williams was convicted of rape, kidnapping, burglary, and two counts of second degree battery. He was sentenced to twenty years for rape and to five years for each of the other crimes, all to be served concurrently.

He appealed the rape conviction, arguing that there was insufficient evidence of rape. The Arkansas Court of Appeals affirmed without reaching the issue since the petitioner's attorney had failed to raise the sufficiency of the evidence at trial. *Williams* v. *State*, 24 Ark. App. 118, 748 S.W.2d 355 (1988). The petitioner now seeks permission to proceed in circuit court for post-conviction relief pursuant to Rule 37.

The petitioner claims that his attorney was ineffective for not making a motion for a directed verdict with respect to the rape charge and one of the battery charges. The evidence showed that the petitioner, who had at one time dated the victim, broke into the victim's apartment, carrying with him an ice pick, screwdrivers, and a stun gun. The victim woke with stabbing pains from the stun gun which felt like electric shocks. According to the petitioner's testimony, a voice told him to kill the victim, and he counted her ribs so that he could insert the ice pick exactly where the voice directed. When he placed the ice pick in the chosen point on the victim, the voice told him not to proceed. According to the victim, the petitioner inserted his fingers in her vagina during the attack. The attack left the victim with numerous abrasions, burns, and marks on her body.

The petitioner was convicted of rape in that he engaged in deviate sexual activity with the victim. *See* Ark. Code Ann. § 5-14-103 (1987) [Ark. Stat. Ann. § 41-1803 (Repl. 1977)]. He was also convicted of the second degree battery of the victim in that he caused physical injury to her by means of a deadly weapon. *See* Ark. Code Ann. § 5-13-202(a)(2) (1987) [Ark. Stat. Ann. § 41-1602(1)(b) (Repl. 1977)]. The other conviction for battery arose out of injury the petitioner inflicted on the victim's eight-month-old son.

The petitioner argues that although there was evidence that he inserted his fingers into the victim's vagina, there was no evidence that he did so for sexual gratification as required by the statutory definition of deviate sexual activity. Ark. Code Ann. § 5-14-101(1)(B) (1987) [Ark. Stat. Ann. § 41-1801(1)(b) (Repl. 1977)] states: " 'Deviate sexual activity' means any act of sexual gratification involving: . . . (B) The penetration, however slight, of the vagina or anus of one person by any body member or foreign instrument manipulated by another person." The petitioner also

claims that he assaulted the victim with a stun gun and that there was no evidence that a stun gun is a deadly weapon as required by the second degree battery statute.

The petitioner's arguments are attacks on the sufficiency of the evidence and are not cognizable under Rule 37 because they are direct, rather than collateral, challenges to the conviction which should be made at trial and on direct appeal. *McCroskey* v. *State*, 278 Ark. 156, 644 S.W.2d 271 (1983). Nor may a petitioner circumvent this rule by alleging that his counsel was ineffective for failing to raise the sufficiency of the evidence. *Guy* v. *State*, 282 Ark. 424, 668 S.W.2d 952 (1984). Rule 37 is a narrow remedy designed to prevent wrongful incarceration under a sentence so flawed as to be void. *Long* v. *State*, 294 Ark. 362, 742 S.W.2d 942 (1988). The dissent would have us ignore the rule in order to answer a collateral attack to correct what it perceives to be a "catch 22." That view misconstrues the scope of the remedy since Rule 37 does not provide such an option.

The only instance in which we would consider the sufficiency of the evidence within the purview of Rule 37 is when there is absolutely no evidence whatsoever to support the conviction; in such a case the conviction would be void. When we review a conviction on appeal, it is in a light most favorable to the appellee, and we affirm if there is substantial evidence. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982). Substantial evidence means that the jury could have reached its conclusion without having to resort to speculation or conjecture. *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981). In a Rule 37 petition, however, if a petitioner alleges that there is no evidence, we consider whether the conviction is supported by any evidence, however slight, not whether the evidence is sufficient. *See Thompson* v. *Louisville*, 362 U.S. 199 (1960). Where there is no evidence whatsoever, a conviction could not stand because a conviction under such circumstances would violate due process. *See Gregory* v. *Chicago*, 394 U.S. 111 (1969). This "no evidence" rule protects an accused from a wholly arbitrary deprivation of liberty. *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

In the petitioner's case there is evidence to support both convictions. Although there is no direct evidence that the petitioner put his fingers in the victim's vagina for sexual

gratification, it may be assumed that the desire for sexual gratification was the plausible reason rather than out of revenge or out of anger as the petitioner suggests. The plain fact is that when persons, other than physicians or other persons for legitimate medical reasons, insert something in another person's vagina or anus, it is not necessary that the state provide direct proof that the act was done for sexual gratification. With respect to the second degree battery charge, the petitioner admitted holding an ice pick next to the victim's body and using a stun gun to shock her. The victim did not know what was being used to produce the pains and cuts on her body. The fact that the petitioner was carrying an ice pick, clearly a deadly weapon, and admittedly held it to the victim's body, is sufficient to find that the conviction for battery was supported by some evidence.

Petition denied.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The United States Constitution requires that an accused be convicted only upon evidence which goes beyond a reasonable doubt. The Constitution further requires that an accused be furnished effective assistance of counsel. In the present case the issue of the sufficiency of the evidence to support a conviction for rape was not brought to the attention of the trial court. It was the duty of defense counsel to have done so. The Court of Appeals did not reach the issue due to the defense attorney's failure to question the sufficiency before the trial court. In the present decision this court does not reach the issue—this time on the basis that there is no constitutional right to a post-conviction proceeding.

Even though the opinion pretends not to reach the issue of the sufficiency of the evidence, the majority points out in much detail the evidence to support the verdict without allowing petitioner to challenge the sufficiency of the evidence. What is the purpose of reciting the facts if we are not going to review them? It seems to me that the opinion is doing exactly what it states cannot be done in this case. The opinion states that "there is evidence to support both convictions." What do these words mean if they do not mean the evidence was sufficient to sustain the conviction? Likewise, the ineffective assistance claim is evaded by holding that it cannot be included in a claim challenging the sufficiency of

the evidence. A claim of ineffective assistance of counsel usually cannot be made until after trial. The vast majority of our Rule 37 petitions claim ineffective assistance of counsel.

The petitioner is consequently denied a hearing on the merits of either issue. We ought not to cover up the denial of a constitutional right under the guise that there is no constitutional right to a post-conviction proceeding. We should allow the petitioner to argue the ineffective assistance issue to the trial court pursuant to his Rule 37 petition as that is the normal procedure. After all, he has already been denied a direct appeal concerning the sufficiency of the evidence. This is a real "Catch 22." The opinion appears to have ruled on both issues without considering the merits of either.

Not one court—not the trial court, not the Court of Appeals, nor this court—has directly addressed the issue of whether petitioner's rape conviction was supported by evidence proving the state's case beyond a reasonable doubt. Not one court has reached the issue of ineffective assistance of counsel on its merits. I believe that the petitioner has been denied due process of law. I would grant the petition for Rule 37 relief and allow him to proceed in the trial court.

Mark Anthony PERKINS *v.* STATE of Arkansas

CR 88-190 767 S.W.2d 514

Supreme Court of Arkansas
Opinion delivered April 3, 1989

*Grant & Berry*, by: *Sandra T. Berry*, for appellant.

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

JACK HOLT, JR., Chief Justice. Appellant Mark Anthony Perkins was convicted on charges of burglary, aggravated robbery, rape, and two counts of theft. On appeal, Perkins argues that the evidence was insufficient to support the burglary and rape convictions and that the trial court erred in not granting a directed verdict on one of the theft charges as there was but one act of theft. We find the arguments to be without merit and affirm.

On the evening of May 6, 1988, Perkins was driving a truck and was accompanied by two men — James Hammond and Tyrone Jones. Hammond and Jones apparently came up with the idea to rob someone named Wochner. Hammond had done yard work for Ms. Wochner and knew she had money. The trio drove to a residence in Little Rock, and Perkins parked the truck while Hammond and Jones broke in through the front door of the home.

Perkins entered the residence only minutes after the others had broken in. He later told detectives of the Little Rock Police Department that the original plan had been to knock on the door, and he had no idea Hammond and Jones actually broke into the residence.

Ms. Wochner testified that she was awakened sometime after 11:30 p.m. on May 6 when she heard the sound of breaking glass. Thinking it was her niece, who shared the home but was not in, Ms. Wochner went to the living room and was confronted by Hammond who held a gun and told her that he would kill her if she did not give him her money. At the same time she heard voices coming from the kitchen.

Ms. Wochner gave Hammond the money she had in her purse and was told to turn around. She heard the individuals in the kitchen come into the room and was told to lie on the floor in the hallway. Some type of clothing from the niece's bedroom was placed over her head and throughout the remainder of the ordeal Ms. Wochner never again actually saw her attackers. She was able to identify only Hammond.

Perkins, Hammond, and Jones spent an hour or more in the home. Each took turns holding the handgun to prevent Ms. Wochner's escape while the others searched for valuables. The trio took money, jewelry, credit cards, television sets, lamps, a tape recorder, a camera, a typewriter, Ms. Wochner's car, and other items. Individually, both Ms. Wochner and her niece each suffered a loss of over $2,500.00 in money and personal property.

Ms. Wochner testified that while she was lying in the hallway she was repeatedly kicked, called names, stepped on, and hit with some object while her attackers demanded to know where she had more money. At one point, someone took the handgun and twisted it into Ms. Wochner's vagina. After that, the gun was placed between her buttocks several times. Nothing was said by the attackers, and Ms. Wochner was unable to identify the individual or individuals who raped her.

*Burglary — Sufficiency of the Evidence*

Perkins argues that there was insufficient evidence to support the burglary conviction and that the trial court should have granted his motion for a directed verdict. Perkins rests his

argument on the scenario in which he parked the truck while Hammond and Jones deviated from the plan to knock on the front door and instead broke into the house. From this, Perkins claims that he could only be convicted of burglary as an accomplice. Because he had no knowledge of the plan to break into the house, rather than gain admittance by knocking, Perkins contends he did not solicit, advise, encourage, or coerce another to commit burglary; or aid, agree to aid, or attempt to aid in planning or committing the offense. Ark. Code Ann. § 5-2-403 (1987). We find the evidence sufficient and resolve this issue without addressing the "accomplice" argument.

The offense of burglary is defined in Ark. Code Ann. § 5-39-201 (1987) as follows:

> A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of commiting therein any offense punishable by imprisonment.

Perkins admitted in his statement that the trio intended to rob Ms. Wochner. Perkins makes no argument that he did not actually enter the residence or that he did not subsequently commit aggravated robbery and theft. Nor does he argue that he had a lawful right to be in the house. As such, the jury was warranted in finding that Perkins entered or remained unlawfully in the occupiable structure of another with the purpose of committing therein an offense punishable by imprisonment.

*Rape — Sufficiency of the Evidence*

Perkins contends that the evidence was insufficient to support the rape conviction because there was no evidence he was the one who raped Ms. Wochner and there was no evidence of a common purpose or plan to rape her. Under these circumstances, Perkins claims he could not be convicted as a principal or as an accomplice. We conclude that there was sufficient evidence to support the jury's verdict.

In cases involving charges of rape or deviate sexual conduct, even where the victim is unable to personally identify the defendant as the one who committed the offense, the issue of the defendant's guilt may go to the jury based on circumstantial evidence alone. That evidence may serve as the basis upon which

to support a conviction provided the evidence is substantial in nature. *Smith* v. *State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

On this issue, Ms. Wochner's testimony was as follows:

> Well, they started ransacking the house and every time they walked past me somebody took a sap and hit me in the side of my head up along my head. And they did that numerous times . . . They kept plundering and demanding money and wanting to know where the money was and I told them that was all the money I had. They went through the bank records and stole, took the bank cards and told me how much money I had in the bank and they knew I had more money in the house and when I said that I didn't they took the gun . . . I was still in the hallway face down. And he took the gun and he slid it between the labia to the vagina and twisted it in and held it there. And then cocked the pistol. And several times after that they slid the gun between the buttocks and would hold it there. And then one of them made me get up and go into the front bedroom and shoved me across the foot of the bed . . . .

The foregoing testimony clearly establishes the commission of rape as set forth in Ark. Code Ann. §§ 5-14-101(1)(B) and 5-14-103(a)(1)(1987).

The issue becomes whether there is sufficient evidence to link Perkins to the conduct described by Ms. Wochner. In his statement to detectives, Perkins admitted that he was with Hammond and Jones when Ms. Wochner was moved from the hallway to the bedroom. The evidence indicates this took place immediately after the rape incident in the hall. The statements by Perkins were corroborated by Hammond who testified for the State that Perkins was with them when they moved Ms. Wochner to the bedroom and that Perkins was actually the one who moved her. Also, while they were still in the hallway, it was Perkins who was "hitting the lady in the head with his, with something wrapped around it, it was a cloth . . . Hitting her in the head asking for more money." Hammond further testified that Perkins, like the others, took turns holding the gun in order to keep Ms. Wochner in the hallway.

While circumstantial, the foregoing testimony is substantial

and supports the verdict. Perkins was in the hall just before Ms. Wochner was moved, which is when the rape took place. More particularly, the evidence indicates Perkins was the one hitting Ms. Wochner and demanding to know where more money was kept. From Ms. Wochner's testimony it is evident that she was raped with the handgun just after she responded that she had no more money.

*Directed Verdict — Theft*

The argument under this heading is that double jeopardy precludes conviction on more than one count of theft; namely, despite the fact that property belonging to two individuals was taken from the home of Ms. Wochner, there was but one act of theft. We disagree.

A case somewhat related to this one is *Watson* v. *State*, 295 Ark. 616, 752 S.W.2d 240 (1988), which involved convictions on three counts of theft by receiving. We found that the act of receiving stolen property was a single act set on foot by a single impulse and operated by an unintermittent force. The result was that only one conviction for theft by receiving could lie.

*Watson* was based upon Ark. Code Ann. § 5-1-110(a)(5) (1987) which precludes conviction of more than one offense when the same conduct of a defendant may establish the commission of more than one offense, provided the conduct constitutes an offense defined as a continuing course of conduct. In *Smith* v. *State*, 296 Ark. 451, 757 S.W.2d 554 (1988), we said that for § 5-1-110(a)(5) to apply, the conduct itself *must be* defined as a continuing course of conduct crime. Examples are found in *Smith, supra*, and in *Britt* v. *State*, 261 Ark. 488, 549 S.W.2d 84 (1977). While Perkins concedes that theft is not a continuing course of conduct offense, and therefore section 5-1-110(a)(5) does not apply, we find our language in *Watson* useful in disposing of Perkins' claim that there was but one act of theft.

The case before us simply does not involve "a single act set on foot by a single impulse and operated by an unintermittent force." Whereas the initial intent may have been to rob Ms. Wochner, the evidence shows that the intent subsequently shifted to the niece's property. Where "successive impulses are separately given, even though all unite in swelling a common stream of action, separate

charges lie." *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980). *See also, Tarry* v. *State*, 289 Ark. 193, 710 S.W.2d 202 (1986). A review of the abstracted record convinces us that successive impulses were separately given — first as to the theft of Ms. Wochner's property and, second, as to the niece's property.

Perkins, Hammond, and Jones intended to rob Ms. Wochner. This intent was carried out, and the theft of Ms. Wochner's property was accomplished. Ms. Wochner's testimony then demonstrates (after she had been thrown onto her niece's bed):

> The voice in the bedroom asked me *if my niece's jewelry* was diamonds. And I told him no, they were cubic zirconiums. *She liked flashy jewelry.* [Emphasis ours.]

Later, Ms. Wochner again testified concerning the theft of property belonging to her niece:

> The other credit cards I found spread on the floor where they had probably dropped them. *They kept insisting I give them the access number for my niece's bank card.* And each time I refused. This one beat me in the head again. My ear turned purple and my eye turned black and my head was black and blue for a week or ten days. [Emphasis ours.]

We have no doubt that two separate impulses are shown. The first was to commit the theft of property belonging to Ms. Wochner. The second came later and involved the separate intent to commit theft of property belonging to the niece. As such, the convictions on separate counts of theft were proper.

Perkins also cites language from our decision in *Holder* v. *Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949), where we said,

> If a thief simultaneously steals two objects, the State may charge him with the theft of one, and under that indictment he cannot be convicted of stealing the other. A plea of double jeopardy would nevertheless bar a second trial for larceny; for there is only one offense, which the State cannot subdivide by making separate accusations.

However, in *Miller* v. *State*, 222 Ark. 476, 261 S.W.2d 411 (1953), we noted that our language in *Holder* went further:

"When the crimes involve the element of intent we see no difficulty in finding two offenses in one act."

Affirmed.

James MAXWELL *v.* STATE of Arkansas

CR 88-75 767 S.W.2d 303

Supreme Court of Arkansas
Opinion delivered April 3, 1989

*Marc Aaron Kline*, for appellant.

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

STEELE HAYS, Justice. This appeal from the denial of a Rule 37 petition raises the question whether the petition was timely under A.R.Cr.P. 37.2(c) which requires filing within three years, unless the grounds for relief would render the conviction absolutely void.

Appellant James Maxwell was charged with capital felony murder and on February 21, 1980, he pled guilty to a reduced charge of first degree murder, receiving a sentence of life imprisonment.

On October 26, 1987, appellant filed a Rule 37 petition claiming his guilty plea was involuntary. On November 3, 1987, the trial court issued an order acknowledging the petition and finding it was beyond the time allowed under Rule 37.2(c). The order stated that, "Without considering the issues, the appellant is given 30 days to supplement his petition to show justification or an explanation for the delay." On November 13, 1987, appellant filed a supplemental petition containing allegations that his conviction was void.

A hearing on the Rule 37 petition was held on February 29, 1988. At the beginning of the hearing the circuit judge again

noted that the petition was untimely. He further noted that there was no practical way to separate the evidence going to the merits of appellant's claims and the evidence going to show that the conviction was void, the latter proof allowing an otherwise untimely petition. That being so, the trial court allowed appellant to present all his evidence together. After the evidentiary hearing the court denied the petition, reaching the merits of appellant's claims and specifically denying the petition on that basis.

We affirm the trial court, but we find the petition should have been denied not on the basis of the merits, but rather for the untimeliness of the petition, as none of appellant's claims would have rendered his conviction void.

While timeliness was not raised below the state now contends it may be raised for the first time on appeal because the time limits imposed by Rule 37.2(c) are jurisdictional. Though we have not addressed this point before, we agree with the state's position.

A.R.Cr.P. 37.2(c) provides:

> A petition claiming relief under this rule must be filed in circuit court, or, if prior permission to proceed is necessary as indicated in paragraph (a) [a case originally appealed to this court], in the Supreme Court, within three (3) years of the date of commitment, *unless the ground for relief would render the judgment absolutely void.*

Jurisdiction is the power and authority of the court to act, *Mark Twain Life Ins. Corp.* v. *Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984), and to hear a case on its merits, 20 Am. Jur. 2d, *Courts* § 88 (1965). Here, Rule 37.2(c) clearly limits the court's power when cases are filed after three years to act on and hear the merits of only those cases where the conviction would be rendered absolutely void, and we have consistently so held. *York* v. *State*, 295 Ark. 163, 747 S.W.2d 102 (1988); *Hedrick* v. *State*, 292 Ark. 411, 730 S.W.2d 488 (1987); *Williams* v. *State*, 293 Ark. 73, 732 S.W.2d 456 (1987); *Ellis* v. *State*, 291 Ark. 72, 722 S.W.2d 575 (1987); *Sanders* v. *State*, 291 Ark. 200, 723 S.W.2d 370 (1987); *Craft* v. *State*, 289 Ark. 466, 712 S.W.2d 303 (1986); *Locklear* v. *State*, 290 Ark. 70, 716 S.W.2d 766 (1986); *Henry* v. *State*, 288 Ark. 592, 708 S.W.2d 88 (1986); *Travis* v. *State*, 286

Ark. 26, 688 S.W.2d 935 (1985); *Bramlett* v. *State*, 284 Ark. 114, 679 S.W.2d 209 (1984). There are strong policy reasons supporting limitations on the trial court's authority to act. As we stated in *Travis, supra*:

> At some point we are entitled to presume that the convicted defendant has exhausted his state remedies and stands fairly and finally convicted. (cite omitted). The need for stability of judgments in criminal cases requires that the petitioner raise whatever issues he may desire to raise within the reasonable time set by our procedural rules.

Those same reasons were cited in *United States* v. *Robinson*, 361 U.S. 220 (1959), in holding the time limits on post-trial remedies to be jurisdictional. We believe the language of Rule 37.2(c) and the policy reasons behind it are sufficient to hold that the time limits of the rule are jurisdictional in nature.

We note that at the beginning of appellant's testimony, the trial court inquired as to the reason for the inordinate delay in bringing the petition. Appellant responded he had only recently learned of the existence of Rule 37 relief, and that, he had no reason to complain about a promise of a parole in seven years until the seven years had passed.

The trial court accepted the reasons given as "entirely reasonable." At the conclusion of the hearing the trial judge repeated his position on the timeliness issue, finding there was reason for delay in the submission of the petition, but finding the claims lacking on their merits. Needless to say, appellant's explanations for an untimely petition were not sufficient to void his conviction. Contrary to the comments of the trial court, the standard for allowing a late petition is not the "reasonableness" of the delay, but whether the alleged grounds are sufficient to render the conviction *absolutely void*.

We emphasize that a court always has the power and duty to examine the evidence and determine whether in fact it does have jurisdiction over the matter. *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980); *Arkansas Savings & Loan Ass'n* v. *Corning Savings & Loan Ass'n*, 252 Ark. 264, 478 S.W.2d 431 (1972). That being so, a petition once tendered should be filed even though untimely so that the court may exercise the power

and duty to determine whether jurisdiction exists. Also, as recognized by the trial court in this case, often in a Rule 37 hearing evidence offered on the merits will be intertwined with evidence on the issue of voidness, making severance of those two issues difficult if not impossible. Even so, once it is determined that jurisdiction does not exist, the disposition of the case must be made on that basis. So, in the case at bar, having heard the evidence, the trial court should have determined that none of the contentions rendered appellant's conviction absolutely void and dismissed the petition accordingly.

Turning to the specific contentions, appellant claimed ineffective assistance of counsel, comprising four separate allegations. Appellant first claimed that he was misled into believing he was facing the death penalty. We have specifically found this charge insufficient to void a conviction. *Travis* v. *State, supra.* Appellant claimed he had abandoned a meritorious suppression motion because of the misleading advice about the death penalty, that his attorney was simultaneously representing interests adverse to him, and that he was promised parole in seven years. None of these claims have merit. We reiterated the point in *Travis, supra*, that the grounds must be so basic as to make the judgment of conviction a complete nullity, and that issues not sufficient to void the conviction are waived, even if of constitutional dimensions. Appellant's allegations are not so basic as to render the judgment a nullity. See also, *Locklear* v. *State*, 290 Ark. 70, 716 S.W.2d 766 (1986); *Williams* v. *State*, 293 Ark. 73, 732 S.W.2d 456 (1987).

Appellant also maintains the trial court was biased, quoting several excerpts from the hearing which he insists support this conclusion. At no time, however, did appellant raise any objection to the comments he now complains of. Absent an objection below, an issue may not be raised on appeal. *Fretwell* v. *State*, 288 Ark. 91, 708 S.W.2d 630 (1986).

As appellant's claims were not sufficient to render his conviction absolutely void, his petition, coming well beyond the three-year limit of Rule 37.2(c), is untimely filed. While the trial court based its denial on the merits of the petition, we uphold the decision for a different reason. *Edgemon* v. *State*, 292 Ark. 465, 730 S.W.2d 898 (1987).

AFFIRMED.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. There was no appeal from the appellant's guilty plea of February 21, 1980. On October 26, 1987, he filed a Rule 37 petition asserting that his guilty plea was involuntary. The matter was properly filed in the trial court. On November 3, 1987, the trial court issued an acknowledgment of the petition and gave the appellant 30 days to amend his petition to show a cognizable cause in the trial court. The appellant then filed an amended petition.

The court subsequently conducted a hearing on both the petition and amended petition. He found that the original petition was untimely and that there was no evidence to support the allegation that the judgement was void.

I believe the court proceeded in the exact manner intended by Rule 37. Certainly the trial court has jurisdiction to determine whether a cause of action is stated in a Rule 37 petition. The trial court is also vested with jurisdiction to make a determination upon the allegations of voidness. In the present case the trial court acted exactly as it should have. The majority opinion acknowledges this when it states that "[w]e emphasize that a court always has the power and duty to examine the evidence and determine whether in fact it does have jurisdiction over the matter." Moreover, the majority opines that once an otherwise untimely petition is tendered, the trial court should exercise its power and determine whether jurisdiction exists.

The court initially determined that the petition was untimely. With the consent of the court, the petition was amended. Thereafter, upon a hearing, the court properly determined that the original petition was untimely and that the conviction was not absolutely void.

The trial court in this case proceeded in strict observance of Rule 37 and the law.

Dennis McCASLIN *v.* STATE of Arkansas

CR 88-167 767 S.W.2d 306

Supreme Court of Arkansas
Opinion delivered April 3, 1989

*Young & Finley*, by: *Dale W. Finley*, for appellant.

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

DAVID NEWBERN, Justice. At the trial in which the appellant, Dennis McCaslin, was convicted of delivery of marijuana, the defense was entrapment. The entrapment issue was submitted to and rejected by the jury. McCaslin's contention on appeal is that a verdict should have been directed in his favor because the court should have found he was entrapped as a matter of law. The issue is whether entrapment must be found as a matter of law when the testimony of the accused, showing entrapment, is not rebutted by evidence presented by the state. We hold the court was correct in refusing to direct a verdict because, despite the failure of the state to produce evidence bearing directly on the issue of entrapment, the question of the credibility of McCaslin's testimony remained for the jury to decide. The conviction is affirmed.

Ronnie Fleetwood testified he was at a bar in Morrilton when Norman Bryant asked Fleetwood to take him to Russellville. Fleetwood said he refused but suggested his nephew McCaslin could do it. McCaslin and Theresa Shepherd testified they were

sitting together in the bar and that Bryant approached them and asked McCaslin to take him to Russellville. When McCaslin asked "What for?", Bryant replied "Fifty dollars."

McCaslin testified he borrowed Fleetwood's truck, and when he and Bryant left for Russellville, Bryant obtained some marijuana from a place behind the bar. McCaslin testified that Bryant asked McCaslin to sell the marijuana to Kimberly Powell and tell her it belonged to Fleetwood because he, Bryant, owed Powell $200, and she would try to deduct it from the price if she knew it belonged to Bryant. McCaslin testified he agreed to make the sale after being asked several times.

Powell was an undercover Russellville police officer. Bryant was also being paid "expenses," including apartment rent and money for drinks and entertainment, by the state police to work with them in apprehending drug offenders. Bryant was also being paid a fee for each "transaction" he consummated for the police. In addition, Bryant was in trouble with the law over charges that he had shot a man in the same bar where he, McCaslin, Theresa, and Fleetwood testified this episode began.

The jury was shown a video tape of the meeting of Bryant, McCaslin, and Powell, at Powell's Russellville apartment, in which McCaslin sold Powell a quarter of a pound of marijuana for $650. She tried to get him to take less, but he said Fleetwood told him he had to have $650. At one point after the transaction, while Bryant was out of the room, the video showed McCaslin discussing marijuana prices with Powell. Although the audio portion of the recording is difficult to understand, it is clear enough that one can hear McCaslin explaining to Powell that someone had been buying from the same source as Fleetwood for less than Fleetwood was paying. At one point McCaslin stated Fleetwood kept his own books and he paid the source $24,000 last year. McCaslin then said, "He's trying to tell us he's giving $2800 a pound for it. I can figure maybe eighteen."

Bryant was subpoenaed as a witness by both the state and McCaslin. The state's subpoena was served, and Bryant was at the courthouse on the day of trial. However, when the prosecutor called him as a witness, he had fled and was unavailable to testify. McCaslin did not seek a continuance for the purpose of obtaining Bryant's testimony, thus the only evidence bearing on what

happened between McCaslin and Bryant as they drove from Morrilton to Russellville came from McCaslin's testimony.

In Arkansas, entrapment is an affirmative defense, Ark. Code Ann. § 5-2-209(a) (1987), upon which the defendant bears the burden of proof by a preponderance of the evidence. Ark. Code Ann. § 5-1-111(d) (1987). *See Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978). McCaslin has cited no case decided in this jurisdiction in which it was held that entrapment, or any affirmative defense, was established as a matter of law solely on the basis of the unrebutted testimony of the party asserting it. There is no requirement that his testimony be believed. In civil cases we hold that a party who bears the burden of proof is not entitled to a directed verdict because the jury need not necessarily believe his evidence. *James* v. *Bill C. Harris Construction Co.*, 297 Ark. 435, 763 S.W.2d 640 (1989). Also in civil cases, we have held that a directed verdict in favor of a party bearing the burden of proof may be proper, but only if the facts he must establish have been admitted by the other (adversary) party, leaving no question for a jury to decide. *Barger* v. *Farrell*, 289 Ark. 252, 711 S.W.2d 773 (1986). Absent evidence from the state confirming his entrapment story, McCaslin's credibility was for the jury to decide.

McCaslin has cited and quoted extensively from *Sorrells* v. *United States*, 287 U.S. 435 (1932), a landmark case on entrapment in which the Supreme Court discussed the nature of the defense and held that the petitioner had presented an issue of entrapment for the jury to decide. Also cited is *Sherman* v. *United States*, 356 U.S. 369 (1958), in which the Supreme Court concluded the petitioner had established entrapment as a matter of law on the basis of the testimony of the prosecution witnesses.

McCaslin also cites *Roundtree* v. *State*, 271 So. 2d 160 (Fla. App. 1973), and *State* v. *Sainz*, 84 N.M. 259, 501 P.2d 1247 (1972), as cases in which it was held there was entrapment as a matter of law. In the *Roundtree* case there was testimony by an undercover deputy sheriff showing that the deputy induced the drug sale with which Roundtree was charged. In the *Sainz* case the court recited facts without attribution to testimony, so we cannot tell how the entrapment was shown.

Two Mississippi cases in which it was held that entrapment

had been established as a matter of law are, on their facts, remarkably similar to the case before us now. In *Jones* v. *State*, 285 So. 2d 152 (Miss. 1973), the defendant testified an informant asked him to make the sale of marijuana because the informant owed the buyer money and thus would expect to get the marijuana as repayment of the debt. The Mississipi Supreme Court noted that entrapment is an affirmative defense but concluded it was established, apparently solely on the defendant's unrebutted testimony. The decision was followed by *Sylar* v. *State*, 340 So. 2d 10 (Miss. 1976), where the court noted that the exchange of government marijuana for government money is not even a sale. In *Torrence* v. *State*, 380 So. 2d 248 (Miss. 1980), the other case factually similar to the one before us now, the defendant testified that the informant told him she needed to sell marijuana but could not make the sale personally because she owed the buyer money. Absent government rebuttal testimony it was again held that entrapment was established.

These Mississippi cases offer no discussion of the burden of proof issue and do not explain why the credibility of the defendant was not an issue for the jury. An explanation of a similar Arizona ruling is offered in *State* v. *McKinney*, 108 Ariz. 436, 501 P.2d 378 (1972). There, a defendant testified to facts showing entrapment. The state offered no rebuttal. The defendant had sought from the state the name of the informant who, he said, had set him up, and the court denied his motion seeking the information. The court also denied the defendant's motion for a continuance to obtain the presence of the informant at the trial. The Arizona Supreme Court pointed out that a defendant is in a weak position to establish entrapment. While it is an affirmative defense, once the defendant has raised it, the burden of proof shifts to the state, the court held.

The authority cited by the Arizona court for the shifting of the burden of proof is from federal court cases, primarily *United States* v. *Brown*, 421 F.2d 1283 (9th Cir. 1970). There the court of appeals affirmed the conviction but stated the federal standard according to which the government must prove lack of entrapment beyond a reasonable doubt if the defense has been raised. The *Brown* decision was based on *Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966), in which it was noted that the Supreme Court in the *Sorrells* and *Sherman* cases had not established the

nature of the burden of proof for federal entrapment cases and had not determined by which party it was to be borne.

Wherever the burden may lie in federal cases, as we noted at the outset of this opinion, it has been placed on the defendant by statute in Arkansas. Even if the matter had been discussed in the *Sorrells* and *Sherman* cases, those were not decisions on constitutional law. They only dealt with federal law and thus would not be binding on the states. *See Sylar* v. *State, supra.* We have no quarrel with the proposition that Bryant should have been present to testify about his role in the selling of the marijuana to Powell. McCaslin does not argue that here, and properly so, as he did not pursue it with the trial court. The only issue before us is whether McCaslin's testimony established entrapment as a matter of law. We hold it did not, and it was thus proper for the question to be submitted to the jury.

Affirmed.

PURTLE, J., dissents from this opinion.

HICKMAN and GLAZE, JJ., concur with this opinion.

TOM GLAZE, Justice, concurring. I certainly agree with the result reached by the majority, but the majority opinion confuses matters by citing and discussing cases from Mississippi, Arizona and United States Ninth Circuit Court of Appeals that are simply inapplicable. Arkansas law specifically provides that entrapment is an affirmative defense which the defendant must prove by a preponderance of the evidence. However, the defendant's burden does not arise until the state has met its burden of proof as to the elements of the offense with which he is charged. *Fairchild* v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984), *cert. denied*, 471 U.S. 1111 (1985); *Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

Here, the state undisputedly met its burden of proof. In fact, the appellant admitted his complicity in the sale and delivery of the marijuana to police officer Powell. Since only the appellant's testimony—that he had been entrapped—conflicted with the state's proof that he willingly committed the crime, the appellant failed to meet his burden of proving his affirmative defense. Arkansas law is well settled that a jury is not bound to believe the appellant's story. This court's decision should end at this point.

Since it does not, I remain hopeful that today's decision in no way suggests this court is entertaining the idea that the respective burdens of proof of the state and defendant in cases where the defense of entrapment is raised should be reanalyzed or reshuffled along the views expressed in the cases from other jurisdictions discussed in the majority opinion. If such a suggestion is intended, I am unequivocally against such an idea.

JOHN I. PURTLE, Justice, dissenting. We are called upon frequently to review cases involving allegations of entrapment by various law enforcement agencies. This case, like *White* v. *State*, 298 Ark. 163, 765 S.W.2d 949 (1989), and many others, was initiated by the police. Naturally, the scheme included an informant who has a criminal record and is facing another trip to the penitentiary, and an "undercover" law enforcement person — in this case a woman.

The informant in this case faced not just a sentence involving a shooting; he faced a sentence for shooting with intent to kill. His desire to obtain favorable action in his own criminal case no doubt weighed most heavily on his mind as he went about his designated job of setting people up for criminal charges. The fact that the informant's rent was paid by the police, as were his expenses such as travel, food, drinks, pool fees, and game machine costs, did not reduce his desire to trap the appellant. The informant was also paid $30 to $50 "by the sale" for each transaction for all those he could get to deal in marijuana. The state also paid the rent and expenses for the undercover officer and her live-in state police boyfriend.

In the present case only two people know what actually occurred when this deal was planned — the appellant and the informant. The informant, pursuant to a subpoena issued by the state, showed up at the commencement of the trial but mysteriously disappeared for the rest of the trial. This disappearing act, although not new, is becoming commonplace in this type of case. Had this witness been compelled to testify, it is not too inconceivable that the jury might have believed that indeed the appellant was entrapped. The defense counsel had caused a subpoena to be issued for the same witness but it was not served by the sheriff because he had already served the state's subpoena.

The jury was shown a video tape of the meeting of Bryant,

McCaslin, and Powell, at Powell's Russellville apartment, in which McCaslin sold Powell a quarter of a pound of marijuana for $650. All of this, of course, had been pre-planned by the officers and the informant. No doubt Bryant coached the appellant on what to do and say when they arrived at the undercover agent's apartment. If the appellant and the informant had rehearsed the transaction, the video could not have been more incriminating to the appellant's case. The missing witness was absolutely essential to the defense. The state offered no explanation for his mysterious disappearance, but I have no doubt whatsoever that the state could have produced him for trial.

In Arkansas, entrapment is by statute an affirmative defense, Ark. Code Ann. § 5-2-209(a) (1987). Consequently the tradition has been that the defendant must bear the burden of proof on this defense by a preponderance of the evidence. Ark. Code Ann. § 5-1-111(d) (1987); see *Walls* v. *State*, 280 Ark. 291, 658 S.W.2d 362 (1983); and *Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978). The majority correctly notes that McCaslin has cited no precedent from this jurisdiction in which it was held that entrapment was established as a matter of law solely on the basis of the unrebutted testimony of the defendant. However, I have found no Arkansas decision where this issue has been presented to an appellate court.

Ordinarily there is no requirement that the trier of fact believe a defendant's testimony. Thus, given the defendant's burden of proof on the issue of entrapment, this question of fact was submitted to and decided by the jury. However, it is significant that the state made no effort to offer any evidence to rebut the appellant's version of the facts.

McCaslin has cited and quoted extensively from *Sorrells* v. *United States*, 287 U.S. 435 (1932), and also has cited *Sherman* v. *United States*, 356 U.S. 369 (1958). These two decisions define the entrapment defense in the federal courts, but they are not binding on this court. The Supreme Court's discussion of the entrapment defense is, however, quite instructive.

The United States Supreme Court discussed the function of the entrapment defense in *Sherman* v. *United States,* supra:

> In *Sorrells* v. *United States*, 287 U.S. 435, this Court

> firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S. at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

The majority opinion discusses in some detail several Mississippi, Arizona, and Ninth Circuit Court of Appeals decisions that essentially shift the burden to the state once the defense has been raised. As noted by the Arizona Supreme Court in *State* v. *McKinney*, 108 Ariz. 436, 501 P.2d 378 (1972), a defendant is in a very poor position to establish entrapment. The question to be decided is whether we should do as the Mississippi and Arizona courts have done and hold that, by presenting a prima facie case of entrapment, a defendant has satisfied his burden of proof at that point and that the burden then shifts to the state to come forward with evidence that the defendant was not entrapped.

The nature of entrapment is such that it is often unlikely the act itself will be observed by anyone other than the defendant and the government operative. Moreover, I cannot help but note the pattern of "unavailability" of these "informants" to testify at trial. A defendant who asserts entrapment necessarily places himself in the posture of admitting commission of an illegal act. *Spears* v. *State*, supra; and *Brown* v. *State*, 248 Ark. 561, 453 S.W.2d 50 (1970). He thus is in a very weak position to convince a jury that he was indeed induced by the state to commit a crime.

The state cites *Walls* v. *State*, supra, and *Leeper* v. *State*, 264 Ark. 298, 571 S.W.2d 580 (1978), in support of its contention

that entrapment may be established as a matter of law only where there are no disputed facts. In *Leeper*, there was testimony by the undercover officers who participated in the illegal whisky purchase. The "informant" also testified. In *Walls*, the informant was not present to testify. However, an undercover state police officer testified that, while the alleged informer had "paved the way" for the drug sale, he was not, to the officer's knowledge, employed by or otherwise compensated by the state police. That left open the question whether, in the words of Ark. Code Ann. § 5-2-209(b) (1987), the alleged informant was "a person acting in cooperation with" a law enforcement officer. *Walls* is distinguishable from the present case because here there is no dispute concerning the fact that Bryant was acting in cooperation with the police.

There is absolutely no rebuttal by the state of McCaslin's testimony that Bryant supplied the marijuana and induced him to make the sale. The majority cites no case holding that the testimony of a defendant asserting entrapment may not establish the defense as a matter of law if the state has produced no rebuttal evidence. Nor have I found any such case. Since this question is one of first impression in this jurisdiction, we should strive to insure that this decision is founded upon solid principles of law and justice.

I conclude that we should follow the decisions from other jurisdictions holding that the burden of proving the defense may be satisfied by the testimony of the accused unless that testimony is rebutted by evidence produced by the state. Because an accused must in effect admit having committed what would otherwise be an offense in order to take advantage of the entrapment defense, it is of no consequence whether the state must prove lack of entrapment beyond a reasonable doubt. That is so because assertion of the defense of entrapment does not negate an element of the crime. See E. Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 Ark. L. Rev. 429 (1976). The overall burden of proof, or the "burden of persuasion" as Professor Osenbaugh calls it, remains with the defendant on the issue of entrapment. However, the state must go forward with the evidence when the defendant's evidence has presented a prima facie case on the issue. When the state is unable to produce any evidence to dispute that evidence, even if it consists only of the

testimony of the accused, a verdict should be directed.

The police in this case at the least actively participated in the crime; at worst the police actually were the major factor that precipitated this crime. Under such circumstances, it is not unreasonable to place upon the state the burden of establishing that the defendant was not entrapped. I would reverse and dismiss because, in my opinion, it was the police who planned and executed this crime. After all, the function of law enforcement does not include the manufacturing of criminal activity.

James E. ATCHISON *v.* STATE of Arkansas

CR 88-154 767 S.W.2d 312

Supreme Court of Arkansas
Opinion delivered April 3, 1989

*Sexton Law Firm, P.A.,* by: *John R. VanWinkle,* for appellant.

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

Gen., for appellee.

TOM GLAZE, Justice. This is an appeal from the trial court's denial of the appellant's pro se motion for reduction of sentence pursuant to Ark. Code Ann. § 16-90-111 (1987). The trial court treated the appellant's motion as a petition for post-conviction relief under A.R.Cr.P. Rule 37.1.[1] Appellant's sole argument on appeal is that the trial court's finding is clearly against the preponderance of the evidence. We disagree and therefore affirm.

Appellant was charged with four counts of burglary, four counts of theft of property, and with being a habitual criminal. Pursuant to a plea agreement, the appellant pled guilty to all counts and was sentenced to imprisonment for twenty years with five years suspended. Appellant filed a pro se motion for reduction of sentence alleging, among other things, that he only accepted the plea bargain because he was threatened with more prison time by his court appointed attorney and that his sentence was too harsh for his crime. The trial court appointed an attorney for the appellant, and a hearing was held on appellant's motion. At this hearing, the appellant's main argument was that his sentence should be reduced because he had given information to Noel Harvey, Captain of the Fort Smith Police Department, who in return had promised him that he would only have to serve a few years in prison for his crimes. The only relief the appellant sought was a reduction of his sentence.

All parties agree that Officer Harvey's intervention on the appellant's behalf resulted in the appellant being released from jail on a signature bond. Officer Harvey testified that he helped the appellant because the appellant had told him that he could locate some stolen property and provide information to help with some felony arrests. Apparently, the appellant did give the police some information, but according to Officer Harvey the information did not lead to any arrests. When we review the evidence presented at the hearing, we find a conflict in testimony about the agreement between the appellant and Officer Harvey. Appellant testified that he had an agreement with Officer Harvey that if he

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[1] In *Williams* v. *State*, 291 Ark. 255, 724 S.W.2d 158 (1987), this court affirmed the trial court's treatment of a motion under the same statutory provision as a Rule 37 petition.

gave him information, Officer Harvey would help him out so that he would only have to serve a few years in prison. Officer Harvey testified that he never promised the appellant that he would help him get a reduced sentence, but instead he told the appellant that if he was able to make a relatively large case, it might help him with the prosecuting attorney's office. Paul Hughes, appellant's court appointed attorney at the time of his plea agreement, testified that he called Officer Harvey, but the officer told him that he could not help the appellant.

When there is a conflict of testimony, it is the trial judge's job to resolve it. *Huff* v. *State*, 289 Ark. 404, 711 S.W.2d 801 (1986). The trial judge is not required to believe any witness's testimony, especially the testimony of the accused, since he has the most interest in the outcome of the proceedings. *Id.* Here, the trial court believed Officer Harvey's testimony that he made no agreement with the appellant to get him a reduced sentence. Further, the trial judge found that the appellant received a fair sentence, which was far below the statutory limits. This court has repeatedly held that we will not reverse the trial court's denial of post-conviction relief unless the trial court's findings are clearly against the preponderance of the evidence. *See, e.g., Madewell* v. *State*, 290 Ark. 580, 720 S.W.2d 913 (1986). Since there was evidence presented at the hearing to support a ruling either way, we cannot say the trial court's ruling is clearly against the preponderance of the evidence. *See Ackers* v. *State*, 294 Ark. 47, 740 S.W.2d 620 (1987). For the reasons stated above, we affirm.

Russell Gene JERNIGAN *v.* Hubert Lynn CASH and James H. Wilson

89-29 767 S.W.2d 517

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Dale Lipsmeyer*, for appellant.

*Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A.*, by: *Walter A. Kendel, Jr.*, for appellee Hubert Lynn Cash.

*Lizabeth Lookadoo*, for appellee James H. Wilson.

JACK HOLT, JR., Chief Justice. Appellee Hubert Lynn Cash filed suit against appellant Russell Gene Jernigan alleging that Jernigan damaged Cash's automobile by negligently driving his own automobile into Cash's. Jernigan denied this allegation and moved to join appellee James H. Wilson, whose vehicle was also damaged in the incident, as a plaintiff pursuant to Ark. R. Civ. P. 19(a). The trial court granted his motion. After trial without jury, the trial court found that Jernigan was negligent and entered judgment for Cash in the amount of $7,500.00 and for Wilson in the amount of $1,143.16. From this order, Jernigan appeals. We find that the trial court erred in allowing an amendment to Cash's complaint and reverse and remand.

On June 7, 1986, Jernigan and a friend, Hayden Booth, went to the "Party Tyme" bar in Morgan, Arkansas. Jernigan had several drinks and then started playing pool. A stranger, hereinafter referred to as John Doe, approached Jernigan and began

harassing him. John Doe was asked to leave "Party Tyme" but returned a short time later and renewed the harassment. Eventually, both Jernigan and Booth were asked to leave "Party Tyme" because they were arguing loudly. While Jernigan and Booth were sitting in Jernigan's car with the motor running in a parking lot adjacent to "Party Tyme," Jernigan was approached by John Doe, who began to hit him through the open window. John Doe then told Jernigan to get out of the car; Jernigan refused. Thereafter, John Doe informed Jernigan that if he would not get out of the car, he would shoot him. According to Jernigan, Doe drew a gun from his waist. Booth testified that he heard the threat but did not see a gun. Jernigan put his vehicle in gear, backed up, and drove off in an erratic manner, running into several vehicles, two of which were owned by appellees. Jernigan exited his car immediately and ran from the scene.

Jernigan first contends that there was no substantial evidence for the trial court to find him negligent in that he acted reasonably in an emergency situation.

When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous (clearly against the preponderance of the evidence). *Bassett* v. *Hobart Corp.*, 292 Ark. 592, 732 S.W.2d 133 (1987). *See also Superior Improvement Co.* v. *Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980). In reviewing a finding of fact by a trial court, we consider the evidence and all reasonable inferences therefrom in a light most favorable to the appellee. *McCartney* v. *McLaughlin*, 296 Ark. 344, 756 S.W.2d 907 (1988).

The test for negligence is whether the defendant, in light of all the circumstances, acted as a person of ordinary prudence would have acted under the same or similar circumstances. *Earnest* v. *Joe Works Chevrolet, Inc.*, 295 Ark. 90, 746 S.W.2d 554 (1988). *Verson Allsteel Press Co.* v. *Garner*, 261 Ark. 133, 547 S.W.2d 411 (1977).

When a person is confronted with a sudden emergency created by the conduct of another, his course of conduct must be measured by what a man of ordinary prudence would do in an emergency, rather than what he might do on more mature

deliberation. *James* v. *South Central Stages, Inc.*, 160 F. Supp. 288 (W.D. Ark. 1958); *Keene* v. *George Enterprises*, 145 F. Supp. 641 (W.D. Ark. 1956). *See Lambert* v. *Saunders*, 205 Ark. 717, 170 S.W.2d 375 (1943); *Missouri Pacific Transportation Co.* v. *Mitchell*, 199 Ark. 1045, 137 S.W.2d 242 (1940). *See also Restatement (Second) of Torts* § 296 (1965). The existence of an emergency does not automatically absolve one from liability for his conduct; the standard still remains that of a reasonable man under the circumstance. *Ferrer* v. *Harris*, 55 N.Y.2d 285, 434 N.E.2d 231, 449 N.Y.S.2d 162 (1982).

The fact that a person was voluntarily intoxicated at the time of the occurrence can be considered by the trier of fact in determining whether he was negligent. *See Mills* v. *Silbernagel & Co.*, 204 Ark. 734, 164 S.W. 2d 893 (1942); *Powell* v. *Berry*, 145 Ga. 696, 89 S.E. 753 (1916). *See also Inderrieden* v. *Phillips*, 294 Ark. 156, 741 S.W. 255 (1987). Ordinary care is measured by what a prudent sober man, not a prudent intoxicated man, would do under like circumstances. *Little Rock Ry. & Elec. Co.* v. *Billings*, 173 F. 903 (8th Cir. 1909); *Powell, supra.*

When viewed in a light most favorable to appellees, the evidence shows that Jernigan drank several bourbon and Cokes before the accident; he was threatened by John Doe; John Doe did not employ a gun; and in response to these threats, Jernigan took a path of retreat that caused extensive damage to appellees' vehicles. After considering this evidence, the trial court determined that Jernigan was negligent in that a reasonable person would not have created a "demolition derby" in response to the circumstances with which Jernigan was confronted.

We cannot say that the trial court's finding that Jernigan was negligent is clearly erroneous. Whether Jernigan acted reasonably under the circumstances is a matter for the trier of fact to determine. *See Jones* v. *Ferguson*, 243 Ark. 698, 421 S.W.2d 607 (1967). *See also Elk Corp. of Arkansas* v. *Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987). Simply stated, we decline to substitute our judgment for that of the trial court.

Jernigan also argues that the trial court erred in allowing an amendment to appellee Cash's complaint after he had rested his case.

In his complaint, Cash asked for $4,314.04 (cost of repair) in damages to his new 1986 Honda Accord. Testimony was introduced at trial that he paid $13,500.00 for the car; repair costs were $4,314.04; the car was worth five or six thousand dollars after the accident; and the car still has air leaks, and its doors rattle and will not shut. At the close of trial, the following exchange took place:

> The Court: I'm awarding Mr. Wilson $1,143.16 and Mr. Cash $7,500.00. I know what Hondas are worth. I drive one. I feel sorry for him. I wouldn't trade mine for any other car. Maybe a Porsche 944 Turbo, but—that's a good car and I feel for him.
>
> Mr. Staten (Cash's counsel): Your Honor, for the record, in my complaint I believe that we only asked for damages in the amount of the repair bill and I'm going to—
>
> The Court: Well, that's all you're entitled to.
>
> Mr. Staten: Well, I was going to amend my complaint since there is still—this trial is bifurcated and open-end damages.
>
> The Court: You should have done that before you came in here. What did you pray for?
>
> Mr. Staten: The amount of the repair bill.
>
> The Court: Forty-three fourteen.
>
> Mr. Staten: Four Thousand three hundred fourteen dollars and four cents.
>
> The Court: I think he's been damaged more than that. I really do.
>
> Mr. Staten: I think he has too, your Honor, based upon the proof I found out about today. And since the trial is not over yet and judgment technically has not been entered—
>
> The Court: All right, I'll allow you to amend it. I think like I say, maybe I know too much about Hondas but I know a brand new Honda with a hundred miles on it and it gets wrecked like this and you say I've only been damaged forty-three hundred dollars, that car has appreciated a lot

more than that because I know what the value of a Honda is. It stays very high and his would have appreciated a lot more than that.

. . .

The Court: I'm going to award him $7,500.00. I think he was damaged that much.

Mr. Lippsmeyer (Jernigan's counsel): Your Honor, for the record, I'd like to object to allowing Mr. Cash to amend the complaint—

The Court: It's discretionary and I'm going to do it.

Granted, the proper measure of damages for damage to an automobile is the difference in the fair market value of the automobile before and after the occurrence. AMI 2210. Notwithstanding, by making biased comments concerning the value of Hondas, the trial judge induced or persuaded Cash to move to amend his complaint to pray for additional damages to his car. In effect, the judge made the motion to amend. This conduct was improper. A trial judge should refrain from actions that tend to favor one litigant over another. *Western Coal & Mining Co.* v. *Kranc*, 193 Ark. 426, 100 S.W.2d 676 (1946).

Under the circumstances, we conclude that the trial court abused its discretion in allowing the amendment. We reverse and remand.

Reversed and remanded.

GLAZE, J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. This was a bifurcated trial before the court. Appellant Russell Gene Jernigan (defendant below), testified that he had been drinking at the Party Tyme bar from 10:00 p.m. to 12:30 a.m., when he was asked to leave due to an altercation with another patron, who then followed him to his car and struck him several times through the car window. He said this individual, identified only as "John Doe," then pointed a pistol at him and ordered him out of the car, presumably to fight. Jernigan made a frenzied attempt to escape and crashed into several parked vehicles in what the trial judge aptly characterized

as a "Demolition Derby." One of the parked vehicles belonged to appellee Hubert Lynn Cash (plaintiff below). Cash testified that his vehicle, a new Honda, had been purchased the day of the collision at a price of $13,500, that it cost $4,314.04 to repair the damage and the value of the car had been reduced to only $5,000 or $6,000.

As with most bench trials, the dialogue between court and counsel at the close of the case was casual and the trial judge commented that the damage to the new Honda exceeded the amount of the repair bill—a fairly obvious fact in view of the testimony. Mr. Cash's counsel then remarked that he intended to amend the complaint, which, in the absence of prejudice, a party can now do "at any time without leave of court." ARCP Rule 15(a). The trial judge permitted the amendment over appellant's general objection. The issue of prejudice was not argued then or now.

The majority concludes that the trial judge "induced" or "persuaded" the appellee's amendment to the complaint and by so doing abused his discretion. I respectfully disagree. The trial judge has broad discretion under Rule 15, and that discretion was not abused by the trial judge merely by observing what was obvious, that the damage to the Honda plainly exceeded the amount of the repair bill. *Hogue* v. *Jennings*, 252 Ark. 1009, 481 S.W.2d 752 (1972). I would affirm.

Don RAGAR *v.* Joseph (Buz) HOOPER, et al.

89-70 767 S.W.2d 521

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*David Hodges* and *Gene O'Daniel*, for appellant.

*Friday, Eldredge & Clark*, by: *Richard D. Taylor*, for appellees Shackleford Street Development Company and Flake & Company, Inc.

*Wallace, Dover & Dixon, P.A.*, for appellees Tad Krug, Sheldon Rand, Alan Rothman, James Rasco, Howard E. Hardin, Tim Farrell, Leon Teske, Aaron Lubin, Gary Burris, Larry Wilson, Milt Rothman, William Payne, M.D. Graham, Robert Winter, C. Dudley Rogers, and Robert Lapin.

DARRELL HICKMAN, Justice. This is the fourth time this case has been before us, and unfortunately it is still not resolved. *Hooper-Bond Limited Partnership Fund III* v. *Ragar*, 294 Ark. 373, 742 S.W.2d 947 (1988); *Ragar* v. *Hooper-Bond Limited Partnership Fund III*, 293 Ark. 182, 735 S.W.2d 706 (1987); *Hooper* v. *Ragar*, 289 Ark. 152, 711 S.W.2d 148 (1986).

The appellant, not satisfied with the results of his lawsuit in circuit court, filed this time in chancery court, essentially seeking to litigate issues already resolved, or those that could have been resolved. The chancellor ruled that two counts in the appellant's complaint directed at Flake & Company and Shackleford Street Development Company were barred by the doctrine of *res judicata*. The chancellor's ruling is affirmed in that regard. *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 680 (1988); *Talbot* v. *Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988).

The remaining issue concerns a summary judgment granted in favor of the sixteen appellees who were limited partners in the Shackleford Street Development Company. The appellant, a limited partner himself, had asked for an accounting from the other limited partners. On February 4, 1988, the appellees filed a motion for summary judgment, attaching affidavits and documents which they claimed constituted an accounting. The appellant responded that discovery had not been completed. No counter affidavits were attached to his response. The chancellor scheduled a hearing on the motion for May 12.

Before the summary judgment motion was filed, the appellant had notified the sixteen limited partners that he would take their depositions. The partners asked for a protective order. At a March 15 hearing on the protective order, the chancellor ruled, without notice, that the summary judgment would be granted, apparently without ruling on the protective order. There is no record of exactly was transpired at the hearing.

The appellant protested that the early ruling deprived him of the opportunity to take the partners' depositions and file counter affidavits before the scheduled hearing date.

ARCP Rule 56(c) reads as follows:

> The motion shall be served at least 10 days before the time fixed for the hearing. *The adverse party, prior to the day of hearing, may serve opposing affidavits.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Italics supplied.)

The chancellor did not have to set the matter for a hearing twelve weeks away. But having done so, he should not have granted summary judgment before that day unless it clearly appeared that Ragar could produce no proof contrary to the affidavits. We distinguish the case of *BWH Inc.* v. *Metropolitan Nat'l Bank*, 267 Ark. 182, 590 S.W.2d 247 (1979), in which the court held that the appellant's desire for further discovery, in a promissory note case, was a mere fishing expedition. Here, it is not so clear, as it was in *BWH*, that the appellant could not obtain the necessary proof to rebut the allegations in the summary judgment motion. *See First Nat'l Bank* v. *Newport Hospital & Clinic, Inc.*, 281 Ark. 332, 663 S.W.2d 742 (1984).

We do not address the appellant's argument that Rule 56 requires ten days notice of an intent by the trial court to rule on a motion for summary judgment.

Affirmed in part and reversed and remanded in part.

HOLT, C.J., not participating.

Thomas Truman HAYES, Jr. *v.* STATE of Arkansas

CR 88-200 767 S.W.2d 525

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Terry Crabtree*, for appellant.

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

Gen., for appellee.

ROBERT H. DUDLEY, Justice. The primary issue in this criminal case is whether the trial court erred in refusing to allow the appellant to testify that he was willing to take a polygraph examination. The trial court's ruling was correct and, accordingly, we affirm the convictions.

Arkansas law prohibits the admission of polygraph test results, except upon a written stipulation of the parties. *See* Ark. Code Ann. § 12-12-704 (1987); *Foster* v. *State*, 285 Ark. 363, 687 S.W.2d 829 (1985), *cert. denied*, 482 U.S. 929, 107 S. Ct. 3213 (1987). Such stipulation agreements are to be scrutinized carefully by the courts, and will not be honored if any questions or problems arise. *See, e.g., Foots* v. *State*, 258 Ark. 507, 528 S.W.2d 135 (1975). Further, we have held that any reference to a polygraph test, in the absence of an agreement or other justifiable circumstances, ordinarily constitutes prejudicial error. *Roleson* v. *State*, 272 Ark. 346, 614 S.W.2d 656 (1981). In *Roleson* v. *State*, 277 Ark. 148, 640 S.W.2d 113 (1982), we held that the trial court did not commit error when it refused to allow a line of questioning which might have led to the mention that a lie detector test had been taken. We noted that the trial court bore the responsibility of preventing any occurrence which might warrant a mistrial in the case. We similarly approve of the trial court's ruling in this case.

Our holding is in accordance with the case law in the majority of other jurisdictions and with several noted treatises. *See* Annotation, *Propriety and Prejudicial Effect of Comment or Evidence as to Accused's Willingness to Take Lie Detector Test*, 95 A.L.R.2d 819 (1964); Gianelli and Imwinkelried, *Scientific Evidence* § 8-1 to 8-8 (1986); Wharton, *Wharton's Criminal Evidence* § 593 (14th ed. 1987); and Underhill, *Underhill's Criminal Evidence* § 150 (5th ed. 1956). These sources state the general rule is that a defendant's willingness or unwillingness to take a lie detector test is inadmissible in evidence. The refusal to allow any reference to the accused's willingness to take a polygraph test is based on the inadmissibility of the results of such a test, once taken. These sources point out that the self-serving nature of such testimony destroys any probative value it might have, especially since an accused may be aware that the results of

such a test are generally inadmissible. While it is true that allowing testimony of this nature will not always constitute prejudicial error, *Van Cleave* v. *State*, 268 Ark. 514, 598 S.W.2d 65 (1980), we cannot fault the trial court's use of caution in excluding such testimony.

The appellant also tries to attack the sufficiency of the evidence to support his conviction. However, he did not preserve this issue for appeal by making a motion for directed verdict below, or by questioning the sufficiency of the evidence against him in any other manner. *See* A.R.Cr.P. Rule 36.21(b); *Hughes* v. *State*, 295 Ark. 121, 746 S.W.2d 557 (1988).

Affirmed.

Van Martin RICHIE *v.* STATE of Arkansas

CR 88-44 767 S.W.2d 522

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Pamela S. Osment*, for appellant.

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

ROBERT H. DUDLEY, Justice. In 1978, the appellant was charged in an eight count information with committing the following crimes against Dorothy Mullen: capital murder, kidnapping, rape, and robbery; and committing the following crimes against Axie Criner: attempted capital murder, kidnapping, rape, and robbery. The information did not specify which charges constituted the underlying felony or felonies to the capital charges. The next year, in 1979, appellant pleaded guilty to all eight counts and was sentenced to life without parole on the capital murder conviction and to life on each of the other seven convictions. In 1986, he filed a Rule 37 petition seeking to have the convictions for the underlying felonies set aside. On February 9, 1988, the trial judge wrote "Rule 37 denied" in his docket book. No judgment was entered, and the appellant was not informed of the ruling. Under such circumstances we granted appellant's motion for a belated appeal.

On September 12, 1988, the Attorney General apparently recognized that a denial of post-conviction relief without specifying any findings was reversible error and, by motion, asked us to remand the case to the trial court so that a judgment with findings of fact could be entered showing that the prisoner was not entitled to relief. On December 5, 1988, we granted the State's motion

and remanded the case to the trial court so that the trial court could state the reason the prisoner was not entitled to relief. The Writ issued by this Court specifically provides: "Trial court is directed to comply with A.R.Cr.P. Rule 37.3(a)." That subsection of the rule provides: "If the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings." Instead of entering a judgment with findings stating the reason the prisoner was not entitled to relief, the trial court entered an order vacating the convictions and sentences for the underlying felonies of kidnapping, rape, and robbery in the capital murder of Dorothy Mullen. The order did not give any reasons for the refusal to vacate one or some of the felonies underlying the attempted capital murder of Axie Criner. The order was then lodged in this court pursuant to writ of certiorari.

The appellant argues on direct appeal that he is entitled to have all six convictions and six life sentences for the kidnappings, rapes, and robberies vacated because they are underlying felonies. The State admits that the appellant is entitled to have one conviction and sentence set aside as underlying the capital murder of Dorothy Mullen, and another set aside as underlying the attempted capital murder of Axie Criner. The State, in a veiled cross-appeal, argues that the trial court granted too much relief to appellant when it set aside the kidnapping, rape, and robbery charges underlying the capital murder of Dorothy Mullen.

It is interesting that a part of appellant's argument is that he is entitled to have the three convictions and sentences for felonies underlying the Mullen capital murder vacated, when the trial court granted that very relief. We assume the argument is made because the appellant's attorney questions the validity of the trial court's order, but does not want to openly disclose the issue to the State. It is a jurisdictional issue which we raise on our own. After a notice of appeal is docketed and the record is filed in this court, the trial court loses jurisdiction, except for appointment of defense counsel. *Glick* v. *State*, 283 Ark. 412, 677 S.W.2d 844 (1984). Here, the belated appeal was docketed, and the record was filed. The trial court had lost jurisdiction at that

point. We remanded and vested the trial court with jurisdiction only "to comply with Rule 37.3(a)." Thus, the trial court acted without jurisdiction in vacating three of the convictions. Since we hold the trial court's order is void, we do not reach the issue of whether the State can cross-appeal from the order. *See State* v. *Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988).

Unquestionably, at least one of the felonies underlying the capital murder of Dorothy Mullen must be vacated, *Martin* v. *State*, 277 Ark. 175, 639 S.W.2d 738 (1982), and at least one of the felonies underlying the attempted capital murder of Axie Criner must be set aside. *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982). Appellant, however, urges us to vacate the kidnapping, rape, and robbery convictions as underlying the capital murder of Dorothy Mullen and to vacate the kidnapping, rape, and robbery convictions as underlying the attempted capital murder of Axie Criner, based upon *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982).

In *Hill*, we stated:

> We affirm the conviction and sentence for capital felony murder but set aside the lesser included offenses of kidnapping and aggravated robbery in connection with offenses against Donald Lee Teague. Ark. Stat. Ann. § 41-105(1)(a) and (2)(a) (Repl. 1977) [Ark. Code Ann. § 5-1-110 (a)(1) and (b)(1)] prohibit the entry of a judgment of conviction on capital felony murder or attempted capital felony murder and the *underlying specified felony or felonies*. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981). (Emphasis added.)

"Underlying specified felony or felonies" means the felony or felonies set out in the information as underlying the capital murder charge. In *Hill*, we assumed that the underlying felony or felonies would always be set out in the information, or else the defense would request that it be so designated. We made such an assumption because the underlying felony or felonies become an element of the capital murder charge, *Cozzaglio* v. *State*, 289 Ark. 33, 709 S.W.2d 70 (1986), and it would seem that the defendant would always move to reduce a capital murder charge to a first degree murder charge if an underlying felony were not

listed. However, in this case the information does not specify a felony or felonies underlying the capital murder charges, and the defense did not question the charges. Even so, the appellant is now entitled to some relief since the capital murder conviction and the attempted capital murder conviction each required at least one underlying felony which, in turn, merged into the capital murder. The doctrine of merger then prevents conviction and sentencing on the underlying felony.

The only issue to be decided is whether all of the felonies enumerated in separate counts merged into the two capital charges, or whether only one merged into each capital charge. The capital murder statute, Ark. Code Ann. § 5-10-101(a)(1), requires only one underlying felony to be merged into the capital murder conviction. It does not require that all other felonies charged at the same time be merged into the capital murder conviction. Accordingly, we hold that one felony conviction, the robbery conviction, was merged into the conviction for the capital murder of Dorothy Mullen, and likewise, the robbery conviction was merged into the conviction for the attempted capital murder of Axie Criner. The other convictions and sentences remain in effect.

Reversed.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. It is the duty of the state to make specific allegations in the information or amended information. In this case we have had to guess at the underlying felony. The trial court made a logical conclusion in deciding that all three felonies at issue supported the capital murder charge.

If we are to strictly construe criminal statutes we must conclude that the trial judge was right. Our guess as to the underlying felony is no better than his, but we are right because there are more of us. All four of the charges concerning the criminal acts against Dorothy Mullen grew out of one episode, and all four of the charges concerning the criminal acts against Axie Criner grew out of one episode. Perhaps the state intended to prove that all of the other felonies were supporting the capital felony murder charge and the attempted capital murder charge. See, e.g., *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982). However, the prosecution and the court should not strive to

multiply the crime and sentence beyond the facts. After all, the appellant cannot be expected to serve more than one life sentence.

The majority captions the decision as a reversal, but it seems to me to be more of an affirmance.

Helen WADE *v.* MR. C. CAVENAUGH'S and Cigna Insurance Company

88-245 768 S.W.2d 521

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Riffel, King & Smith*, by: *Kirby Riffel*, for appellant.

*Friday, Eldredge & Clark*, by: *Elizabeth J. Robben*, for appellees.

ROBERT H. DUDLEY, Justice. At the initial hearing in this workers' compensation case the Administrative Law Judge denied the appellant's entitlement to additional benefits. The Administrative Law Judge's order was affirmed by the full Commission. The Court of Appeals remanded the case to the Commission. *See Wade* v. *Mr. C. Cavenaugh's and Cigna Insurance Company*, 25 Ark. App. 237, 756 S.W.2d 923 (1988).

We granted a petition for review and now affirm the order of the Workers' Compensation Commission.

I. Facts

On October 15, 1985, the appellant, Helen Wade, was working the night shift as a cashier in a convenience store located in Black Rock. At about 4:00 a.m. the store was robbed, and one of the robbers struck the appellant on the left side of the face, momentarily knocking her unconscious. The police investigated the robbery, and she resumed her work. After her shift was finished a friend drove her to the emergency room of the hospital in nearby Walnut Ridge where a physician x-rayed her jaw. Later, a dentist, James Phillips, treated her for pain and inability to open her mouth. On October 21, he recommended she return to work. She was only able to work for two hours and returned to Dr. Phillips and complained of a loss of vision. He referred her to Dr. Joe Stainton, an ophthalmologist, but she was not happy with his treatment. Phillips then referred her to another ophthalmologist, Dr. Bobby McKee, of Jonesboro.

The claimant worked from October 23, 1985, until November 10, 1985, when she was fired. There was testimony that her termination was the result of three cash shortages. The record also contains testimony of a store bookkeeper who stated that the claimant was one of several employees who had cash shortages, and at least one of her shortages could be explained as a bookkeeping error.

The claimant then went to Dr. Steven Flannigan, Chairman of the Department of Neurosurgery at the University of Arkansas Medical School who, in turn, referred her to a neuro-ophthalmologist, Dr. Walter Jay. She told Dr. Jay that her visual acuity diminished immediately after she was struck by the robber. Dr. Jay initially could not make any objective findings, so he hospitalized her for tests. After thorough testing he found there was no objective etiology for her visual loss. It was his opinion that the visual loss was psychological and he referred her to Dr. Gary Souheaver, a clinical neuro-psychologist who administered a Minnesota Multiphasic Personality Inventory and concluded that the most that could be said about her MMPI is that it would be associated with a high probability of alcohol or drug abuse, or both. Dr. Jay then referred the appellant to a psychoanalyst in

Jonesboro, which was closer to her home. That psychoanalyst, Dr. Edwin Price, stated that the appellant did not relay a past history of blurred vision, or that she was refused unemployment benefits because of making a material misrepresentation on her application for unemployment. He attributed all of her emotional problems to the robbery and the blow to her face suffered on October 12, 1985.

However, the record reflects that a Memphis ophthalmologist had seen the appellant on June 17, 1983, almost twenty-eight months before the October 1985 robbery. At that time she complained of headaches, pain around the left eye, and blurred vision in the left eye. In 1983 and 1984, he saw her seven times and hospitalized her twice for the same complaints. He also saw her after the robbery and was unable to connect any visual problem to her having been struck in the face during the robbery. In addition, he did not see any difference in her emotional state before and after the robbery.

Appellee paid for appellant's medical treatment until March 1986, including her initial evaluation by Dr. Price, but refused to pay for further treatment, controverting appellant's claim for additional temporary total disability benefits and medical benefits. After two hearings, an Administrative Law Judge denied appellant's request for additional benefits. The Commission affirmed the Law Judge's decision. The Commission found that appellant had failed to prove a causal connection between the compensable injury received during the robbery and the disability and additional benefits appellant claimed after her employment was terminated. Although the Commission found that appellant was upset by the robbery, it found that her emotional reaction did not rise to the level of a psychiatric problem or the level of disability within the meaning of Ark. Code Ann. § 11-9-102(5) (1987) [formerly Ark. Stat. Ann. § 81-1302(e) (Repl. 1976)].

The claimant's five points of appeal can be reduced to three issues: (1) whether the Commission erred by not extending the benefit of doubt to the claimant on all factual determinations; (2) whether the Commission erred in finding that the claimant's preexisting eye condition was not aggravated by the robbery; and (3) whether the Commission's decision denying additional benefits was supported by substantial evidence.

## II. Benefit of Doubt

The appellant first argues that the Commission erred by not giving her the benefit of the doubt on all factual questions. She bases her argument on our case of *Brower Mfg. Co.* v. *Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972). It is true that in *Brower*, this court held that the claimant was entitled to the benefit of the doubt in every factual determination. However, this is no longer the law. Act 10 of 1986, Second Extraordinary Session, codified as Ark. Code Ann. § 11-9-704(c)(4) (1987) changed the existing law to provide that in determining whether a party has met its burden of proof, Administrative Law Judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party. In *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987), the Court of Appeals noted this change in the law and determined that it should be applied retroactively to any case heard by the Administrative Law Judges or the Commission after the effective date of the act in June of 1986, regardless of the date of the claimant's injury. *See also Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). Thus, even though appellant's injury occurred before the effective date of the act, the Commission correctly refused to give the appellant the benefit of the doubt in making factual determinations, since it reviewed the case well after the effective date of the act.

## III. Pre-existing Injury

The appellant argues that she should not be denied additional workers' compensation benefits merely because of evidence that she had diminished visual acuity which pre-existed her injury. Appellant correctly states the rule that when a pre-existing injury is aggravated by a later compensable injury, compensation is in order. As the Court of Appeals said in *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987), the employer takes the employee as he finds him. The Commission did not dispute this point; rather, it merely stated that it did not find that the robbery had aggravated the appellant's pre-existing eye condition.

## IV. Substantial Evidence

An appellate court must affirm the Commission's decision if it is supported by substantial evidence. Substantial evidence exists if reasonable minds could have reached the same conclusion. Here, there is substantial evidence to support the Commission's conclusion.

Dr. Richard Drewry, Jr., who had treated appellant for her eye condition in 1983 and 1984, could find no connection between appellant's eye problem and appellant's being struck in the face during the robbery. He testified that there was no change in the December 1985 examination of appellant from his earlier examinations of her in 1983 and 1984. Further, Dr. Walter Jay, who specializes in neuro-ophthalmology, testified that, in his opinion, appellant suffered from psychological visual loss in 1983 and 1984, and that the loss pre-existed the October 12, 1985, injury. Thus, there was substantial evidence to support the Commission's finding that appellant's pre-existing eye condition was not aggravated by the robbery injury.

The appellant contends that the Commission erroneously based its decision on facts outside the record when it relied upon the observations made by the Administrative Law Judge at the initial hearing. The Court of Appeals may have accepted such an argument when it wrote, "[t]he Commission's finding about the claimant's physical reactions during her testimony before the law judge is not a matter that the Commission can see or judge for itself." We wholly reject the argument and expressly hold that the Commission is entitled to rely on the Administrative Law Judge's observations and comments made about the claimant's demeanor, conduct, appearance or reaction at the hearing. Here, the Administrative Law Judge, in his opinion wrote:

> Doctor Edwin Price, in his deposition, as noted above, does not feel, from his contact and treatment of the claimant, that the Employment Security Division's rulings and claimant's contact with same were significant. Having had benefit of observing the claimant during two (2) hearings, I note and the transcripts of same reflects, whenever this area was broached, either on questioning of the claimant or other witnesses, claimant appeared to become distraught, upset, and began crying, seemingly uncontrollably.

The transcript does reflect these emotional outbursts. The Commission relied on the above quoted statement and the transcript and wrote:

> The preponderance of the evidence in the record is that even if Wade is too traumatized to work and in need of psychotherapy, the emotional problems stem not from the robbery but from the firing and accusations regarding the alleged cash shortages and the denial of benefits by the Employment Security Division. Not only do these other matters figure much more prominently in Dr. Price's reports and testimony, but we find it significant that Wade became distraught and began crying during the hearing before the Administrative Law Judge when questioned about the ESD problems but not while describing the robbery. In the absence of a showing of incapacity to work or other[wise] function normally and of a definite causal connection between the emotional stress and the robbery, we are unable to award either disability or psychiatric benefits.

The Commission was entitled to rely upon the Law Judge's observations and the transcript.

The appellant next argues, alternatively, that even if the Commission can consider the Administrative Law Judge's observations, it did so in error here, because the appellant cried once while first discussing the robbery, and therefore, appellant argues, the observation is in error. The short answer is that the first incident was not as intense as the later ones, and it is clear from the record that the frequency of becoming upset and crying increased significantly when the appellant was testifying about being fired and being denied unemployment benefits.

The appellant argues that the Commission also relied on facts outside the record when it stated that Dr. Price found that the events surrounding the appellant's firing and denial of unemployment benefits were a prominent cause of her emotional problems. In its opinion, the Commission specifically stated:

> While Dr. Price opined that her emotional stress was serious enough to be disabling and that it was causally connected to the robbery, his opinion is necessarily based

> upon the history and description of symptoms given him by the patient. A physician's opinion is not conclusive or binding on the commission. It merely constitutes competent evidence to be considered along with all other evidence. (Citations omitted.) . . . Not only do these other matters [the firing, accusations, and denial of benefits] figure much more prominently in Dr. Price's reports and testimony, but we find it significant that Wade became distraught. . . .

Nowhere in its opinion does the Commission state that Dr. Price found the ESD matters to be more prominent in relation to appellant's problems than the robbery itself. Indeed, the opinion clearly recognizes Dr. Price's conclusion that the appellant's problems were causally connected to the robbery. The Commission simply decided not to give much weight to that opinion in light of all the other evidence. This was a proper thing for the Commission to do, since the weight and credibility of a witness' testimony are exclusively within the province of the Commission. *See Price* v. *Servisoft Water Co.*, 256 Ark. 702, 510 S.W.2d 293 (1974); *May* v. *Crompton-Ark. Mills, Inc.*, 253 Ark. 1080, 490 S.W.2d 794 (1973).

Appellant's final contention about the Commission basing its decision on facts not in the record relates to the Commission's finding that appellant had returned to the same duties and salary after her period of disability. Specifically, the Commission stated:

> Wade was able to return to work until she was discharged for alleged cash shortages. There is a presumption that one returning to the same job with the same duties and salary has suffered no loss of earning capacity. *Bragg* v. *Evans-St. Clair Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985). Although she says she is afraid to drive a vehicle, she drove herself to work. She repeatedly told the manager that she was "fine." Although she expresses fear that the robbers might return, she refused an offered transfer to the day shift. She also told the Employment Security Division that she was ready, willing, and able to work. She gave no testimony that she had been unable to find or hold employment due to physical or mental injuries stemming from the robbery . . . . In the absence of a showing of

> incapacity to work or other[wise] function normally . . . we are unable to award either disability or psychiatric benefits.

The appellant argues that she testified that she was not fit to return to work, and that she was not able to perform her normal duties. She points out that she only worked 16 to 18 hours per week after the robbery, while before the robbery she never worked less than 32 hours per week. However, the evidence indicated that the decrease in appellant's working hours was more attributable to her employer's suspicions about her being responsible for the robbery and to the cash shortages she had been having, than to any inability to work on her part. The appellant also contends that the Commission should not have relied on the testimony of Marge Starling in concluding that she was fit to return to work. She argues that Starling's testimony was discredited by the fact that appellant's hours were substantially reduced after her return. Once again, the credibility of the witnesses is entirely up to the Commission. They did not have to believe appellant over the other evidence that she was, in fact, ready and able to return to work on October 21, 1985.

Finally, the appellant argues that the Commission did not give sufficient weight to Dr. Price's testimony. The appellant argues that Dr. Price was the only person to give an opinion as to the cause of appellant's problems; therefore, she contends that the Commission was bound to accept his opinion on the matter. First, it is not true that no other witness gave an opinion as to the cause of appellant's problems. Dr. Richard Drewry, who had treated the appellant for her pre-existing eye condition prior to the robbery, testified that appellant's emotional condition seemed to be exactly the same after the robbery as it was before the robbery. As the Administrative Law Judge noted in his opinion, Dr. Drewry was unable to connect appellant's most recent injury to her continuing eye problem. Dr. Walter Jay, a neuro-ophthalmologist, who had examined appellant after her injury, concluded that appellant had sustained a psychological visual loss and that such a loss pre-existed the robbery injury. Even Dr. Price's opinion is not unequivocal. While he does state that in his opinion the appellant's problems are causally connected to the robbery, his testimony and reports reveal that a large factor in the appellant's problems were the events surrounding her being fired

and being accused of cash shortages, as well as the denial of unemployment benefits and the continuing litigation with regard to workers' compensation benefits. Thus, there was testimony that conflicted with that of Dr. Price, and it was for the Commission to decide who to believe.

Even if Dr. Price had given the only medical opinion as to causation, the Commission would not be unconditionally bound by his opinion. As we stated in *Wilson & Co.* v. *Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968), the Commission has never been limited to medical evidence only in arriving at its decision as to the amount or extent of a claimant's injury. Rather, we wrote that the Commission should consider all competent evidence, including medical, as well as lay testimony, and the testimony of the claimant himself. Further, the Court of Appeals has stated several times recently that while medical opinions are admissible and frequently helpful in workers' compensation cases, they are not conclusive. *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987); *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

The holding of the Commission is affirmed.

GLAZE, J., concurs.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I am not prepared to say that the appellant is or is not disabled from work as a result of the robbery or as a result of the firing. Nor do I believe that this court (or, for that matter, the Court of Appeals or the Commission) is able to render a just decision regarding appellant's claim due to the completely erroneous statement of fact found in the Commission's opinion. The Commission found it "*significant* that Wade became distraught and began crying during the hearing before the Administrative Law Judge when questioned about the ESD problems *but not while describing the robbery*." (Emphasis added.) The record reflects otherwise.

I agree with the disposition made by the Court of Appeals. See *Wade* v. *Mr. C. Cavenaugh's and Cigna Insurance Co.*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). The Court of Appeals correctly recognized that the statement of the facts by the Administrative Law Judge was incomplete, and that the sum-

mary of the record as considered by the Commission was inaccurate and downright misleading. Although there is no reason to suspect that it was intended to be incomplete and inaccurate, it nevertheless came out that way.

The crux of the matter is that the Administrative Law Judge did not listen to all of the evidence, and he did observe the appellant cry when her termination was mentioned. However, the full record discloses that she also cried on several other occasions, including those times when the robbery was mentioned.

This court's standard of review on appeal is whether the decision of the Commission is supported by substantial evidence. *Henson* v. *Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987); and *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987). This court does not reverse a decision of the Commission unless we are convinced that fair minded persons *with the same facts before them* could not have arrived at the conclusion reached. *Henson*, supra; and *Boyd*, supra. There was substantial evidence to support the Commission's finding, but the Commission's decision appears to have been substantially based on a completely erroneous interpretation of the record — i.e., that the appellant did not become visibly upset when the robbery was being discussed. The Commission was consequently handicapped and has not yet had an opportunity to rule on the case with all of the relevant evidence before it.

The evidence does not compel a decision one way or the other as to whether the appellant's emotional problems stemmed from the robbery or from the firing or from both. However, it is clear that the Commission did not have a full picture before it in making its decision. In fairness to the appellant and the Commission, the case should be remanded as directed by the Court of Appeals. The Commission is entitled to rely on the findings of the Administrative Law Judge, but when the decision of the Commission is founded upon a completely erroneous interpretation of the record, the decision should not be allowed to stand.

The majority opinion of this court recognized that the statement of the facts in the Commission's decision was in error. This court then dismisses this significant error by stating that "[t]he short answer is that the first incident [when the robbery was discussed] was not as intense as the later ones." The majority

simply does not address the argument that the decision of the Commission apparently was based on a completely erroneous statement of fact.

Fair minded men with *different* facts before them can and do arrive at different conclusions. Since the Commission did not have an opportunity to make a determination based upon all of the evidence, I would affirm the action of the Court of Appeals in remanding the case to the Commission for consideration on its merits.

Charles B. SANDERS d/b/a Fayetteville Marine *v.* Hila Mae WALKER

89-15 767 S.W.2d 526

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Putnam & Maglothin Law Offices*, by: *Charles L. Stutte*, for appellant.

*Everett & Gladwin*, by: *John C. Everett*, for appellee.

STEELE HAYS, Justice. Appellant Charles B. Sanders, doing business as Fayetteville Marine, brought this action against appellee Hila Mae Walker for damages resulting from a fire in a building which housed Sanders's retail boat business. The building, constructed around 1965, belonged to Ms. Walker and was occupied by Sanders under a verbal lease on a month to month basis. Sanders had been in the building since 1982, and the loss occurred on February 19, 1987.

Sanders's complaint alleged that he was entitled to a recovery based on negligence, express and implied warranties of habitability, and strict liability. Prior to trial the court granted summary judgment on the issue of strict liability and at the close of the plaintiff's case granted a directed verdict on the allegations of negligence and breach of warranty. Charles Sanders has appealed. We affirm.

The test concerning the granting of a motion for a directed verdict by the trial court has been clearly stated. The evidence, with all reasonable inferences, is viewed in the light most favorable to the party opposing the motion, and given its highest and strongest probative value. When viewed in that light if the evidence is so lacking in substance that it would require that a jury verdict be set aside, the motion must be granted. *Pritchard*

v. *Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982); *Cowling* v. *Clinton Board of Education*, 273 Ark. 214, 618 S.W.2d 158 (1981). Evidence is said to be substantial when it "is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture." 4 R. Ford, *Law on Evidence* § 549 (1935); *DuPont* v. *Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983).

Mr. Sanders and Ms. Walker had had previous dealings and were good friends. Sanders testified Ms. Walker had offered a written lease but he declined because the building was going to need some repairs and he did not want to assume that responsibility. "I did not ask Ms. Walker what kind of shape the building was in. I think the only conversation that took place was she asked me if I wanted it month to month or on a lease and I said month to month because of the fact that I don't want to maintain it." "I knew it was an old building." Mr. Sanders and Ms. Walker did not specifically agree as to who would assume responsibility for wiring or other repairs.

When Sanders moved in there were large freezer units along one wall, but some months later Ms. Walker's manager, Ronnie Skelton, made arrangements to remove them. After the units were removed Sanders noticed loose electrical wiring, but Ronnie Skelton assured him the wires were dead. Sanders was not aware of any problems with the electrical system from the time of occupancy until the fire.

Mr. Larry Poage, in charge of fire prevention and investigation for the Fayetteville Fire Department, participated in putting out the fire and then entered the building to investigate. He determined that the fire originated in a circuit box, which he believed failed to break properly, resulting in the fire. He testified that a short circuit occurred, which could have resulted from a surge of electrical power caused by a car striking a telephone pole, or from high winds, which had occurred the day of the fire, or from an appliance or piece of equipment in the building coming on, or from lightning, or "any one of a dozen things." He said a power surge was a common occurrence and a circuit box was designed to switch and break off the power from going to that

circuit. "I have seen situations in which circuit breakers don't break or fall out when, say, lightning hits them. They don't fall out, they just switch back, like a light switch. It is not uncommon for them to malfunction if lightning is around." The gist of Mr. Poage's testimony was that although he was confident the fire started in the circuit box, he could not say what caused it.

Mr. John Durham testified that at the time of the fire he was assistant Fire Inspector with the Fayetteville Fire Department assisting Captain Poage. He had inspected these premises in 1981 for fire prevention and had listed a number of violations of the fire code, including the lack of a cover on the circuit box. Whether these had been subsequently corrected, he did not know, except that after the fire he noticed that the cover on the circuit box had been replaced. He said none of the listed items from his inspection had anything to do with the fire. He attributed the fire to a malfunction in the main electrical distribution panel (the circuit box) on the "service side." "It is my opinion that there was an undue stress or load on the inside of the electrical distribution panel. Why? I do not know." "I do not know what caused the stress to be put on the system, but as a result, there was a weak link inside the box and we had our fire." Mr. Durham testified that when he inspected the circuit box in 1981 he found no problems in it, other than the lack of a cover. He testified that he did not know what caused the electrical panel to fail, but acknowledged the same possible causes as Mr. Poage. "Though I don't know what caused the undue stress, it is my opinion that the undue stress, when put into the system, resulting in a fire because there was a weak link in that panel box."

## I

### *Negligence*

Appellant's theory of negligence is threefold: a) that Ms. Walker was on notice before Mr. Sanders rented the building that the building was not in compliance with the local fire code; b) that after Sanders took possession Ms. Walker still maintained responsibility for the electrical system, as evidenced by Ronnie Skelton supervising the removal of the freezer units, and c) that had the electrical panel box and surge suppressor functioned properly, the fire would not have occurred.

Whatever might be said about the proof in support of those theories, one thing stands out—there was no proof that any negligence by the defendant was a proximate cause of appellant's damage, an essential element of any claim of negligence. *Grain Dealers Mutual Ins. Co.* v. *Porterfield*, 287 Ark. 27, 695 S.W.2d 833 (1985). As to the items in nonconformance with the fire code, Mr. Durham's uncontroverted testimony was that the items he noted in his 1981 inspection of the building had nothing to do with the fire. As to the removal of the freezer units, the evidence, also uncontroverted, was that the fire and the removal of the freezer units were unrelated. Whether or not it can be inferred that Ms. Walker assumed responsibility for the electrical system is ambiguous at best, but even if we could agree that she undertook that duty, there is no proof that her negligence permitted the condition to arise or that, by the exercise of reasonable care, she or agents could have prevented it. Without some fuller explanation of the reason the fire occurred, we believe the trial court was right to direct a verdict to the negligence counts of the complaint. *Glidwell, Adm.* v. *Arkhola Sand and Gravel Co.*, 212 Ark. 838, 191 S.W.2d 455 (1948); *Williams, Adm.* v. *Lauderdale*, 209 Ark. 418, 191 S.W.2d 455 (1945); AMI 203.

II

*Express and implied warranties of habitability*

Appellant cites us to nothing that would sustain a finding of an express warranty by Ms. Walker as to the condition of the premises and the record refutes any such contention.

As to an implied warranty of habitability, appellant tracks the development of recent changes in the earlier common law of nonliability of landlords, citing cases from our own as well as other jurisdictions: *Blagg* v. *Fred Hunt & Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981); *Sargent* v. *Ross*, 113 N.H. 388, 308 A.2d 528 (1973); *Kline* v. *Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Wawak* v. *Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970). Appellant contends, in short, that when Ms. Walker rented the building to Mr. Sanders she impliedly warranted the premises to be fundamentally safe.

In *Wawak* this court did recognize for the first time an implied warranty of fitness in a sale of a new dwelling. A decade

later in *Blagg* v. *Fred Hunt & Co., supra*, the doctrine was extended to a sale involving parties who were not in privity with the original vendor-builder.

Appellee points to the obvious distinction between the case at bar and the *Wawak* and *Blagg* cases—the dwellings in Wawak and Blagg were newly constructed, both less than a year old, whereas the building in this case is easily twenty years old. In *Blagg* we specifically observed that an implied warranty will expire after a reasonable time. Without suggesting that on this proof a submissible factual issue existed for breach of an implied warranty, we believe that time had dissolved any warranty of the fitness of these premises.

III

*Strict liability*

We have very little in the way of an abstract on the issue of strict liability. The motion for summary judgment, the response and any supporting affidavits have not been abstracted and we are left with only a general impression of how this issue was presented to, and resolved by, the trial court. Appellant argues that a commercial building is a "product" within the meaning of the Arkansas strict liability statute. Ark. Code Ann. § 4-86-102 (1987). He cites *Blagg* v. *Fred Hunt & Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981), where we held that a cause of action based on strict liability could exist where the "product" was a newly constructed dwelling.

In this case, however, in addition to the problem of proximate cause, already noted, we must assume that the appellant failed to satisfy the trial judge that he could meet the requirements of § 4-86-102 by showing that Ms. Walker was "engaged in the business of . . . leasing, or otherwise distributing the product;" or that "[t]he product was supplied by [her] in a defective condition which rendered it unreasonably dangerous." Certainly we find nothing in the record as abstracted that could support a factual finding that the "defect" in the circuit box existed in 1982 when the building was leased to appellant.

For the reasons stated, the judgment is affirmed.

Brian Scott COLLINS *v.* STATE of Arkansas

CR 89-27 769 S.W.2d 402

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Jerome J. Paddock*, for appellant.

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

DAVID NEWBERN, Justice. On January 4, 1988, the appellant, Brian Scott Collins, was adjudicated a delinquent child and was committed to the care of the Division of Children and Family Services. The commitment was, however, suspended for two years. Collins was ordered to appear on September 7, 1988, to respond to a petition to revoke the suspension. He failed to appear but was brought before Juvenile Referee Thomas A. Martin on September 9, 1988. The abstract submitted by Collins shows that the referee made the following statement at the conclusion of the

hearing:

> I am revoking your suspended sentence and recommending to Judge McCorkindale that you be committed to the boy's training school for a term of nine (9) months. That order will be entered shortly and you will be transported.

Collins argues two points. First, he contends the referee lacked authority because he had not been appointed by both the circuit judge and the probate judge to hear juvenile cases. Second, he contends the appointment of a juvenile referee pursuant to Act 14 of 1987 violates the requirements of Ark. Const. art. 7. The second point is valid and sufficient to dispose of the appeal, therefore, we need not address the first point.

Our understanding of the referee's remark quoted above is that there was no doubt he was exercising the authority of the circuit judge in this case, even though the judge may have signed the final order. The referee purported to revoke the suspension personally and said he would recommend commitment, and then he said "[t]hat order will be entered shortly and you will be transported." Just as in our recent decision in *Hutton* v. *Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989), where we found the acts of the referee were unconstitutional in that they exceeded any authority which could possibly be given to a probate master or referee, we find the referee here was acting in an unconstitutional excess of any authority which could have been conferred upon him by the circuit court.

While the order pursuant to which Mr. Martin was appointed juvenile referee does not appear in the abstract, the state apparently concedes that the appointment was made pursuant to Act 14. Its main argument on this point is that Mr. Martin's appointment was proper because it was permitted by Act 14 which, the state argues, is not unconstitutional.

The issue is whether the scheme of Act 14, and particularly § 6 of the act, for appointment of juvenile referees to act under the auspices of the circuit and probate courts violates Ark. Const. art. 7 by permitting assignment of judicial powers on a permanent basis to someone other than the courts created or authorized to be created by art. 7. We answered that question in *Hutton* v. *Savage,*

*supra*. That decision involved a master acting pursuant to an order of a probate court. We held that appointment of a master pursuant to Act 14 amounted to the creation of a substitute judge in violation of Ark. Const. art. 7, § 34, which provides that the probate judge is to try issues of law and fact within the jurisdiction of the probate court. We noted that "a similar conflict arises" with respect to the circuit courts. We wrote:

> Additionally, § 6 of Act 14 of 1987 impermissibly authorizes circuit and probate judges to appoint masters or referees to hear juvenile cases with such powers as may be granted by the circuit and probate judges and purports to vest those masters or referees with all the powers and authority of the judges. As such, § 6 of Act 14 of 1987 is unconstitutional.

We hold that the act of the referee in this case was in excess of the authority which may properly be delegated to a master, *see* Ark. R. Civ. P. 53, and that it was not cured by § 6 of Act 14 of 1987 which we have held to be unconstitutional and void to the extent it permits referees or masters to be substitute judges.

Reversed and remanded.

CITY OF LITTLE ROCK *v.* Virginia WEBER

88-100 767 S.W.2d 529

Supreme Court of Arkansas
Opinion delivered April 10, 1989

*Mark Stodola*, City Attorney, by: *Victra L. Fewell*, Asst. City Att'y, for appellant.

*Perroni, Rauls & Looney, P.A.*, by: *Rita S. Looney*, for appellee.

DAVID N. LASER, Special Justice. Appellee Virginia Weber sued the City of Little Rock, appellant, for damages she sustained when a Little Rock policeman, driving a city patrol car with blue lights and siren engaged, entered an intersection against a red light and struck her vehicle. The city moved for summary judgment on the basis of governmental immunity, which was denied by the trial court. The case proceeded to trial, resulting in

a jury verdict for Weber in the amount of $4,750.00. The city lodged its appeal, contending that a municipality is absolutely immune from tort liability arising out of a city policeman's negligent operation of an authorized emergency vehicle. The city also argues on appeal that the trial court erroneously instructed the jury on the standard of care applicable to the operation of an emergency vehicle. We affirm.

In response to a decision of this court setting aside the common law immunity of municipalities, *Parish* v. *Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), the Arkansas Legislature passed Act 165 of 1969 restoring governmental immunity. That Act, however, also included the following provision:

> All political subdivisions shall carry liability insurance on all their motor vehicles in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act. . . .

Ark. Code Ann. § 21-9-303 (1987).

This statute was first interpreted in *Sturdivant* v. *City of Farmington*, 255 Ark. 415, 500 S.W.2d 769 (1973), a case arising out of a fatal collision between the city marshal of Farmington and plaintiff's intestate. *Sturdivant* held that the purpose of § 21-9-303 was to provide the public with a remedy against cities when injured by municipally owned vehicles. That purpose would be defeated unless the city, either through insurance or self-insurance, were liable to the extent of the stated limits. This result was reaffirmed in *Thompson* v. *Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984). (Section 21-9-303 has subsequently been amended to specifically state that political subdivisions shall carry liability insurance or become self-insured. Ark. Code Ann. § 21-9-303 (Supp. 1987).)

It is argued by the City of Little Rock that this court should return to a test previously used to determine whether a state employee could be liable for negligently injuring another even though the state was constitutionally prohibited from being made a defendant in her own courts. Ark. Const. art. 5, § 20. Using that test, the state employee could be liable when his negligence constituted a violation of a duty imposed upon him by law in common with all other people, as opposed to negligent conduct

arising out of a duty peculiar to his employment. *Kelly* v. *Wood*, 265 Ark. 337, 578 S.W.2d 566 (1979); *Grimmett* v. *Digby*, 267 Ark. 192, 589 S.W.2d 579 (1979). For instance, in *Kelly* this court held that a state trooper could be liable for negligently running a stop sign while driving his patrol car to meet a friend for dinner. Using that test, the city argues that the operation of an authorized emergency vehicle by the police officer was obviously unique to his employment and thus the city should be immune from tort liability.

The city's reliance on these cases is misplaced. The test used previously in those cases allowed an injured party to side step governmental immunity and seek relief against the employee when the duty of the employee breached was common to all people. It cannot be used by the city to create governmental immunity not otherwise available, as where a statute specifically provides that all political subdivisions shall carry liability insurance on their motor vehicles.

There is no indication in § 21-9-303 that the legislature intended to distinguish in any manner the circumstances to which it applied. In any event, we see no reason why a person injured by an emergency vehicle should be left without a remedy while persons may seek redress against a municipality for its employees' negligence in the operation of all other vehicles.

To avoid confusion in this area, it should be pointed out that the rule in *Grimmett* and *Kelly* allowing suit against certain government employees has subsequently been abolished by Ark. Code Ann. § 19-10-305 (1987). That statute specifically provides immunity to officers and employees of the State of Arkansas from civil liability for acts or omissions within the course and scope of their employment. See *Beaulieu* v. *Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986).

The City of Little Rock also argues for reversal that the trial court erred in its jury instructions regarding the standard of care applicable to the operation of authorized emergency vehicles. The trial court instructed the jury pursuant to Arkansas Model Jury Instruction (AMI) 305 that it was the duty of both parties to use ordinary care for their own safety and the safety of others. An instruction was also given based upon AMI 911 which sets out certain statutory privileges for drivers of emergency vehicles.

These privileges allow the driver to proceed cautiously through a red light and give the right-of-way to emergency vehicles over other vehicles. The instruction also provided that these privileges do not relieve the driver of the emergency vehicle of the duty to exercise ordinary care.

The City of Little Rock argues that AMI 911 was incorrect, and contends that the jury should have been instructed that the city could be liable only if the driver acted with reckless disregard for the safety of others.

We first must address the issue which has been raised concerning whether this point of appeal has been properly preserved. The parties sent the city's proposed jury instructions to the judge before trial which included proposed instructions as to the city's standard of care. The instructions submitted by Weber defining negligence and holding the city to the standard of ordinary care were given over the objections of the city. The city attorney objected to the instructions for the record, stating with specificity how he contended such instructions incorrectly defined the city's standard of care. The proposed instructions which the city submitted prior to trial were never given to the court reporter to be included in the transcript. Realizing this omission after receipt of the trial transcript and while the case was on appeal, the city requested that the record be supplemented to include the proposed instructions. This court granted certiorari to allow the trial court to consider the city's request. Following a hearing, the trial court ruled that the instructions were not correctly proffered and refused to allow the record to be supplemented.

The city contends that submitting the instructions prior to trial and objecting to the instructions given preserved this issue for appeal. Weber argues that absent a proffer to the court reporter with a request that the instructions be made a part of the record, the objection is waived.

The procedure for preserving a jury instruction issue for appeal is stated in A.R.C.P. Rule 51 as follows:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no

> party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue.

Thus, when a party objects to an erroneous instruction of law which should not be given, all that is required is to timely state valid reasons for the objection. For instance, in *Tandy Corp.* v. *Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), the appellant argued the trial court erred in giving an instruction on punitive damages in a case involving an intentional tort. This court held it was not necessary for the appellant to proffer a substitute instruction to preserve that objection for appeal.

When the argument on appeal is a failure to give an instruction, then the party appealing must submit a proposed instruction on the issue. *Peoples Bank& Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986). In *Wallace*, the appellant argued that the instruction given by the trial court on the issue of agency did not instruct the jury on apparent or implied authority of an agent. The appellant had a duty to submit a proposed instruction on that issue, and its failure to do so prohibited that argument on appeal.

In this case, clearly an instruction had to be given on the standard of care by which the jury could measure the officer's conduct. AMI 305 and AMI 911 were given over the objection of appellant and in this connection trial counsel stated distinctly the matter to which he objected and the grounds of his objection. In fact the city stated for the record that in its opinion the proper standard of care was reckless disregard (for the safety of others) as opposed to ordinary care. This in our opinion constituted adequate compliance with A.R.C.P. Rule 51 to preserve the standard of care issue on appeal.

As relates to the appellant's contention that certain instructions it submitted to the court in advance of trial should have been given by the court, we hold that appellant has not sufficiently complied with A.R.C.P. Rule 51 to preserve this issue on appeal. Simply giving a set of instructions to the trial judge prior to trial is not sufficient to allow this court to address the propriety of appellant's proposed instructions. To so hold would place the responsibility of bringing a record up on appeal from which we can fully review the proceedings on the trial judge

rather than on the appellant, where this court has many times said it belongs. *Thigpen* v. *Polite*, 289 Ark. 514, 712 S.W.2d 910 (1986); *RAD-Razorback, Ltd. Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986).

Insofar as the applicable standard of care is concerned we hold that the trial court did not err in instructing that the city should be held to a standard of ordinary care as opposed to a standard of reckless disregard for the safety of others.

The trial court relied on AMI 911, which states in pertinent part that the driver of an emergency vehicle is entitled to operate the vehicle in accordance with the following traffic laws:

> ***
>
> (b) The driver of an emergency vehicle is not required to stop at a stop light but must slow down as necessary for safety and may then proceed cautiously past the signal.
>
> ***
>
> (d) An emergency vehicle has the right of way over other vehicles.

The part of the instruction which the city found objectionable states:

> The existence of these privileges does not relieve the driver of an emergency vehicle of the duty to exercise ordinary care for the safety of others using the street.

The language in AMI 911 allowing the operator of an emergency vehicle to drive through a stop light is found in Ark. Code Ann. § 27-49-109 (1987). This statute is silent as to the standard of care for the driver. The statutory authority for instructing that the operator of an emergency vehicle has the right-of-way is found at Ark. Code Ann. §§ 27-37-202(e) and 27-51-901 (1987). Section 27-51-901(c) also provides:

> This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

Arkansas Code Ann. §§ 27-51-202(a) and 27-51-204(b)(1) (1987) exempt drivers of emergency vehicles from the speed

limitations applicable to other vehicles. Those statutes also state that these exemptions "shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the street [or highway], nor shall it protect the driver of any emergency vehicle from the consequence of a reckless disregard of the safety of others." Although speeding was not alleged in this case, the city argues the standard of care should be the same.

Arkansas case law provides little guidance on this issue. In *Healey & Roth* v. *Balmat*, 189 Ark. 442, 74 S.W.2d 242 (1934), this court held that although an ambulance was on an emergency call, and had the superior right on the highway to other traffic, this "did not relieve it from the consequences of its negligence, if it were guilty of negligence." The negligence of an ambulance driver was also at issue in *Freeman & Cobb* v. *Reeves*, 241 Ark. 867, 410 S.W.2d 740 (1967). After holding that the trial court correctly submitted to the jury the issue of whether the privately owned ambulance was an authorized emergency vehicle, this court stated:

> Of course, even if an ambulance is exempted from observing certain traffic regulations and has the right-of-way under appropriate circumstances, it does not follow that this is an exemption from the duty to exercise care commensurate with the circumstances for the safety of other travelers or persons. . . . We think the evidence was sufficient to justify the submission of the question whether there was negligence on the part of appellants to the jury and to sustain the jury's finding that there was such negligence. . . .

These cases indicate that a driver of an emergency vehicle is held to a standard of ordinary care in the exercise of these statutory privileges. Decisions from other jurisdictions have dealt more directly with language similar or identical to the Arkansas statutes at issue. A Nebraska Supreme Court decision, *Lee* v. *City of Omaha*, 209 Neb. 345, 307 N.W.2d 800 (1981), quoted the following statute which is part of its legislation granting privileges to drivers of emergency vehicles:

> The provisions of this section shall not relieve the driver of such emergency vehicle from the duty to drive with due

> regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others.

The officer in that case was judged by a standard of ordinary care and the Court said the officer "is required to observe the care which a reasonable prudent man would exercise in the discharge of official duties of a like nature under like circumstances."

*See also, McMillan* v. *Newton*, 306 S.E.2d 470 (N.C. 1983); *Franklin* v. *Dade County*, 230 S.E.2d 730 (Fla. 1970); *Mason* v. *Bitton*, 85 Wash. 2d 321, 534 P.2d 1360 (1975); *Brown* v. *City of New Orleans*, 464 So.2d 976 (La. App. 1985); *Brummett* v. *County of Sacramento*, 21 Cal.3rd 880, 582 P.2d 952 (1978).

We held that the instructions given by the trial court correctly stated the appropriate standard of care.

Affirmed.

GLAZE, J., not participating.

ARKANSAS DEPARTMENT OF HUMAN SERVICES, A Division of Children and Family Services *v.* Howard TEMPLETON, Probate Judge, Craighead County, Arkansas
and
Arkansas Department of Human Services, A Division of Children and Family Services *v.* Tom Keith, Circuit/Chancery Judge, Benton County, Arkansas

89-97 & 89-102 769 S.W.2d 404

Supreme Court of Arkansas
Opinion delivered April 12, 1989

*Debby Thetford Nye*, General Counsel, and *S. Whittington Brown*, Deputy General Counsel, for petitioners.

*Steve Clark*, Att'y Gen., by: *Tom Gay*, Deputy Att'y Gen., for respondents.

TOM GLAZE, Justice. Petitioner, the Arkansas Department of Human Services, Division of Children and Family Services (hereafter DHS), requests this court for writs of mandamus to compel respondents, Probate Judges Howard Templeton and Tom Keith, to hear certain juvenile cases pending in their respective courts. In support of its requests, DHS asserts each judge has appointed a special master to hear juvenile matters in violation of Rule 53 of the Arkansas Rules of Civil Procedure and the specific directives of this court as set out in *Hutton* v. *Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989). Because both actions filed here by DHS involve the same legal issues arising from similar circumstances, we consolidate the actions for purposes of this court's review and decision writing.

We first note that DHS requested the wrong remedy in its petitions. A writ of mandamus does not lie to control the

discretion of a trial court or tribunal. *State* v. *Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969). However, where the lower court's order is entered without or in excess of jurisdiction, we can carve through the technicality and treat the application as one for certiorari. *Wasson v. Dodge*, 192 Ark. 728, 416 S.W.2d 316 (1936); *see also First Nat'l Bank* v. *Roberts*, 242 Ark. 912, 416 S.W.2d 319 (1967). The settled rule is that when there is a remedy by appeal, a writ of certiorari will not be granted unless there was a want of jurisdiction, or an excess in its jurisdiction, by the court below. *State* v. *Nelson*, 246 Ark. at 217, 438 S.W.2d at 38. That want of jurisdiction or act in excess of jurisdiction must be apparent on the face of the record. *Id.* Such are the situations in the two matters pending before us.

In our recent *Hutton* decision, the court ruled that the probate court's use of a master in a juvenile case was in excess of its jurisdiction, and, in doing so, we held that any reference to a master under Rule 53 should be the exception and not the rule. We reached a similar holding with respect to circuit courts in *Collins* v. *State*, 298 Ark. 380, 769 S.W.2d 402 (1989). Actually, the ruling concerning the use of masters reiterated what he had already said in *Gipson* v. *Brown*, 295 Ark. 371, 749 S.W.2d 297 (1988). *See also State* v. *Nelson*, 246 Ark. at 218-220, 438 S.W.2d at 39-40.

In one of the cases before us, Judge Templeton, acting under Rule 53, appointed a master to hear a juvenile case, explaining that he was unable to conduct a hearing required by the Juvenile Code "due to scheduling and other conflicts." In the second case, Judge Keith, acting pursuant to Rule 53, entered similar but separate orders that appointed a master to hear four different juvenile cases. Judge Keith explained in his orders that he was "unavailable" and that the master, who had previously functioned as juvenile master for Benton County, was familiar with the facts and previous history of the four juvenile cases. DHS contends that, under the circumstances described, neither judge had authority to appoint masters and that the appointments demonstrate the continued illegal use of special masters for juvenile cases. We agree.

Some confusion was to be expected after a juvenile system operated under the auspices of the county courts, which had been

functioning for nearly 100 years, was ruled unconstitutional. Juvenile matters are no longer heard by the county courts or their referees and masters, but rather are to be decided by full-fledged courts of general jurisdiction presided over by full-time judges — an event that was long overdue.

These courts of general jurisdiction, which are now empowered to decide juvenile matters, are regulated by and subject to the applicable rules set forth in the Arkansas Rules of Civil Procedure, including, but not limited to, Rule 53. Section (B) of this rule specifically provides that the "reference to a master shall be the exception and not the rule" and except in matters of account and difficult computation of damages, "a reference shall be made only upon a showing that some exceptional condition requires it." Certainly a simple statement of unavailability or conflict by the trial judge is not a showing of exceptional conditions.

If a trial court has problems with congested dockets or conflicts in scheduling, and the prompt and proper administration of justice warrant it, the temporary assignment of judges may be had pursuant to Ark. Code Ann. § 16-10-101 (1987). Or, when the temporary replacement of a judge is necessary, such a procedure is provided under Ark. Const. art. 7, §§ 21 and 22. *Wessell Bros. Foundation Drilling Co.* v. *Crossett Pub. School Dist. No. 52*, 287 Ark. 415, 701 S.W.2d 99 (1985); *See also* Ark. R. Civ. P. Admin. Order Number 1.

Since courts with jurisdiction of juvenile actions now may avail themselves of the applicable laws that have been generally relied upon by general jurisdiction courts to avoid delays in trying cases on their dockets, the employment of part-time masters for this purpose should be unnecessary. A crowded or congested docket has never been determined a valid purpose for the appointment of a master under ARCP Rule 53; nor is a master appropriate because he or she is more familiar with the case or because the judge is unavailable. Clearly, Judge Templeton's and Judge Keith's appointments of masters in the juvenile cases pending in their respective courts were unauthorized and in excess of their jurisdiction. Therefore, we grant writs of certiorari quashing the judges' orders that appointed juvenile masters as well as those orders ensuing from such appointments.

Our decision today should, we think, resolve the doubts that seem to have lingered since the *Hutton* decision as it affected the use of masters in juvenile cases. Clearly, any attempt or pretense to use Rule 53 to continue the employment of masters to hear juvenile actions, as has been the situation in the past, is now contrary to the law. Although not all juvenile judgeship positions are in operation at the moment, we are confident that most of our trial judges are meeting the challenge and responsibility of hearing and deciding juvenile matters on the same par as matters concerning property and monetary issues. While a few problems or questions may remain to be resolved in implementing the state's new juvenile court structure, hopefully, the use (or more appropriately the non-use) of masters or referees by trial courts in such juvenile matters has been laid to rest by this court's decision in *Hutton* and the one we hand down today.

PURTLE, J., dissents. HAYS, J., concurs.

STEELE HAYS, Justice, concurring. I expressed my views on the use of masters in a dissenting opinion in *Hutton* v. *Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989). I was a minority of one in that position and since the majority view was decisive I saw no need to restate it in *Collins* v. *State*, 298 Ark. 380, 769 S.W.2d 402 (1989), decided this week. Now the majority position is further solidified in the decision of these consolidated cases and while I have not changed my view, I see nothing to be gained by continuing to espouse a position that has no likelihood of prevailing. On that basis, and the fact that given the approach taken by the majority the petitioner is entitled to the relief sought, I concur.

JOHN I. PURTLE, Justice, dissenting. I believe the majority takes a stand which is too rigid. There is no room for any give and take. Of course it all started with *Walker* v. *Department of Human Services*, 291 Ark. 43, 722 S.W.2d 558 (1987), in which I concurred along with Justice Hickman. I stated in *Walker* that the legislature had the power to assign cases involving dependent-neglected children to any existing court.

I went along with the decision in *Hutton* v. *Savage*, 293 Ark. 256, 769 S.W.2d 394 (1989) because I agreed that the legislature could not give judges the authority to appoint another person a judge to help carry the load. I did not forsee that the opinion in

*Hutton* would be construed as prohibiting judges from appointing special masters in every situation. Masters and referees may be necessary to keep up with the demand that dependent-neglected child cases require. ARCP Rule 53(b) states that "reference to a master shall be the exception and not the rule." Cases of dependent-neglected children constitute such an exception. After all, juvenile cases are only a small part of the circuit judge's and chancellor's present caseload. We created Rule 53 and we can amend it if necessary to accommodate the requirements announced in *Walker* and *Hutton.*

The courts and the people need a bridge from the present until the new juvenile code becomes effective on August 1, 1989. This court has the authority and the duty pursuant to Article 7, Section 4, and Amendment 28 of the Constitution of Arkansas to provide a procedure which will suffice until the new law becomes effective.

The majority "can carve through the technicality" and reach the desired result, but at the same time refuse to allow trial courts to "carve through the technicality" and serve the legitimate purposes of the juvenile justice system. Certainly these cases should be decided by full-fledged judges, but judges cannot fully investigate all cases from start to finish. Judges acting on other cases are not required to attend to every detail concerning every case filed. No doubt present judges are willing to work a little harder — until the new law becomes effective.

I agree with the majority that judges and chancellors cannot anoint clones to perform their judicial functions. However, this court should not hand them a brick while they are attempting to swim the stream. Under the circumstances, I would exercise a little more tolerance in appointing masters and referees until the new law takes effect. Trial courts must have some discretion in matters such as this in order to accomplish what is demanded by the law. Generally speaking we leave much to the discretion of trial courts. Certainly this is just such an occasion. Common sense and justice dictate that we be strong enough to bend.

Joe Samuel BROWN *v.* STATE of Arkansas

CR 88-187 767 S.W.2d 313

Supreme Court of Arkansas
Opinion delivered April 17, 1989]
[Rehearing denied May 15, 1989.]

*Morris & Hodge*, by: *Henry C. Morris*, for appellant.

*Steve Clark*, Att'y Gen., by: *Jeannette Denhammcclendon*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Appellant Joe Samuel Brown pleaded guilty to first degree battery and was sentenced to a five-year term. He filed a Rule 37 petition for post-conviction relief, which was denied by Judge Berlin C. Jones without an evidentiary hearing. On appeal, Brown contends the Rule 37 court erred in failing to (1) conduct an evidentiary hearing; (2) obtain a transcript of prior proceedings; and (3) grant his petition.

Ordinarily, the judgment or decree appealed from is an essential component of the abstract. *Davis* v. *Wingfield*, 297 Ark. 57, 759 S.W.2d 219 (1988). Because Brown did not abstract the court's order denying the petition, we must affirm. Ark. Sup. Ct. R. 9(d).

Affirmed.

Thomas Lloyd GRISWOLD *v.* STATE of Arkansas

CR 88-174 768 S.W.2d 35

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Young & Finley*, by: *Dale W. Finley*, for appellant.

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

DARRELL HICKMAN, Justice. This is an appeal from an order denying the appellant a new trial for ineffective assistance of counsel. We remand the case for further proceedings.

The appellant's convictions for the rape of three young girls were affirmed by this court. *Griswold* v. *State*, 290 Ark. 79, 716 S.W.2d 767 (1986). In 1987 he sought permission, *pro se*, to proceed with a Rule 37 petition, claiming that his lawyer has failed to call crucial witnesses whom he knew could testify to the victims' lack of credibility. In an unpublished *per curiam* dated November 9, 1987, we ordered that a hearing be held limited to the allegation regarding the failure to investigate the potential witnesses named by the petitioner.

The appellant's attorney, Robert Irwin, testified at the hearing and admitted he was aware that certain witnesses had information relevant to the appellant's case: Linda Bright, a social worker in Louisiana; Dr. Alan Klein, a psychologist in Louisiana; Homer Griswold, the appellant's brother, and Homer's wife, Dr. Beth Griswold, a psychologist.

Irwin telephoned the Griswolds, who lived in Newcastle, Wyoming, and recorded the conversation. They told Irwin that

two of the appellant's alleged victims had wrongly accused them of abuse and had fabricated stories concerning other adults as well.

Dr. Griswold also provided Irwin with written reports prepared by Linda Bright and Dr. Alan Klein. Bright's report indicated generally that the girls had distorted perceptions of reality. Dr. Klein's report noted that one of the girls had retracted her claim that she had been abused by the Griswolds.

Irwin did not contact either Klein or Bright. As he testified, he decided to "put all his eggs in one basket" and rely on Homer and Beth Griswold to undermine the credibility of the victims. He admitted that Klein and Bright had knowledge of the victims' psychological problems, but felt that Dr. Griswold would be his "number one, best witness" and Homer Griswold the second best witness.

The trial was apparently set several times and finally scheduled for October 4. Irwin sent blank subpoenas to the Griswolds in Wyoming so they could clear any absence for trial with their employers. On October 4, the trial was reset for October 18. Additional subpoenas were sent, but they did not reach the Griswolds until just a few days before trial.

Irwin spoke with the witnesses on the phone the Wednesday before the trial on Friday. Dr. Griswold said she informed him that a winter storm had made traveling hazardous in their area and that her husband had injured himself. On the day before trial, she confirmed that it would be impossible for them to attend. She testified that she asked Irwin to try for a continuance, but he said he could not get one. The appellant learned, for the first time, on the day before his trial that his key witnesses would not appear.

Irwin testified that the Griswolds' testimony was very important. While he did not believe the testimony of either Klein or Bright would be crucial, he stated, "there is no question in my mind that the outcome of the case might have been different had [the Griswolds] appeared." Irwin did not recall Dr. Griswold mentioning a continuance. Nevertheless, he did not move for a continuance when it was discovered they would not be available. Irwin testified he came to believe the Griswolds did not intend to come to Arkansas because they feared charges would be made

against them.

The trial judge denied the appellant's petition. He decided it was not counsel's fault that the Griswolds did not appear. He concluded the Griswolds did not want to come to the trial and declined to rule on whether Irwin should have asked for a continuance, saying the only issue before him was whether the witnesses had been properly investigated.

While we do not fault the trial judge for reading our *per curiam* narrowly, and perhaps its wording was too restrictive, it would indeed make justice an empty vessel to say a lawyer should investigate and prepare for trial but is not required to take all reasonable steps necessary to get critical evidence introduced.

Therefore we remand the case for the trial judge to determine if Griswold was denied effective assistance of counsel because his attorney did not move for a continuance. If the appellant brings another appeal, he should abstract the trial record. Prejudice must be demonstrated.

Remanded.

HAYS and GLAZE, JJ., dissent.

STEELE HAYS, Justice, dissenting. In our per curiam order of November 9, 1987, *Griswold* v. *State*, we stated as grounds for remanding this case that the petitioner had alleged that his trial counsel failed to adequately investigate the case or prepare a defense:

> Specifically, the lack of investigation lies in failing to contact witnesses who, according to petitioner, would give testimony as to the victims' history of fabricating claims of abuse and their general lack of credibility. The petitioner names the witnesses, at least two of whom are psychology professionals familiar with two of the victims, and alleges that he asked his attorney to call them but that his attorney refused. . . . *The hearing will be limited to the allegation regarding the failure to investigate potential witnesses named by the petitioner.*" [My emphasis.]

The trial court did exactly as we directed and heard testimony from which he concluded that defense counsel had not neglected to investigate and prepare. That finding was not clearly

against the preponderance of the evidence.

As to Dr. Klein and Ms. Linda Bright, the record tells us almost nothing of what Ms. Bright might testify to and the report of Dr. Klein was made in 1980, whereas the offenses involving these children occurred from August 1983 to July 1984. Moreover, it is clear Dr. Klein's information came entirely from Dr. Griswold, as defense counsel testified:

> His background information, however, came from Dr. Griswold. The information about the grandfather, the allegations of abuse by the grandfather, the abuse by petitioner, and the allegations of abuse against Dr. Griswold, *all came from her* [referring to Dr. Griswold]. [My emphasis.]

The plan of defense counsel was to have Dr. Griswold, a clinical psychologist, testify as an expert, "relying on all the information available to her," including Dr. Klein's report. In short, these were decisions of trial strategy which we have said repeatedly are not a proper basis for ineffective assistance of counsel. *Knappenberger* v. *State*, 283 Ark. 210, 672 S.W.2d 54 (1984); *Leasure* v. *State*, 254 Ark. 961, 497 S.W.2d 1 (1973).

The evidence is undisputed that the Griswolds told defense counsel they would come for the trial, but refused "at the last moment," telling defense counsel that an injury to Mr. Griswold's foot made it impossible for them to attend the trial. At the hearing after remand, however, petitioner contended that "a blizzard" prevented the Griswolds from leaving their home in Newcastle, Wyoming. The injury was not mentioned.

Now the majority has changed the premises altogether and reversed the trial court, not for failure to comply with the per curiam order, but for conducting a hearing which did exactly as we instructed. The case is remanded a second time to address a wholly different issue, i.e., whether defense counsel should have sought a continuance to obtain the presence of the Griswolds, an issue not raised in petitioner's fifteen page Rule 37 petition nor mentioned in our per curiam. That issue could have been resolved at the last hearing if the petitioner had asserted it and it is, I believe, inconsistent with the purpose of Rule 37 to permit it to be raised in retrospect, thereby necessitating two hearings. All of

this in spite of a total lack of any showing by the petitioner that he was so prejudiced by these developments that his trial must be regarded as unfair. *Strickland* v. *Washington*, 466 U.S. 668 (1984).

I respectfully dissent.

Billy Frank GROSS *v.* STATE of Arkansas

CR 88-195 767 S.W.2d 314

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Robert A. Newcomb*, for appellant.

*Steve Clark*, Att'y Gen., by: *Ann Purvis*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Billy Frank Gross was convicted of attempted capital murder and sentenced to fifty years imprisonment. A related charge of felon in possession of a firearm was severed.

Gross argues that a prospective juror should have been stricken for cause, two guns seized pursuant to the arrest should have been excluded, and the capital felony murder statute is unconstitutional. Finding no error, we affirm his conviction.

The charges arose from a disturbance reported at the Gross residence in Little Rock. Officer Kenneth Temple met Lynette Schoenberg and drove to that residence about 3:30 a.m. on March 26, 1988. Officer Kris Bell arrived to assist. The officers knocked on the door several times but received no response. Officer Temple testified that the second time he and Officer Bell went to the door Ms. Schoenberg went with them. She began yelling and finally received a response from inside the residence. She said, "Billy, let my mother out," at which time they heard a man say, "get away from the door or I'm going to blow you away." A shot from inside the home was then fired through the door. The officers identified themselves as police officers. Officer Temple then heard, "you better have a badge." At that time Officer Temple told him, "I do have a badge." The person inside replied, "Well, if you've got a badge, I'm going to f------ kill you."

According to both officers, Gross opened the door and fired shots at Officer Bell, using a silver colored revolver. Officer Bell returned fire. No one was hurt.

Gross was told to come out. Officer Bell saw him come out and then go back inside the house. When he then came out a second time, the police arrested him. Officer Temple found a black revolver when he searched the area. The officers immediately entered the house to see if anyone was hurt during the shooting. They knew that at least Ms. Schoenberg's mother was in the home and that there were several other people reportedly there. Officer J. D. Martin testified that they found two women, a child, and an older white male in the house. No one was injured. A silver colored .22 revolver was found just inside the door by

Officer Martin.

The judge refused to excuse potential juror O. L. Plunkett for cause, simply because several of his relatives were either police officers or had been police officers. At one point he also stated that he would believe a police officer over someone else. The appellant peremptorily challenged Plunkett and argues he was forced to accept Fred Meux because he was out of peremptory challenges. Even if the trial judge was wrong in not excusing Plunkett, the test is that the appellant must demonstrate that the juror actually seated should have been struck for cause. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Fred Meux stated that "my wife's cousin's relative is on the State Police but I don't get to see him very often." The appellant as much as concedes that he could not challenge Mr. Meux for cause. In *Ross* v. *Oklahoma*, 108 S.Ct. 2273 (1988), the U. S. Supreme Court said: "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." We find no error on this point.

The appellant also argues the silver colored revolver was inadmissible because Gross had already been arrested and was in custody when the officers entered the house and seized the gun without a search warrant. The police knew there were others in the house and entered to see if anyone was injured; shots had been fired at the house. Under the circumstances the officers were clearly justified, indeed duty bound, to enter the house to check on the well-being of the occupants. The gun was in plain view just inside the door. We agree with the trial court that the officers were justified in seizing the gun since there were exigent circumstances which made their entry lawful.

In *Mincy* v. *Arizona*, 437 U.S. 385 (1978), the court said:

> 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency' . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

*See also Holder* v. *State*, 290 Ark. 458, 721 S.W.2d 614 (1986).

The appellant argues that the black revolver was

irrelevant, because the police officers identified the silver revolver as the gun the appellant used when he shot at Officer Bell. However, the black revolver explained the number of shots fired. The officers testified that one shot was fired through the door and two shots fired at Officer Bell. There was also testimony another occupant of the house had also fired a gun that evening. When the officers checked the guns, they found two shots had been fired from the silver revolver and two from the black revolver.

The appellant claims the capital murder statute, which singles out the attempt to kill or the killing of a policeman or judge, and certain other public officials, is unconstitutional because it is special legislation in violation of Amendment 14 of the Arkansas Constitution. We answered this argument in *Swindler* v. *State*, 264 Ark. 107, 569 S.W.2d 120 (1978). Nor is Ark. Code Ann. § 5-3-201 unconstitutionally vague because it allows the prosecution to elect to charge one with this crime or aggravated assault. *United States* v. *Batchelder*, 442 U.S. 114 (1979).

Affirmed.

George PARRISH, et ux. *v.* Charles Thomas NEWTON, et al.

89-28 768 S.W.2d 17

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Jeff Slaton*, for appellant.

*Roy & Lambert*, by: *David E. Morris*, for appellee.

DARRELL HICKMAN, Justice. This is an automobile accident case. The jury returned a verdict in favor of appellants, Mr. and Mrs. Parrish, and awarded them a total of $5,300 in damages. The Parrishes filed a motion for a new trial, claiming evidentiary errors and an inadequate verdict, which the court denied. Finding no error, we affirm.

The accident happened April 14, 1987, on Highway 68 in Springdale. Appellee Charles Newton was driving his father's car. While attempting to enter Highway 68 from a side road, Charles pulled out in front of the Parrish car, causing the accident.

The Parrishes sued Charles Newton, asking for damages for medical expenses, property damage, pain and suffering, lost wages and loss of consortium. Newton answered that upon

entering the intersection, his vehicle had stalled without warning. By an amended complaint, the Parrishes added Lawrence Newton, the father of Charles Newton, as a defendant, claiming that he had negligently failed to maintain his vehicle.

The case went to trial, and the jury found that Charles Newton was totally responsible for the accident. The father was dismissed on a directed verdict. The jury awarded Lorraine Parrish $5,000 and awarded George Parrish $300. The appellants' motion for a new trial asserted three errors: (1) the trial court improperly admitted certain documents into evidence showing Mrs. Parrish was receiving benefits from a collateral source; (2) testimony that Lawrence Newton's wife knew the car was in poor mechanical condition was improperly excluded as hearsay; and (3) the amount of the verdict was inadequate.

Mrs. Parrish claimed lost wages from the date of the accident until the time of trial. The appellees contended that any wages lost after June 2, 1987, were not the result of the accident but other physical problems, specifically gallbladder disease.

The appellants' witness, Dr. Tom Whiting, testified that in the fall and winter of 1987 he did excuse Mrs. Parrish from work for one period of nine weeks and on another occasion for three weeks. He indicated that Mrs. Parrish's inability to work could have been caused by a combination of her accident injuries and her gallbladder surgery.

The doctor had signed two forms which had been submitted by Mrs. Parrish to her employer, Tyson Foods. The forms were titled "Tyson Disability Security Claim." The forms indicated that Mrs. Parrish was unable to work from September 28 to November 27 because of "gallbladder disease with surgery," and from December 23 to January 11 for shoulder and neck pains. The judge allowed the appellees to introduce the forms after deleting their title captions.

The appellants objected that the collateral source rule had been violated. The rule is that evidence showing an injured person received benefits from a collateral source is inadmissible unless relevant for some purpose other than the mitigation of damages. *Amos* v. *Stroud*, 252 Ark. 1100, 482 S.W.2d 592 (1972).

Here, the forms were relevant for the purpose of determining causation. Mrs. Parrish claimed all her lost wages were attributable to the accident. The doctor testified that it was a combination of the accident and Mrs. Parrish's illness. But the forms tended to support the appellees' position that the damages were due to factors unrelated to the accident. There was nothing on the forms which clearly indicated Mrs. Parrish had received any collateral benefits.

In short, the trial judge was called upon to weigh the probative value of the forms against the unfair prejudice that could result. Such a matter is within the discretion of the court. *Oxford* v. *Hamilton*, 297 Ark. 512, 763 S.W.2d 83 (1989). Under the circumstances of this case, we find no abuse of discretion in admitting the forms.

The appellants' claim that the forms were introduced in bad faith is not borne out by the record. Immediately upon objection, the appellees assured the trial court that the forms were being offered to show causation and readily agreed to deleting any offending portions.

The appellants attempted to introduce testimony of two witnesses who would repeat a statement made by Lawrence Newton's wife that there were numerous problems with her husband's vehicle. The trial judge properly refused to admit the evidence.

Though Mrs. Newton was not a party to the case, the appellants attempted to introduce her statement as an admission by a party opponent, claiming she was her husband's agent regarding the vehicle. *See* A.R.E. Rule 801(d)(2)(iv).

One spouse is not necessarily the agent of the other solely by virtue of the marital relationship. *Cooper* v. *Cooper*, 225 Ark. 626, 284 S.W.2d 617 (1955). It was shown that Mrs. Newton often rode in the car as a passenger while pursuing family errands. But the appellants never made a case that she was Mr. Newton's agent for the purpose of maintaining the vehicle.

Finally, the appellants question the amount of the verdict. The jury received separate damage instructions on Mr. and Mrs. Parrish. Mr. Parrish's instruction told the jury it could award property damages for the vehicle. The verdict for him was $300,

although damages to the car were at least $1,400. However, Mrs. Parrish gave all the testimony regarding damage to the vehicle, and the car was in both their names. Even the appellants admit that the award for the car could be included in the $5,000 given to Mrs. Parrish.

In addition to property damage, Mrs. Parrish suffered about $850 in medical bills and six weeks of lost wages, which $5,000 would adequately compensate. All other damages were greatly disputed. When the issue is the alleged inadequacy of the damage award, the denial of a new trial will be sustained unless a clear and manifest abuse of discretion is seen. *Fields* v. *Stovall*, 297 Ark. 402, 762 S.W.2d 783 (1989). We cannot say that occurred.

Affirmed.

W.J.B. "Sonny" AXSOM II *v.* APARTMENT HOUSE BUILDERS, INC.

88-235 768 S.W.2d 19

Supreme Court of Arkansas
Opinion delivered April 17, 1989
[Rehearing denied May 15, 1989.*]

*Holt, C.J., and Hickman, J., not participating.

*Davidson Law Firm*, by: *Charles Phillip Boyd, Jr.*, for appellant.

*Friday, Eldredge & Clark*, by: *James M. Simpson, Scott J. Lancaster* and *Hank Jackson*, for appellee.

JOHN I. PURTLE, Justice. The appellant, an employee of a subcontractor, filed suit for injuries which he sustained while on the job and which he asserted were the result of the negligence of the prime contractor. After a jury trial a verdict was returned in favor of the appellee. The appellant argues that the trial court erred in failing to give Arkansas Model Instruction (AMI) 1104 or 1106 and that the court should have instructed the jury on strict liability. The appellant failed to preserve the issue of strict liability for appellate review. We agree that AMI 1104 should have been modified and given or that AMI 1106 should have been given. The failure to give either of the requested instructions was prejudicial error.

The appellant was at the time of the events discussed herein an employee of Riverside, Inc., a subsidiary and subcontractor for Apartment House Builders, Inc., appellee. It is admitted that the general contractor occupied the premises, but a dispute arises on the question of whether he had a duty to maintain the premises in a safe condition for the employees of the subcontractor. The contract is apparently silent on responsibilities for keeping the premises in safe working order. One clause in the contract states: "The subcontractor shall at all times keep the building and premises clear of debris arising out of the operation of this subcontract." Although debris could become a factor in causing injury, it cannot be said that this clause created an express duty on the part of the subcontractor to keep the premises in a safe

working condition. It is also not disputed that the contractor and subcontractor in this case agreed to cooperate in scheduling their work in a manner so as to create as little conflict as possible between the two parties in performing their responsibilities under the contract.

The appellant was injured on July 18, 1986, while descending an unfinished metal stairway between the second and third floor of the premises under construction. He caught his foot on a metal lip on the outside rim of a pan-like step, which was to be filled with concrete, and fell from the third floor level to the second floor level, receiving a severe fracture of his right wrist. The allegation in the complaint was that the stairway was unlit, had no handrails or protective guard, and was unfinished. Subsequently the complaint was amended to allege that the incomplete stairway was a product under the Products Liability Act and that it was defective and unreasonably dangerous.

The appellant argues that the court erred in failing to present the issue of strict liability to the jury for consideration. However, the appellant did not offer instructions on this subject or, if an unsatisfactory instruction was offered, did not preserve his objection or offer another instruction. Simply put, he did not preserve his appellate rights on this issue.

From the record it appears that another subcontractor was responsible for pouring the concrete in the steps of the stairway. Although Riverside, Inc., installed the metal frame of the stairway, it was the prime contractor who had directed the stairway to be erected in the first place, and it was its responsibility to notify the other subcontractor when to pour the concrete.

The facts are not the major issue in this appeal. The responsibilities and duties between a contractor and subcontractor constitute the point at issue. After the evidence had been presented and the court was going over the instructions to be given, the appellant requested AMI 1104 and 1106. However, the court refused to give these instructions on the basis that AMI 301, as modified, would be given and that it explained the duty to exercise ordinary care sufficiently for the jury to understand the case. The appellant argued to the court that he was clearly an invitee; therefore the duty owed to him was that contained in AMI 1104. The attorney added: "If the court feels there was an

issue as to whether he was a business invitee or licensee, then AMI 1106, at the very minimum, should be given." AMI 1104 as presented to the court by the appellant's counsel stated: "In this case Sonny Axsom was a business invitee upon the premises of Apartment House Builders, Inc."

AMI 1106 was requested and it appears to have been properly drawn to frame the issues before the jury. AMI 1106 put the question of "whether Sonny Axsom was a licensee or an invitee" to the jury for a decision. If the question was not in issue, then 1104, possibly modified to say "If you find Sonny Axom was a business invitee . . . ," would have been appropriate. The question presented for resolution in this appeal is the duty owed by a prime contractor who is responsible for the construction premises to the employees of its subcontractor.

A case which is quite close to the present one is *Gordon* v. *Matson*, 246 Ark. 533, 439 S.W.2d 627 (1969), where the court stated:

> It appears to be the general rule that the responsibilities of the prime contractor to employees of the subcontractor on the job are comparable to the duties of the owner of the premises. This is a duty to exercise ordinary care and to warn in the event there are any unusually hazardous conditions existing which might affect the welfare of the employees.

The *Gordon* opinion also recognized that the prime contractor is responsible for injuries to the subcontractor's employees if the prime contractor has undertaken to perform certain duties or activities and has done so negligently. There is a distinct difference in the *Gordon* case and the present case in that the injury in *Gordon* was caused by a hoist which was under the exclusive control of the subcontractor, and it was conceded that the prime contractor did not exercise any supervision or control over any of the activities of the subcontractor or its employees.

We stated in *Ollar* v. *Spakes*, 269 Ark. 488, 601 S.W.2d 868 (1980), that "it is the duty of an owner or occupier of land to his business invitees to maintain a reasonably safe condition for those coming upon his premises." The *Ollar* opinion went on to extend this duty to the areas immediately adjacent to the property where

the invitee is visiting if the owner or occupier knew of dangerous conditions not known by the invitees.

A case factually similar to the present case in some respects is that of *Daniel Construction Co.* v. *Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979). Holden was an employee of a subcontractor and was injured on the job site while doing something unrelated to the duties assigned to him by the subcontractor. After Holden received a jury verdict in the amount of $38,500, the prime contractor appealed to this court and obtained a reversal. Holden was not engaged in the performance of his duties at the time of his injury. He fell through a stairwell opening from one floor to another in an apartment building under construction after the close of work hours. He had gone to his private automobile, had obtained his personal clothing, and had come back inside the apartment building for the purpose of changing clothes. He stepped into an unfinished stairwell and was injured. In that case the appellant conceded that employees of the subcontractor were business invitees of the general contractor while performing their work on the job site, pursuant to the terms of the contract. This court found that Holden had crossed the boundaries of being an invitee and became instead either a licensee or a trespasser. There are no such allegations in the case before us. It is undisputed that the appellant was engaged in the performance of his duties as foreman of the subcontractor.

The Eighth Circuit Court of Appeals interpreted the Arkansas law on this subject in *Dunn* v. *Brown and Root, Inc.*, 455 F.2d 717 (8th Cir. 1970), and stated that "where the prime contractor is itself guilty of negligence causing or contributing to the injury, it cannot escape liability. . . . [I]t appears that a prime contractor may be held liable for failure to perform a duty which it has undertaken." In reaching this decision the Circuit Court of Appeals quoted from *Gordon* v. *Matson*, supra, likening the position of a prime contractor to that of any owner or occupier of land and the position of a subcontractor's employee to that of a business invitee. The heart of the ruling was that it is the duty of an owner or occupier of land to exercise ordinary care and to warn invitees in the event there are unusually dangerous conditions existing which might affect the welfare of the invitees.

In none of the cases cited is there a bright line holding

that a prime contractor is always responsible to a subcontractor's employee who is injured while performing the duties of the subcontractor. Thus, the general rule is that in the absence of statutory requirement, contractual obligation, or undertaking of another party, the prime contractor in possession of the construction premises is responsible for injuries which arise because of its negligence. The common thread running through all of the Arkansas cases that we have reviewed leads us to conclude that we must make a determination on the merits of each case and consider the specific facts before we can determine whether AMI 1104 or 1106 is mandated. The reason for the stairway being unlit is disputed as is the reason for the concrete not being poured in the shell steps of the stairway. It is not disputed that the contractor was carrying on other phases of the work during the same time the subcontractor was performing its duties.

AMI Civil 2d 301 does not mention the duties of a general contractor to those coming upon the premises. Therefore, we disagree with the trial court's holding that the submission of either of the proffered instructions would have been cumulative or duplicative, or that they would have added nothing to the plaintiff's case. The proffered instructions, on the other hand, speak directly to the appellee's duties to the appellant.

This court held in *Beevers* v. *Miller*, 242 Ark. 541, 414 S.W.2d 603 (1967), that "it is error to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law in a general way is covered by the charge given, unless it appears that prejudice has not resulted." We cannot say that prejudice did not result from the failure to give one of these instructions.

Reversed and remanded.

HICKMAN, J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I disagree with the majority that the appellant has demonstrated error by the trial court which requires reversal. Appellant contends that when an employee of a subcontractor is injured on the job site and sues the general contractor, the giving of AMI 1104 or 1106 is "mandatory," not by reason of the particular circumstances of

the case, but by virtue of the relationship between the parties.

There are no cases from this court, nor, so far as I can determine, from other jurisdictions which hold that an employee of a subcontractor is, ipso facto, a business visitor or invitee of the general contractor. Certainly nothing cited in the majority opinion so holds. I submit that is not the law and ought not to be. The duty owing by the general contractor depends upon the particular facts of the case, the issue being whether the general contractor has that degree of control and possession of the area where an injury occurs that it can be said there is a duty to maintain such premises in a reasonably safe condition. Thus the duty arises not simply from the relationship, but from the responsibilities undertaken.

> The general contractor *in control of a structure or premises* owes to the employees of any other contractor rightfully thereon a duty to exercise ordinary care to keep the structure or premises in a safe condition for their use. *This duty, however, is coextensive only with the general contractor's possession and control of the premises*—that is, it devolves upon him because of the control undertaken or exercised by him, rather than merely because of his position as general contractor. [My emphasis.]

13 Am. Jur. 2d *Building and Construction Contracts* § 135.

The rule is correctly stated in *Kennedy* v. *United States Construction Co.*, 545 F.2d 81 (1976):

> If a general contractor retains control over the premises where a subcontractor is working, then the general contractor owes a duty to employees of the subcontractor to use ordinary care to maintain the premises in a reasonably safe condition for the use of those employees.

The "premises" where appellant's injury occurred consisted of a metal stairway which appellant's own employer installed, consisting of steps fashioned like a rectangular dish or pan into which concrete was to be poured. Another subcontractor was to pour the concrete. The majority opinion states that it was the responsibility of the general contractor to notify the other subcontractor when to pour the concrete. I find nothing in the record as abstracted to support this assertion, but assuming it to be

correct, standing alone it would hardly override every other consideration as to who controlled the premises. We do not know whether the other subcontractor had been notified or even whether it was time for the concrete to be poured. In short, it is clear that whether the general contractor or one or more subcontractors was responsible for maintaining *these* premises was a factual issue. The trial court heard the proof in its entirety and rejected the theory that AMI 1104 or 1106 was "mandatory." Appellant has not shown that ruling to have been erroneous.

The majority seems to concede that appellant was entitled, at most, only to a modified version of AMI 1104, but impliedly puts the responsibility on the trial judge to make that alteration. However, that responsibility expressly rests on the litigant, not the trial judge. Even if it could be assumed the appellant's proof justified an instruction patterned after AMI 1104 he failed to present a proper instruction to the trial court. ARCP Rule 51; *Peoples Bank & Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); *Curtis Communications* v. *Collar*, 11 Ark. App. 14, 665 S.W.2d 301 (1984). Appellant took the position that AMI 1104 was "mandatory" by reason of the relationship between the parties. That was a mistaken assumption of the law and it follows that the trial court should be affirmed.

Roderic M. BELL, Sr., Roderic M. Bell, Jr., Jerome C. Bell, Frances B. Bell and Mattye H. Acuff *v.* Doris J. WILSON

88-306 768 S.W.2d 23

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Ball, Mourton & Adams*, by: *Phillip A. Moon*, for appellant.

*Epley & Epley, Ltd.*, by: *Lewis E. Epley, Jr.*, for appellee.

STEELE HAYS, Justice. In 1966 William A. Hill and Theodore F. Mariani, as trustees for "Georgetown Associates," purchased some 323 acres of land in Benton County.[1] On January

[1] The boundaries of Benton County were later changed by the legislature and the tract now lies in Carroll County.

14, 1967, Theodore F. Mariani, William A. Hill, Dr. Charles F. Hufnagel, Dr. John F. Gillespie, and Roderic M. Bell, Sr., entered into a joint venture agreement under the name of "Georgetown Associates" for the purpose of acquiring and developing the 323 acres of land. Subsequent to the execution of the joint venture agreement, the real property's acreage was reduced by various conveyances, and now consists of approximately 215 acres of land.

In 1969, Doris J. Wilson, the appellee, purchased an interest in the joint venture from Dr. John Gillespie. Over the years various members of the joint venture transferred their interest resulting in the appellants Roderic Bell, Sr., Roderic Bell, Jr., Jerome Bell, Frances Bell, and Mattye Acuff—collectively owning an 87.5% undivided interest. Doris Wilson, the appellee, owns the remaining 12.5% interest.

The appellants filed a complaint for dissolution of the joint venture and sought only to have the jointly held property sold at public auction, with the proceeds divided among the joint venturers. Doris Wilson counterclaimed, seeking a partition in kind of her 12.5% undivided interest. The chancellor held that a 12.5% portion of the real property could be partitioned in kind "without great prejudice to the owners," and appointed five commissioners,[2] pursuant to Ark. Code Ann. § 18-60-414(a) (1987), to conduct the partition. The chancellor also ordered Doris Wilson to pay the appellants $1,611.06 for her share of the taxes, insurance, property improvements, maintenance, repairs, and fire protection for the last five years.

On December 29, 1987, the commissioners filed a unanimous report with the court. The appellants moved to set aside the report, renewing their argument that the property could not be divided in kind. The court considered this motion on February 9 and 23 of 1988. After hearing testimony from Mr. Russell Atchley, chairman of the commissioners, as to the method and manner of partitioning the land, the chancellor confirmed the commissioners' report. An order approving the Commissioners'

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[2] Three commissioners were first appointed and when one declined to serve the number was increased to five—one selected by the appellants, one by the appellee, and one by the chancellor pursuant to a stipulation.

Deed was later issued. The appellants appeal from the chancellor's order confirming the commissioner's report arguing that the commissioner's report should be set aside.

The appellee has moved to dismiss the appeal as untimely, thus, the threshold issue is whether the case must be affirmed on that basis. The chancellor ordered partition in a decree filed on December 31, 1986. Appellee points out that notice of appeal was filed on April 27, 1988, well past the thirty day period for filing notice of appeal. Appellee relies on *Smith* v. *Smith*, 235 Ark. 932, 362 S.W.2d 719 (1962), where the partition decree was entered on April 15, 1961, and the order of confirmation on January 16, 1962. The court held in *Smith* that the partition must be affirmed because no notice of appeal was filed within thirty days of the partition decree: "A decree partitioning land is a final decree from which an appeal could have been prosecuted." See *Branstetter* v. *Branstetter*, 130 Ark. 301, 197 S.W. 688 (1917).

However, more recently in *Dorazio* v. *Davis*, 283 Ark. 65, 671 S.W.2d 173 (1984), we recognized that a decree ordering partition either in kind or by a sale and division of the proceeds is not a final order from which an appeal must be taken. We think that is the better view, as it avoids multiple appeals. We expressly overrule *Smith* v. *Smith*, and those cases holding that the appeal must be taken at an interlocutory stage in the proceedings.

Turning to the merits, the appellants first contend the decree ordering partition simply directed the commissioners to partition the land, and thus restricted their discretion in determining whether the land was susceptible of partition without great prejudice to the owners. The appellants argue that the commissioners were unaware of their statutory duty to report back to the court if they deemed that a partition could not be accomplished fairly. Ark. Code Ann. § 18-60-415(a) (1987) provides:

> The commissioners shall immediately proceed to make a partition according to the judgment of the court, unless it shall appear to them or a majority of them, that partition of the premises cannot be made without great prejudice to the owners.

By relying on the subordinate language in this statute, the appellants' argument would shift the authority to weigh the

equities and to determine if partition in kind can be accomplished from the chancellor to the commissioners. We believe that position is contrary to our partition scheme and to our case law. See *McNeely* v. *Bone*, 287 Ark. 339, 698 S.W.2d 512 (1985).

Under our statutory scheme the chancellor ordinarily initially determines the interests of the parties and whether partition should be ordered. Those issues having been resolved, the chancellor may then appoint commissioners to partition the land, if possible, according to the interests previously determined. Of course, if the complexities of the case are such that the commissioners deem it impossible to partition the land, they report back to the court and the chancellor then decides whether to confirm, set aside, or remand that report, the final decision resting with the chancellor. In this case, the position of the appellants from the outset was that the land should be sold, rather than partitioned in kind. That being so, the question of partition in kind was the paramount issue at the trial consuming three days. The question was thoroughly developed by lay and expert testimony, as well as by photographs, charts and topographical maps of the terrain. At the end of that proceeding the chancellor announced his finding that the property could be partitioned in kind and that finding was fully supported by the evidence. The chancellor then issued a decree of partition and appointed commissioners to make the partition in kind. While it is true, as appellants contend, that Mr. Atchley testified that the commissioners did not consider "as a body" whether the property could be partitioned without great prejudice to the owners, he also testified that he was familiar with the partition statutes, that he reviewed the statutes after the commissioners met and, notably, that he believed the partition which the commissioners arrived at did not cause great prejudice to the owners. That testimony with the directive of the chancellor that the commissioners consider both the quality and quantity of the tract to be divided, given its highest probative force, permits an inference that the commissioners were not unaware that they had the option to report back that the property was incapable of division in kind.

We recognize that in practice the chancellor initially determines the interests of the parties and whether partition, either in kind or through a sale, should be had, and does not ordinarily decide whether partition in kind is appropriate before the

commissioners are appointed. But we find nothing in our statutory scheme that renders that order of procedure inflexible. In fact, the use of the word "may" rather than "shall" in Ark. Code Ann. § 18-60-414 (1987), suggests that the deployment of commissioners is permissive.

The appellants also argue that neither the chancellor, nor the commissioners considered the appellants' separate and distinct interests before partitioning the land. The partition statutes do require the court to take into consideration the respective rights and interests of the parties to the action. However, the appellants did not seek a partition in kind. Therefore, the chancellor considered himself without proper authority to divide their interest in kind and thus considered their remaining interests collectively.

Again, the crux of appellants' argument focuses on their contention that the property was incapable of being equitably divided. As previously stated, this is a question for the chancellor. The commissioners might have partitioned the land, believing that there were only two owners of the property, but the chancellor was aware of the separate interests, and no doubt considered all these interests when he approved the commissioners' report. After hearing the report of the commissioners, and the evidence presented, the chancellor found and declared that the commissioners made a fair and just division of the property. Considering the commissioners' report, and the conflicting testimony as to whether the land could be partitioned, the chancellor's finding does not appear to be clearly erroneous. We think the commissioners and the trial court were in a better position to make that determination, *O'Mary* v. *Dunn*, 261 Ark. 323, 547 S.W.2d 758 (1977), and accordingly the decree is affirmed.

Sandra Real OLMSTEAD *v.* Arvin H. LOGAN

89-17 768 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Ozark Legal Services*, by: *Margaret E. Reger* and *Marcia McIvor*, for appellant.

*Stripling & Morgan*, by: *M. Edward Morgan*, for appellee.

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

STEELE HAYS, Justice. This litigation puts at issue the

constitutionality of replevin procedures under Ark. Code Ann. §§ 18-60-810 and 811 (1987). The trial court upheld the constitutionality of the statutes. However, we find it necessary to remand because the attorney general was not notified of the constitutional challenge pursuant to the requirements of Ark. Code Ann. § 16-111-106(b) (1987).

Appellant Sandra Olmstead purchased a 1977 Pontiac automobile from appellee Arvin Logan, agreeing to pay $300 down and $100 per month for six months. When a dispute arose over the cost of repairs, Ms. Olmstead refused to make the monthly payments. Mr. Logan filed a complaint and affidavit for replevin under § 18-60-810. The circuit clerk issued a summons and an order directing the sheriff to deliver the automobile to Logan, which was done.

Ms. Olmstead filed an answer and counter-claim alleging false representations and challenging the constitutionality of the order of replevin issued pursuant to § 18-60-810. At a trial before the court the constitutional issue was taken under advisement. The trial judge subsequently denied the counter-claim and ruled that Mr. Logan was entitled to possession of the vehicle. On appeal Ms. Olmstead contends that she was deprived of property without due process of law under the Fourteenth Amendment, and deprived of the right to testify in her own behalf.

Appellant points out that in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Supreme Court invalidated a Florida replevin statute which was not materially different from the Arkansas statute, holding that it was a violation of procedural due process for a state to summarily deprive a person of property without prior notice and an opportunity to be heard. Later cases dealing with similar issues are *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975); and *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). It is conceded that following the *Fuentes* decision, the Arkansas General Assembly revised the replevin procedures in light of *Fuentes* (Ark. Code Ann. § 18-60-801, et seq.), however, the new enactment contains this anomalous provision: "[this act] shall not repeal any existing law pertaining to the recovery of personal property by parties claiming an interest therein." § 18-60-802. For reasons that are not stated, appellee elected to follow the pre-existing route,

eschewing the more recent replevin procedures.

We do not address the merits of appellant's arguments, because the Attorney General was not notified in accordance with § 16-111-106(b), providing that "in any proceeding" if a statute is alleged to be unconstitutional the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard. While this appeal was pending the Attorney General moved to intervene, which we granted, and now argues that the case must be reversed for failure to give the required notice and to afford him the right to be heard. *Roberts* v. *Watts*, 263 Ark. 822, 568 S.W.2d 1 (1978).

While we have said that notice to the Attorney General is not a jurisdictional requirement, nevertheless it is generally reversible error not to give the notice. *City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). Exceptional circumstances may render the omission harmless, as where the record discloses that all points pro and con have been argued and fully developed by litigants who are clearly adversarial. Here, we find no indication that the arguments were fully developed before the trial court. Moreover, it is evident that appellant is prepared to seriously challenge the constitutionality of the earlier replevin statutory scheme and that is a sufficient basis for reversal. *Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984).

Appellant's second point, i.e., that the trial court erred in denying her the right to testify because she was not listed as a witness in her response to interrogatories, is rendered moot by reversal of the case on the previous point. Presumably the issue will not arise on remand.

REMANDED.

WALT BENNETT FORD, INC. *v.* Richard Randall KECK

88-148 768 S.W.2d 28

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Wallace, Dover & Dixon*, by: *Suzanne Antley* and *David A. Couch*, for appellant.

*Steven R. Davis*, for appellee.

VINCENT FOSTER, JR., Special Justice. Appellant, Walt Bennett Ford, Inc., having completed warranty repairs on a Yugo automobile owned by appellee, Richard Keck, declined to surrender the Yugo to Keck due to his refusal to pay rental charges for a substitute automobile appellant provided him to use while his Yugo was being repaired. Keck sued for conversion of the Yugo, and the jury returned a verdict against appellant for both compensatory and punitive damages, from which appellant appeals. Appellant contends that the trial judge erred in allowing the introduction of certain evidence and in submitting the issue of punitive damages to the jury and argues alternatively the punitive award was excessive. We affirm.

In October 1986, Keck purchased the Yugo automobile from appellant, an automobile dealer. Mechanical and other defects immediately developed, and Keck took it back to the appellant for repair on at least two occasions. Both times the appellant provided Keck an automobile to use while the Yugo was being repaired. On the first occasion it is undisputed there was no charge for the substitute automobile. On the second occasion Keck testified he told a representative of the dealer that he would be out of state for six to eight weeks and he needed a "loaner" automobile to use while the Yugo was being repaired. He testified that he was told there would be no charge for the "loaner" automobile. Appellant disputed this testimony. On both occasions Keck signed a lease agreement form but he testified the form was blank when he signed it and that he was told the form was necessary only to waive liability insurance on the substitute automobile. When Keck returned to pick up his Yugo seven

weeks later, in late December, the dealer's agents demanded $1,200 in rent for use of the substitute automobile. Upon Keck's refusal to pay, the demand was reduced to $360 rental, calculated to cover the time which the dealer contended the Yugo had been repaired and available to be picked up. Keck testified he had not received prior notice the automobile was ready and he refused to pay the reduced demand. Because of Keck's refusal to pay rental, the appellant declined to surrender the Yugo and its service manager told Keck that appellant would keep the automobile until Keck paid the rental claimed. Keck left the dealership on foot.

It is undisputed that all repairs to the Yugo were warranty repairs, that Keck owed the dealer nothing for the repairs, and that the lease agreement form for the substitute automobile did not grant the dealer a possessory lien on the automobile being repaired.

In response to Keck's claim for conversion of his Yugo, appellant filed a general denial and counterclaimed for rental on the substitute automobile. The jury held for Keck on the counterclaim and awarded him $6,337.33 in compensatory damages and $25,000 in punitive damages on the conversion claim.

Appellant contends evidence introduced regarding the defects of the Yugo and attempts at repairs was irrelevant to the elements of conversion and inflamed the jury. Rule 401 of the Arkansas Rules of Evidence defines "relevant evidence" as "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." Appellant's counterclaim for rental directly placed in issue whether or not Keck had agreed to pay rental on the substitute automobile. Keck testified that when he delivered the Yugo for repair on the second occasion he was initially told that the dealer could not give him a "loaner" vehicle but that a rental unit was available. Keck testified that because of all the problems he had had with the Yugo he was adamant with the dealer that he was not going to pay for a rental car and that the dealer's representative agreed. The testimony concerning the mechanical problems and repair attempts tended to make Keck's version of the discussions regarding the substitute automobile, including the

dealers' acquiescence in Keck's unwillingness to agree to pay rental, more probable than if the jury had considered the issue without knowing the history of prior problems experienced by Keck.

Appellant contends the evidence should have been excluded under Rule 403 of the Arkansas Rules of Evidence even if it were relevant. Rule 403 permits the trial court to exclude relevant evidence if its probative value is *substantially* outweighed by the danger of unfair prejudice or other specified considerations. The balancing of the probative value against prejudice from evidence is within the discretion of the trial judge, and his decision on such a matter will not be reversed absent an abuse of that discretion. *Simpson* v. *Hart*, 294 Ark. 41, 740 S.W.2d 618 (1987); *Wood* v. *State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987). The admission of the challenged evidence did not constitute an abuse of discretion, and some of the testimony complained of was invited during cross-examination by appellant's counsel.

Appellant next contends that the trial court erred in submitting the issue of punitive damages to the jury and that the jury's award of punitive damages was unsupported by the evidence. Appellant does not argue the sufficiency of the evidence to establish liability for willful conversion.

In *Ford Motor Credit Co.* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979), the appellant lender had financed the sale of two pickup trucks and had peacefully repossessed the trucks upon the buyer's default on monthly payments. But despite demand the lender had not promptly returned personal property which was stored in the trucks at the time of the repossession. Upon the debtor's suit for conversion of the personalty, the jury awarded $2,000 in actual damages and $17,000 in punitive damages. The appellant asserted that the trial court erred in instructing the jury regarding punitive damages since there was no evidence of force, oppression, or intimidation in connection with the repossession. This Court held:

> Exemplary damages are proper where there is an intentional violation of another's right to his property. *Kelly* v. *McDonald*, 39 Ark. 387 (1882); *Ft. Smith I. & S. Mills* v. *So. R. B. P. Co.*, 139 Ark. 101, 213 S.W. 21 (1919); and

> *Parks* v. *Thomas, supra.* In view of the evidence previously recited, we hold that, although the taking was proper, the retention of the personalty after demand for its return constituted a submissible fact question on the issue of punitive damages.

*Herring* at 206-07, 589 S.W.2d at 588. This Court also affirmed the sufficiency of evidence to uphold a punitive damages award for conversion of appellee's automobile in *Williams* v. *O'Neal Ford, Inc.,* 282 Ark. 362, 668 S.W.2d 545 (1984).

In *Shepherd* v. *Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987), the appellant admitted having possession of appellee's commercial fishing nets but claimed he was keeping them to ensure the recovery of nets of his own, pursuant to an alleged agreement with appellee. The jury rejected the explanation, and this Court held the evidence was sufficient to support the award of punitive damages.

The trial court instructed the jury on Keck's claim for punitive damages that he "has the burden of proving that Walt Bennett Ford intentionally pursued a course of conduct for the purpose of causing damage." This instruction presented one of the two alternative descriptions of conduct in AMI Civil 2d 2217 (Revised) which can justify an award of punitive damages. Appellant's objection was not to the form of the instruction but rather to the sufficiency of evidence to support the submission of the issue of punitive damages to the jury.

■ Appellant's conduct of retaining the Yugo even through the trial, thirteen months after the demand for surrender, without any claim of mistake or privilege or other legal right to do so, presents a submissible issue on punitive damages. The jury reasonably could have concluded that appellant withheld Keck's property, his means of transportation, with the intent of causing him such inconvenience and damage that he would be coerced into the payment of a questionable debt. Appellant continued this course of conduct even after it was sued for conversion, obtained legal counsel and filed a counterclaim for the disputed rental. The evidence is sufficient to support a finding of intent to cause damage.

■■ Appellant contends in the alternative that the puni-

tive award was excessive, given under the influence of passion and prejudice. The issue of whether the punitive award was motivated by passion or prejudice was submitted to the trial court by appellant in a motion for new trial under Rule 59 of the Arkansas Rules of Civil Procedure. The trial court denied the motion. Considerable discretion is given to the jury in fixing punitive damages in an amount it deems appropriate to the circumstances. *First National Bank of Brinkley* v. *Frey*, 282 Ark. 339, 343, 668 S.W.2d 533, 536 (1984). While the award of punitive damages is substantial, it is not so great as to indicate the jury was influenced by passion or prejudice. The amount of the punitive award is supported by substantial evidence, including the relationship between the parties and the extent and duration of the appellant's exercise of dominion over the personalty, and we do not find it excessive under the facts presented, reviewing the evidence in the light most favorable to the verdict. *Schaeffer* v. *McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985); *Schuster's, Inc.* v. *Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987).

Affirmed.

Special Justice SAM ED GIBSON joins in this opinion.

GLAZE, J., concurs.

Special Justice ROBERT L. JONES, JR., dissents.

PURTLE, HAYS, and NEWBERN, JJ., not participating.

TOM GLAZE, Justice, concurring. The dissent by Special Justice Robert L. Jones is well-reasoned and appears to agree with the majority's assessment as to the law on when punitive damages can be imposed for conversion. Justice Jones seems to part with the court based on the idea that the appellee, Richard Keck, had failed to meet his burden of proof to show the appellant intentionally pursued a course of conduct for the purpose of causing Keck damage. In support of his position, Justice Jones relates his review of the evidence as follows:

> The conduct in question was the retention of possession of appellee's automobile by the appellant. The undisputed evidence is that the appellant retained possession of the appellee's automobile for the purpose of collecting rental which it claimed to be due from appellee for a substitute

> automobile. There was no evidence presented that the appellant knew that it had no right to retain possession of appellee's automobile for that purpose. There was no evidence of any motive for the appellant to want to cause damage to the appellee. Its only motive was to collect the rental charge it believed to be due, and it may have believed it had a legal right to retain possession of appellee's automobile until it was paid.

If the evidence mentioned by Justice Jones had been undisputed, I would join in his dissent. However, as I read the record, Keck testified that he told an employee of the appellant that he "wanted it understood that he was not paying for the ['loaner'] car" and that the employee said, "You won't have to because it is covered under your Yugo warranty." Keck said that he never agreed to lease a car from appellant but did sign a blank lease form for the sole purpose of declining insurance on the "loaner" car since he already had insurance that would cover it.

It appears clear to me that a major conflict existed in the testimonies given by the opposing parties. Of course, if the jury believed Keck's story, it could have concluded that he had never agreed to rent a car from the appellant. Further, the jury could have reasonably inferred or found that after Keck signed a blank lease form to waive liability insurance on the "loaner," an employee for the appellant improperly completed the lease agreement thereby obligating Keck for rental payments he never agreed to pay.

In my view, Keck's testimony, by itself, presents a submissible fact question on the issue of punitive damages. It is not this court's duty, on review, to weigh issues of credibility or disregard admissible evidence. Instead, this court's obligation is to determine whether the jury verdict is supported by substantial evidence. In light of the evidence noted above, I agree with the majority in affirming the jury's verdict for punitive damages in this cause.

ROBERT L. JONES, JR., Special Justice, dissenting. This is an action for conversion of personal property. The appellee left his automobile with appellant for repairs while he was out of the state for approximately six weeks. A rental agreement was introduced in evidence which appellee testified that he signed in blank with

the understanding that the form was necessary only for the purpose of waiving liability insurance on the substitute automobile. When the appellee returned the substitute automobile to get possession of his automobile, he was told that he could not have his automobile until he paid the rental due on the substitute automobile. He denied that any rental was due. Appellee filed suit for conversion and appellant counterclaimed for the rental alleged to be due. The jury resolved the issue in favor of the appellee and awarded him $6,337.33 compensatory damages and $25,000.00 punitive damages. I would affirm as to the compensatory damages and reverse as to the punitive damages.

Ark. Code Ann. § 18-45-201 (1987) provides for a possessory lien by automobile repairmen for parts and labor for the repair of an automobile. The repairs effected on appellee's automobile were covered under a manufacturer's warranty; therefore, there was no amount due for the repairs which would give rise to a possessory lien. There is no possessory lien provided under Arkansas law for unpaid rental on a substitute automobile; therefore, appellant had no right to retain possession of appellee's automobile and became liable for conversion. The award of the fair market value of the property at the time of the conversion is the proper measure of compensatory damages.

The instruction given by the trial court on punitive damages was as follows:

> "In addition to compensatory damages for any actual loss that Richard Randall Keck may have sustained, he asks for punitive damages from Walt Bennett Ford, Inc. Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. *In order to recover punitive damages from Walt Bennett Ford, Richard Randall Keck has the burden of proving that Walt Bennett Ford intentionally pursued a course of conduct for the purpose of causing damage.* You are not required to assess punitive damages against Walt Bennett Ford, Inc. but you may do so if justified by the evidence." (Emphasis added.)

AMI 2217 provides two alternative standards of conduct which may justify an award of punitive damages. The first standard is that the defendent knew or ought to have known in the light of the surrounding circumstances that his conduct would

naturally and probably result in damage and that he continued such conduct with malice or in reckless disregard of the consequences from which malice may be inferred. *The second standard is that the defendant intentionally pursued a course of conduct for the purpose of causing damage.* The conduct in question was the retention of possession of appellee's automobile by the appellant. The undisputed evidence is that the appellant retained possession of the appellee's automobile for the purpose of collecting rental which it claimed to be due from appellee for a substitute automobile. There was no evidence presented that the appellant knew that it had no right to retain possession of appellee's automobile for that purpose. There was no evidence of any motive for the appellant to want to cause damage to the appellee. Its only motive was to collect the rental charge it believed to be due, and it may have believed it had a legal right to retain possession of appellee's automobile until it was paid.

The effect of the holding of the majority is that a person who withholds possession of another's property without legal right to do so, even though he may honestly and in good faith believe that he has a legal right to do so, may nevertheless be punished by an award against him for punitive damages. This is contrary to the holding of this Court in the case of *Satterfield* v. *Rebsamen Ford, Inc.*, 253 Ark. 181, 485 S.W.2d 192 (1972). In order for punitive damages to be proper, the person against whom they are awarded must be guilty of malice or act in such a willful, wanton or reckless disregard of consequences from which malice may be inferred. (*Satterfield, supra*, at page 185) In this case, the jury was instructed that Keck had the burden of proving that Walt Bennett Ford withheld possession of Keck's automobile "for the purpose of causing damage" (with malice). In my opinion, the evidence was insufficient to justify the submission of that issue to the jury. The burden of proof is on the plaintiff to prove malice, not on the defendant to prove lack of malice.

Donnie Elbert GIST *v.* STATE of Arkansas

RC 89-12 768 S.W.2d 34

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Sherman and James*, by: *Anthony J. Sherman*, for petitioner.

No response.

PER CURIAM. Petitioner, Donnie Gist, by his attorney, Anthony J. Sherman, has filed a motion for rule on the clerk. His attorney admits that he failed to file a transcript within the ninety (90) day limit due to his erroneous belief that he had been relieved as attorney of record.

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 Comittee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

Sterlin P. JONES *v.* Brian GOODSON

89-58 768 S.W.2d 33

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Raymond Harrill*, for appellant.

*Ivester, Henry, Skinner & Camp*, by: *Robert Keller Jackson*, for appellee.

PER CURIAM. This is a question of procedure on appeal. Goodson obtained a $27,500 judgment against Jones, a patient at the Veterans Administration Hospital. No appeal was taken from the judgment. Goodson attempted to collect on the judgment by filing garnishments against several banks which held funds allegedly belonging to Jones and by attempting to levy on Jones' wheelchair.

Sterlin Jones appealed from a circuit court order dated February 17, 1989, which directed two garnishees to turn over certain funds to appellee, Brian Goodson. On March 6, we granted an emergency stay of the order and requested briefs from

the parties. The appellant filed a brief with his record on February 27 and wants to stand on it, which we will allow.

On March 9, Brian Goodson filed a cross-appeal in the case. He appealed from a December 22, 1988, order of the circuit court dismissing one of the garnishees, Pulaski Bank & Trust. He also appealed from a portion of the February 17 order quashing the writ of execution issued on Sterlin Jones' wheelchair. The appellant's motion to dismiss the cross-appeal on the ground of untimeliness is denied. The December 22 order was an intermediate order which can be properly reviewed upon appeal of the final order in the case. Ark. R. App. P. 2(b). The notice of cross-appeal was properly filed with the circuit court which rendered the judgment. Ark. R. App. P. 3(d).

In his notice of cross-appeal, Goodson designated seven additional items to be included in the record on appeal. Jones claims that Goodson, as cross-appellant, should bear the responsibility of ordering these supplemental materials from the court reporter. Goodson cites Ark. R. App. P. 6(b), which provides that if the appellant has designated less than the entire record, the appellee may file and serve on the appellant a designation of the additional parts to be included. The appellant shall then direct the reporter to include those parts in the transcript.

The majority of the items designated in the notice of cross-appeal appear to concern the issues on cross-appeal more than the issues on direct appeal. But, not having addressed the merits of the case at this point, we cannot say which items are necessary to the determination of which issues. Therefore, we place the responsibility of ordering the additional parts of the record on the appellant, Sterlin Jones. Since a record has already been filed in the case, these items should be contained in a supplemental record.

If the appellant feels that the appellee has designated portions of the record which are not necessary to the determination of the issues on direct appeal, he may ask for an adjustment of costs after the case has been decided.

Daniel Eugene REMETA *v.* STATE of Arkansas

CR 87-214 771 S.W.2d 249

Supreme Court of Arkansas
Opinion delivered April 17, 1989

*Douglas, Hewett & Shock*, by: *J. Randolph Shock*, for appellant.

No objection.

PER CURIAM. Appellant's motion to file an enlarged brief is denied.

JOHN I. PURTLE, Justice, dissenting. This case involves the death sentence. The appellant tendered his brief, the argument portion of which exceeds by 17 pages the page limit allowed by Supreme Court Rule 8(c). He requested this court to waive the rule and allow him to exceed the limit.

On this same date, in *Logan* v. *State*, CR 87-45, an appeal involving seven convictions for rape, the state filed a brief exceeding the argument limit by 23 pages. The state requests that we waive the rule.

This court denied the appellant's motion for an additional 17 pages and granted the state's request in the other case for 23 additional pages. Apparently we are using different scales of justice for appellants and the state.

I would grant both or deny both.

James A. DUTY and Opal Duty *v.* Barry WATKINS

88-291 768 S.W.2d 526

Supreme Court of Arkansas
Opinion delivered April 24, 1989
[Rehearing denied May 30, 1989.*]

*James A. Duty* and *Opal Duty*, for appellants.

*Bassett Law Firm*, by: *Curtis L. Nebben*, for appellee.

DARRELL HICKMAN, Justice. The appellants' lawsuit was dismissed because they refused to comply with an order compelling discovery. We affirm the court's action dismissing the appellant Opal Duty with prejudice, but we reverse and remand to allow James Duty to take a nonsuit.

James Duty and his mother, Opal, filed suit against Barry Watkins, an attorney. Watkins filed a motion to dismiss the complaint for failure to answer discovery requests. Since Judge Kim Smith had disqualified himself in the case, the motion to dismiss was heard by Judge Mahlon Gibson.

James Duty appeared *pro se* at the hearing and asked to take a nonsuit under ARCP Rule 41(a). The appellee claimed his motion to dismiss for failure to respond to discovery should be

*Purtle, J., would grant rehearing.

ruled on first. The trial judge agreed and granted the appellee's motion to dismiss with prejudice.

James Duty's request for a nonsuit should have been granted. The rule is clear that the privilege to take a nonsuit before final submission of a case is absolute. *Haller* v. *Haller*, 234 Ark. 984, 356 S.W.2d 9 (1962) (interpreting Ark. Stat. Ann. § 27-1405 [Repl. 1962], virtually identical to Rule 41[a]). This case had not been finally submitted because, although the case had come to a hearing, the argument was not yet closed. *See Mutual Benefit Health & Accident Assoc.* v. *Tilley*, 174 Ark. 932, 298 S.W. 215 (1927).

Opal Duty did not appear at the hearing and made no motion for a nonsuit. James, as a layman, could not represent her, so the dismissal with prejudice stands as to her.

Since we are reversing to allow a nonsuit, we need not address the question of whether Judge Gibson should have disqualified on his own motion.

Affirmed in part, reversed and remanded in part.

James Allen BECKER *v.* STATE of Arkansas

CR 89-19 768 S.W.2d 527

Supreme Court of Arkansas
Opinion delivered April 24, 1989

*Norman Douglas Norwood*, for appellant.

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

ROBERT H. DUDLEY, Justice. The appellant, an habitual offender, was convicted of robbery pursuant to Ark. Code Ann. § 5-12-102 (Supp. 1987). That section provides:

> A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

According to Ark. Code Ann. § 5-12-101 (1987), physical force is defined as "any bodily impact, restraint, or confinement or the threat thereof." The appellant argues that the trial court erred in refusing to direct a verdict in his favor because there was no proof that he used force to resist apprehension immediately after a misdemeanor theft. The argument is without merit.

The robbery statute has been followed in a number of cases

similar to the one now before us. *See Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985); *Jarrett* v. *State*, 265 Ark. 662, 580 S.W.2d 460 (1979); *Wilson* v. *State*, 262 Ark. 339, 556 S.W.2d 657 (1977); *Williams* v. *State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); and *White* v. *State*, 271 Ark. 692, 610 S.W.2d 266 (Ark. App. 1981). In all of these cases the appellant was caught shoplifting and then used force to prevent apprehension.

In this case the evidence, viewed most favorably to the appellee, the State, as we must do, is as follows: A supermarket employee saw the appellant hiding some ham in his coat. The employee notified an off-duty police officer who helped with security in the store, and the officer watched the appellant leave without paying for the ham. The officer asked the appellant to follow him to the store office. After entering the office, the officer asked the appellant for some identification. The appellant said he had none and gave a false name. The policeman asked the appellant for the ham, and he gave it to him. The appellant was told he was under arrest for shoplifting. Appellant then took off his coat and gave it to the officer, as requested. The officer asked appellant to turn around and place his hands behind his head. The appellant refused. Appellant grabbed his coat and started for the office door. The officer grabbed the coat and forced appellant into a chair. The appellant jumped up, struck the officer in the chest, and once again started for the door. The two then struggled for some time before appellant was finally subdued. The officer testified that the time between the initial approach of the appellant and the time he was finally handcuffed was five minutes or less.

■ In *Wilson* v. *State*, 262 Ark. 339, 556 S.W.2d 657 (1977), a similar case, we defined "immediate" as "a reasonable time in view of particular facts and circumstances of the case under consideration." Here, the evidence was sufficient to establish a theft and the employment of force immediately after the theft to resist apprehension or arrest.

■ The appellant next argues that the robbery statute at issue should be declared unconstitutionally vague. The argument has no merit. In *Long* v. *State*, 284 Ark. 21, 680 S.W.2d 686 (1984), we said that a law will be held to be vague when it leaves the police or the fact finder free to decide, without a fixed

standard, what is prohibited.

The appellant contends that the statute is vague in that it refers to physical force upon another, while our cases refer to physical force upon the victim. Our cases do not change the wording of the statute, which clearly states that a defendant is responsible for the use of force on anyone either before, during or after the theft. The statute is not vague.

In his final argument the appellant contends that the trial court should have granted a directed verdict because he was not identified in court as the robber. This argument is also without merit. In *Moore* v. *State*, 297 Ark. 296, 761 S.W.2d 894 (1988), the same argument for a directed verdict was made, and we stated that "an element to be proved in every case is that the person who stands before the court in the position of the defendant is the one whom the indictment or information accuses and to whom the evidence is supposed to relate." Still, we declined to dismiss the case on that basis.

The reason is that identification can be inferred from all the facts and circumstances that are in evidence. *United States* v. *Weed*, 689 F.2d 752 (7th Cir. 1982); *Delegal* v. *United States*, 329 F.2d 494 (5th Cir.), *cert. denied*, 379 U.S. 821 (1964); *State* v. *Watts*, 72 N.C. App. 661, 325 S.E.2d 505 (1985); *Dillon* v. *State*, 508 P.2d 652 (Okla. Crim. App. 1973); *State* v. *Hill*, 83 Wash. 2d 558, 520 P.2d 618 (1974).

Here, there were no co-defendants; the defendant was tried alone. He was specifically identified as "Mr. Becker" and "the defendant" throughout the trial. The witnesses were eyewitnesses to the robbery, and the fact that none of them pointed out that the wrong man had been brought to trial was eloquent and sufficient proof of identity.

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. Either something is wrong with our criminal justice system or something is wrong with this case. No fair system of justice could sanction giving a man fifteen years in prison for stealing a few slices of ham. The prophecy made in the dissent in *Jarrett* v. *State*, 265 Ark. 662,

580 S.W.2d 460 (1979), has now been fulfilled. Although the ham slices in this case, which were in the appellant's jacket pocket, may have been worth more than the fifteen cents referred to in the *Jarrett* dissent, the principle is still the same. There it was stated: "In practical application the majority view here would allow a robbery conviction for a person who took a 15-cent item and ran and, while running, accidentally bumped into someone in a crowd of people."

The food store manager noticed the appellant putting the ham slices in his pocket and followed him to the cash register; observing that the appellant did not pay for the ham slices, the manager asked him to come of the office. An off-duty policeman, serving as a security guard for the store, assisted, and the appellant accompanied them to the store office. When asked for the ham, the appellant took it out of his coat pocket and laid it on the desk. The officer then took his coat. The coat, I am sure, was worth considerably more than the eighty-nine cent package of ham. After "ten or fifteen minutes," the appellant decided to leave. In getting up out of the chair, where he had been placed by the off-duty policeman, he shoved the officer. The manager of the store described the encounter between the officer and the appellant in the following words:

> The gentlemen doesn't have much of a shirt left on him because Jim is trying to hang on and he is trying to run. Becker was trying to get away from Officer Kibat. I don't think it was his intention to try to beat Officer Kibat. It really wasn't a fight, it was more or less Jim hanging on. I guess the part of the fight would be just trying to keep him there, would be part of the fight. The only thing that I seen the gentlemen, the contact that he put on Jim Kibat was when he was sitting in the chair and he came up like this and knocked him against the wall. I did not see any punches swung at any time from anybody. He did shove the police officer. . . . I did not see him strike the police officer with his fist. I did not find a weapon on Mr. Becker, I did not see a gun, or a knife or a baseball bat. When Mr. Becker came into the office and I confronted him he put the ham on the table. When he decided to leave he left both pieces of ham and a flint.

The statute which allows a misdemeanor to be elevated to the felony of robbery requires that a person committing a theft, in his effort to avoid apprehension, "employs or threatens to immediately employ physical force upon another." By no stretch of the imagination can it be said that the appellant, in attempting to avoid apprehension, was using the type of force envisioned by this statute. He had been in the office from ten to fifteen minutes before he decided to leave. All the force used in this case was directed at the appellant. At most, he bumped into the off-duty officer as he attempted to get up out of his chair to leave the office. He did not have a gun, knife, or other object or weapon and did not strike the officer or anyone else with his fist.

If the statute has no plain meaning to the majority, then it behooves them to overcome the argument of vagueness. The opinion does not do so. Any reasonable interpretation of the statute would seem to require the appellant either to use physical force directed at another person or to use threats to employ a gun or knife or some other weapon. He attempted to steal a small amount of ham. No doubt he was hungry. He probably would not have been given more than thirty days had he been charged with shoplifting, the actual offense, instead of the bootstrapped felony which resulted in a fifteen-year prison sentence.

Over one hundred twenty-five years ago, Victor Hugo, in *Les Miserables*, attacked the injustice of a system that sentenced a man to imprisonment for stealing a loaf of bread. Surely we have made a little progress since that time. Many persons who have taken a human life have received less punishment than the fifteen years meted out to the appellant who tried to pilfer a small package of ham. Justice and mercy cry out against the imposition of such disproportionate punishment. The store manager, who was present from start to finish of the episode, did not even know a robbery had occurred. The reason he did not know it was because only a misdemeanor had occurred.

It is cases like this which lead to the overcrowding of our prison system and the devouring of a substantial amount of our tax money. I believe in fair and just punishment delivered without undue delay. However, this case does nothing to promote a fair and just criminal justice system. It is, in fact, a blight upon our system. If this court will not correct it, then the Governor and the

General Assembly should.

The CITY OF HOT SPRINGS, Arkansas, By and Through Its Duly Elected Mayor, Honorable Jon L. Starr *v.* The VAPORS THEATRE RESTAURANT, INC.

88-308 769 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered April 24, 1989

*David M. Love*, City Att'y, for appellant.

*Q. Byrum Hurst*, for appellee.

ROBERT H. DUDLEY, Justice. This case involves a special tax

on mixed drinks. The specific issue is whether the City of Hot Springs may collect a three percent "hospitality" tax pursuant to an ordinance enacted by authority of Ark. Code Ann. § 26-75-602 (1987), in addition to the customary ten percent mixed drink tax collected by the City under authority of Ark. Code Ann. § 3-9-213 (1987). The circuit judge ruled that the hospitality tax could not be added on to the regular mixed drink tax. We affirm.

In 1969, the General Assembly passed Act 132, the mixed drink act. Section 8 of that Act, codified as Ark. Code Ann. § 3-9-213 (1987), provided that the sale of alcoholic beverages would be subject to the Arkansas Gross Receipts Act of 1941, and, in addition, imposed a supplemental state tax of ten percent on the gross proceeds or gross receipts from the sale of alcoholic beverages.

Section 9 of the same Act, codified as Ark. Code Ann. § 3-9-214 (1987), provided that an additional supplemental tax could also be imposed upon alcoholic beverages by any city or county, provided that such tax did not exceed the amount provided for in Section 8, ten percent.

Thus, the sale of alcoholic beverages is subject to the general sales tax, the supplemental tax of ten percent imposed by the State in Ark. Code Ann. § 3-9-213 (1987), and potentially to another supplemental tax imposed by the city or county as authorized in Ark. Code Ann. § 3-9-214 (1987).

Pursuant to Ark. Code Ann. § 3-9-214, the City passed Ordinance No. 2989, which, among other things, imposed a supplemental tax of ten percent on the gross revenues from all sales of alcoholic beverages covered under the Act. Thus, all sales of mixed drinks in Hot Springs are subject to the three taxes mentioned above. None of these taxes is questioned. The issue in this case comes about because of the imposition of a fourth tax, a hospitality tax.

Ark. Code Ann. § 26-75-602(a)(1)(B) (1987), which is entirely separate from the mixed drink act, authorizes any city of the first class which is located in a national park to levy a hospitality tax of up to three percent upon the gross receipts from, among other things, restaurants, cafes, cafeterias, and other business establishments engaged in the business of selling pre-

pared food for consumption on the premises in the city. The City interprets this to include mixed drinks. This statute originated with Act 185 of 1965, which was four years before passage of the mixed drink act, and provided that cities having no less than 25,000 inhabitants could levy a tax of one percent upon the gross receipts of restaurants, cafes, cafeterias, and other establishments engaged in the business of selling prepared food for consumption on the premises. This Act has since undergone several modifications, until it has finally evolved into what is now Ark. Code Ann. § 26-75-602. At first the Act authorized a one percent tax. Later, it authorized a two percent tax, and now it authorizes a three percent tax for certain cities.

Over the years, the City of Hot Springs has passed several ordinances pursuant to this statute. The two that are at issue in this case are Ordinance No. 3303 and Ordinance No. 3610. Ordinance No. 3303 was passed in 1975 and levies a two percent tax on the gross proceeds of the restaurants, cafeterias, and other businesses selling food in the City. This ordinance increased the amount of the tax from one percent, as it was pursuant to an earlier ordinance. Then, in 1981, the City passed Ordinance No. 3610, which increased the tax by another one percent, making the total tax on these items three percent, exactly what is authorized by Ark. Code Ann. § 26-75-602(a)(1)(B).

The appellee in this case, the Vapors Theatre Restaurant, Inc., filed suit in circuit court, seeking to have these two ordinances declared invalid to the extent that they impose another tax on the sale of alcoholic beverages.

The trial court ruled that Section 8 of the mixed drink act, Ark. Code Ann. § 3-9-213 (1987), governs the taxation on mixed drinks. It provides: "The taxes herein prescribed may be passed on to the consumer and *shall be in lieu of all other special taxes at the retail level.*" The trial court further ruled that the provision must be given a common sense interpretation which means no additional special tax, such as a hospitality tax, can be added to the mixed drink tax.

■ The appellant City first argues that the trial court erred because the three percent tax is not a tax. Its argument is based upon Section 2 of Act 976 of 1985, not codified but mentioned in the publishers notes to Ark. Code Ann. § 26-75-602, which

provides: "This tax is not a 'tax' as 'taxes' are ordinarily understood and intended for governmental services and support, but is a special levy paid by persons, and collected by entities, peculiarly associated with and benefited by tourism." The statutory language is farcical. Any burden imposed by a government upon a taxpayer for the use and benefit of that government is a tax, whether labeled tax, levy, duty, custom, gabelle, or anything else.

Appellant next argues that the language in Ark. Code Ann. § 3-9-214, the mixed drink act, which provides that "the taxes herein prescribed may be passed on to the consumer and shall be in lieu of all other special taxes at the retail level" refers only to the taxes authorized by the mixed drink statute and "does not mean that the city is prohibited from placing an additional tax or fee on alcohol as authorized by other statutes." (Appellant's brief p. 25) The argument defies our first rule of statutory construction, which is to construe a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Bolden* v. *Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986). Here, the tax on "hospitality" items is a special tax, and all special taxes other than those authorized in the mixed drink act are prohibited. Even if there were any doubt in the language of the statute, we would resolve it against the City because any doubt regarding the imposition of a tax should be resolved in favor of the taxpayer and against the taxing authority. *Dunhall Pharmaceuticals, Inc.* v. *State*, 295 Ark. 483, 749 S.W.2d 666 (1988).

Finally, appellant argues that, as to the City, the two taxing statutes have different purposes since the City's part of the mixed drink act goes to the City's general fund, while the hospitality taxes go to promote tourism or finance revenue bonds. The appellant demurs to the argument. We sustain the demurrer because the hospitality tax is specifically prohibited, therefore, its intended purpose is immaterial.

Affirmed.

Ronald WARD *v.* STATE of Arkansas

CR 88-145 770 S.W.2d 109

Supreme Court of Arkansas
Opinion delivered April 24, 1989

*Joseph B. Brown, Jr.* and *Samuel Turner, Jr.*, for appellant.

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

ROBERT H. DUDLEY, Justice. At his first trial of this case the appellant was convicted of capital murder and sentenced to death. He appealed, and we reversed and remanded because of the improper use of peremptory challenges by the State to exclude black people from the jury. *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987). Upon retrial, appellant was again convicted of capital murder, but this time he was sentenced to life in prison without parole. He now appeals from the second conviction. This time, we affirm.

Because appellant argues that the trial court erred in denying his motion for a directed verdict, it is necessary to recite the evidence in some detail. On April 12, 1985, Audrey Townsend and Lois Townsend Jarvis, two elderly sisters, and Chris Simmons, their twelve-year-old great-great nephew, were found dead in the sisters' home in West Memphis. Each had multiple deep stab wounds. In addition, Audrey Townsend had been raped, and the house had been ransacked. A large knife was found in the kitchen sink. A witness, Ricky Vail, saw the appellant on the night in question close to Vail's house, which was just across the street from the victims' house. Audrey Townsend's vagina contained semen from someone who had type O blood and who

secreted the H factor into his blood; appellant had type O blood and is a secretor of the H factor. A hair was found on the underwear which Audrey Townsend was wearing when she was raped and murdered; that hair is microscopically similar to hair taken from appellant's head. A pubic hair was removed from the pubic area of Audrey Townsend; that hair had the same microscopic characteristics as a hair taken from appellant's pubic area. Two hairs were found on a sweater seized from appellant's bedroom; one, a pubic hair, was microscopically similar to the pubic hair of Lois Townsend Jarvis, and the other was microscopically similar to the hair on the head of Chris Simmons. Appellant's fingerprints were found on broken pieces of glass which were recovered from the crime scene. Appellant's fingerprints were on an insurance notice which was found at the crime scene. His fingerprint was found on a window pane at the rear of the victims' house. His fingerprint was found on a light bulb which was near the back door of the victims' house. His fingerprints were found on the doorknob of a closet in a bedroom of the victims' house. His fingerprints were found on the kitchen window of the house. Appellant gave a lengthy in-custodial statement in which he said that someone named Ike forced him to break in, ransack the house, leave his fingerprints all about, rape Audrey Townsend, and then Ike committed the murders; appellant never could recall Ike's last name, nor could he locate him. Just before the initial hearing, the police heard appellant tell his attorney, "Um, something just came over me, its just like, I didn't mean to, just something came over me, made me go in that house and stuff like that, I didn't, I just wasn't myself."

Appellant contends that the foregoing evidence does not show that he acted with a premeditated and deliberated purpose in killing two or more people in one criminal episode. *See* Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1987). In order to prove that an accused acted with a premeditated and deliberated purpose the State must prove: (1) that the accused had the conscious object to cause the death of another; (2) that the accused formed the intention of causing the death before acting; and (3) that the accused weighed in his mind the consequences of a course of conduct, as distinguished from acting suddenly on impulse without the exercise of reasoning power. *Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3, *cert. denied*, 459 U.S. 1022 (1982). A

defendant's premeditated and deliberated culpable mental state can be inferred from the circumstances of the murder, such as the character of the weapon used, the manner in which it was used, the nature, extent, and locations of the wounds inflicted, and the conduct of the accused. *Ricketts* v. *State*, 292 Ark. 256, 729 S.W.2d 400 (1987). Premeditation and deliberation are not required to exist for any particular length of time and may, in fact, be formed in an instant. *Garza* v. *State*, 293 Ark. 175, 735 S.W.2d 702 (1987). Such intent may and often must be inferred from circumstantial evidence. *Garza* v. *State, supra.*

Here, breaking into the victims' house, ransacking the house, raping one of the women, and then inflicting numerous, deep, and fatal stab wounds with a large knife upon three different victims is substantial circumstantial evidence of a premeditated and deliberated culpable mental state.

Appellant next argues that the trial court erred in excluding the proffered testimony of John Golden. The argument is without merit. Appellant wanted to call John Golden to testify that a Ricky Smith had supposedly told Golden that Smith and another man had planned to kill three white people in West Memphis, take their cocaine, and blame it on a fifteen-year-old boy named Ward (appellant). Ricky Smith was available to testify but appellant apparently did not want to call him because he would deny having ever made such a statement. Appellant sought to introduce Smith's alleged hearsay statement through Golden by A.R.E. § 803(24), the residual exception. The rule provides that a statement should not be excluded as hearsay, even though the declarant is available, when the statement is trustworthy and reliable. A good example of the rule in use is where a postmark, which is reliable hearsay, is offered to prove that a letter was mailed from the city shown on the postmark. *See U.S.* v. *Cowley*, 720 F.2d 1037 (9th Cir.), *cert. denied*, 465 U.S. 1029 (1983). We have said it "must have circumstantial guarantees of trustworthiness equivalent to those supporting common law exceptions." *Blaylock* v. *Strecker*, 291 Ark. 340, 350, 724 S.W.2d 470, 475 (1987). It is intended that the residual hearsay exception rule will be used very rarely, and only in exceptional circumstances. Cotchett and Elkind, *Federal Courtroom Evidence* 286 (1987).

In determining trustworthiness or reliability, we ordinarily will not look so much to the reliability of the original declarant, but instead to the reliability of the statement itself. This is because the reliability or credibility of the declarant is more a matter for the jury, rather than a matter of admissibility. However, in this case, there was testimony that John Golden had been in a mental institution, was presently under the care of a psychiatrist, is easily misled, is prone to fantasize, gets confused often, makes up stories to fit a situation, and "lives in his own world." More importantly, John Golden originally told the police that on April 11, one day before the murders, that Ricky Smith had stolen a large amount of money and asked for a ride to Horn Lake, Mississippi. Golden told the police he took Smith to an apartment in Horn Lake where they saw a white man dressed in cowboy attire. Golden did not mention Smith blaming the murders or anything else on appellant. Even though the police had not had a report of anyone stealing money, they went to the apartment, which turned out to be a duplex, and found a black man occupied one side and a white man the other. Neither wore cowboy attire nor knew Smith. Later, after the murders had occurred, and after the media reports of them, Golden began to change his story. He also asked for a reward. Still, it was not until the first trial of this case that Golden disclosed any information, supposedly gained on the way to Horn Lake, about Smith disclosing a plot to blame appellant for the murders. Golden's statement clearly did not meet the standard for trustworthiness or reliability.

The appellant next argues that the trial court erred in admitting an in-custodial statement. This argument is also without merit. The appellant was given his *Miranda* warning and gave an inculpatory statement. A few days later two policemen took him to the Municipal Court in West Memphis for the appointment of a defense attorney and the setting of bond. One of the policemen took along a tape recorder. It was in plain sight as it had a strap which was around the policeman's neck. The officers, the appellant, and the public defender were standing in a hallway just outside the courtroom. The public defender twice asked the appellant if the police had explained his rights. He responded affirmatively both times. He then specifically asked appellant if he understood that anything he said could be used against him.

Again, he answered, "yes sir." The attorney again cautioned appellant to keep that warning in mind and even again asked if appellant understood that anything he said could be used against him. The appellant again said he understood. In other words, the public defender twice asked appellant if he understood his rights and twice specifically asked if he understood that anything he said could be used against him. All four responses were "yes." Counsel further advised appellant to keep that warning in mind. The public defender asked appellant if there was anything which appellant wanted the attorney to tell the judge. The appellant said he had never been in trouble before, and then, in front of the police, blurted out another incriminating statement.

The actions of the public defender do not constitute ineffective assistance of counsel. The appellant did not offer any proof about the layout of the courtroom or any adjacent rooms, or whether the attorney could have held a private conversation with appellant. The attorney was not called and asked about the circumstances of the event or surroundings. The public defender did not ask a question which caused the incriminating statement. Certainly, after the four questions about appellant's rights, and four affirmative responses, plus the warning, counsel could not have anticipated that the appellant would blurt out an incriminating statement.

Even if counsel's conduct were professionally unreasonable, the judgment of conviction must stand because appellant has not demonstrated that the error had a prejudicial effect on the outcome of his trial. *See Strickland* v. *Washington*, 466 U.S. 668 (1984) and *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

The appellant, who was fifteen years old at the time he committed the murders, next argues that the trial court committed error in excluding three prospective jurors because they were unalterably opposed to the death penalty. *See Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S. Ct. 2687 (1988). The appellant raised this point at his first trial, but did not raise it at the second trial. It was necessary for him to bring the issue before the trial court at the second trial in order to have the issue preserved for this second appeal. When a case is broadly remanded for a new trial, as this one was, evidentiary objections must be made, the

same as if there had been no first trial. *See Sanders* v. *Walden*, 214 Ark. 523, 217 S.W.2d 357 (1949).

However, even if the issue had been preserved, and even if *Thompson* v. *Oklahoma, supra*, were a clear majority opinion dictating that appellant could not be sentenced to death, we would not reverse. Here, the State sought the death penalty in a bifurcated trial. Accordingly, the jury was death qualified. However, after the jury took thirteen hours to decide the guilt phase of the trial, the prosecutor apparently realized the improbability of the jury imposing the death penalty, and waived the second phase, or death penalty phase, of the trial. If a defendant in a capital case does not receive the death penalty, he cannot obtain reversal of his conviction and sentence on appeal by pointing to errors having to do with the jury's consideration of the death penalty. *Allen* v. *State*, 296 Ark. 33, 39, 751 S.W.2d 347, 350 (1988). In addition, because the State had not yet decided to waive its right to seek a death sentence when the jury was picked, the trial court did not err in death qualifying the jury. *See Buchanan* v. *Kentucky*, 483 U.S. 402 (1987), which held that a joint trial of a defendant, against whom the death penalty is *not* sought, along with a co-defendant, against whom the death penalty *is* sought, does not deprive the defendant of his right to an impartial jury if the jury is death qualified.

Appellant's next two points of appeal are governed by the law of the case doctrine. *See Hickerson* v. *State*, 286 Ark. 450, 693 S.W.2d 58 (1985). First, he argues that five photographs were unfairly prejudicial. These same photographs were admitted in the first trial, and we approved their use. *Ward* v. *State*, 293 Ark. at 101. Second, he argues that the use of his fingerprints was error. We have already rejected that argument. *Ward* v. *State, supra*, 293 Ark. at 99-100.

Pursuant to Rule 11(f) of the Rules of the Supreme Court and Court of Appeals of Arkansas, we state that we find no unassigned error which would cause reversal of this sentence to life without parole.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. In reversing this case

the first time (see *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987)), this court noted the failure of the trial court to allow the testimony of witnesses Golden and Langford that Harry Smith made statements against his interest. The opinion stated that the testimony of witnesses Golden and Langford would not be admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." The opinion further stated that on retrial the judge should make the determination of trustworthiness before deciding if the proffered testimony would be admitted. Upon retrial, when the testimony of Golden was offered, the judge stated: "I am absolutely 100% convinced that my initial ruling three years ago when this case was tried first — that it was inadmissible hearsay — was correct." Such a ruling hardly complies with the mandate in this case.

At the first trial the judge, apparently relying on Arkansas Rules of Evidence Rule 804(b)(5), which applies in the case of unavailable witnesses, ruled that Golden's testimony was inadmissible. Smith, so they said, was unavailable. In fact, the general tone of the state's testimony and presentation was that no such person existed. The court and local authorities evidently considered Smith to be a figment of Golden's imagination. However, at the second trial, after the appellant's attorneys brought up information concerning the missing witness, the court remarked that the local police had located Smith within fifteen minutes after starting to search for him. Thus, a man who was only a figment of the imagination of a witness at the first trial appeared at the instance of the state within fifteen minutes after information was revealed by the defense attorneys regarding his present location and his previous statements against interest.

The question of the testimony concerning statements of Harrison Smith (a/k/a Harry Smith, a/k/a Rick Smith, and a/k/a James Brown), figured in the first reversal and should require a second reversal. After long and laborious efforts to get the alleged statement of witness Smith introduced into evidence at the appellant's second trial, the trial court ended the matter by stating:

> Gentlemen, here's my ruling, and I don't want to hear anymore about this. I am absolutely 100% convinced that my initial ruling three years ago when this case was first

> tried — that it was inadmissible hearsay — was correct. I am even more convinced after hearing and observing the demeanor of the so-called Harrison Smith that my ruling was correct. It's inadmissible hearsay. . . . I am going to — let me tell you a few things that are incredible to me, and I am getting tired of this charade. It's incredible to me that in fifteen minutes of effort the police produced the witness that you claimed to have been trying to find. . . . My ruling stands. Let's get on with it.

The discussion at the first trial concerning the attempt to locate Smith and to have him served with a subpoena, culminated with the court's statement: "Well, it doesn't prove he existed, it just proves he attempted to serve a summons on somebody given at that address. Whether they existed or not, I don't know and he doesn't either."

The court ruled at the first trial that the testimony of Golden and Langford was inadmissible under A.R.E. 804(b)(5), which applies when the declarant is unavailable. It is quite obvious to me that the appellant in the first instance offered the hearsay statement of Harry Smith as a statement against interest pursuant to A.R.E. Rule 804(b)(3). Certainly that is essentially the argument which the appellant presents at both trials. A.R.E. Rule 803(24) and A.R.E. Rule 804(b)(5) are identical and read as follows:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of truthworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the

declarant.

The rationale for allowing statements of this kind to be introduced is predicated upon the fact that the declarant has admitted to the commission of an act which would hold him up to public ridicule and contempt or expose him to civil or criminal actions in court. See A.R.E. Rule 804(b)(3).

The trustworthiness of the statement of Smith is the matter the trial court should have considered. However, it appears the court decided the trustworthiness of the testimony of Golden and Langford. Without any citation of authority, the majority of this court makes exactly the same mistake.

Rule 803(24) allows into evidence "a statement . . . having equivalent circumstantial guarantees of trustworthiness . . ." as an exception to the hearsay rule. The very words of the rule indicate that the key to the question is governed by the circumstances surrounding the making of the hearsay statement — in this case, the circumstances surrounding Smith's statements to Golden. The majority opinion, without expressly saying so, suggests that the decision is governed by the circumstances surrounding the mental stability of witness Golden, in effect reducing the question to one of Golden's credibility. I submit that the truthworthiness of the testimony of Golden and Langford was a matter of credibility to be considered by the jury.

In support of the reliability of both the proffered testimony of Golden and Langford and the statements against the interest of Smith, certain facts are not disputed. Golden and Langford stated that Harry Smith paid them twenty dollars on April 11, 1985, to drive him from West Memphis, Arkansas to an apartment and to a mobile home (in which he claimed to reside) just south of Memphis, Tennessee. Golden informed the police about carrying Smith to Mississippi, and told them that Smith claimed to have helped rob some white people of a large amount of money and drugs and that Smith bragged that he was going back that night to finish the job. Smith boasted that they would read about it in the paper. Later, Golden stated that Smith had told him that Smith and some other people were going to rob and murder some white people and lay it off on a boy named Ward. It was disputed whether the name Ronald Ward was mentioned to the police before or after Golden learned that Ward was being investigated.

The evidence indicates that Golden went to the police on the 12th of April to try to tell them what Smith had told him. The police were very busy investigating a triple murder at the time. They were too busy to talk to Golden and told him to come back on Monday, the 15th. Golden asserts that when he went back, he mentioned Ward's name or, at the very least, that he told the police that Harry Smith had informed him that Smith was involved in a crime which would fit the facts of the present case.

Ronald Ward was not picked up until April 16 or 17 and them only for identification and fingerprinting. Golden told the police that Smith had also carried some drugs to Mississippi. The proffer included testimony that Harrison Smith was overheard talking with a white man about plans to kill three white people, rob them of cocaine, and pin the crime on a fifteen-year-old boy named Ward.

The testimony of local officials was that Golden was something of a schizophrenic, that he could not be trusted to furnish reliable information, and that he lived in a world of his own. (See the majority opinion for all his blemishes.) However, it should be noted that the police put Golden in the car with them and retraced the steps from West Memphis to Mississippi; Golden took them to the apartment, where the people failed to identify Smith, and then to the mobile home where Smith lived. Smith's mother was located at that address, and some drugs were found, just as Golden had indicated they might be. It seems to me that, as far as the state was concerned, Golden was reliable when he was furnishing information favorable to the state's case, but unreliable when he was furnishing information which would be helpful to the defense. Golden furnished additional information which caused the police in Waukegan, Illinois, to arrest and detain Smith.

In my opinion, the reliability of the testimony of Langford and Golden was established when the officer located the residence where Smith lived (and where his mother still resided), and further when they found the illegal drugs at that location. After Smith was located by the police and brought in, he testified that some people took him to Mississippi after he had left his job on April 11, 1985. He stated that he then left Mississippi and went to Waukegan, Illinois. His mother stated that she carried him to the

bus station at 4:00 or 4:30 p.m. on April 12, 1985. The bodies of the three victims were discovered on April 12, but they may have been killed before midnight on April 11.

The other point on which I disagree with the majority is its conclusion that the first counsel appointed to represent the appellant was not ineffective. It would serve no purpose to cite cases in this instance because it is purely a fact question. In my opinion, no effective defense attorney should have his first interview with his client in the presence of a police officer who, with the attorney's knowledge, is recording the statement. This grossly ineffective assistance by itself should have rendered the statement recorded by the policeman inadmissible.

Some of the decisions of this court dealing with the test of trustworthiness under Rules 803 and 804 are *Hill* v. *Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984); *Tillman* v. *State*, 275 Ark. 275, 6 S.W.2d 5 (1982); *Doles* v. *State*, 275 Ark. 448, 631 S.W.2d 281 (1982); and *David* v. *State*, 269 Ark. 498, 601 S.W.2d 864 (1980). This court noted in *Hill* that all the common-law exceptions to the hearsay rule are based upon necessity or some compelling reason for attaching more than average credibility to the hearsay. "Consequently any new exception must have, in the language of the Rule, circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions." *Hill* at 190. I submit that Smith's statement meets this requirement.

I have no doubt that the proffered testimony of Golden and Langford should have been allowed in evidence because of the very nature of Smith's statements. The trustworthiness of the proffered testimony was clearly established by the extremely incriminating character of these statements. Moreover, the statement: (1) concerned a material fact, (2) was more probative for the purpose offered than any other evidence, and (3) the interests of justice would have best been served by admission of the statements into evidence. The proffered testimony should have been admitted as a clear exception to the rule against hearsay as defined in A.R.E. Rules 803 and 804. It is the responsibility of the jury, not the court, to decide the credibility of this testimony.

# Dan WILBURN *v.* KEENAN COMPANIES, INC.

89-33 768 S.W.2d 531

Supreme Court of Arkansas
Opinion delivered April 24, 1989

*Richard L. Peel*, for appellant.

*Jonathan P. Shermer, Jr.* for appellee.

ROBERT H. DUDLEY, Justice. This is an appeal from the refusal to set aside a default judgment. On November 20, 1987, plaintiff, now appellee, Keenan Companies, Inc., filed suit against defendant, now appellant, Dan Wilburn. Appellee is a resident of the State of Arkansas, and appellant is a resident of the State of

Missouri. Appellee forwarded a copy of the summons and complaint to appellant by certified mail. At the top of the receipt for certified mail delivery, there are two boxes explaining additional services which are available for additional fees. The second box is for "Restricted Delivery." That box was not marked in any way, nor was there any evidence that appellee had requested that the summons and complaint be mailed with "restricted delivery." Appellee received a return receipt on which the signature of "L.D. Madden" was written. Madden's signature was on line 6 of the return receipt which is entitled, "Signature — Agent."

On January 21, 1988, a default judgment was entered against appellant. On January 25, 1988, appellant filed an answer to the complaint and also a motion to set aside the default judgment. After a hearing, the trial court found that service upon appellant was effective and denied his motion to set aside the judgment.

Appellant argues that the default judgment against him is void because the summons and complaint were not mailed with delivery restricted to the addressee as required by the Arkansas Rules of Civil Procedure. The argument has merit, and, accordingly, we reverse the trial court's refusal to set aside the default judgment.

ARCP Rule 4(e)(3) provides:

> (e) *Other Service*: Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:
>
> . . .
>
> (3) By any form of mail addressed to the person to be served with a return receipt requested and *delivery restricted to the addressee or the agent of the addressee.*

(Emphasis added.)

The Reporter's Notes concerning the 1983 amendment to Rule 4 explain that, "[p]ostal regulations permit mail addressed with delivery restricted to addressee to be received only by the addressee *or an agent appointed according to postal regulations.*" (Emphasis added.) Further, the Reporter's Notes con-

cerning the 1986 amendment to the rule provide:

> Rule 4(e)(3) is amended to make explicit that service by mail outside the state *must* be sent with restricted delivery, thus harmonizing the provision with Rule 4(d)(8), which governs service by mail within the state.

(Emphasis added.) Section 933.41 of the postal regulations directs mail carriers to, "[d]eliver mail marked Restricted Delivery only to the addressee or to the person *specifically authorized in writing* as the addressee's agent to receive the mail." Domestic Mail Manual (1988).

Thus, the term "restricted delivery" denotes a very specific delivery procedure within the postal service. ARCP Rule 4(e)(3) requires the use of that procedure if service is to be made by mail.

Statutory service requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978). The same reasoning applies to service requirements imposed by Rules of Court. Proceedings conducted where the attempted service was invalid render judgments arising therefrom void *ab initio*. *Halliman* v. *Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971); *Edmonson* v. *Farris*, 263 Ark. at 508. In cases where judgments are void, proof of a meritorious defense is unnecessary. *Edmonson* v. *Farris*, 263 Ark. at 508.

Appellee's service of the summons and complaint in the instant case did not meet the requirements of ARCP Rule 4(e)(3). There was no evidence that appellee had directed the summons and complaint to be mailed with restricted delivery. Nor was there any evidence that appellant had specifically authorized, in writing, that L.D. Madden was to be his agent to receive mail. Consequently, the default judgment was void *ab initio*, and the trial court erred in denying appellant's motion to set it aside.

In the instant case, there was no evidence that appellant had actual knowledge of the proceedings against him prior to the entry of the default judgment. We note, however, that the outcome of this appeal would have been the same even if appellant had had actual knowledge. Actual knowledge of a proceeding does not validate defective process. *Tucker* v. *Johnson*, 275 Ark.

61, 628 S.W.2d 281 (1982). To the extent that the opinion in *Southern Paper Box Co.* v. *Houston*, 15 Ark. App. 176, 690 S.W.2d 745 (1985) conflicts with that rule, it is overruled.

Regina BOLTS *v.* DELTIC FARM AND TIMBER CO., INC. and Gary Coffman

88-295 768 S.W.2d 532

Supreme Court of Arkansas
Opinion delivered April 24, 1989

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

*Baxter, Eisele, Duncan & Jensen*, for appellee.

TOM GLAZE, Justice. Regina Bolts brought suit against Deltic Farm and Timber Co. and Gary Coffman for injuries she received in a collision with a lumber truck, driven by Coffman. Deltic Farm and Timber Co. filed a motion for summary judgment alleging that Coffman was not an agent, servant or employee at the time of the accident. The trial court granted Deltic's motion for summary judgment, leaving Coffman as the only defendant in the lawsuit.

**[1, 2]** Bolts attempts to appeal from the trial court's order granting summary judgment. We dismiss the appeal for lack of an appealable order. Pursuant to ARCP Rule 54(b), when multiple parties are involved, the trial court may direct the entry of a final judgment as to one or more but fewer than all of the parties only upon express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the present case, there was no such determination or directive. This court has repeatedly held that unless Rule 54(b) is complied with, there cannot be an appeal from an order dismissing one defendant when other defendants remain. *See, e.g., Rone* v. *Little*, 293 Ark. 242, 737 S.W.2d 152 (1987); *Kilcrease* v. *Butler*, 291 Ark. 275, 724 S.W.2d 169 (1987).

Jerry KELLY *v.* STATE of Arkansas

RC 89-14 768 S.W.2d 533

Supreme Court of Arkansas
Opinion delivered April 24, 1989

*Terry Crabtree,* for appellant.

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

PER CURIAM. Appellant files a motion for belated appeal. His motion, with affidavit attached, originally asserted that he did not receive a copy of the trial court's order denying his Rule 37 petition until after his appeal time had expired. He further alleged the court's order failed to reflect that notice denying his petition was ever sent to appellant or his attorney. Appellant cites Rule 37.3(d) of the Rules of Criminal Procedure and *Porter* v. *State*, 287 Ark. 359, 698 S.W.2d 801 (1985), for the proposition that the circuit court was required to mail him a copy of the post-conviction order.

We find appellant's motion for belated appeal confusing, because someone crossed out with a pen the original allegations that indicated he never received notice of the trial court's order. After this alteration, his motion now reads that his attorney did not receive notice. The attorney general's office has filed a response, but offers no explanation for the lines drawn through the appellant's allegations, nor does the attorney general indicate it investigated whether the trial court may have mailed its post-conviction order to the appellant.

Obviously, the striken portion contained in appellant's motion raises the question that appellant may have received notice of the trial court's order. Nonetheless, we are unable to make any clear determination concerning this critical point, and for that reason, we remand this cause to the trial court for it to conduct a hearing to determine why appellant's motion was changed or modified and whether the notice requirement under Rule 37.3(d) was complied with.

Steve ELDRIDGE, and Others, as a Class *v.* BOARD OF CORRECTION and Department of Correction of the State of Arkansas

88-222 768 S.W.2d 534

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*W. Swain Perkins* and *Larry Dean Kissee*, for appellants.

*Steve Clark*, Att'y Gen., by: *Leslie M. Powell*, Asst. Att'y Gen., for appellees.

JACK HOLT, JR., Chief Justice. Appellant Steve Eldridge, on behalf of a class of individuals, brought suit for declaratory and injunctive relief challenging on several different grounds the site selection for an adult detention facility by the appellee Department of Correction. Relevant to this appeal is Eldridge's claim that the Department failed to comply with the notice and hearing provisions of the Arkansas Administrative Procedure Act, Ark. Code Ann. §§ 25-15-201—25-15-214 (1987). In response to the complaint by Eldridge, the Department moved to dismiss the suit for failure to state facts upon which relief could be granted and, in the alternative, asked that summary judgment be entered in its favor. The court entered an order granting both motions. From that order comes this appeal. We affirm.

Although the chancellor's order reflects the granting of the Department's motion to dismiss as well as the motion for summary judgment, Eldridge acknowledges in his brief that the trial court treated the entire proceeding as one for summary judgment. A review of the record supports Eldridge's observations, and the combined motions to dismiss and for summary judgment should be resolved in accordance with our summary

judgment rule — ARCP Rule 56.

ARCP Rule 12(b) provides that if, on motion to dismiss for failure to state a claim, matters outside the pleading are presented to and not excluded by the court, the motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56." Here, the court's order recites that the chancellor considered the "motions, the responses thereto, as well as the pleadings, briefs, exhibits attached thereto, and other matters." Thus, we review this case as any other where there is an appeal following summary judgment. *Carter* v. *F. W. Woolworth Co.*, 287 Ark. 39, 696 S.W.2d 318 (1985); *Guthrie* v. *Tyson Foods*, 285 Ark. 95, 685 S.W.2d 164 (1985).

Eldridge claims that in granting summary judgment the chancellor erred in considering matters contained in the parties' briefs and exhibits attached thereto. To support his position, he cites our opinion in *Guthrie*, *supra*, where we said that, in treating a motion to dismiss as one for summary judgment, it would have been incorrect for the court to base its decision on allegations in briefs and attached exhibits. We then cited ARCP Rule 56(c), which limits the court to considering the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any.

While the language in *Guthrie* may have been somewhat imprecise, the clear import of our discussion was that it would be error for a court on motion for summary judgment to consider any allegations brought out *for the first time* in the parties' briefs and exhibits attached thereto. Such new matters would, of course, go beyond the scope of the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits, thus being improper under Rule 56(c). We did not mean in *Guthrie*, nor do we mean to imply now, that the parties cannot submit briefs in support of a motion for summary judgment or that the court ought not entertain argument by counsel on the motion.

Eldridge is correct in his argument, therefore, only to the extent the chancellor considered matters in the briefs and exhibits which had not been raised previously. We held in both *Guthrie* and *Carter*, *supra*, that the error would be of no consequence if this court determined that summary judgment

was nonetheless proper.

In arguing that it was error to grant summary judgment, Eldridge maintains that the chancellor disposed of a genuine issue of fact when he ruled that the site selection for an adult detention facility by the Department of Correction does not constitute the adoption of a rule as that term is defined by the Administrative Procedure Act. Eldridge further argues that the chancellor incorrectly ruled in favor of the Department of Correction on that issue. We disagree with Eldridge on both points. The question before the chancellor was one of law, not fact, and we have no hesitancy in affirming the chancellor's conclusion that the Department's activity involved neither rule making nor the adoption of a rule.

Ark. Code Ann. § 12-27-103(a) and (b)(9) (1987) provide that there is established, under the supervision, control, and direction of the Board of Correction, a Department of Correction, which shall have the function, power, and duty, in accordance with the rules and regulations of the Board, to establish and operate regional adult detention facilities. The legislation in question, the Administrative Procedure Act, applies to the various boards, commissions, departments, officers, or other authorities of the State of Arkansas, with such exceptions as are set forth in Ark. Code Ann. § 25-15-202(1)(B). The Department of Correction is not excepted and is therefore subject to the Act.

Apparently, the part of the Act that prompted the suit by Eldridge is section 25-15-204, which sets forth a variety of procedural due process requirements, such as notice and the right to file arguments, which must be met any time an agency subject to the Act either adopts, amends, or repeals any "rule." Section 25-15-202(4) defines "rule" as any agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of any agency. Subsection (5) defines "rule making" as any agency process for the formulation, amendment, or repeal of a rule.

Eldridge strongly argues that the decision by the Department of Correction to establish an adult detention facility is a statement of general applicability that implements the law authorizing the Department to establish such facilities. While

this construction perhaps involves an interesting argument in semantics, the action of the Department was no more than the carrying out of legislatively mandated administrative duties under section 12-27-103 and not the adoption of a rule within the meaning of section 25-15-202(4) and (5).

Here, the term "rule" has been defined for us, and subsections (4) and (5) of section 25-15-202 were obviously drafted to address those instances in which an agency subject to the Act either formulates, amends, or repeals statements of general applicability and future effect which implement, interpret, or set out provisions having legal consequences, or which describe departmental policies, or explain the organization, procedure, or practice of an agency. Our first rule of construction as to the language of any piece of legislation is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Bolden* v. *Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986). Site selection for the construction of an adult detention facility does not fall anywhere within the definition of the term "rule" as contained in the Act, if for no other reason than that it does not constitute an agency statement of general applicability.

We note that in the complaint by Eldridge there is a claim that the action of the Board of Correction, and hence, the Department of Correction, constituted special or local legislation in violation of the Arkansas Constitution. In his brief on appeal, Eldridge makes vague reference to that claim and suggests there remained a genuine issue of fact on that point. However, Eldridge offers no argument to support his position and makes no reference to the chancellor's resolution of this issue in the order on appeal. We find the claim to be entirely without merit and see no need to discuss the point further.

Because no issue of fact was presented to the chancellor, and because the Department's actions did not constitute the adoption of a rule or rule making as defined by the Act, it was not error to grant the motion for summary judgment.

Affirmed.

# SAVERS FEDERAL SAVINGS AND LOAN ASSOCIATION of Little Rock, Arkansas *v.* FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION of Harrison, Arkansas

88-260 768 S.W.2d 536

Supreme Court of Arkansas
Opinion delivered May 1, 1989
[Rehearing denied May 30, 1989.]

*Hoover, Jacobs & Storey*, by: *O.H. Storey III* and *William C. Mann III*, for appellant.

*Frank H. Bailey, Benjamin F. Mann*, and *Michael Thompson*, for appellee.

DARRELL HICKMAN, Justice. First Federal Savings and Loan of Harrison (First Federal) entered into a loan participation contract with Savers Federal Savings and Loan (Savers). The question on appeal is whether the circuit court was correct in declaring that First Federal effected a "legal rescission" of the contract and was entitled to full restitution of its funds expended, less its return on investment. We find there was no rescission at

law and remand the case for further proceedings.

In 1983, Savers was the lead lender on a $3.31 million construction loan made to Woodlake Manor, a retirement condominium development in Texas. In response to an offering memorandum from Savers, First Federal purchased a 30% participation interest in the loan, which amounted to $981,718.51. The memorandum contained an appraisal which estimated the undiscounted market value of the project at $4,152,800.[1]

Just two months later, it was discovered that several appraisals contained in Savers' loan files did not comply with a Federal Home Loan Bank Board guideline known as R41B. That guideline required an appraiser to take into account the discounted value of the property. Savers wrote to the appraiser on the Woodlake Manor project and asked if his appraisal was prepared in compliance with R41B. He said no, and submitted a supplemental appraisal declaring the value at $2,903,700.

That appraisal presented an immediate problem because the loan exceeded the value of the property. Savers wrote to the appraiser again, challenging the new figure. The point of contention was whether the developer's profit should be deducted in the discounting process. The appraiser agreed not to deduct it, resulting in a new appraised value of $3,572,200 as of August 24, 1984. Savers never informed First Federal of the subsequent appraisals.

The new appraisals had a definite impact on the creditworthiness of the loan. Under the original appraisal, the loan amount was 79.5% of the property value; under the final appraisal, the loan to value ratio was over 90%.

Woodlake defaulted on the loan in 1985 and Savers foreclosed on the property. More than a year later, First Federal discovered the existence of the other appraisals. An officer of First Federal wrote to Savers that if it had known of the new appraisals, it would have stopped disbursements on the loan until the project could be reevaluated. The letter also declared, "we have no other

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[1] When an appraisal value is "undiscounted," it means no adjustments have been made for costs to be incurred while the property is awaiting sale, such as insurance, taxes, etc.

recourse but to ask Savers Federal to repurchase our participation interest or we will be required to pursue other means to resolve the issue."

Savers refused and First Federal filed suit in Pulaski County Circuit Court. The complaint alleged breach of warranty, breach of fiduciary duty, constructive fraud and mutual mistake. The relief prayed for was rescission or alternatively, for damages.

The trial judge, sitting as factfinder, declared that Savers' use of the original, undiscounted appraisal which did not meet FHLB guidelines was not fraud or a breach of duty. First Federal should have known about R41B just as Savers should have. But the judge did find that Savers breached its fiduciary duty[2] and was guilty of constructive fraud in not informing First Federal of the new appraisals.

As a result of Savers' breach, the judge awarded damages of $876,480.16, which is the amount First Federal paid out, less its return on investment. Savers protested that the award exceeded the damages actually caused by the breach and that the circuit court lacked jurisdiction to grant rescission. The judge refused to compute damages based on causation, declaring he could not compel First Federal to remain in a relationship with an untrustworthy fiduciary. He also stated that First Federal's letter to Savers effected a rescission at law.

■ We agree with Savers that First Federal's actions did not amount to a rescission at law. Rescission at law is accomplished when one party to a contract tenders or returns to the other party the benefits received under the contract. It simply means a party, by his acts, rescinds the agreement. *Coran* v. *Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988). *See also Herrick* v. *Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980). The difference in rescission at law and in equity is explained in D. Dobbs, *Pressing Problems for the Plaintiff's Lawyer in Rescission*, 26 Ark. L. Rev. 322 (1972):

> If the plaintiff has adequate grounds for avoiding the transaction, his notice to the defendant that he had done so,

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[2] The participation agreement provided that Savers would act as a fiduciary in administering and servicing the loan.

> accompanied by restoration to the defendant of benefits received by the plaintiff in the transaction, will itself amount to a rescission. This is called rescission at law, meaning rescission under the theory used in law, rather than equity, courts. The theory here is that the court has nothing to do with the rescission of the transaction; that is accomplished by the plaintiff when he notifies the defendant and returns what he has received under the transaction.

The plaintiff's restoration to the defendant of benefits received in the transaction constitutes the "tender" requirement. According to Dobbs, many courts hold that tender must be complete and unequivocal. In *Anson* v. *Grace*, 174 Neb. 258, 117 N.W.2d 529 (1962), a purchaser of land sent a "notice of rescission" promising to reconvey the property to the seller. The court held the tender requirement was not met.

First Federal's letter did not offer to restore the benefits First Federal received under the agreement. It was an equivocal statement. Since there was no effective tender, there was no rescission.

This error might not make a difference if the Arkansas legal system were like most states with courts which deal with questions of both law and equity. But we have separate courts, and it is important to keep the line drawn between what cases belong in circuit court and what cases must be decided in chancery. Since First Federal did not accomplish a legal rescission, the circuit court fashioned an equitable remedy when it allowed rescission and restitution. That could only have been done in a court of equity.

This means the judgment must be reversed and remanded for further proceedings.

Reversed and remanded.

Christopher KING *v.* STATE of Arkansas

CR 88-170 769 S.W.2d 407

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Matt Keil*, 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

rape and burglary and was sentenced to consecutive terms of life and thirty years in prison. On appeal he argues that the court erred in not granting his motion for mistrial and in failing to suppress the in-court identification by the victim. We do not agree with either argument and therefore affirm the action taken in the trial court.

The victim was raped twice on February 28, 1987. At about 2:30 a.m. an intruder raped the woman in her bedroom after ordering her to take off her clothes. Although the victim is nearsighted and was not wearing glasses when her attacker raped her, she later testified that he was close enough for her to identify him when he first approached while the bedroom light was still on. Following the rape, the victim told her attacker that she had some money in a purse in an adjacent hallway. In order to locate it, the intruder turned on the hall light. When he returned with the purse, he allowed the victim to get her glasses, and she was able to see him well. The intruder raped the victim a second time before he left the house at about 6:00 a.m. As he left he turned on a light, and she observed his features again.

On March 10, 1987, the appellant was in custody on a related charge when he was placed in a lineup at which the rape victim identified him as her attacker. The appellant had not been charged with either the rape or the burglary at that time.

During the trial the victim made an in-court identification of the appellant. After extensive cross-examination by the defense counsel, the victim, who had walked in front of the jury as she was leaving the courtroom, appeared to faint or collapse in the exit doorway. The trial court overruled the appellant's motion for a mistrial at that point and subsequently instructed the jury to disregard the incident.

[redacted] We first consider whether the court erred in failing to grant a mistrial at the time the victim collapsed in the jury's presence. A mistrial is an extreme and drastic remedy which will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial. *Brewer* v. *State*, 269 Ark. 185, 599 S.W.2d 141 (1980). The decision whether to grant a new trial is left to the sound discretion of the trial judge and will not be reversed in the absence of an abuse of discretion or manifest prejudice to the complaining party. *Foster*

v. *State*, 294 Ark. 146, 741 S.W.2d 251 (1987). Generally a cautionary instruction will take care of unusual events such as this. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982). There are circumstances, however, in which statements or actions in the jury's presence are so highly prejudicial that they violate the accused's right to a fair trial, and no admonition to the jury can cure them. *Dean* v. *State*, 272 Ark. 448, 615 S.W.2d 354 (1981); *Sharron* v. *State*, 262 Ark. 320, 556 S.W.2d 438 (1977); and *Hughes* v. *State*, 154 Ark. 621, 243 S.W. 70 (1922).

It is unfortunate that the victim collapsed in the presence of the jury. There is, however, no indication whatsoever that either the victim or the state orchestrated this action for the jury's benefit. The court admonished the jury to render its verdict on the basis of the testimony and instructions and to put aside prejudice, sympathy and the like. He specifically directed the jurors not to consider the witness's collapse in their deliberations. The court's admonition to disregard the incident was apparently as effective as words can be in directing the jury to not consider the matter in reaching a verdict.

We recently decided a case which is factually similar to the present case. In *Wilson* v. *State*, 297 Ark. 568, 765 S.W.2d 1 (1989), we upheld the trial court's denial of a continuance following the testimony of a rape victim who was in obvious pain and discomfort and who communicated her condition to the jury through language and groans and grunts. Earlier, in considering the refusal of a trial court to grant a mistrial, we approved an admonition to disregard the emotional outburst of a murder victim's mother while she was testifying on the stand. *Venable* v. *State*, 260 Ark. 201, 538 S.W.2d 286 (1976). We find that no prejudice has been demonstrated.

The second point for reversal is that the trial court erred in failing to suppress the victim's in-court identification of the appellant. This point was raised in a pretrial motion in which the appellant sought to prevent the victim from identifying him in court based upon the lineup identification procedure held on March 10, 1987. Counsel failed to obtain a ruling by the court on this motion. It is the duty of the appellant to obtain a ruling on his motions. *Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987). The appellant argues that he was entitled to counsel at

the lineup proceedings, despite the fact that formal charges against him had not been filed at the time. In *McClendon* v. *State*, 295 Ark. 303, 748 S.W.2d 641 (1988), we held that the Sixth Amendment right to counsel had not attached when the accused was required to participate in the lineup prior to the time charges had been filed against him. See also *Kirby* v. *Illinois*, 406 U.S. 682 (1972), and *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988).

The issue of whether to declare a mistrial is a matter which was no doubt seriously considered by the trial court and refused. We cannot find from the record that there was an abuse of discretion by the judge. Even if we were to reach the second issue, the circumstances of this case do not require reversal for allowing the in-court identification. The judgment is therefore affirmed.

Barry L. JOHNSON *v.* STATE of Arkansas

CR 88-182 769 S.W.2d 3

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Darrell F. Brown & Associates, P.A.*, for appellant.

*Steve Clark*, Att'y Gen., by: *Ann Purvis*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant filed a petition for a writ of habeas corpus alleging that he was convicted and sentenced in municipal court and later convicted and sentenced in circuit court on the same facts. The circuit court declined to issue the writ. We affirm.

The issue on appeal is whether the petitioner established that he was being held without lawful authority. Ark. Code Ann. § 16-112-103(a) (1987). One is held without lawful authority when it is shown that: (1) The commitment is invalid on its face; or (2) the court lacked jurisdiction. *George* v. *State*, 285 Ark. 84, 685 S.W.2d 141 (1985). Neither of these conditions was met in this case.

(1) Commitment Invalid on Its Face. Appellant makes no assertion that the commitment was invalid on its face.

(2) Court Lacked Jurisdiction. At the time of the second conviction, the one in circuit court, the trial court had personal jurisdiction over the appellant and also had jurisdiction over the subject matter, and had authority to render the particular judgment. Thus, the trial court had jurisdiction and habeas corpus will not issue. *See Goodman* v. *State*, 221 Ark. 308, 254 S.W.2d 63 (1952).

Affirmed.

HOLT, C.J., and PURTLE, J., concur.

JACK HOLT, JR., Chief Justice, concurring. I concur, but would decide this habeas corpus case on the basis of waiver as discussed in *United States* v. *Broce*, ___ U.S. ___, 109 S.Ct. 757 (1989). In that case the Supreme Court held that a defendant must raise a double jeopardy argument at the time of the alleged second conviction or else the issue is waived and, therefore, cannot be raised in a subsequent habeas corpus proceeding. I would overrule any of our cases with dictum to the contrary.

PURTLE, J., joins in this concurrence.

Chris PENNY, Bill Penny and Martha Penny *v.* Dana PHILLIPS, a Minor, By Her Next Friend, Jimmy Phillips

89-2 769 S.W.2d 4

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Laser, Sharp, Mayes, Wilson, Bufford & Waters, P.A.*, by: *Brian Allen Brown*, for appellants.

*Gibson & Hashem*, by: *Hani W. Hashem*, for appellee.

STEELE HAYS, Justice. Following a verdict for the defendants in a personal injury suit, the trial court set the verdict aside and ordered a new trial. The defendants have appealed. Finding no abuse of discretion, we affirm.

Jimmy Phillips filed this suit on behalf of his daughter, Dana

Phillips, a minor. The defendants, who are now the appellants, are Chris Penny and his parents, Bill and Martha Penny.

On the night of October 24, 1986, Chris was driving a family vehicle with Dana riding as a passenger. The vehicle, a pickup truck, left the highway at a curve on Ridgeway Road in Pine Bluff and struck a tree, injuring both Chris and Dana. Evidently Dana's injuries were more severe. The complaint alleges negligence by Chris Penny and negligent entrustment by Bill and Martha Penny, who also signed the driver's license application of Chris Penny.

The testimony at trial is readily summarized: Mrs. Nancy Black witnessed the incident which happened about 10:00 p.m. She described the curve as "extremely sharp" and "real bad," that twenty miles per hour would be fast coming around that curve. She saw the truck go off the road and into a ditch. She wasn't sure if Chris Penny was hurt but she could hear Dana Phillips moaning. The ambulance, she said, arrived in five or ten minutes.

A police officer testified that the truck left the highway on the right, where the grass was wet and muddy, came back onto the highway and straight across the roadway and down into a ditch, striking a tree head-on. He said both driver and passenger were hurt. Chris Penny told him he did not see the curve until he entered it, that he left the road on the right shoulder, panicked, and the next thing he remembered was sitting on the tailgate of the truck after the accident.

Chris Penny testified that he and Dana were on a date. He said they had not been drinking, and that it had not been raining but the roads were wet. He said he wasn't speeding but Dana "told me to slow down anyway," which he did. "Then there was this street which cuts off the road. I got confused and went off the road onto the wet grass. There is a tree standing there, I swerved to avoid it and went off the opposite side of the road and down into the ditch." He said his lights were on, but not on bright, adding, "I might have seen the curve better had I had the bright lights on." He said Dana had nothing to do with the accident, but they might have been talking.

Dana Phillips testified that they were driving at a moderate

speed, probably 25-30 miles per hour, that Chris didn't realize the curve was there, went off on the right, tried to gain control and then went off to the left side into the ditch. The balance of her testimony related to her injuries.

After the jury returned its verdict, 11 to 1 for the defendants, the plaintiff moved for a new trial or for a judgment n.o.v. The trial court ruled that the verdict was clearly contrary to the preponderance of the evidence and granted a new trial pursuant to ARCP Rule 59(a)(6).

While we have said that a trial court may not substitute its view of the evidence for that of the jury, *Brant* v. *Sorrells*, 293 Ark. 276, 737 S.W.2d 450 (1987), that does not imply that he or she is without discretion in determining whether to grant a new trial. Clearly the trial courts have that authority under ARCP Rule 59(a)(6), providing that a new trial may be granted when the verdict is clearly against the preponderance of the evidence. Cases interpreting the rule are plentiful, e.g., *Wilson* v. *Kobera*, 295 Ark. 201, 748 S.W.2d 30 (1988); *Stephens and Morten* v. *Saunders*, 293 Ark. 279, 737 S.W.2d 626 (1987); *Brown* v. *Wilson*, 282 Ark. 450, 669 S.W.2d 6 (1984); *Clayton* v. *Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982). The broad discretion that once existed was narrowed somewhat by the 1982 amendment to Rule 59(a)(6), which inserted the word "clearly," *see Clayton* v. *Wagnon*, *supra*, but the decision is still an exercise of discretion and will not be disturbed on appeal unless discretion has been abused. *Peoples Bank & Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986). Moreover, where the trial court has ordered a new trial, it is more difficult to establish an abuse of discretion than when a new trial is denied. *Adams* v. *Parker*, 289 Ark. 1, 708 S.W.2d 617 (1986).

Having examined the evidence carefully, we conclude that the appellants have failed to show that the trial court's discretion was abused. In addition to having heard the testimony in its entirety, the trial court had the benefit of photographs and a diagram of the accident scene which are not in the abstract. There is no contention that Dana Phillips was in any manner at fault and the testimony of Chris Penny, however one may choose to interpret it, points unerringly to a failure to maintain a proper lookout or a failure to maintain proper control over his vehicle as

proximate causes of the collision.

Finding no abuse of discretion, we affirm.

GLAZE, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion recognizes the applicable law in this case but reaches the wrong decision. The evidence set out in the opinion is sufficient to clearly establish that the facts were fairly evenly divided, thereby presenting a jury question. The driver, Chris Penny, was not speeding, drinking, or otherwise violating the rules of road or any ordinance or statute.

It seems to me that the trial court substituted its judgment for that of the jury. The majority opinion relies upon *Brant* v. *Sorrells*, 293 Ark. 276, 737 S.W.2d 450 (1987), recognizing that a trial court may not substitute its view of the evidence for that of the jury.

The majority has, at the very least, reverted to the rule as it existed prior to the decision in *Clayton* v. *Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982), and the 1982 amendment to ARCP Rule 59(a)(6).

I would affirm the verdict rendered by the jury.

James Edward WILLIAMS *v.* STATE of Arkansas

CR 88-164 768 S.W.2d 539

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Gibbons & Walker*, for appellant.

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

STEELE HAYS, Justice. Appellant James Williams was

convicted of aggravated robbery and rape. The only question on appeal is the sufficiency of the evidence.

The crimes occurred in the early morning hours of December 2, 1986, at the Best Western-King's Inn in Russellville, Arkansas. Betty Lindsey was working the 11:00 p.m. to 7:00 a.m. shift as a desk clerk when she was approached by a man holding what appeared to be a pistol, but which was in fact a visegrip partially concealed in a cloth bag so as to look like a weapon. He demanded she give him money from the cash register and then pushed her into a back room where he tied her hands with wire and raped her.

After hearing of the robbery and rape, two other women employed as night clerks at neighboring motels came forward with information that they had been approached by a man around the time of the incident at Best Western-King. Their description of the man was similar to that given by the victim. In both cases the man had inquired about the price of a room and after a short discussion of the matter, had departed.

About two months later, on February 10, 1987, the three women were shown a photographic lineup which included a picture of the appellant, James Williams. All three identified the photograph of appellant as the man who had approached them on the night in question.

There was a motion filed to suppress the in-court and out-of-court identification based on the photo lineup's suggestiveness but there is nothing in the record to show that the motion was ever ruled on. In fact, the motion seems to have been abandoned as there was no objection on that basis to the testimony at trial of the out-of-court identification nor to the in-court identification.

A trial was held on March 16, 1988. The jury found appellant guilty on both the charge of rape and the charge of aggravated robbery and imposed a sentence of forty years and life imprisonment. It is from that judgment that appellant brings this appeal.

Appellant argues that the trial court erred in denying his motion for a directed verdict, as there was insufficient evidence from which the jury could find appellant was the person who committed the crimes.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). On appeal, we review the evidence in the light most favorable to the appellee and sustain the conviction if there is any substantial evidence to support it. *Wright* v. *State*, 288 Ark. 209, 703 S.W.2d 850 (1986). The evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion or conjecture. *Birchett* v. *State*, 289 Ark. 16, 708 S.W.2d 625 (1986). We view only the evidence which is most favorable to the jury's verdict and do not weigh it against other conflicting proof favorable to the accused. *Ricketts* v. *State*, 292 Ark. 256, 729 S.W.2d 400 (1987).

The evidence in this case rests upon the credibility of the victim and the two other witnesses, and while there are some inconsistencies in the testimony, that is a matter of credibility for the jury to decide. *Burris* v. *State*, 291 Ark. 157, 722 S.W.2d 858 (1987); *Cope* v. *State*, 292 Ark. 291, 730 S.W.2d 242 (1987); *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980). A jury may accept or reject any part of a witness's testimony and we are bound by the jury's conclusion. *Burris* v. *State*, *supra*. We have no right to disregard the testimony of a witness after the jury has given it full credence, at least where it cannot be said with assurance that it was inherently improbable, physically impossible or so clearly unbelievable that reasonable minds could not differ thereon. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

We find the discrepancies in the testimony in this case are not of a nature that we could say with any assurance the evidence was inherently improbable or physically impossible. This is so particularly in light of the fact that all three women were positive and unequivocal in their identification of the appellant.

It seems clear that the perpetrator of the crime was the same man who visited the three motels. The man was in each motel within a three hour period on the same night, and all motels were in close proximity to each other. All three clerks described a black man with a stubbly beard, similar clothes, and the same approach — an inquiry about a room followed by a brief conversation with the desk clerk.

The three women identified the appellant in a photo lineup

shown to them within about two months of the incident. All three had an opportunity to view the appellant in good light and all three unequivocally identified him as the man they had seen that night. The victim identified appellant in the courtroom and stated she had no difficulty identifying him at this time, even with a heavier beard than he had had before. She said having the beard made no difference because she could not forget the eyes, or, "his whole face . . . everything about his face." She then stood next to appellant to judge his height and stated there was no question in her mind that he was the man.

Paula Crippen was one of the two clerks from the neighboring motels. She picked appellant out of the photo lineup and again in court. She also stated that the fact appellant now had a beard did not prevent her recognizing him, that it was the same man who had appeared in the motel that night and the same man she had selected from the photo lineup.

Linda Foster was the other clerk. She, too, identified appellant in the photo lineup and in court. She said there was no doubt in her mind he was the same man who had been in her motel that night.

The discrepancies appellant points to are: 1) the victim's description of the perpetrator to the police as being several inches shorter than his actual height; 2) the witnesses' failure to mention a scar over the appellant's eye; 3) the victim's notation in her description to police that appellant had splotches of pigment on his face, like freckles, which she said were not there when she viewed him at trial.

As pointed out by the state, the failure of a rape victim to accurately assess the height of a rapist could not be found to be particularly surprising considering the circumstances under which that assessment is made. And when it is considered that other features of appellant, including his clothing, beard and eyes were described by the other witnesses as well as the victim, the height discrepancy is of minimal importance.

■ While the victim had not mentioned the scar at the time she gave her description of the assailant to the police, when she was questioned about it on the stand, she stated she had nevertheless remembered it. As to the splotches, they may have

been attributable to lighting at the time, or the fact that appellant had since grown a fuller beard and the spots were not visible at trial. Whatever the explanations, the discrepancies were not of a sort to make the testimony inherently improbable and the evidence was more than sufficient to support the conviction.

The judgment is affirmed.

James GRABLE *v.* STATE of Arkansas

CR 89-68 769 S.W.2d 9

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Robert Meurer*, for appellant.

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

DAVID NEWBERN, Justice. The appellant, James Grable, seeks reversal of his conviction of driving while intoxicated on the ground that the officer who arrested him did not meet mandatory qualifications to make the arrest, and thus the charge against him was invalid and the evidence presented through him was inadmissible. The state argues Grable failed to show the charge by the officer was the only one levied against him and the regulations cited by Grable were not introduced in evidence and cannot be considered. The state also argues there was compliance or substantial compliance with the regulations. We hold compliance with the regulations, of which we may take judicial notice, was mandatory, and Grable had not complied with them. The charge was invalid, and Grable was not required to present evidence that it was the only charge against him. The arrest and charge were

invalid, and the evidence resulting from the arrest should not have been admitted. We, therefore, reverse and dismiss the conviction.

Grable was arrested at 1:35 a.m., January 1, 1988, for speeding and driving while intoxicated (first offense) by Officer Carson of the Judsonia Police Department. He was found guilty of both offenses in the Judsonia City Court and appealed to the circuit court where he was convicted only of DWI. Officer Carson testified that Grable's breath smelled of intoxicants at the time of the arrest, Grable's eyes were bloodshot, and he failed the field sobriety and portable breath test. He transported Grable to Searcy where an intoxilyzer test was administered by a Searcy Police Department patrolman.

*1. Judicial notice*

Courts may take judicial notice of the regulations of state agencies. *Seubold* v. *Fort Smith Special School Dist.*, 218 Ark. 560, 237 S.W.2d 884 (1951); *State* v. *Martin*, 134 Ark. 420, 204 S.W. 622 (1918). The cases cited by the state hold courts may not take judicial notice of municipal ordinances and regulations, and thus they are inapplicable here. *E.g., Orrell* v. *City of Hot Springs*, 265 Ark. 267, 578 S.W.2d 18 (1979) (municipal civil service regulations); *Smith* v. *City of Springdale*, 291 Ark. 63, 722 S.W.2d 569 (1987) (municipal ordinance).

*2. The regulations*

Qualifications of candidates for police positions in Arkansas are set by regulations promulgated by the Arkansas Commission on Law Enforcement Standards and Training. By Ark. Code Ann. §§ 12-9-104 and 12-9-106 (1987), the general assembly has empowered the commission to establish minimum selection and training standards and general qualifications of law enforcement personnel.

Commission on Law Enforcement Standards and Training Regulations, as abstracted, provide:

> § 1002(2)(c). Every officer employed by a law enforcement unit shall be fingerprinted and a search made of state and national fingerprint files to disclose any criminal record.
>
> § 1002(2)(i). Every officer employed by a law enforcement

> unit shall be examined by a licensed psychiatrist or a licensed psychologist, who, after examination, makes recommendations to the employing agency.
>
> § 1002(4). The minimum standards for employment or appointment must be completed before employment eligibility is established. Employment eligibility should depend upon the results and recommendations received by the investigator and examiners.

Arkansas Code Ann. § 12-9-108(a) (1987) provides:

> A person who does not meet the standards and qualifications set forth in this subchapter or any made by the Arkansas Commission on Law Enforcement Standards and Training shall not take any official action as a police officer, and any action taken shall be held as invalid.

Subsequent sub-sections contain exceptions for disaster or emergency situations and permit issuance of parking violation citations by law enforcement personnel who have not met the standards.

*3. Compliance or substantial compliance*

The evidence showed that Officer Carson's file contained neither a record of a completed fingerprint check nor a record of the required psychological examination. The state argues that there was compliance with the fingerprint requirement because the search had been initiated. It argues substantial compliance with the psychological testing requirement because Carson had undergone such a test in connection with previous employment by another city and because he completed the requirement within 30 days of the arrest in this case. No evidence of the previous psychological test was in Carson's Judsonia file.

We reject the argument of compliance with the fingerprint check because § 1002(4) of the regulations makes it clear that the minimum standards must be "completed" before employment.

We reject the substantial compliance argument with respect to the psychological testing requirement because of the emphatic language of Ark. Code Ann. § 12-9-108(a) which makes clear the intent of the general assembly that we are not to tolerate anything but strict compliance with the regulations. We

note in passing that if we were to adopt a substantial compliance exception the obvious intent of the general assembly to improve the quality of law enforcement by enacting laws requiring standards would never be achieved.

*4. Invalid charge*

Given the failure of Officer Carson to be in compliance with the regulations at the time of the arrest, § 12-9-108 invalidates the arrest and the action taken by Carson in charging Grable. The state argues, however, that the conviction should be affirmed because Grable failed to show that the citation he was given by Carson was the only charge against him.

In *Davis* v. *State*, 296 Ark. 524, 758 S.W.2d 706 (1988), we noted that, in accordance with § 12-9-108(a), a charge filed by an unqualified law enforcement officer created a situation as if no charge whatever had been filed. However, we noted, "the appellant does not *tell us* whether the non-qualified officer's citation was the only formal charge [emphasis supplied]. . . ." Given the failure of the appellant even to argue that the charge of which he complained was the only charge against him, we declined to presume error and affirmed the conviction.

In *Helms* v. *State*, 297 Ark. 44, 759 S.W.2d 546 (1988), we were presented again with an invalid charge and we again declined to reverse because, in part, "the appellant failed *to show* that the arresting officer's citation was the only formal charge [emphasis supplied]. . . ."

We must overrule both of those cases to the extent they implied or said it was the duty of the defendant or appellant to present evidence to the trial court that there was no charge against him other than the one contended to be invalid. Just as the defendant has no duty to establish any fact proving his innocence, *Griffin* v. *State*, 169 Ark. 342, 275 S.W. 665 (1925), he has no duty to prove the negative proposition that there are no charges against him other than the one before the court of which he complains. *See Austin* v. *Dermott Canning Co.*, 182 Ark. 1128, 34 S.W.2d 773 (1931), where it was held that a party should not be required to prove a negative where the means of making the proof are in the control of his adversary. It is the duty of the state to give notice of the offense charged in the charge levied against

the defendant, *Robbins* v. *State*, 219 Ark. 376, 242 S.W.2d 640 (1951). Clearly the state is in the better position to establish whatever charges it has made against the defendant.

We have no doubt it is the duty of the state to bring a proper charge. If the state is willing to stand on the charge of which the defendant complains, so be it, and the court can then determine its validity. If there is a valid charge against the defendant other than the one to the validity of which he objects, the state should be able to produce it and should have the duty to do so.

Reversed and dismissed.

Sharon STANDRIDGE, Guardian of Pamela Lynette Standridge *v.* Annie Louise Thacker STANDRIDGE

88-250 769 S.W.2d 12

Supreme Court of Arkansas
Opinion delivered May 1, 1989
[Supplemental Opinion on Denial of Rehearing
May 30, 1989.*]

*Holt, C.J., Hays and Glaze, JJ., would grant rehearing. Purtle, J., not participating.

*Young & Finley*, for appellant.

*Mobley & Smith*, by: *William F. Smith*, for appellee.

DAVID NEWBERN, Justice. This case arises from a contest in the probate court over who should be the personal representative and administrator or administratrix of a decedent's estate. The primary issue litigated was whether the appellee, Annie Louise Thacker Standridge, was divorced from her prior husband at the time she married Carroll Wayne Standridge. The answer to that question, in turn, determines whether Annie's marriage to Carroll was valid, and it may determine whether she was a proper personal representative of his estate. The trial court held Annie was Carroll's widow despite the fact that her divorce decree had not been entered in accordance with the provisions of Ark. R. Civ. P. 58 at the time she and Carroll participated in a marriage ceremony. We conclude the marriage between Annie and Carroll was invalid because her previous marriage had not been terminated by divorce at the time she purported to marry Carroll. Because a number of decisions made by the probate court may have hinged on its holding that the marriage between Annie and Carroll was valid, we must remand the case.

Annie was appointed administratrix over the objection of the appellant, Sharon Standridge. Sharon is Carroll Standridge's former wife and the mother of their daughter, Pamela Lynette Standridge, on whose behalf Sharon appeared. Sharon had sought the appointment of an independent administrator on the ground that Annie and Annie's son, Johnny Thacker, who had lived with Annie and Carroll, had interests in the decedent's estate which were in conflict with those of Pamela, and, therefore, Pamela's interest in the estate would suffer if Annie were appointed administratrix.

The primary asset of Carroll Standridge's estate was a wrongful death claim which resulted from Carroll's death in a motorcycle accident. The court approved a contingent fee contract between the estate and the law firm which pursued the claim

by which the firm would receive 33⅓% of an award upon settlement, 40% if litigation were required, and 50% in the event of an appeal. After the case had been filed in a United States district court, Annie negotiated a settlement. The estate was to receive some $470,000. The awards to the individual recipients were structured in various amounts over various time periods.

On behalf of Pamela, Sharon filed an objection to the proposed settlement. She pointed out that, although she had sought notice of any proposed settlement of the claim, no notice was provided to her. She objected to the 40% fee for the attorneys and contended that Annie Louise Thacker Standridge was entitled to no portion of the recovery because she was not legally the widow of Carroll.

The court ultimately approved the settlement after it was revised to give a greater share to Pamela than that which had first been negotiated.

*1. Annie's divorce*

The decree divorcing Carroll from Sharon was filed with the chancery clerk on October 5, 1984. On that same date, the chancellor heard the divorce proceedings between Terry and Annie Thacker, and he wrote on his docket book, "decree—a little unusual but it may work." Apparently the chancellor was referring to the fact that Terry Thacker was to have custody of the couple's daughter and Annie was to have custody of the son, Johnny. The daughter was afflicted with a disease known as lupus and required extensive medical support. There was no provision, other than medical insurance coverage, for support for Johnny, but Terry was given reasonable visitation rights.

On October 7, 1984, Carroll and Annie participated in a marriage ceremony. On October 24, 1984, the decree divorcing Annie and Terry Thacker was filed with the chancery clerk. Annie and Carroll were aware there was a "problem" with the validity of their marriage. She testified about the two of them having made several visits to Oklahoma because she and Carroll thought they would thus achieve a common law marriage. She said she and Carroll did not want to go through another ceremony because he did not want it to seem as an admission that they had not been married during the time they had lived together.

In support of his holding that the marriage was valid, the court cited *Parker* v. *Parker*, 227 Ark. 898, 302 S.W.2d 533 (1957), and *Pendergist* v. *Pendergist*, 267 Ark. 1114, 953 S.W.2d 502 (Ark. App. 1980). Both are cases which were decided in accordance with the law in effect prior to the adoption of the Arkansas Rules of Civil Procedure. The *Parker* case held that a pronouncement of divorce from the bench at the conclusion of the hearing effected the divorce. In the *Pendergist* case, the court of appeals noted that the controlling law in the future would be Rules 58 and 79 which would "at least" require a written docket entry of "it," referring to the judgment.

Since the adoption of the rules, this court has made it clear that a judgment or decree may not be effective until it has been "entered" as provided in Rules 58 and 79. The latter rule has now become Arkansas Supreme Court Administrative Order 2. The second paragraph of Rule 58 provides:

> Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Rule 79(a). Entry of judgment or decree shall not be delayed for the taxing of costs.

Administrative Order 2, as did the former Rule 79(a), provides merely for the ministerial act of filing in the chancery docket book kept by the clerk. In *Childress* v. *McManus*, 282 Ark. 255, 668 S.W.2d 9 (1984), a chancellor held that a divorce announced from the bench at the close of a hearing was valid although the husband died before the decree was entered. The decree was reversed, and we held a divorce decree entered after the death of a party was a nullity. The failure to enter the decree in accordance with Rule 58 until after the death invalidated the decree.

Annie argues the *Childress* case and cases similarly decided by our court of appeals are distinguishable because they involve the death of a party, which is not involved here, and because they involve situations where there were or may have been issues left unresolved after announcement of the decree which, she contends, is not the case here. We see no significant difference between the case where a death occurs before entry of a decree and one where remarriage occurs before entry of a decree. In each case, the question is the same. Was the announcement of the

divorce from the bench sufficient to effect the divorce? We again say no.

Nor are we persuaded by the idea that in those cases there may have been issues remaining to be resolved. Although in the case before us now the support and property issues seemed to have been settled through Annie's testimony at the divorce hearing as to the parties' agreement, there is no telling what sort of objections one or the other of them might have upon seeing the decree in writing and being asked to approve it before entry. Our experience tells us there may always be outstanding issues until a written document is made the final instrument of the divorce and the divorce is made final at some definite point. The purpose of Rule 58 was to provide a definite point at which a judgment, be it a decree of divorce or other final judicial act, becomes effective. The rule tells clearly what that point is.

As Annie was not divorced at the time she married Carroll, their marriage was invalid. A statute, Ark. Code Ann. § 9-12-101 (1987), provides that a subsequent marriage may not be undertaken by a person not yet divorced from a living "former" spouse. We have held such a marriage to be "void," *Goset* v. *Goset*, 112 Ark. 47, 164 S.W. 759 (1914), and that is so even where one of the parties to the second marriage entered it in good faith. *Morrisson* v. *Nicks*, 211 Ark. 261, 200 S.W.2d 100 (1947); *Evatt* v. *Miller*, 114 Ark. 84, 169 S.W. 817 (1914). *See Yocum* v. *Holmes*, 222 Ark. 251, 258 S.W.2d 535 (1953). Note, 10 *Ark. L. Rev.* 188, 196 (1956).

*2. Common law marriage*

In his holding, the chancellor pointed out that the visits to Oklahoma amounted to no more than "window dressing," and we must agree. It is clear from Annie's testimony that, although one of the visits may have been made to find a place to live in Oklahoma, she and Carroll returned to Arkansas to conclude his employment here, and they did not "move" to Oklahoma or ever stay there for any considerable length of time.

Annie cites *Stilley* v. *Stilley*, 219 Ark. 813, 244 S.W.2d 958 (1952), for the proposition that this court will recognize a common law marriage validly contracted in a state where such a marriage is sanctioned. However, there, as in other cases where

we have recognized a common law marriage, the parties established a substantial relationship of long duration in the common law marriage state. In the *Stilley* case, for example, the parties stayed in Kansas, a common law marriage state, for nine years, and Mrs. Stilley bore five children there.

In *Walker* v. *Yarbrough*, 257 Ark. 300, 516 S.W.2d 390 (1974), we concluded that mere visits or sojourns of parties to a common law marriage state are insufficient to create a common law marriage recognized in Arkansas. We agree with the judge's apparent conclusion that the record here does not support a finding that a common law marriage was established between Annie and Carroll.

*3. Nunc pro tunc*

The chancellor who awarded the divorce entered an order on April 20, 1988, purporting to make it effective as of October 5, 1984. Annie argues the order was a proper application of the *nunc pro tunc* procedure because, again, the decree was effective upon its rendition. Courts are permitted to enter orders *nunc pro tunc* when the record is merely being made to reflect that which occurred but was not recorded due to the misprision of the clerk. A court may not, however, change the record to do that which should have been done but was not. *Canal Ins. Co.* v. *Arney*, 258 Ark. 893, 530 S.W.2d 178 (1975).

To argue that the purported *nunc pro tunc* decree was proper because it made the record reflect the decree was to be effective on October 5, 1984, only begs the question whether compliance with Rule 58 was necessary to make the decree final.

*Conclusion*

Annie and Carroll were not married. We reverse and remand the case for proceedings consistent with this opinion.

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

TOM GLAZE, Justice, dissenting. In my view, the court is wrong in concluding Annie Standridge's marriage to Carroll Standridge was invalid. The court's decision is based on the premise that, at the time Annie married Carroll, Annie's divorce to her former husband, Terry Thacker, was not final. The

majority court reasons that, although the chancellor entered on his docket that the Thacker divorce was decreed, a separate written decree had not been filed or entered. Besides working an injustice to Annie Standridge and her now deceased husband, Carroll, I believe the court's decision will cause future problems and inequities, as well.

In support of its holding, the majority court cites Rule 58 of the Arkansas Rules of Civil Procedure which provides as follows:

> Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Rule 79(a). Entry of judgment or decree shall not be delayed for the taxing of costs.

The court also notes Administrative Order 2, formerly ARCP Rule 79(a), which provides, among other things, for the trial court to enter the dates and substance of its orders or judgments in a docket book. The Administrative Order further requires that the court's clerk "keep a judgment record book in which shall be kept a correct copy of every final judgment or appealable order."

After noting Rule 58 and Administrative Order 2, the court construes them to mean that a court's order or judgment is not final and effective until the order or judgment is reduced to a separate written document which is filed or entered. The court places this construction on Rule 58 even though the Reporter's Notes clearly explain the rule should have little or no effect on prior practice, which recognized the trial court's decision to be final when it was *rendered*. The Reporter's Notes further state the following:

> 4. This rule provides that a judgment or decree shall not be effective unless and until it is entered pursuant to Rule 79(a). *Thus for appeal purposes, the date of entry or filing of the judgment or decree is the effective date, as opposed to the date of rendition. Cranna* v. *Long*, 225 Ark. 153, 279 S.W.2d 828 (1955); *Wilhelm* v. *McLaughlin*, 228 Ark. 582, 309 S.W.2d 203 (1958). (Emphasis added.)

As can readily be seen above, the drafters of Rule 58 intended to clarify that, *for appeal purposes*, the date of entry or filing of the judgment or decree is the effective date, as opposed to

the date of rendition. This rule merely clarified and formalized prior case law on the subject, and was not intended to change prior practice. As already mentioned above, the prior, settled case law (and practice) recognized that decrees rendered in open court are effective from the date they are actually rendered, and not from the date of entry of record. *Parker* v. *Parker*, 227 Ark. 898, 302 S.W.2d 533 (1957). The *Parker* court, quoting from *McConnell* v. *Bourland*, 175 Ark. 253, 299 S.W. 44 (1927), said, "the rendition of a judgment is a judicial act on the part of the court, while the entry of a judgment is a ministerial act performed by the clerk."

The court's decision today clearly changes prior law and makes the formal filing of a judgment a judicial act rather than the ministerial act it truly is. The court's interpretation of Rule 58 will cause frustrations for trial judges and parties alike, since the finality of any decision made by the trial court will now depend upon when the attorneys prepare and return their precedents (orders, judgments or decrees) to the judge for signature and entry of record. As was the situation in the instant case, delays will inevitably occur between the time a judge renders his or her decision and when the written document is actually filed. Given this hiatus in time, one might even expect a party to assert a small amount of gamesmanship in order to obtain an advantage over an opposing party. All of this, I submit, is unnecessary and is based upon this court's erroneous interpretation and application of its own rule.

For the above reasons, I would hold that Annie Standridge was divorced from her former husband when she married her husband, Carroll. Her marriage to Carroll was valid, and this court commits a serious mistake by holding otherwise.

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

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
MAY 30, 1989

771 S.W.2d 262

PER CURIAM. Rehearing denied.

PURTLE, J., not participating.

HOLT, C.J., and HAYS and GLAZE, JJ., would grant rehearing.

TOM GLAZE, Justice, dissenting.

TOM GLAZE, Justice, dissenting. Appellee's petition for rehearing should be granted. I expressed my views in this cause in my earlier dissent and would generally write no further. *See Standridge* v. *Standridge*, 298 Ark. 494, 499, 769 S.W.2d 12, 15 (1989) (Glaze, J., dissenting). I choose to write again in this instance mainly because I recently discovered certain legal authority that further demonstrates how off-the-mark the court was in interpreting ARCP Rule 58 and in reversing the trial court's decision.

To summarize, this court held that appellee's, Annie Standridge's, marriage to Carroll Standridge was invalid because at the time of that marriage, the court determined Annie was still married to Terry Thacker. The majority concluded that, although the chancellor had entered on his docket that the Thacker divorce was decreed, a separate written decree had not yet been filed or entered when the Standridge marriage took place. The court construed Rule 58 and Administrative Order 2 to mean that a court's order, decree or judgment is not final and effective until it is actually filed.

In my dissent, I referred to the Reporter's Notes to Rule 58 which related that the Rule's drafters intended to clarify that *for appeal purposes*, the date of entry or filing of the judgment or decree is the effective date, as opposed to the date of rendition. Rule 58 of the federal rules of procedure has been construed to this same effect. Although I failed to mention it in my dissent, the Supreme Court, in interpreting FRCP Rule 58, stated that the *sole purpose* of the separate-document requirement was to clarify when the time for appeals begins. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978). Amplifying further, the Supreme

Court stated the following:

> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. *See United States* v. *Indrelunas*, 411 U.S. 216, 220-222 (1973). Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.

In the *Mallis* case, the district court's decision, dismissing the action, had been recorded in the clerk's docket, but no separate judgment had been filed before an appeal was taken to the Court of Appeals. Nonetheless, the Court of Appeals decided the case on its merits and the Supreme Court held the Court of Appeals had jurisdiction to do so. *See also Wright & Miller, Federal Practice and Procedure: Civil* §§ 2781-2786 (1973). In sum, FRCP and ARCP Rules 58 establish that the appeal time commences when the court's judgment is filed; they are in no way intended to delay the effect of the court's decision once it is rendered.

To further emphasize the point, I note the case of *Bethlehem Mines Corp.* v. *United Mine Wkrs. of Amer.*, 476 F.2d 860 (3rd Cir. 1973). There, the district court held several hearings during which it *orally* continued a temporary restraining order enjoining a strike. Subsequently, the district court, finding Local 1368 violated the court's restraining order, held Local 1368 in civil contempt. On appeal, Local 1368 challenged the court's contempt order, contending the court's restraining order had never been set forth on a separate document as required by Rule 58, and

therefore the restraining order was ineffective. In holding the district court's failure to set forth its restraining order in a separate document did not preclude an adjudication of civil contempt, the Third Circuit Court of Appeals stated the following:

> Rule 58, however, was intended primarily to clear up the uncertainties of determining when, for the purpose of appellate review, there is a final, appealable judgment. In addition, the purpose of Rule 58 is to insure that parties know what is required of them, that the public has notice of the entry of judgments, and that an appellate court has sufficient information upon which to base its review.
>
> Under the facts of this case, none of these purposes of Rule 58 would be thwarted. There is no question involved of the time for filing an appeal or of any other matter dealing with an appeal. Defendant never attempted to appeal the granting of preliminary relief, nor has it alleged that it was in any way prevented from doing so. Moreover, the mere fact that the preliminary injunction was not in writing and set forth in a separate document has not been claimed, and, in the context of the present dispute, would not appear to prejudice anyone.
>
> The parties were present in court, either personally or by counsel, during the hearings on the temporary restraining order, when the preliminary injunction was granted, and also in subsequent conferences with the judge. Because the oral preliminary injunction simply continued the earlier temporary restraining order which was set forth in a separate document, the record makes clear that the parties were fully aware of the existence and content of the injunction. No objection was made by the defendant to the granting of injunctive relief, nor was any appeal ever filed. *Under these circumstances, we would be exalting form over substance if we were to hold that in failing to enter the preliminary injunction on a separate document, the district court thereby rendered itself powerless to adjudge violations in civil contempt.* (Emphasis added.)

*Bethlehem Mines Corp.*, 476 F.2d 860, 863 (citations omitted).

In the present case, the chancellor decreed Annie's divorce from Terry Thacker by entering it on the court's docket book. Both Annie and Terry understood they were divorced, no objection was made and no appeal was ever filed. The chancellor's decree included a custody award, and the chancellor's power to enforce the decree was not, and should not be, dependent upon a party or his or her attorney filing a separate document that merely reflects what the court previously decided. To give more effect to the separate-document requirement of Rule 58 was not intended and can only lead to a multitude of problems.

HOLT, C.J., HAYS, J., join in this dissent. PURTLE, J., not participating.

George W. THOMPSON *v.* STATE of Arkansas

CR 89-28 769 S.W.2d 6

Supreme Court of Arkansas
Opinion delivered May 1, 1989
[Rehearing denied June 5, 1989.*]

*Purtle, J., would grant rehearing.

*John Wesley Hall, Jr.* and *Craig Lambert*, for appellant.

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

DAVID NEWBERN, Justice. The appellant, George W. Thompson, appeals his conviction of keeping a gambling house in violation of Ark. Code Ann. § 5-66-103 (1987). He states four points: (1) the court erred in failing to require the state to produce a confidential informant and then permitting a police officer to testify with respect to statements made by the informant, (2) the court erred in admitting hearsay evidence, (3) the evidence was insufficient to support the verdict, and (4) the statute is unconstitutional because it is vague. We hold: (1) it was not error to permit testimony about statements made by the informant because the defense opened the subject through cross-examination; (2) the statements complained of were not hearsay; and (3) the evidence was sufficient to support the conviction. We need not reach the constitutional issue because it was not raised at the trial, *Barnes* v. *State*, 294 Ark. 359, 742 S.W.2d 925 (1988). We, therefore, affirm the conviction.

At an omnibus hearing, the court ruled that the state need not reveal the name of its informant absent a plan to present, at trial, testimony as to statements made by the informant. The state did not reveal the name of the informant. At the trial, Officer Wallis testified he conducted a search of a building located at 1234½ W. 10th St. in North Little Rock as the result of a tip received from an informant. On cross-examination defense counsel questioned the officer specifically about what was said during conversations between the informant and a person who answered as "George" during calls to 371-9781 being monitored by Wallis prior to the search. Wallis described the calls and stated "we came to recognize his voice."

During the search two telephones on the premises rang constantly, each about every 60 seconds. On one occasion an

officer answered the phone and actually accepted what was apparently a horse race bet, known as a "round robin," from someone named Waller. A number of documents which appeared to be, and which were described by Wallis as, "betting slips" were seized, along with a list apparently showing customer names and the amounts they owed or which were owed to them. Thompson was arrested at the scene. A telephone company official testified the number (501) 371-9781 was listed for a George A. Thompson.

*1. Identity of the informant*

Whether the name of a confidential informant is to be disclosed depends on the circumstances of the case. *Roviaro* v. *United States*, 353 U.S. 53 (1957); *McDaniel* v. *State*, 294 Ark. 416, 743 S.W.2d 795 (1988); *James* v. *State*, 280 Ark. 359, 658 S.W.2d 382 (1983). Disclosure is required if the state is to produce the informant as a witness at the trial, *see* Ark. R. Crim. P. 17.5, but not if the informant is only to be referred to as someone who assisted in the investigation leading to the arrest. *See* A.R.E. 509; *Shackleford* v. *State*, 261 Ark. 721, 551 S.W.2d 205 (1977).

The court's initial ruling was correct. It would have been necessary for the state to produce the name of the informant if it had planned to use his testimony to show he participated in the crime or the manner in which it was committed. The state, however, put on no such testimony in its case in chief. The defense cross-examination of Officer Wallis went into what was said to and by the informant during the monitored calls. That opened the door for the state to discuss those conversations with the witness. *Poyner* v. *State*, 288 Ark. 402, 705 S.W.2d 882 (1986); *Robinson* v. *State*, 275 Ark. 473, 631 S.W.2d 294 (1982).

*2. Hearsay*

When Officer Wallis testified about the conversations between the informant and "George," counsel for Thompson made a hearsay objection. The court correctly ruled the testimony was not hearsay. Officer Wallis testified he placed the calls and monitored them. As he heard what was being said, he was not repeating what the informant told him George told the informant. He was not relating the conversations to establish the truth of the

matters asserted in them, but rather to establish that the conversations occurred. An out-of-court statement which is not offered for the truth of the matter asserted is not hearsay. *Liberto* v. *State*, 248 Ark. 350, 451 S.W.2d 464 (1970). *See also Jackson v. State*, 274 Ark. 317, 624 S.W.2d 437 (1981); *Flaherty* v. *State*, 255 Ark. 187, 500 S.W.2d 87 (1973).

*3. Sufficiency of the evidence*

Thompson's directed verdict motion and his argument here that there was no substantial evidence to support his conviction emphasizes what the state did not prove, *e.g.*, no one saw him take a bet or money, no gambling devices were found in his house, the state did not show his fingerprints were on the betting forms, and the state did not prove whose writing was on them.

We view the evidence in the light most favorable to the appellee. *Pope* v. *State*, 262 Ark. 476, 557 S.W.2d 887 (1977). We note testimony from which the jury could have concluded: Thompson was seen entering and leaving the house at 1234½ W. 10th Street in North Little Rock; he was present when officers executed the search warrant; the betting slips and customer lists were found on the premises; the telephones were ringing every 60 seconds, and the callers were asking for "George;" a bet was placed by one caller during the search; the two telephones were in the name of "George A. Thompson" according to telephone company records; and the informant had earlier placed bets over the telephone at the number listed for Thompson with a person called "George."

The evidence was sufficient to support a verdict reached by the jury without resort to suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. This archaic law is, in my opinion, unconstitutional for vagueness. Moreover, without any valid justification it prohibits some people from doing the very things others are allowed to do. The appellant was apparently guilty of bookmaking or taking bets on horses, just as they do at the racetrack in Hot Springs. My basic disagreement is not

so much with the majority opinion as it is with the law and how it has been interpreted over the years.

I cannot understand how Ark. Code Ann. § 5-66-103(a) (1987) can be read to include making or accepting bets on horse races. The code reads as follows:

> Every person who shall keep, conduct, or operate, or who shall be interested, directly or indirectly, in keeping, conducting, or operating any gambling house or place where gambling is carried on, or who shall set up, keep, or exhibit or cause to be set up, kept, or exhibited or assist in setting up, keeping, or exhibiting any gambling device, or who shall be interested directly or indirectly in running any gambling house or setting up and exhibiting any gambling device or devices, either by furnishing money, or other articles for the purpose of carrying on any gambling house shall be deemed guilty of a felony and on conviction shall be confined in the State Penitentiary for not less than one (1) year nor more than three (3) years.

Other sections of the code are more nearly descriptive of the activities for which the appellant was convicted. Section 104 prohibits the setting up, keeping, or exhibiting of gaming devices. Section 106 establishes the penalty for betting. Then there is the greatest of all the laws in this field, Ark. Code Ann. § 5-66-116(a), which makes it illegal to bet on horse races. It reads as follows:

> It shall be unlawful to bet in this state, directly or indirectly, by selling or buying pools or otherwise, any money or other valuable thing, on any horse race of any kind whether had or run in this state or out of this state.

Naturally, it is not a violation of this act if you make bets on horse races in Hot Springs. See Ark. Code Ann. § 23-110-102 (1987). If people in Hot Springs are able to bet on horse races by the use of totalizators or pari-mutuel betting, why should the people in North Little Rock be denied the opportunity to bet on horse races in a less extravagant manner?

If people who can afford to go to Oaklawn, dressed in all their finery and driven in their expensive limousines, are allowed to place their bets in the exclusive preserve of the Jockey Club, why

should those less fortunate be denied the opportunity to engage in the same activity elsewhere at much less expense? There are no classes of citizens according to our constitutions; nevertheless, certain "classes" of people seem to think so. I do not. Article 2, section 2, of the Arkansas Constitution states:

> All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

The evidence against the appellant consisted primarily of a telephone and a piece of paper called a betting slip, as well as a list of names and addresses with some figures written near the names. Compare these items with what may be found in any home and you will discover the same "evidence" — they are hardly the same devices described in § 5-66-104 that one may expect to find in a "gambling house" as established by § 5-66-103(a).

The appellant was also seen leaving or returning to his residence — on several occasions. This type of criminal activity cannot be tolerated in a law-abiding community.

There are presently too many unsolved crimes, such as burglaries and drug offenses, and too many hoodlums on the street. It is therefore counterproductive to allow the already understaffed and underpaid police departments to assign teams of several officers to catch bookies, especially in other cities. However, if this law is to be literally enforced against everyone, then I submit that the biggest gambling house of all is located on Central Avenue in Hot Springs, Garland County, Arkansas.

Michael WRIGHT *v.* Leon STOREY

88-309 769 S.W.2d 16

Supreme Court of Arkansas
Opinion delivered May 1, 1989
[Supplemental Opinion on Denial of Rehearing
July 3, 1989.*]

*David H. White*; and *David Love*, Hot Springs City Att'y, for appellant.

*Q. Byrum Hurst, Jr.*, for appellee.

DAVID NEWBERN, Justice. This is an illegal exaction suit brought as a class action by the appellees, who are Garland County taxpayers, against the appellants, who are the city manager, mayor, and members of the City of Hot Springs Board of Directors. Pursuant to Ark. Const. amend. 31, the residents of Hot Springs approved by referendum vote a property tax levy of up to one mill to provide a fund for police pensions and up to one mill for firefighter pensions. That took place in 1941, and one full mill was certified and taxed for those purposes until the passage of Ark. Const. amend. 59 in 1980, at which point the taxes were

*Hickman, Hays, and Glaze, JJ., dissent.

rolled back to .4 mill for each fund. The reduced amount was collected until 1986 and 1987 when the city board certified one mill although no further election had occurred. The court held the city had illegally collected the taxes because no further election had occurred and there had been no compliance with the part of amend. 59 which is now Ark. Const. art. 16, § 14. The city argues amend. 31 permitted the one mill levy, that the people had approved it by election, and that amend. 59 did not affect amend. 31. We conclude there was no error because the court was correct in holding that there must be compliance with amend. 59.

In *Clark* v. *Union Pacific R.R.*, 294 Ark. 586, 745 S.W.2d 600 (1988), we offered explanation of amend. 59. We found it to be the purpose of the amendment to equalize tax rates on personal and real property. The idea is to reduce personal property taxes simultaneously with the raising of real property taxes or to hold personal property taxes static until real property tax rates equal them. As Justice Glaze noted in his concurring opinion, the revenues from personal property were to be computed so as not to exceed collections in excess of the "base year." This was the so-called "rollback" provision.

Assuming the rollback from one mill to .4 mill was done to comply with amend. 59, the city was thereafter collecting the same revenues it had collected at one mill on the taxes in question. To allow the city then to return to the old rate (clearly in excess of 10% over the base year) on the newly increased appraised value of the property would violate amend. 59, even though it might have seemed permitted, literally, by amend. 31. The later amendment prevails in the event of a conflict. *Chessir* v. *Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930); *Lybrand* v. *Wafford*, 174 Ark. 298, 296 S.W. 729 (1927).

Moreover, the court's finding that the city had not demonstrated compliance with art. 16, § 14, was appropriate. While that section is otherwise confusing, it clearly states:

> The adjustment or rollback of tax rates or millage for the "base year" as hereinafter defined shall be designed to assure that each taxing unit will receive an amount of tax revenue from each tax source no greater than ten percent (10%) above the revenues received during the previous year from each such tax source, adjusted for any lawful tax

> or millage rate increase or reduction imposed in the manner provided by law . . . .

The court's order required the city to refund taxes collected in excess of what it would have collected under the .4 mill rate plus ten percent per year increase.

We do not consider whether an election was required to permit the ten percent increase, as the taxpayers have not cross-appealed on that point.

Affirmed.

HICKMAN, J., concurs.

PURTLE and GLAZE, JJ., dissent.

DARRELL HICKMAN, Justice, concurring. Another victim of godzilla. *See Clark* v. *Union Pacific Railroad Co.,* 294 Ark. 586, 745 S.W.2d 600 (1987) (Hickman J., dissenting).

TOM GLAZE, Justice, dissenting. In *Clark* v. *Union Pac. R.R.*, 294 Ark. 586, 745 S.W.2d 600 (1988), we said that Amendment 59 provides that the amount of revenue derived from personal property cannot be increased until the rates for real and personal property equalize. There, the parties provided extensive testimony, findings and conclusions that clearly reflected that the real and personal property rates in School District No. 9 in Cross County had not been equalized and that to apply a new millage to personal property in the district would only perpetuate that unequal discrimination which was contrary to Amendment 59.

Here, the parties have presented virtually no proof bearing on the change in the millage rates and its effect on the collection of revenues from the real and personal property in issue. Unlike in *Clark*, the parties here offered no testimony or findings to the trial court, so there is virtually no record to review on appeal. The court's only reference to millage was that a one mill levy on real and personal property was assessed for the benefit of the police and fire pension funds and that the one mill was "rolled back to .4 per fund per Amendment 59" in 1982 and collections for that year totalled $135,032.00. No mention is made of how the millage was rolled back or the effect it had on the respective collections from the real and personal property assessed and located in the City of Hot Springs. In sum, I am unable to discern what

differences existed between real and personal property rates, assessments and collections in base year 1982 and subsequent years. As a consequence, I cannot determine if any prior discrimination in personal and real property rates has been equalized since the roll back took place in 1981. Clearly, if equalization has been achieved, the appellants' action in returning the millage to one mill from .4 mill is not wrong merely because it increased revenue collections in excess of 10% over the base year.

Because this case fails to present an adequate record to decide the issue reached and decided by the trial court, I would reverse and remand this cause rather than postulate the information necessary to determine whether the appellants' action in this cause violated Amendment 59.

PURTLE, J., joins this dissent.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JULY 3, 1989

772 S.W.2d 598

*David H. White*, for appellant.

*Q. Byrum Hurst, Jr.*, for appellee.

DAVID NEWBERN, Justice. The appellants seek rehearing of our decision rendered May 1, 1989, asserting that the language in

our opinion misinterprets the provisions of amend. 59 when read as a whole. They also suggest that the language in our decision inadvertently conflicts with our opinion in *Clark* v. *Union Pacific R.R.*, 294 Ark. 586, 745 S.W.2d 600 (1988). The Assessment Coordination Division of the Public Service Commission joined as *amicus curiae* supporting the appellants in these assertions. The petition offers, in great detail, what they submit to be the proper interpretation "overall" of the provisions of amend. 59. The supplemental dissenting opinion on denial of rehearing agrees that our opinion in this case reinstates the same error we corrected by the substituted opinion in the *Clark* case.

The dissent quotes this sentence from the body of our opinion to support the conclusion that the error corrected by the substituted opinion in the *Clark* case has been reinstated: "To allow the city then to return to the old rate (clearly in excess of 10% over the base year) on the newly increased appraised value of the property would violate amendment 59, even though it might have seemed permitted, literally, by amendment 31."

While that sentence, read in isolation from the remainder of the opinion might be subject to that interpretation, the opinion as a whole does not support such a conclusion. The language we corrected in the *Clark* case had suggested that *real estate taxes* could not be increased more than ten percent after the base year. That conclusion is not supported by the majority decision in this case. As we stated in the paragraph above the quoted sentence, the purpose of the amendment is to equalize the tax rates on real and personal property and this could be accomplished either by holding personal property taxes static and raising real property taxes until equalization occurred or by the rollback procedure. There is no suggestion that the same goal could not be achieved by both rolling back personal property rates and raising real property rates to close the gap.

■ That which is prohibited by amend. 59, by the court's opinion in this case, and by the court's opinion in the *Clark* case is any increase in the millage rate on the newly appraised value of *personal* property prior to equalization. To avoid the possibility of future misinterpretation, the language of the sentence quoted above is modified to read as follows: To allow the city then to

return to the old rate (clearly in excess of 10% over the base year) on the newly increased appraised value of personal property would violate amend. 59, even though it might seem permitted, literally, by amend. 31.

The dissenting opinion also concludes, as did the dissenting opinion accompanying our decision in this case, that the record was insufficient to support the chancellor's finding that amend. 59 had not been followed. The record was sufficient to show, and none of the facts were even contested, that the Hot Springs city board raised the millage from .4 to 1 mill after the rollback. If it is the suggestion of the dissenting opinion that the record does not demonstrate that equalization had not occurred at the time the increase was ordered, such a suggestion is unacceptable. If equalization had been achieved, it was the duty of the appellants to present a record demonstrating it. Surely the appellants would have argued equalization had occurred were there any possibility that it had. No such argument has ever been made.

Another good reason for denying rehearing is that the appellants failed to make the arguments presented in their rehearing petition suggesting the possible interpretation of amend. 59 at either the trial level or in the orginal briefs arguing this case before this court. We have repeatedly held that we will not address arguments which the appellant did not raise in the proceedings below. *Reed* v. *Alcoholic Beverage Control Div.*, 295 Ark. 9, 746 S.W.2d 368 (1988); *Arkansas Cemetery Board* v. *Memorial Properties*, 272 Ark. 172, 616 S.W.2d 713 (1981).

Rehearing denied.

HICKMAN, HAYS and GLAZE, JJ., would grant this rehearing.

TOM GLAZE, Justice, dissenting. Appellants petition for rehearing and request we reverse our decision rendered on May 1, 1989. The court badly bungled this case, and we compound our error by failing to grant the appellants' petition. I quickly add that I believe the respective parties' failure to present an adequate record in this case did much to cause the erroneous decision reached by this court. *See Wright* v. *Storey*, 298 Ark. 508, 510,

769 S.W.2d 16, 18 (1989) (Glaze, J., dissenting).

The majority court's opinion says, "To allow the city then to return to the old rate (*clearly in excess of 10% over the base year*) on the newly increased appraised value of the property would violate amendment 59, even though it might have seemed permitted, literally, by amendment 31." (Emphasis added.) This language reflects the same blunder we made (and corrected) in *Clark* v. *Union Pac. R.R.*, 294 Ark. 586, 745 S.W.2d 600 (1988). In *Clark*, we originally opined that real estate taxes could not be increased more than ten percent after the base year — the same principle noted above and followed by the majority in this cause; however, in response to a rehearing petition, we promptly corrected our error in *Clark* by deleting such limiting language. Thus, by the majority court's opinion in this case, the court reinstates the same error we corrected in *Clark*.

After reviewing their petition and contemporaneous brief, I glean the appellants have a better grasp of the constitutional issues in this case and now realize how poorly developed this cause was when it was tried below. Without an adequate record before it, this court chose to shoot in the dark, hoping to resolve the serious constitutional issues presented in this appeal. In doing so, it not only bagged Justice Hickman's "Godzilla," *Clark*, 294 Ark. at 593, 745 S.W.2d at 604 (Hickman, J., dissenting), it also created a monster of its own. We could alleviate this concern (which will continue to loom in the future) by granting the appellants' rehearing petition and reversing and dismissing this case without prejudice.

In conclusion, I would note that, in responding to my dissent, the majority attempts to clarify its earlier opinion while, at the same time, saying the opinion is correct. Quite candidly, I am uncertain as to how the court's clarification avoids the conflict I, the appellants and the Assessment Coordination Division perceive exists in this case and our prior decision in *Clark*. From my reading of the majority's original and supplemental opinions, I am further convinced this case was not adequately developed or argued below. If we reversed this case, perhaps the parties would eventually return it to us with a more understandable format and record. As it now stands, the majority's decision only adds to the

confusion that gradually envelopes Amendment 59.

HICKMAN and HAYS join in this dissent.

William G. WYLIE and Carolyn S. Wylie *v.* Gene B. TULL, et al.

89-3 769 S.W.2d 409

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Robert M. Abney*, for appellant.

*Randall L. Gammill; Green & Henry*, by: *David G. Henry*, for appellee.

DAVID NEWBERN, Justice. This is an appeal from a chancery court decree quieting title to forty-nine parcels of land in the appellees. The appellants, William G. and Carolyn S. Wylie, are the successors in interest to the Chicago Rock Island and Pacific Railroad Company and its predecessors to which the lands in question were conveyed when railroad lines were being built in Arkansas. The forty-seven appellees are successors to the grantors. The chancellor held in favor of the appellees on the ground that each deed was a conveyance of a right of way easement rather than fee simple, and that the lands reverted to the grantors and successors when the railroad company abandoned them. We agree with the chancellor's decision with respect to each deed, thus the decree is affirmed.

We thoroughly reviewed the law concerning conveyances to railroad companies like the ones before us now in *Coleman* v. *Missouri Pacific R.R.*, 294 Ark. 633, 745 S.W.2d 622 (1988). We noted that, as in nearly all deed construction cases, it is necessary to ascertain the intention of the parties by examining the deeds "from their four corners." We revisited *Daugherty* v. *Helena & Northwestern Ry.*, 221 Ark. 101, 252 S.W.2d 546 (1952), and *El Dorado & Wesson Ry. Co.* v. *Smith*, 233 Ark. 298, 344 S.W.2d 343 (1961), and discussed the *Daugherty* case as follows:

> In *Daugherty*, the deed contained language in its granting clause that is almost identical to that which appears in the two deeds here dated July 23, 1902, *viz.*, 'In consideration of the sum of five dollars and of the benefits to accrue to us from the construction of the Missouri & North Arkansas Railroad, we . . . convey . . . *a strip of land 100 feet in width for a right of way* . . .' In holding that the deed in *Daugherty* granted an easement and not a fee simple title, the court reasoned that the deed referred not simply to a strip of land but instead specified strip of land 100 feet in width 'for a right of way.' The court further said that, when the grantor unequivocally conveys the fee, his designation of the property's intended use should be regarded as surplusage; but when the grantor's intention is itself subject to question, then the fact that he attempts to restrict the use of the property becomes a factor in the interpretation of his deed. In holding the parties, by their

> deed, intended to convey an easement, the court emphasized those factors that it believed indicated an easement, not a fee simple title, *viz.*, that only a nominal consideration had been paid by the railway company for the strip of land; that the shape of the tract conveyed indicated a right of way; and that the railway company was given the right 'to take stone, gravel and timber and to borrow earth *on the said right of way*' for the construction and maintenance of the railroad.

In the *Coleman* case, we looked at the distinguishing factors in the three deeds at issue. They gave the railway company the right to take stone, gravel, timber and earth outside the strip, they contained a relinquishment of dower (a factor significant in *St. Louis & San Francisco Ry. Co.* v. *Tapp*, 64 Ark. 357, 42 S.W. 667 (1897), and they conveyed additional land beside the narrow strip [a factor significant in *Lynch* v. *Cypert*, 227 Ark. 907, 302 S.W.2d 284 (1957)]. We concluded a fee simple had been conveyed.

As stated in the *Daugherty* case and restated in the *Coleman* case, there are four indicators that an easement, as opposed to a fee, has been conveyed. First, the deed mentions right of way. Second, only nominal consideration is stated. Third, the shape of the tract (long, narrow strip) makes other uses unlikely. Fourth, the railroad is given the specific right to take earth from the strip itself.

There was a statement in the third of the deeds we considered in the *Coleman* case that the conveyance was for right of way, and it was undisputed that consideration was nominal. Two factors were cited, however, which were said to indicate a fee simple transfer. First, the grant of the right to take earth outside the strip and second, the relinquishment of dower by the spouse. Even though it was not stated as a critical factor, we noted that the three deeds were all executed by the parties within two months, and the first deed conveyed a strip of land with no mention of right of way. The second and third deeds conveyed the aforementioned strip, called it a right of way, and conveyed extra ground for a depot.

One basis we found in the *Coleman* case for contrasting the deeds there with that in the *Daugherty* case was that the railroad

was given the right to move earth and change water courses off the premises conveyed, whereas in the *Daugherty* case deed, the railroad was given the right to take earth on the land conveyed. That was a good distinction, because in the *Daugherty* case we pointed out it would be absurd to grant a grantee the right to take dirt from land he owned in fee.

In some of the deeds described below the right to go on the grantor's property beyond the premises conveyed is granted. While that, again, makes a nice contrast with the *Daugherty* case deed, it does not mean that the conveyances before us where such a right is given are necessarily grants of fees. The limited right to go on the land of the grantor adjacent to the land conveyed is no more than the granting of an easement on the adjacent property, and there is no reason to infer that it is attached to a fee which has been granted to the railroad.

Most of the deeds we consider here contain indicators of both fee simple and easement. Rather than reproduce each deed, we will give a summary of each, noting the factors we have considered. For the convenience of the parties, we designate each deed as it was designated in the record. In nearly every case, factors indicating an easement outnumber the ones indicating conveyance of a fee. In none of the deeds before us did we find that the factors pointing to the grant of a fee outnumbered or outweighed those pointing to the grant of an easement. In the few cases where there seem to be an equal number of considerations favoring construction as a fee rather than an easement grant, we defer to the chancellor because the appellants have not shown us his decision was erroneous. The determination of the intent of a grantor is largely a factual one, and we will not reverse a chancellor's determination of a factual matter unless it is shown to be clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a); *Brown* v. *Bell*, 291 Ark. 116, 722 S.W.2d 592 (1987).

R-11: Titled "Warranty Deed." Consideration, $1.00 plus benefits from construction. Transfer of strip of land 200′ "for right of way". If construction not commenced within 12 months right of way reverts. Right to borrow earth on said right of way granted. Dower relinquished.

R-12A: Titled "Warranty Deed." Consideration, $25 plus

benefits from construction. Transfer of strip of land 200′ "for right of way". Right to borrow earth on said right of way granted. Dower relinquished.

R-1A: Titled "Warranty Deed," but says quitclaim in the body. Consideration, benefits to accrue from construction. Grants "my right of way being 100′ ". Right to fell trees outside strip which may endanger railcar granted. Dower relinquished.

R-13 and R-22: Titled "Deed." Consideration, $1500. Transfer of a strip of land 100′ (50′ on each side of center of main track already constructed). Right to borrow earth on "said right of way" granted. [These deeds present two of the closest cases because the consideration was clearly substantial rather than nominal. We cannot say, however, that the chancellor's conclusion that it was an easement was erroneous in view of the very narrow shape of the land conveyed and the right to borrow earth which would have been unnecessary had the grantor intended conveyance of a fee.]

R-16: Titled "Deed to Right of Way." Consideration, $245. Transfer of a strip of land 100′ (50′ on either side of main track). Right to borrow earth on said "right of way" granted. Dower relinquished.

R-23A: Titled "Right of Way Deed." Consideration, $90. Transfer of a strip of land 100′ (50′ on either side of main track already constructed). Right to borrow earth on "said right of way" granted. Dower relinquished.

R-23B: Titled "Right of Way Deed." Consideration, $5. Conveys a strip of land 100′ wide (50′ on each side of the main track). Right to borrow earth on said "right of way" granted. Right to make embankments or cuts outside "said right of way" but not to exceed 100′ on either side at any one point. [Grantor was a single man].

R-27C: Titled "Right of Way Deed." Consideration $315. Transfer of two strips of land 100′ (50′ on each side of the main track). Right to borrow earth on "said right of way" granted. Dower relinquished.

R-29: Titled "Right of Way Deed." Consideration, $280. Transfer of a strip 100′ (50′ on each side of the main track). Right

to borrow earth on said "right of way" granted. Right to make embankments or cuts within 50′ on either side of the right of way. Dower relinquished.

R-32B: Titled "Right of Way Deed." Consideration, $242.50. Transfer of a strip of land 100′ (50′ on each side of the center of the main track). Right to take or borrow earth on said right of way granted. Dower relinquished.

R-36: Titled "Right of Way Deed." Consideration, $371. Transfer of a strip of land 50′ wide on each side of described section. Right to borrow earth on said right of way. Right to make embankments outside the right of way not to exceed 100′ at any one point. Dower relinquished.

R-18: Titled "Right of Way Deed." Consideration $1. Transfer of a strip 100′ (50′ on each side of the center of the main track). Right to borrow earth on said "right of way" granted. Dower relinquished.

R-20, R-21B, R-24A, and R-26B: Titled, "Right of Way Deed." Consideration $1. Transfer of a strip 100′ (50′ on each side of the center of the main track). Right to borrow earth on said "right of way" granted. Right to make embankments outside the right of way not to exceed 100′ at any point. Dower relinquished.

R-25A: Titled "Right of Way Deed." Consideration, $1. Transfer of a strip of land 100′ wide [additional description describes land forming parallelogram east of the center line of the tract of the railway]. Right to borrow earth on "said right of way" granted. Dower released.

R-25B and R-25C: Titled "Right of Way Deed." Consideration, $1. Transfer of a strip of land 50′ wide along east side of main track. (R-25C transfers a strip 100′ wide, 50′ on each side of the track.) Right to borrow earth on "said right of way" granted. Right to make embankments outside right of way but not to exceed right of way by 100′ at any one point. Dower relinquished.

R-26A: Titled "Right of Way Deed." Consideration, $1. Transfer of a strip of land 50′ wide (along west side of main track). Right to borrow earth "on said right of way" granted. [Transfer by a single woman].

R-26B, R-27A, and R-27B: Titled "Right of Way Deed."

Consideration, $1. Transfer of a strip of land 100′ (50′ on each side of main track). (R-27A and R-27B, strip is 50′ wide.) Right to borrow earth on "said right of way" granted. Right to make embankments outside right of way not to exceed 100′ at any one point. Dower released.

R-28 and R-30A: Titled "Right of Way Deed." Consideration, $1. States transfer of a strip of land 100′ wide (50′ on each side of main track, except N.E.¼ where a curve to the West may be made). (R-30, strip is 50′ wide.) Right to borrow earth on said "right of way" granted. Dower relinquished.

R-30B: Titled "Right of Way Deed." Consideration, $1. Transfer of a strip 50′ wide to be taken on the West side. Railroad is required to build a depot within 3 miles of the land or the deed is void and to begin work within 1 year or the deed is void. Right to borrow earth on "said right of way" is granted. Dower is relinquished.

R-32A, R-34A, and R-35B: Titled "Right of Way Deed." Consideration, $1. Transfer of strips 50′ wide on either side of the main track with right to borrow earth on "said right of way". Dower is relinquished.

R-35C, and R-37: Titled "Right of Way Deed." Consideration, $1. Transfer of strip of land 50′ wide. Right to borrow earth on said "right of way" granted. Deed to be void if railroad not in operation before 1/1/13. (R-35C is by a widower, and R-37 is by a single woman.)

R-38. Titled "Right of Way Deed." Consideration, $500. States transfer of strip of land 100′ wide (50′ on each side of the main track) with the right to borrow earth from said "right of way" granted. (Grantors are unmarried persons).

R-39: Titled "Right of Way Deed." Consideration, $1. Transfer of a strip of land 50′ wide (on west side of main track) with the right to borrow earth from said "right of way" granted. (Grantor is unmarried).

R-17: Titled "Right of Way Deed." Consideration, $2. Transfer of strip 100′ wide (50′ on each side of the center of the main track). Dower is relinquished.

R-9B: Titled "Warranty Deed." Consideration, $1. Trans-

fer of a strip 100′ on each side of the center of the main track. Right to borrow earth on said "right of way." Reserves merchantable timber on said "right of way." Dower is relinquished.

R-12C: Titled "Warranty Deed." Consideration, $1. Transfer of strip 100′ for right of way. Right to borrow earth on said right of way is granted. Dower is relinquished.

R-12D: Titled "Warranty Deed." Consideration, $1 and benefits to accrue from construction of railway. Transfer of strip of land 100′ for right of way. Right to borrow earth on said right of way granted. Dower is relinquished.

R-1B: Titled "Deed." Consideration, $35. Quitclaim transfer of "my right of way" being 100′ the middle thereof to be the railroad track. Right to fell trees outside limits which might endanger railroad. Grantor reserves right to cultivate up to railroad tracks and railroad to put in cattle guards. Dower is relinquished.

R-3A: Untitled. Consideration, $1. Transfer of strip 100′ wide for right of way (50′ on each side of the railway). Right to borrow earth on right of way. Right to take earth outside right of way up to 100′. (Unmarried man).

R-3B: Untitled. Consideration, $1 and benefits to accrue. Transfer of strip 100′ wide for right of way (50′ on each side of center of main track). Right to borrow earth on right of way granted. (Widow).

R-3C: Untitled. Consideration, $1 and benefits to accrue. Transfer of strip 50′ wide for right of way. Right to borrow earth on right of way granted. Dower relinquished.

R-4: Untitled. Consideration $175 and benefits to accrue. States transfer of strip 100′ wide for right of way. Right to borrow earth on right of way is granted. Dower is relinquished.

R-5: Untitled. Consideration, $175 and benefits to accrue. Transfer of strip 100′ for right of way. Right to borrow earth on right of way is granted. Dower is relinquished.

R-7A: Untitled. Consideration $1 and benefits to accrue. Transfer of strip 200′ wide for right of way. Right to borrow earth on right of way granted. Dower is relinquished.

R-7B: Untitled. Consideration, $50 and benefits to accrue. Transfer of strip 200′ wide for right of way. Right to borrow earth on right of way granted. Dower is relinquished.

R-8: Titled, "Deed of Right of Way." Consideration, $105 and benefits to accrue. Transfer of a strip 200′ for right of way. Right to borrow earth on right of way granted. Dower is relinquished.

R-10: Titled, "Warranty Deed." Consideration, $1 and benefits accrued. Transfer of strip 200′ for right of way. Reserving merchantable timber to grantor. Right to borrow earth on right of way granted. (Widow).

R-6: Condemnation decree. Easement granted.

*Conclusion*

The various provisions contained in these deeds made them ambiguous. As stated at the outset, the job of the chancellor was to ascertain the intention of the parties, particularly the grantor, from the language used. In the *Coleman* case we affirmed the chancellor's conclusion that similar ambiguous instruments appeared to create a fee simple in the grantee railroad rather than an easement.

Likewise, we affirm the chancellor here because the appellants have not demonstrated his conclusion was wrong with respect to any of the deeds under consideration.

Affirmed.

# CITY OF CROSSETT *v.* PACIFIC BUILDINGS, INC.

88-286 769 S.W.2d 730

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Thomas S. Streetman*, Crossett City Attorney, for appellant.

*John R. Byrd*, for appellee.

TOM GLAZE, Justice. This is an appeal from the chancellor's ruling ordering the City of Crossett to accept, maintain and operate the sewer system installed in the Woodlawn Subdivision. The city appeals, alleging seven points of error. We find no error

and therefore affirm.

The Woodlawn Subdivision was the product of a joint venture between Southeast Properties and Real Estate and Pacific Buildings, Incorporated. These two companies used the name Woodlawn Development Company (Woodlawn) for their joint venture.[1] Woodlawn employed the engineering firm of Marion Crist and Associates, which assisted in designing a plan for a 150 house subdivision. The Woodlawn developers met with the Crossett Sewer Commission, and on August 21, 1972, the Commission and its chairman introduced a proposal for the Woodlawn Subdivision to tie into the city's sewer system. Woodlawn was to install the system, and the city was to maintain it. The Crossett City Council approved the proposal. After the city's approval, Woodlawn obtained financing and hired Byron Jones to install the system. As the developers constructed and completed houses in the subdivision, they connected and tied the houses into the city's water and sewer systems.

On March 18, 1974, the city council changed its position and voted that Woodlawn must both install and maintain the sewer system. Robert Kennedy, a partner in Southeast Properties, testified that he was unaware of this change or the council's meeting. It is conceded, however, that Woodlawn had been operating and maintaining the system since it was installed. Nonetheless, according to Kennedy, he first became aware of the city's refusal to maintain the sewer system only when he received a complaint from the State Health Department in January of 1979. After learning of the city's decision to require Woodlawn to maintain the system, Woodlawn met with the Crossett City Council on February 26, 1979. As a result of that meeting, the council passed a motion that it would accept the obligation to maintain and operate the sewer system if the city was furnished with written certification from Marion Crist and Associates that (1) the system was constructed according to the construction standards of the city *or* (2) the system now meets the construction

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[1] Pacific Buildings, Inc. has since purchased Southeast Properties' interest in the subdivision and is now the only company involved in this litigation. For opinion writing purposes, Pacific Buildings, Inc. and Woodlawn will be considered as one and the same.

standards of the city for a sanitary sewer system.

After two inspections by Robert Yeatman, an employee of Marion Crist, and the completion of recommended repair work, Yeatman, in a letter to the city dated October 20, 1986, certified that Woodlawn's sewer system was now in compliance with the city's standards for sanitary sewerage facilities. However, on May 18, 1987, the Crossett City Council still voted not to accept the system. Woodlawn (Pacific Buildings, Inc.) filed suit against the city asking for specific performance and mandatory relief requiring the city to accept, maintain and operate the sewer system. The city responded by denying Woodlawn's claims and by raising the affirmative defenses of the statute of limitations, laches, waiver and estoppel. The city also claimed the chancery court had no jurisdiction to award the relief requested by Woodlawn. The trial court rejected all of the city's claims and defenses and ordered the city to accept, maintain and operate Woodlawn's system effective October 20, 1986, the date Marion Crist certified the system.

We first dispose of the city's jurisdiction argument when it claims the relief requested by Woodlawn is actually one of mandamus, which is not cognizable in chancery court. Although the city attempts to turn Woodlawn's action into one of mandamus, we point out that from the very inception of this litigation, Woodlawn has sought to compel the city to specifically perform its agreement or commitment to accept and maintain Woodlawn's water and sewer system in accordance with the parties' original agreement in 1972, and the more recent one, which resulted from their meeting on February 26, 1979. Specific performance is an equitable remedy which compels the performance of an agreement or contract on the precise terms agreed upon. *McCoy Farms, Inc.* v. *J & M McKee*, 263 Ark. 20, 563 S.W.2d 409 (1978). The chancery court in this cause clearly had the power to award the relief requested by Woodlawn.

We also find no merit in the city's arguments that the trial court erred in holding the city's defenses of statute of limitations, laches, waiver and estoppel did not bar Woodlawn's action. The city argues eight years elapsed between the time it conditionally agreed to maintain Woodlawn's system in February 1979, and when Woodlawn filed suit on August 12, 1987. The

record, however, reflects the parties' agreement never specified a time within which the conditions in the parties' 1979 agreement were to be completed. While the law provides for the implication of a reasonable time for the condition to be performed, the evidence reveals that both parties worked together and with others in order to resolve the problems surrounding Woodlawn's systems.[2] The city council apparently remained dissatisfied but did not refuse the system until May 18, 1987—after Woodlawn furnished the city the certification it requested. Woodlawn filed suit three months later. We believe the evidence clearly supports the chancellor's decision that Woodlawn's action was timely and did not prejudice the city's position in this cause.

Although the city also argues waiver and estoppel, we believe much of the evidence already noted above runs contrary to those defenses, as well. The city argues Woodlawn waived its claim that the city should maintain and operate the system because Woodlawn had maintained it over long periods of times. Further, the city says Woodlawn should be estopped to assert its claim because Woodlawn failed to construct the system as designed or to city standards, and it failed to construct the number of houses originally specified. It also asserts Woodlawn knew the sewer system did not work from the time it was built until sometime in 1984. Again, Woodlawn presented proof that it, the city and others were working towards the city assuming its obligation to maintain the subdivision's sewer system—as the city first promised in 1972. While the record reflects this matter was often an on-again, off-again project, Woodlawn never abandoned its actions to get the city to maintain the system, and as is evidenced by the city's actions in February 1979, the city continued to work with Woodlawn towards this end. The construction of the houses was to be performed in phases, and obviously their construction would in part be dependent upon the resolution of the differences between the city and Woodlawn over the sewer system.

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[2] There was evidence to show that during this time Southeast Properties was having financial trouble which later led to Pacific Buildings purchasing its interest. During some of this time, the repair work on the sewer system was undertaken by a part-time service man.

The appellant next contends that the chancellor erred in finding that the Woodlawn sewer system met the city's construction standards for sanitary sewer systems. We cannot agree. This court will reverse a chancellor's finding only if it is clearly erroneous. ARCP Rule 52.

At the trial, Byron Jones, the contractor of the Woodlawn sewer system, testified that one four inch line ran from the main sewer line to a "Y" connector, which allowed lines from two houses to be attached. After hearing this testimony, Robert Yeatman testified on cross-examination that at the time he wrote the letter certifying that the sewer system met the city's standards, he was unaware that the system had only one service connection for every two lots. Yeatman further stated that the system's one four inch line to two houses did not meet the city standards and was not in accordance to the plans prepared by Marion Crist and Associates. The city also produced testimony by Dean Ray, the city building official, that Woodlawn's sewer system did not meet the city's standards.

In response to the foregoing testimony, Woodlawn had Ray explain that he could not show where the city standards required one line per house. In fact, Ray testified that the city had adopted the State Plumbing Code, which does *not* require one line per house. Ray conceded that he could not point to anything showing that the city had ever amended the code so as to require one service line to one house. Ray also testified that "there were some areas in Crossett that had two sewers tied into one line." In reviewing all of Ray's testimony, one could fairly state that parts of it may be cited to support either the city's or Woodlawn's position as to whether the Woodlawn system now meets the construction standards of the city. Because the record is unclear on what construction standards the city required, we simply are unable to say that the chancellor's finding was clearly erroneous on this issue.

We next consider the city's argument regarding whether the chancellor erred in allowing expert witnesses, Robert Yeatman and Jimmy Knight, to remain in the courtroom. The city had invoked "the rule" to have all witnesses not currently testifying removed from the courtroom. The chancellor granted the city's request, but allowed Woodlawn to have two expert witnesses

remain in the courtroom. We find no error in the trial judge's actions.

Upon request of a party, the court shall order witnesses to be excluded so that they cannot hear the testimony of the other witnesses. A.R.E. Rule 615. The standard of discretion given to the trial judge by this part of the rule is that of no discretion. *Blaylock* v. *Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987). However, the rest of Rule 615 exempts certain persons from the operation of this rule, and the applicable provision here exempts a person whose presence is shown by a party to be essential to the presentation of his or her cause. When dealing with the exemptions from "the rule" provided in the Rule 615, this court has said that the trial judge has average discretion. *Id.*

When reviewing the testimony of Yeatman and Knight, on hindsight, we agree that their testimony was based more on their independent knowledge of the sewer system than on any knowledge they may have obtained by hearing other testimony in the courtroom. At the end of Yeatman's and Knight's testimony, the city objected that it had not been shown that their opinion testimony was based on other witnesses' testimony. Although the chancellor appeared to agree with the city, he overruled the objections because he found that the city had not been prejudiced. We agree.

Violation of the witness-exclusion rule goes primarily to witness credibility. *See Martin* v. *State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987). Here, the city was free to challenge the credibility of the witnesses' testimony on the basis that they had heard testimony from prior witnesses. The city has failed to show that it was prejudiced by Yeatman and Knight remaining in the courtroom. In fact, the city, in much of its argument on appeal, relies heavily on Yeatman's opinion testimony, elicited during the city's cross-examination, which was based upon Byron Jones's testimony at trial.

Finally, the city argues that the chancellor erred in making its order retroactive to October 20, 1986, the date Yeatman certified by letter that Woodlawn's sewer system met the city's standards. The city's argument here is similar to its jurisdictional argument in that it claims Woodlawn's action is for preventive or injunctive relief, which is not relief which addresses

wrongs already committed. Here, the chancellor granted specific performance and stated further that it would enter orders of mandatory injunction as are necessary to insure that the city complies with the orders of the court. In granting such relief, the court merely took into account that the city had voted to accept the Woodlawn sewer system when it received the required letter of certification from Marion Crist and Associates. Accordingly, the condition to which the parties agreed was met on October 20, 1986, and the chancellor was correct to grant relief under the remedy of specific performance beginning with that date.

For the reasons stated above, we affirm.

HOLT, C.J., dissents.

JACK HOLT, JR., Chief Justice, dissenting. This case should be reversed and the suit dismissed. The order of the chancery court directs specific performance of an agreement by the City of Crossett to accept and maintain a sewer system located in the Woodlawn subdivision, which is owned by appellee Pacific Buildings, Inc. The City's obligation to accept and maintain the sewer system was conditioned upon a finding that the system met the City's standards. The evidence shows that the Woodlawn sewer system does not meet the City's standards at present, nor has it ever. The chancellor's findings to the contrary are clearly against a preponderance of the evidence. The City is also correct when it argues that the trial court erred in allowing witnesses for Pacific to remain in the courtroom in violation of A.R.E. Rule 615.

Pacific's predecessor in interest, Richard Kennedy, began the Woodlawn subdivision project in 1972. In order to obtain financing, Kennedy had to obtain the City's commitment to maintain the sewer system once it was built. Plans for construction of the system were drafted to meet the City's standards and were submitted by the engineering firm of Marion Crist and Associates in 1972. Those plans were approved by the City Engineer, the Planning Commission, and the Sewer Commission. Thereafter, the City voted in favor of a proposal to maintain the system.

Approximately 30 lots were developed in 1973, and the sewer system was constructed by Byron Jones. During construc-

tion, the City Engineer inspected and approved the system, which was connected to the City's sewer system although the subdivision had its own pumping station.

Kennedy testified that after construction, during the seven year period from 1972 until 1979, either he or his son maintained the sewer system. The record is clear that the City did nothing as concerns its commitment, and Kennedy did not require it. In fact, as the majority points out, when the City decided not to maintain the system in 1974, Kennedy had no knowledge of that action. This lack of knowledge was typical of the situation, and I find no support for the majority's conclusion that there existed a working relationship between the parties as concerns who was to eventually maintain the system.

By 1979, the system had deteriorated to such an extent that the pumps were failing, the system was overflowing, and at times it had simply shutdown. The record shows that from 1978 until 1979, neither Kennedy nor anyone else bothered to check the system. Finally, in 1979 Kennedy received a notice from the Department of Health concerning the Woodlawn sewer system.

When Kennedy again went to the City Council to discuss the City's commitment to maintain the system, he was informed that the City no longer considered itself bound by its original agreement. However, after another meeting, the City decided to accept and maintain the system provided: (1) Kennedy obtain certification that the system as originally installed was built according to City's standards; or (2) Marion Crist and Associates certify that the system in its present condition met City standards.

Yeatman, the engineer with Marion Crist who drafted the plans for the Woodlawn sewer system, informed Kennedy that he could not certify the system as originally built because he had not supervised its construction. However, he was willing to inspect the system and certify that in its present condition it was up to City's standards. Upon inspection, Yeatman discovered that the system was plagued with malfunctions and construction errors such as sewer lines which ran beneath manholes but which had never been connected to the manholes. He contacted Kennedy and the City, outlined all of the deficiencies, and indicated he could not certify the system as being in compliance with City standards.

For the next four years, between 1979 and 1983, Kennedy tried to upgrade the system on his own. He was not able to do much, and in 1983 he contacted a firm to overhaul the system. In 1984, Pacific bought out Kennedy's interest as it became clear that the entire subdivision was failing. Pacific spent approximately $10,000.00 to install a new pumping system and to correct any problems as to the manholes—some of which could not be located. In fact, a few of the manholes had never been built, some were improperly installed, and several had not been connected or if connected had not been finished; others were overgrown with weeds and covered with garbage to the point that they were not functional. In 1986, after two inspections, Yeatman wrote a letter certifying the Woodlawn sewer system as meeting City standards. In 1987, Pacific contacted the City to request that the municipality accept and maintain the sewer system. The City declined and Pacific brought suit.

Our standard of review in cases from chancery court is that we review the entire case *de novo* but will not reverse unless the findings of the lower court are clearly erroneous or clearly against a preponderance of the evidence. *Witt* v. *Rosen*, 298 Ark. 187, 765 S.W.2d 956 (1989). The only real basis for the chancellor's decree of specific performance is the 1986 letter by Yeatman in which he stated after inspection that the system met City standards. A preponderance of the evidence clearly demonstrates that the condition had never been satisfied.

Yeatman testified that he had been involved in a majority of all sewer projects constructed in the City of Crossett since 1962. His firm drafted the plans and specifications for the Woodlawn sewer system, and he was aware of the necessity that the City assume maintenance of the system so that Kennedy could obtain financing. In fact, it was his understanding that the Woodlawn system was to be owned and operated by the City. Accordingly, *the plans were drafted so that the system would meet the City standards.*

Byron Jones, who represented the firm that constructed the system, testified at trial that when he installed the service lines from the sewer mains to the lots, he would install only one line for every two lots. Apparently, he installed a service line at or near the juncture of the property lines for two lots, skipped a lot, and so

on. The service lines ended in a "Y" so that two adjoining lots could tie in upon completion of the homes.

An examination of the exhibits introduced at trial demonstrates that the plans and specifications for the sewer system called for *one service line to be constructed per lot or home.* Clearly, this was not done. Yeatman first learned of this fact at trial. He testified that his inspection of the system had not disclosed the failure by Jones to comply with the original plans since it would have been necessary to dig up the service lines or place a camera in the mains. Yeatman further testified that the failure to use or construct one service line for each lot would result in problems with the system in the future. Finally, Yeatman testified that he had not known of the defect when he wrote his certification letter in 1986; he then states, "now that I am aware of it, *the system does not comply with the standards of the City of Crossett.*" (Emphasis mine.)

What the majority seems to ignore is that this undisputed testimony came from the individual who wrote the letter upon which the chancellor based his decree of specific performance. Yeatman drafted the Woodlawn sewer system plans in accordance with City standards to require one service line per lot; he later certified the system without knowing that it had not been constructed accordingly. Upon discovering the truth, he testified that the system did not meet City standards.

The majority focuses its attention on the testimony of Dean Ray, the City's building official. Ray testified at trial that whereas the City had adopted the State Plumbing Code, which he thought required one service line per lot or house, he could not find that requirement in the Code. Nevertheless, Ray went on to testify that "[t]he City is allowed to make amendments to the Code. *I have been operating under the policy that requires one per service line.*" (Emphasis mine.)

I fail to understand the magical significance which the majority attaches to adoption of the State Plumbing Code when the evidence clearly demonstrates that the City of Crossett, its engineer, the Planning Commission, and the Sewer Commission all approved the plans submitted by Crist and Associates, which required one service line per lot. The City had the forsight to require one service line per lot in the construction of sewer

systems and, obviously, the plans submitted by Yeatman evidenced the real standards of the City of Crossett, not the State Plumbing Code.

Dean Ray testified that during the week before trial he conducted a complete examination of the Woodlawn sewer system. He stated that the connection between several of the manholes and the actual sewer main was nonexistent. Installation of these manholes had sometimes apparently involved no more than breaking an opening into the top of the sewer main below the manhole cover. Debris collected in the main and around the jagged edges near the bottom of the manhole. Both Ray and Yeatman testified that this condition *did not comply with either the plans or the City's standards*. Ray further established that many of the deficiencies which originally caused Yeatman not to certify the system remained at the time of trial. To some extent, the mayor corroborated the existing defects in the system. The only testimony to refute the evidence concerning the condition of the system was presented by the individual who did the repairs, and he simply stated that to the best of his knowledge he had done everything required by Yeatman to bring the system up to par.

If an enforceable agreement between the City and Pacific existed, it was that the City would maintain the Woodlawn sewer system once it met established City standards. The trial court found, based upon Yeatman's 1986 letter, that the condition had been satisfied. That conclusion is clearly erroneous, even in light of the trial court's ability to judge credibility, since by Yeatman's undisputed testimony alone the Woodlawn sewer system fails to meet City standards—both with respect to the service lines and as to the problems with the manholes. On this point the case should be reversed and the suit dismissed.

I disagree with the majority in at least one other respect. A.R.E. Rule 615 provides that upon the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. *See e.g., Martin* v. *State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987). The standard of discretion given to the trial court by this part of the rule is that of no discretion. *Blaylock* v. *Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987). Use of the word "shall" makes exclusion of the witness mandatory. If a party requests the rule, it must be granted.

*Martin, supra; Blaylock, supra.*

The remainder of the rule exempts certain persons from its operation. In part, it provides that the rule does not authorize exclusion of "a person whose presence is shown by a party to be essential to the presentation of his cause." When an exception to the rule is sought under this language, it is usually based upon A.R.E. Rule 703. *Martin, supra.* Rule 703 deals with expert witnesses who will be present in court to hear the evidence. The exception is not automatic, however, and depends upon the extent to which the expert actually bases his opinion upon testimony presented in court. The witness should be allowed to remain only if his testimony is to be based upon matters testified to by other witnesses. When a party seeks to exempt an expert witness, the decision is within the discretion of the trial court, but this court will reverse if we find an abuse of that discretion.

In the case at bar, after "the rule" had been requested at the start of trial, the City objected to the presence of Yeatman and Knight in the courtroom at every possible point in the trial. Pacific maintained that Yeatman and Knight came within the exception to the rule as they were expert witnesses whose presence at trial was necessary. The trial court allowed the witnesses to remain in the courtroom, and the City objected repeatedly as it became increasingly clear during trial that the testimony of the witnesses was based only upon what was within the personal knowledge of each and not upon the evidence introduced at trial. The chancellor found, at least as to Knight, that it had not been necessary for the witness to remain in the courtroom. Nonetheless, the City's objections were overruled.

The City argues that prejudice can be shown in that it intended to use the testimony of Byron Jones concerning his placement of the service lines on cross-examination of Yeatman and that the City lost the element of surprise when Yeatman was allowed to remain in the courtroom. I would conclude that because the rule is mandatory, the court should have excluded the witnesses unless it could be shown that they came within the exception. As it was clear that the witnesses did not need to remain in the courtroom, I feel the court abused its discretion.

One final point needs to be made. All actions based upon any contract or obligation not in writing must be commenced within

three years after the cause of action accrues. The chancellor ruled that the statute of limitations had not run as the parties did not specify a time period during which Kennedy or Pacific had to bring the sewer system up to City standards. Where no time period has been specified, a reasonable time period will be presumed. Here, Pacific did not attempt to have the City assume control of the sewer system until either 1986 or 1987, which is seven to eight years after the 1979 vote by the City Council to accept and maintain the system provided it met City standards. I find no support for the majority's position that the parties had been working together during this time to solve the question of who was to maintain the Woodlawn sewer system.

Harvey Merle FRITTS *v.* STATE of Arkansas

CR 88-169 768 S.W.2d 541

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Joe O'Bryan*, for appellant.

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

TOM GLAZE, Justice. This case involves the appellant's, Harvey Fritts's, Rule 37 petition wherein he originally alleged that the sentences he received were illegal because they exceed the maximum punishment allowed by law. He also alleged that he was denied effective assistance of counsel. The trial court appointed Fritts an attorney, held a hearing on his petition, and denied the relief requested.

On appeal, Fritts first argues that the trial court had no authority to impose sentences in the manner it did.[1] In this respect, Fritts entered a negotiated plea of nolo contendere to two counts of attempted first degree murder and one count of aggravated assault in exchange for a recommendation from the prosecutor that he receive forty years. On July 15, 1986, the court sentenced Fritts to thirty years for each count of attempted first degree murder. In order to achieve the forty years to which the state and Fritts agreed, the court split the thirty year term on the second count so that twenty years of it would commence and run concurrently with the thirty year sentence for count one and the last ten years of it would run consecutively to the thirty year sentence on count one. Fritts received a six year term for the assault charge to be served concurrently with the other sentences.

We do not reach the merits of appellant's argument because he failed to raise the issue in a timely fashion. Although he challenges on appeal the manner in which the trial court

[1] Fritts abandoned his argument below that his sentences were illegal because they were in excess of the maximum allowed by law. In fact, the sentences imposed were within the terms of punishment prescribed by statute.

imposed the terms on the two counts of murder, he never challenged the sentence given him—at least on the basis he now argues—until he filed his Rule 37 petition on January 30, 1987, or five and one-half months after the sentence was imposed. While an aggrieved party can seek at any time to correct a sentence illegal on its face, he or she can only petition to correct a sentence imposed in an illegal manner if such relief is sought and granted within 120 days after the sentence is imposed. *See* Ark. Code Ann. §16-90-111(a) and (b)(1) (Supp. 1987); *see also Abdullah* v. *State*, 290 Ark. 537, 720 S.W.2d 902 (1986).[2] We note that the sentences given Fritts were clearly within the maximum prescribed by law and not illegal on their face.

Fritts next argues that his attorney was ineffective. He claims that he had valid defenses of voluntary intoxication and diminished mental capacity, and his counsel should have tried the case rather than allow Fritts to plead nolo contendere. Fritts also argues his attorney never explained (1) the range of sentences he could receive, (2) his plea statement, (3) the lesser included offenses with which he could have been convicted and (4) the fact the sentences he received could be either concurrent or consecutive. The record simply fails to substantiate Fritts's claims. Fritts's former attorney testified, and, in doing so, rebutted Fritts's claims. Suffice it to say, the trial court obviously believed the attorney's version. In addition, the attorney's story was supported, in most respects, by the record made at both the plea hearing and post-conviction hearing where Fritts (1) acknowledged his attorney discussed with him the defense of voluntary intoxication, (2) stated he was aware of the possible defenses he could have raised if he had gone to trial, (3) conceded he previously stated he was satisfied with his attorney and (4) knew he would get forty years when he entered a voluntary plea. Furthermore, the plea agreement signed by Fritts disclosed both the maximum and minimum punishments he could have received on each charge pending against him. In sum, the record reflects Fritts's claim of ineffective counsel is wholly without merit.

For the reasons given above, we find the trial court was

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[2] Section 16-90-111 also covers events when appeals have been taken and refers to situations when revocation of probation might be involved.

correct in denying the appellant's petition and therefore affirm.

HICKMAN, J., not participating. PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. There is no authority for a court to split a sentence by suspending a part of it after part of it has been served, and then placing it back in force after a period of suspension. A ten year sentence could be strung along for twenty years or more under the theory utilized by the trial court. This type of sentencing could result in extending the maximum legal sentence for as many additional years as the trial court deems appropriate. That's not the law.

It is true that the appellant could have been sentenced to 60 years, but he was not. The court imposed two 30 year sentences but actually sentenced him to 40 years by hyphenating one of the terms in the middle. It would have been proper to sentence him to 30 and 10 years consecutively in order to arrive at the agreed-upon 40 year sentence.

HICKMAN, J., not participating.

Robbie MITCHELL *v.* STATE of Arkansas

CR 89-69 769 S.W.2d 18

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Paul Petty* and *Robert Meurer*, for appellant.

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

TOM GLAZE, Justice. This is an appeal from the appellant's conviction of driving while intoxicated, first offense, and driving off a laned highway. The appellant moved for the charges to be dismissed and made a motion for suppression of the evidence on the basis that the Bradford city police officer was not qualified to effect appellant's arrest because the officer had not met the minimum standards as provided in the Arkansas Commission on Law Enforcement Standards and Training. The trial judge found that the police department had shown substantial compliance with the requirements of the law and denied the appellant's motions. We reverse.

Under Ark. Code Ann. § 12-9-108 (1987), a person who does not meet the standards and qualifications established by the Commission shall not take any official action as a police officer, and any action taken shall be held as invalid. In accordance with its rule and regulation making authority, Ark. Code

Ann. § 12-9-104 (1987), the Commission has provided that every officer employed by a law enforcement unit shall be examined by a licensed psychiatrist or psychologist who, after examination, makes recommendations to the employing agency.[1] Regulation § 1002(1). The Commission requires that employment eligibility should depend on the results and recommendations received by investigators and examiners, Regulation § 1002(4), and that verification of minimum employment standards must be contained in the permanent record file maintained by the employing department. Regulation § 1002(2)(i). Finally, the Commission has provided that the completion of the established minimum standards for employment or appointment must be achieved before employment eligibility is established. Regulation § 1002(4).

In the present case, the arresting officer's personnel file failed to contain a psychological report until three months after the officer arrested the appellant even though the City of Bradford had employed the officer for some twenty-one months. The state argues that the city was required only to substantially comply with the Commission standards. While substantial compliance with certain laws or regulations may be sufficient, in some situations, the facts do not warrant a finding of substantial compliance here. The Commission clearly has established minimum standards that must be met before employment eligibility is established, and Arkansas law invalidates any action taken by an officer before he or she meets Commission standards. The City of Bradford took *no action* to obtain the required psychological report before hiring the officer involved here and only met this minimum standard or requirement three months after the appellant's arrest, or twenty-one months after the officer was employed. Simply put, this was not substantial compliance with the statutory law or Commission regulations.

In citing our recent cases of *Davis* v. *State*, 296 Ark. 524, 758 S.W.2d 706 (1988), and *Helms* v. *State*, 297 Ark. 44, 759

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[1] The state contends we should not address the merits of this appeal because the appellant failed to introduce the pertinent regulations at the trial. However, this court has held that trial courts can take judicial notice of such rules and regulations of boards and agencies which are adopted pursuant to law. *Seubold* v. *Fort Smith Special School Dist.*, 218 Ark. 560, 237 S.W.2d 884 (1951).

S.W.2d 546 (1988), the state contends that even if the appellant's arrest was illegal because the officer was non-qualified, the appellant must show that the officer's citation was the only instrument that charged him with the offenses. In presenting its case below, the state never raised this issue. In the lower court, the state limited its argument to the single issue that the officer's citation, which resulted in the conviction of the appellant, was valid because the city's employment of the officer substantially complied with the requirements of the law.

The appellant claims that the non-qualified officer's citation was the only formal charge brought against him, and the state does not contend otherwise. Although this court has authority to go to the record to affirm a trial court's decision, we find nothing to support the idea that the appellant was charged with any instrument other than the citation issued by the non-qualified officer. Nor can we find from our review of the record that the appellant's conviction was based upon any evidence except that which resulted from the officer's illegal arrest of the appellant.

At this point, we note that the *Davis* and *Helms* cases relied upon by the state involved similar issues arising from the same trial court that decided the case at bar. We affirmed misdemeanor convictions in both cases and in doing so, we said in *Davis* that the defendant had not told us whether he was charged only by the non-qualified officer's citation; in *Helms*, we stated the defendant failed to show the officer's citation was the only formal charge. As already mentioned, the record must support the appellant's conviction before we can affirm it on appeal, and while we may have suggested otherwise in *Davis* and *Helms*, it is the state's obligation to prove its charges against a defendant and, in doing so, establish a record that will support its case on appeal. To the extent our holdings in *Davis* and *Helms* place that burden on the appellant, we reverse them. *See Grable* v. *State*, 298 Ark. 489, 769 S.W.2d 9 (1989).

Because the Bradford city police officer was non-qualified at the time he arrested the appellant and the appellant's conviction was based solely on the non-qualified officer's citation, we must reverse and dismiss this cause.

# Arleva PAYNE *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, INC.

88-158 768 S.W.2d 543

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Gary Eubanks & Associates*, by: *Hugh F. Spinks* and *James Gerard Schulze*, for appellant.

*Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A.*, by: *Ralph R. Wilson*, for appellee.

DAVID MADDOX, Special Justice. This case involves the interpretation of the Arkansas Uninsured Motorist Act, Ark. Code Ann. §§ 23-89-401—23-89-405 (1987), and the construction of a contract of insurance. Appellant was a passenger in an automobile being operated by an insured of the appellee, Farm Bureau Mutual Insurance Company of Arkansas, Inc., when a collision occurred. There were others injured in the collision in addition to appellant. The insured, Armenda Mathis, had insurance coverage in the amount of $25,000.00 per person and $50,000.00 per occurrence through the appellee. Appellee settled two claims for a total of $43,000.00, and appellant obtained a judgment against the insured, Armenda Mathis, for $17,500.00. Appellee tendered the sum of $7,000.00 to appellant contending that was the full extent of its liability and coverage amount of $50,000.00 per occurrence. Appellant argued that Armenda Mathis became an uninsured motorist to the extent of the unsatisfied judgment of $10,500.00 and brought suit. The trial court granted summary judgment in favor of the appellee.

The question presented to this court is whether a

motorist who carries at least the minimum amount of insurance required by the Motor Vehicle Safety Responsibility Act, Ark. Code Ann. §§ 27-19-601—27-19-621 (1987), becomes an uninsured motorist if the policy limits become exhausted. We believe not.

Appellant did not purchase nor contract with the appellee to purchase uninsured motorist coverage. Appellee's insured Armenda Mathis did, however, purchase uninsured motorist coverage. The purpose of uninsured motorist coverage is to protect the appellee's insured from financially irresponsible motorists. *Childers* v. *Southern Farm Bureau Casualty Insurance Co.*, 282 F. Supp. 866 (E. D. Ark. 1968). *See also Howard* v. *Grain Dealers Mutual Insurance Co.*, 342 F. Supp. 1125 (W. D. Ark. 1972); *First Security Bank* v. *Doe*, 297 Ark. 254, 760 S.W.2d 863 (1988); *Aetna Insurance Company* v. *Smith*, 263 Ark. 849, 854, 568 S.W.2d 11, 14 (1978). In appellee's policy, an uninsured auto is one defined as:

> 1. An auto not insured by a liability policy or bond at the time of accident;
>
> 2. An auto which is insured by a liability policy or bond at the time of the accident but the liability limits are less than the minimum amounts required by the financial responsibility law in the state where your policy is issued;
>
> 3. A "hit and run" auto, whose owner or driver remains unknown, which has actual physical contact with you or other covered persons, or the auto being occupied. Your injury must be a result of the accident. You must report a "hit and run" accident within 24 hours to the police. You must file with us in thirty (30) days a statement about the accident and all damages claimed. The auto you were in at the time of the accident must be available for our inspection;
>
> 4. An auto for which the insuring company becomes insolvent within one year from the date of the accident and is unable to make payment.

Armenda Mathis was not a financially irresponsible motorist. She had purchased the required coverage and that amount of money was available to the claimants as a group.

She was not an uninsured motorist simply because her policy limits were exhausted. There are provisions in the law and in appellee's contract of insurance to provide relief if a claim is not paid because of the insolvency of an insurance company or if a motorist failed to carry the minimum coverage required by the Motor Vehicle Safety Responsibility Act. However, neither of those apply in this case.

Armenda Mathis was not by definition an uninsured motorist nor was she operating an uninsured automobile, and appellee has no exposure under the uninsured motorist provision of its contract.

Affirmed.

GLAZE, J., not participating.

GRAND PRAIRIE SAVINGS AND LOAN ASSOCIATION, Stuttgart, Arkansas, The Hayden Trust, First Presbyterian Church, Jonesboro, Arkansas, and First State Bank of Crossett *v.* WORTHEN BANK AND TRUST CO., N.A.

88-118 769 S.W.2d 20

Supreme Court of Arkansas
Opinion delivered May 1, 1989
[Rehearing denied May 30, 1989.]

*Malcolm R. Smith, P.A.*, for appellant Grand Prairie Savings and Loan Association and the Hayden Trust.

*Paul S. Rainwater*, for appellant First State Bank of Crossett.

*H. William Allen, P.C.*, by: *H. William Allen* and *Sandra Jackson*, for appellee.

JOE D. WOODWARD, Special Justice. This matter comes before this court on appeal of a partial summary judgment

entered by the trial court. The lower court held that loan participations are not securities under the Arkansas Securities Act, Ark. Code Ann. § 23-42-102 (1987).

Sun Belt Federal Bank, FSB, of Lake Providence, Louisiana, agreed to make a loan to BFC 8, Ltd., a limited partnership, for the purpose of building a six story, multi-tenant office building in Baton Rouge, Louisiana. The limited partnership executed and delivered its promissory note in the amount of eight million three hundred fifty thousand dollars ($8,350,000) to Sun Belt Federal Bank. Sun Belt Bank retained a small percentage of the loan, and sold the balance of the loan, in loan participations, to others.

The appellee, Worthen Bank & Trust Company, N.A., was engaged by Sun Belt to help sell participations in the loan. Worthen subsequently prepared an offering memorandum and offered participations in the loan for sale on a commission basis. The appellant, Grand Prairie Savings and Loan, purchased a $300,000 participation, and the appellant First State Bank purchased a $200,000 participation.[1]

The BFC, Ltd. office building project failed and the appellants sued Worthen under the Arkansas Securities Act and for common law fraud, maintaining that the loan participations were "securities" under Ark. Code Ann. § 23-42-102 (1987). The trial court entered a partial summary judgment in favor of Worthen, ruling that the loan participations were not "securities" under section 23-42-102 and left the common law fraud claims pending for trial. On the day of the trial, the appellant, Grand Prairie Savings and Loan Association, took a non-suit as to its common law fraud claims. First State Bank of Crossett went to trial on its claim of common law fraud and a jury returned a verdict in favor of Worthen. That verdict is not here on appeal.

The only issue for this court to decide is whether the trial court correctly determined, by summary judgment, that the loan participations involved are not securities under the Arkansas

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[1] (The Hayden Trust, First Presbyterian Church, Jonesboro, Arkansas, purchased a $250,000 participation and was originally an appellant on appeal, however, the Hayden Trust and Worthen reached a settlement before the matter reached this court. The Hayden Trust is no longer a party to this appeal.)

Securities Act.

The appellants contend that the loan participations which they purchased were notes and, as such, were securities under section 23-42-102.[2]

The appellee, on the other hand, contends that the court below properly interpreted the language of the Arkansas Securities Act and correctly held, as a matter of law, that the loan participations purchased by the plaintiffs were not securities within the meaning of the Arkansas law.

This court holds that the trial court correctly found that the subject loan participations, when viewed under the circumstances of this particular case, as described by the pleadings, admissions, depositions, affidavits offering memorandums, and answers to interrogatories, were not securities within the meaning of Ark. Code Ann. § 23-42-102.

The Arkansas Court of Appeals has held that "securities" under the Arkansas Securities Act are properly found when a transaction is an "investment in the risk capital of a venture with an expectation of benefits but with a lack of control on the part of the investor." *Smith* v. *State*, 266 Ark. 861, 587 S.W.2d 50 (Ark. App. 1979). The test used in *Smith*, *supra*, is substantially the same as the test used in the federal courts. *Union National Bank* v. *Farmers Bank*, 786 F.2d 881 (8th Cir. 1986).

This court has held that "the definition of what constitutes a security must necessarily depend on an analysis of all of the factors in any given transaction." *Schultz* v. *Rector, Phillips, Morris, Inc.*, 261 Ark. 769, 552 S.W.2d 4 (1977). While *Schultz* involved the question of whether a "joint venture interest" was a "security" under the Arkansas Securities Law, the same principle applies to loan participations. The definition section of the Arkansas Securities Law, section 23-42-102, clearly indicates that the term "security" as used in the Act should be construed in its ordinary sense "unless the context

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[2] Section 23-42-102 provides, in part, that "As used in this Chapter, unless the context otherwise requires: *** (13) "Security" means any "note; stock, treasury stock; bond; debenture; evidence of indebtedness; other certificate of interest or participation in any of the profit sharing agreement----". (Underscoring supplied.)

otherwise requires." The purpose of the Act is clearly remedial and is intended to prevent fraudulent practices and activities from becoming a burden upon unsophisticated investors and the general public. Here, the affected parties are longtime professional bankers engaged in an isolated commercial transaction. Bankers are presumed to be sophisticated in banking and financial activities to the extent that they should not need protection from one another. The Hayden Trust, which is no longer a party to this appeal, is not a bank. However, the evidence in the lower court disclosed that its portfolio of investments was being overseen and operated by a bank president who was sophisticated in loan participations and financial affairs generally. The fact that the Trust purchased a loan participation does not alter the fact that the participations were transactions between banks and bankers.

The "context" of the Arkansas Securities Law clearly indicates that this type of isolated commercial transaction was never intended to be covered by the Arkansas Securities Act. *Union National Bank* v. *Farmers Bank, supra*; *American Fletcher Mortgage Company* v. *U. S. Steel Credit Corporation*, 635 F.2d 1247 (7th Cir. 1980).

This court has previously held that on motions for summary judgment, the burden, in the trial court, is upon the movant and the proof submitted should be viewed in the light most favorable to the party resisting the motion. The court below properly placed this burden on the appellee and then correctly considered the pleadings, admissions, depositions, affidavits offering memorandums, and answers to interrogatories in finding that, as a matter of law, the loan participations were not "securities" under the Arkansas Securities Law.

On the basis of all the evidence presented in the court below, there appears to be no genuine issue of material fact and the partial summary judgment was therefore appropriate. See *Ray* v. *Shelby Mutual Ins. Co.*, 14 Ark. App. 265, 266, 687 S.W.2d 526, 527 (1985); *Moller* v. *Thies Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239, 241 (Ark. App. 1985).

AFFIRMED.

GLAZE, J., concurs.

DUDLEY, J., not participating.

TOM GLAZE, Justice, concurring. I agree with the results reached in this case, but I am concerned with the majority's reliance on the fact that only banks were involved in the loan participations. By such reliance, the majority seems to ignore the fact that there was a public offering in this case. The offering memorandum was directed to financial institutions and qualified individual investors. As the facts of this case show, a charitable trust, the Hayden trust, was a participant and a party to the lawsuit until its claim was settled with Worthen.

While I agree that the sophistication and knowledge of the parties should be considered by the court, I submit there are other, more important, factors that should determine the outcome of this case. For instance, in my opinion, the transaction fails to meet the definition of a security under the test set out in *S.E.C.* v. *Howey Co.*, 328 U.S. 293 (1946). One of the prongs of the *Howey* test is that there should be a reasonable expectation of profits from the investments in a venture. I find persuasive the argument that interest obtained from a loan shows not an investment premised upon a reasonable expectation of profits, but a commercial loan transaction. *See American Fletcher Mortg. Co.* v. *U.S. Steel Credit Corp.*, 635 F.2d 1247 (7th Cir. 1980).

One might question whether my reference to the so-called *Howey* test is appropriate, since it has been suggested this court has not adopted that test, preferring instead the view adopted by Minnesota in *Minnesota* v. *Investors Security Corp.*, 297 Minn. 1, 209 N.W.2d 405 (1973). *See Schultz* v. *Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 552 S.W.2d 4 (1977); *see also Note, A Definition of "Investment Contracts" and Equitable Defenses to Suit for Rescission for Nonregistration Under the Arkansas Securities Act*, 1 UALR L.J. 366, 375 (1978) and *Note, Securities Law — Partnerships — Adoption of an Expansive Test for Defining a Security*, 11 UALR L.J. 369, 373 (1988-89). In spite of such a suggestion, I point out that, in reaching its decision, the majority court places substantial reliance on the cases of *Union National Bank* v. *Farmers Bank*, 786 F.2d 881 (8th Cir. 1986), and *American Fletcher Mortg. Co.* v. *U.S. Steel Credit Corp.*, 635 F.2d 1247(7th Cir. 1980), and that the courts in both of these cases applied the *Howey* test when reaching their

respective decisions. In this same vein, I note that the Arkansas Court of Appeals, in its decision in *Smith* v. *State*, 266 Ark. 861, 587 S.W.2d 50 (Ark. App. 1979), relied on a test substantially similar to the *Howey* test. *See also Union Nat. Bank of Little Rock* v. *Farmers Bank*, 786 F.2d at 885.[1]

While not diminishing the importance of the fact that bankers were the participants in the transactions here, I believe the decisive factor, when considering the security issue, is that the transactions revealed participation in what amounted to a standard commercial loan, not an investment. In sum, I am convinced the state securities law was not intended to cover such bank loans.

Gerland Lee GASS *v.* STATE of Arkansas

CR 89-50 769 S.W.2d 24

Supreme Court of Arkansas
Opinion delivered May 1, 1989

[1] Arkansas cases on the subject of defining the term security are not models of clarity, and in my mind at least, the court must better define which test and what factors it will consider when confronted with this issue.

*Q. Byrum Hurst*, for petitioner.

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

PER CURIAM. The petitioner Gerland Lee Gass was found guilty by a jury of the offense of conspiracy to deliver a controlled substance, cocaine, and sentenced to thirty years imprisonment in the Arkansas Department of Correction. A fine of $15,000 was also imposed. The Court of Appeals affirmed. *Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 396 (1986). He now seeks post-conviction relief pursuant to Criminal Procedure Rule 37.

Rule 37.2(c) provides that a petition claiming relief under the rule must be filed within three years of the date of entry of judgment, unless some ground for relief would render the judgment for conviction absolutely void. The judgment and commitment in petitioner's case were entered on November 9, 1984. Petitioner contends that the three year period should be figured from the date the Court of Appeals affirmed his conviction, but this is not a correct reading of the rule. *See Collins* v. *State*, 271 Ark. 825, 611 S.W.2d 182 (1981). As petitioner has alleged only that his attorney was ineffective at trial, an allegation which is not sufficient to void a judgment absolutely, the petition is dismissed.

Petition dismissed.

Carthel J. HODGES, Sr. *v.* Mary Ann HODGES

89-122 771 S.W.2d 741

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Herrods of Arkansas, P.A.*, by: *E.H. "Buz" Herrod*, for petitioner.

*Steve Clark*, Att'y Gen., by: *Paul Cherry*, Asst. Att'y Gen., for respondent Pulaski County Chancery Court, Second Division.

PER CURIAM. We deny the petitioner's request for a writ of prohibition, but we do so because the record and orders presented to us are unclear. In denying such relief, we in no way intend to give validity to the standing master order entered below, but assume that any issue addressing that point would be presented to us along with any other in any appeal.

HICKMAN, J., not participating.

James C. POOLE *v.* Arlene POOLE

RC 89-2 768 S.W.2d 544

Supreme Court of Arkansas
Opinion delivered May 1, 1989

*Knauts & Cole*, by: *C.W. Knauts*, for appellant.

No response.

PER CURIAM. We denied the appellant's motion for a rule on the clerk on February 27, 1989. His petition for rehearing is also denied. The trial court denied his postjudgment motion for a new trial on May 24, 1988. His Notice of Appeal was filed on June 3, 1988. The trial court erred in granting seven (7) months from the Notice of Appeal in which to lodge the record.

The appellant relies on *Pentron Corp.* v. *Delta Steel & Const. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985). In *Pentron* we stated: "The confusion that has arisen is attributable to the wording of the next to the last sentence in Rule 5(b). On the date of this opinion we are also amending that troublesome sentence, effective today, [May 20, 1985]." On that date we issued a per curiam stating that next to the last sentence of Rule 5(b) was amended to read as follows:

> In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment, decree or order, or from the date on which a timely post-judgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later.

The next to the last sentence of Rule 5(b) formerly read:

> In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment, decree or order.

Neither version of the rule ever provided that the seven (7) months run from the date of entry of the Notice of Appeal.

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

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I have come to the conclusion that it is hazardous for a lawyer to file any motion for post-judgment relief. He will enter a maze of our rules and our decisions which qualifies for the legal "Serbonian Bog" award

(which, no doubt, Justice Cardozo intended to establish by his dissent in the case of *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 [1934]).

TOM GLAZE, Justice, dissenting. The appellant's failure to file a timely transcript in this matter is due to confusion that resulted from language this court used in *Pentron Corp.* v. *Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985). For that reason, I would grant appellant's request to lodge his transcript.

Appellant appeals from a judgment which was entered on April 18, 1988. After the trial court, on May 24, 1988, denied his motion for a new trial, appellant filed a timely notice of appeal on June 3, 1988. The trial court granted the appellant a full seven months extension from the date of the notice of appeal—or until January 3, 1989—to lodge his transcript. Although appellant tendered the transcript prior to January 3, 1989, the supreme court clerk refused to file the transcript because appellant failed to meet the time constraints set out in Ark. R. App. P. 5. In relevant part, Rule 5(b) provides as follows:

> In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment, decree or order, or from the date on which a timely postjudgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later.

In calculating and using the seven month extension from either the date of judgment (April 18, 1988) or the date when appellant's motion for new trial was denied (May 24, 1988), it is conceded appellant was late. He was timely only if his seven month extension commenced from the date he filed his notice of appeal.

Prior to the *Pentron* case, Rule 5(b) provided that in no event shall the time be extended more than seven months from the date of entry of the judgment, decree or order. In *Pentron*, we cited *Sherrell* v. *Byram*, 260 Ark. 908, 545 S.W.2d 603 (1977), where we held the seven months must be calculated from the date of the order denying the motion for new trial. We said in *Pentron* that the rule in *Sherrell* was the better rule but also added the following:

> ". . . [A] final disposition of the case in the trial court is reached before the notice of appeal must be filed under Rule 4. Rule 5 must then be observed in the preparation of the record and its filing with the clerk of the appellate court. *That process should logically date from the notice of appeal, not from the entry of a judgment* perhaps some months earlier. Even more important, until a motion for a new trial is acted upon, it cannot be known which party will be the appellant, for by Rule 2(a)(3) an order either granting or denying a new trial is appealable. (Emphasis added.)

Following the foregoing language, we concluded that the next to the last sentence in Rule 5(b)—the sentence providing an extension from the date of judgment—caused confusion; we then proceeded to amend that sentence the same date *Pentron* was decided. In doing so, the court made no reference to the date when the notice of appeal was filed but instead provided the seven months was to be extended from the date of the entry of the judgment, decree or order or from the date on which a timely postjudgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later.

Although the amendment made to Rule 5(b) is clear that the extension time is to begin when the judgment is filed or when a postjudgment motion is denied, I believe our language in *Pentron* was misleading where we noted that the process should logically date from the notice of appeal. The appellant should not be penalized because the court was not as clear as it should have been. The appellant tendered the transcript within seven months from his notice of appeal, and I would allow him to lodge it.

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

Edward GAY, Jr., et al. *v.* The CITY OF SPRINGDALE, Arkansas and Washington Board of Election Commissioners

88-271 769 S.W.2d 740*

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*REPORTER'S NOTE: Justice Purtle's dissenting opinion can be found at 774 S.W.2d 828.

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

*Jeff C. Harper*, City Att'y and *Michele A. Harrington*, Deputy City Att'y, for appellee.

JACK HOLT, JR., Chief Justice. Appellants Edward Gay, et al., challenge the annexation of four tracts of land by the City of Springdale, Arkansas. We hold that the land was properly annexed and affirm.

In 1983, the City of Springdale annexed approximately 7,000 acres of contiguous land pursuant to Ark. Stat. Ann. §§ 19-301—19-339 (Repl. 1980), currently Ark. Code Ann. §§ 14-40-201—14-40-607 (1987). The Washington County Circuit Court upheld the annexation. This court reversed the decision of the trial court, holding that the proof was insufficient that the annexed land met any one of the five criteria required for

annexation by Ark. Code. Ann. § 14-40-302(a) (1987). *See Gay v. City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985).

On September 22, 1987, the Springdale City Council adopted an ordinance pursuant to Ark. Code Ann. § 14-40-301 (1987) by which it set a special election to determine whether four tracts of land contiguous to the City, totalling approximately 7,300 acres, should be annexed. This land, which is the subject matter of the present appeal, is in the same general area as the land involved in the 1983 proposed annexation. At a special election, the voters approved the annexation. Thereafter, appellants, owners of land in the four tracts that were annexed, filed a complaint in circuit court challenging the annexation. At trial, the following facts were established concerning the annexed tracts:

> Tract one: Tract one consists of fruit orchards, poultry houses, vineyards, grassland, commercial enterprises, residential subdivisions, and an industrial subdivision. Aero-Tech Corporation has bought land in tract one where it plans to build a 50,000 square foot building.
>
> Tract two: Tract two consists of farm land and two residential subdivisions.
>
> Tract three: Tract three consists of twenty-nine poultry houses, thirty-two homes, two residential subdivisions, and large areas of bare land.
>
> Tract four: Tract four consists of bare land, a hog farm, a chicken operation, pasture land, a seventy-acre industrial park currently being developed, and 300 acres of roughly wooded land with ravines and gullies. There are no subdivisions in tract four. However, there is property that has recently been purchased for a subdivision.

After hearing testimony from sixteen witnesses and reviewing numerous exhibits, the trial court found that all four tracts met at least two of the criteria contained in Ark. Code Ann. § 14-40-302(a)(2)—(a)(5) (1987). The court also found that the tracts met the requirement of Ark. Code Ann. § 14-40-302(b)(1)(A) (1987), that the lands have a highest and best use and fair market value for other than agricultural or horticultural purposes. As a result, the circuit court denied the petition, holding

that the appellants failed to meet their burden of proof for exclusion of their lands from the annexation. From this order, appellants appeal.

Appellants contend that the trial court erred by failing to deny the petition for annexation when a substantial portion of the lands to be annexed failed to meet any of the five criteria set forth in Ark. Code Ann. § 14-40-302(a). We disagree.

Our law concerning annexation is well established. A majority of electors voting in favor of annexation makes a *prima facie* case for annexation, and the burden rests on those objecting to produce sufficient evidence to defeat the *prima facie* case. *Gay, supra. Holmes* v. *City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985); *City of Crossett* v. *Anthony*, 250 Ark. 660, 466 S.W.2d 481 (1971). Appellants have the burden of showing the area in question should not be annexed. *Chastain* v. *Davis*, 294 Ark. 134, 741 S.W.2d 632 (1987). By the very nature of this type of litigation, there is a wide latitude for divergence of opinion and, consequently, a high degree of reliance must be placed upon the findings of the trial judge. *Lewis* v. *City of Bryant*, 291 Ark. 566, 726 S.W.2d 672 (1987).

We do not reverse the trial court's findings unless they are clearly erroneous. *Id.* In viewing such findings, we consider all evidence in a light most favorable to the appellee. *Jernigan* v. *Cash*, 298 Ark. 347, 767 S.W.2d 517 (1989).

Section 14-40-302(a) provides that a city may annex lands contiguous to the city if the lands are either:

(1) Platted and held for sale or use as municipal lots;

(2) Whether platted or not, if the lands are held to be sold as suburban property;

(3) When the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;

(4) When the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or

(5) When they are valuable by reason of their adaptability

for prospective municipal uses.

The five criteria listed in this provision are disjunctive, and the annexation may be proper when any one of the five conditions is met. *Gay, supra; Lee* v. *City of Pine Bluff*, 289 Ark. 204, 710 S.W.2d 205 (1986); *Faucett* v. *Atkins*, 248 Ark. 633, 453 S.W.2d 64 (1970). If one of the several tracts is found to be improperly included, the entire annexation must fail. *Gay, supra; Herrod* v. *City of North Little Rock*, 260 Ark. 890, 545 S.W.2d 620 (1977).

The fact that land is agricultural and the owner does not want it developed does not determine its fate as to annexation. *Lee, supra; Planque* v. *City of Eureka Springs*, 243 Ark. 361, 419 S.W.2d 788 (1967). Annexation is not prohibited solely because a tract is rather rugged or heavily wooded with sparse population. *Chappell* v. *City of Russellville*, 288 Ark. 261, 704 S.W.2d 166 (1986); *Holmes, supra*. It is proper for a city to annex property if it is needed for the purpose of making improvements and if the value of the land is derived from actual and prospective use for city purposes. *Holmes, supra. Brown* v. *Peach Orchard*, 162 Ark. 175, 257 S.W. 732 (1924).

The trial court found that all four tracts met the fourth criterion of Ark. Code Ann. § 14-40-302(a). To meet this criterion, lands must be needed for any proper municipal purposes such as for the extension of needed police regulation. Several witnesses testified in this regard. Tom Reed, an expert witness for defendant-appellees, testified that all four tracts are needed for proper municipal purposes and that the City had a 16% increase in residential building permits between 1985 and 1986 and a 29% increase between 1986 and 1987. Bob Harlan, an employee of the Northwest Arkansas Planning Commission and a planner for Springdale, testified that Springdale is expected to grow 20% in the next seven years; that the City has proper municipal purpose for controlling orderly growth in all four tracts; and that annexation would serve that purpose.

Andre Houser, the City's administrative assistant to the Mayor, testified that the lands in tracts one and two, which contain "enterprise zones," are needed by the City for the proper municipal purpose of providing new and expanded employment opportunities. An "enterprise zone" provides businesses and

industries located therein certain state income tax exemptions for employees as well as certain sales and use tax refunds for material and machinery used in expansion or construction. Before an enterprise zone may be "activated," it must be inside the city limits.

Daniel White, the Springdale Fire Chief, testified that if the tracts are annexed, the fire department can provide fire service to the annexed areas. In addition, he asserted that the department has had trouble responding to calls because it is often difficult to tell whether a caller is in the City or in tract four. Trumann Brewer, the Springdale Chief of Police, testified that if the tracts are annexed, the department can provide police service to annexed area. He also stated that it will be easier to provide service if the area is annexed since the police will know whether or not callers are in the City.

Rene Langston, Executive Director of the Springdale Water and Sewer Department, testified that the City needs to annex the area for sewer and water planning purposes. Roy Bowman, a Springdale City Councilman, stated that there is growth in all four tracts and that Springdale needs the annexation for orderly growth and development and police and fire protection. Harold Vowell, a local developer, testified that there is a shortage of lots in Springdale and that no land suitable for a subdivision is available in the City limits.

In light of this extensive testimony that the lands are needed for proper municipal purposes, we conclude that the trial court's finding that all four tracts met the fourth criterion is not clearly erroneous. Since the tracts must meet one of the criteria of Ark. Code Ann. § 14-40-302(a) for annexation to be proper, we find it unnecessary to address the trial court's findings regarding the other criteria.

Appellants also contend that the trial court's finding that they failed to prove their lands to have a fair market value at the time of the adoption of the ordinance of lands used only for agricultural or horticultural purposes and the highest and best use of the land is for such purposes is contrary to the law when applied to the facts and testimony in evidence. We disagree.

Section 14-40-302(b)(1)(A) provides that contiguous lands

shall not be annexed if they:

> Have a fair market value at the time of the adoption of the ordinance of lands used only for agricultural or horticultural purposes and the highest and best use of the lands is for agricultural or horticultural purposes.

Appellants' point of contention is that the defendant-appellees' expert witness, Tom Reed, was "forecasting" land use and values when he claimed that the highest and best use and fair market value of the annexed land at the time of the adoption of the ordinance was for other than agricultural or horticultural purposes. Reed's overall testimony reflects otherwise.

Tom Reed testified that after examining sales in the annexed areas in the last two years, he found that (1) there have been numerous residential and commercial sales in all four tracts; that (2) an investor cannot buy land in the tracts for agricultural or horticultural use and get a positive return; that (3) many investors are speculating by buying land for investment purposes and putting chickens on the land for interim use; that (4) the prices paid, as indicated by the prices in the real estate market, do not indicate the land in the four tracts to have a fair market value for agricultural or horticultural purposes or the highest and best use for such purposes; that (5) the highest and best use for some of the landowners is agricultural; that (6) the highest and best use is a market concept, not an individual concept; that (7) highest and best use is a long-term concept, not a present concept; that (8) he is forecasting; that (9) he is not talking about the future, but the highest and best use at the time the ordinance was passed; and that (10) some of the land in the annexation is not ready for immediate development and has an interim agricultural use until the growth, trends, and supply and demand cause it to change.

Although Reed during the course of his testimony characterized his opinion as "forecasting," he specifically stated that he was not talking about highest and best use in the future but at the time the ordinance was passed. The trial court, faced with this apparent inconsistency, had no trouble concluding that his testimony and the evidence established that the highest and best use and the fair market value of the land in all four tracts was for other than agricultural or horticultural purposes. Under the

circumstances, we defer to the judgment of the trial court. We cannot say that the trial court's finding is clearly erroneous.

Finally, appellants contend that Ark. Code Ann. § 14-40-302 violates the due process clause of the United States and Arkansas Constitutions in that it (1) permits the "taking" of property without just compensation and (2) impermissibly dilutes the voting rights of residents in the area to be annexed since an annexation can be approved even if a majority of the voters in the area oppose annexation.

Since appellants neither cite authority nor make convincing argument in support of this point of error, we do not consider it. It is well established that we do not consider arguments on appeal that are unsupported by convincing argument or authority, unless it is apparent without further research they are well taken. *McGuire* v. *Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988).

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. It seems that if it were left entirely to the cities, there would be no land in Arkansas outside municipal boundaries. This court is apparently of the same opinion, except that it would require a formal vote, primarily of city residents, before farms, ranches, orchards, and other agricultural or horticultural lands may be annexed. Neither the cities nor this court seem to consider the actual and natural uses of these lands. Nor do they consider the wishes of the landowners or the people in the community. I submit that this annexation (to say nothing of most others) results from municipal desires to receive more revenue. Usually, no services are promised for a period of three years, and frequently they take even longer to materialize. The result is that the existing cities receive immediate monetary benefits from the annexed areas while giving very little, if anything, in return. (Sometimes the services never reach pre-annexation standards.)

There is a pattern discernable in every annexation attempt that is presented to this court. The police chief and the fire chief, who function as agents of a city's governing body, always testify that they need the proposed area of annexation in order to protect

it. It would be highly unusual for an official of any city to object to what his employer is proposing. In this case the testimony of the police and the fire chiefs was that if the land were annexed, they would be able to give better service because they would then know that it is within the city limits. It is a mystery to me how they will be able to know that this land is within the municipal boundaries after annexation when they evidently do not know where the city limits are at the present time.

There has been no showing that the annexed land is needed for municipal purposes. These are the exact same lands that were annexed in 1983, with a few hundred acres added. The 1983 annexation was voided because the overwhelming bulk of the land was held for investment or agricultural purposes. The opinion stated:

> First, the proof was clear that most of the land was neither platted nor held for sale as municipal lots. Second, the proof was overwhelming that the bulk of the land is held for investment purposes, agricultural purposes, or to be sold as two-to-five acre "farmettes." Therefore, it was not held to be sold as suburban property. Third, there are only 700 homes and 2,500 people in the entire 7,000 acres. Obviously, the tracts represent neither a densely settled area nor the actual growth of the city beyond its boundary. In fact, the appellees' testimony was entirely in terms of the future growth of the city beyond its boundary. Fourth and fifth, a number of witnesses testified by stipulation that "[t]he lands are not needed for municipal purposes and are not adaptable for municipal purposes." These actual stipulations are not contradicted by opposing testimony. In view of the evidence, the proof is clear that the lands did not meet any one of the criteria set forth in the first paragraph of the annexation statute. Therefore, the lands are not eligible for annexation.

*Gay* v. *City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985).

After defeat, by the court, of the last attempted annexation of this land, the City of Springdale devised a scheme to get this court to approve the annexation. It worked. The plan was to break the land up into tracts and put a small portion of each tract in a use for something other than agricultural or horticultural purposes.

All of the houses, barns, subdivisions, enterprise zones, and industrial areas could be placed together on one of these tracts and still have hundreds of acres left. There is absolutely no dispute by any witness that the vast majority of the lands in all four tracts is neither platted or held for city use or development nor designated for anything other than agricultural or horticultural purposes. Under this theory of annexation, a city could locate a plot of ground with a few houses on it and use it as a basis for annexing 10,000 acres of wild, unenclosed agricultural and horticultural lands. This, in my opinion, was never the intent of the legislature. Annexation is now limited only by the projections of city planners and sophisticated developers. It should, however, be limited by laws enacted by the General Assembly since that body is the giver of life to all cities.

I realize that I may as well be hissing in the wind for all the effect this dissent will have on this court and the cities. However, I must express my opinion on annexation, perhaps for the last time. In the present case, both the burden of the election and the proof of the suitability for annexation is on the non-resident citizens. Annexation laws in this state are about as fair as allowing Texas to vote on annexing Arkansas with the results to be determined by a vote of the combined population of the two states.

The city's witnesses as well as the appellants' witnesses all agreed that much of the annexed property is held in agricultural status and that there are thousands of acres with no roads, no water and sewer, no improvements, no plattings and nothing to indicate that the property is held for development purposes. Most of the remainder of the land consists of orchards, chicken ranches, and hog farms. No city ever furnishes water and sewer services. These are paid for entirely by taxpayers and property owners through the establishment of improvement districts.

The city's own expert, Tom Reed, testified that most of the land in each of the four tracts has not been platted and is not held for municipal purposes. He further admitted that none of the tracts were totally adaptable for city purposes. I have never yet seen an expert who did not have, where developments are concerned, an imagination that exceeded the bounds of reason. The vast majority of annexed land is used for agricultural and horticultural purposes. At the time of the adoption of the

annexation ordinance, the highest and best use of the lands was for agricultural and horticultural purposes. That is an undisputed fact revealed by the record.

The city's chief spokesman at trial testified that the city needed all of these tracts of lands for orderly growth and development in the future. That is pure speculation and, at the very least, future planning. The existing law prohibits annexation of lands which, at the time of the adoption of the annexation ordinance, are used for agricultural or horticultural purposes when the highest and best use of such lands is for those purposes. There is no testimony to dispute that much of the land in each of the four parcels is unsuitable for annexation.

The city, as expected, attempted to show by testimony of sophisticated developers that the land was used for agricultural and horticultural purposes only on an interim basis. The same observation could have been made of most of the United States at the time the first cities were developed. Mr. Reed, the city's expert in land use, stated that the property of Smith, Hash, McGuire, and Cargill had a current highest and best use as agricultural lands. This was the same testimony that he had given in 1983. Neither the law nor the land has changed since that time.

According to the record, the only difference in the situation now and in 1983 is that there are 1,000 houses and 2,700 people in the proposed annexed area, whereas in 1983, there were 700 houses and 2,500 people. The difference appears to be that the city added an area which includes a number of residences or a subdivision. The true motive of the city was revealed when its witnesses admitted that it would immediately start gaining $465,780.00 annually in new revenue upon annexation. It will, of course, receive several million dollars in revenue before it ever spends a dime or offers any real services to the area.

Finally, I agree with the appellants that the annexation laws violate the state and federal constitutions by denying due process and equal application of the laws to the people in the area annexed. The surrounding landowners and taxpayers are going to be giving the city at least $465,000.00 for three years before the city even proposes to offer any services to them. It appears to me that this matter is clearly subject to article 2, section 2, of the Constitution of the State of Arkansas, which prevents the

government from taking property without just compensation. It is also clearly a violation of the United States Constitution's prohibition against the taking of private property without just compensation. If a city were required to give the same services to an annexed area that it does to existing parts of the municipality, then I am sure annexation would slow to a snail's pace. Each annexation of large areas causes residents of the central part of a city to move out into the suburban areas, thus leaving an undesirable, unprotected central city to those who would plunder and establish a habitat for crime. If cities were to develop good and workable programs that prove beneficial to their inhabitants, residents of outlying areas would strive for annexation. Annexation can be accomplished by a petition of the adjoining landowners if it is their desire to become a part of the city.

James Earl NEAL *v.* STATE of Arkansas

CR 88-208 769 S.W.2d 414

Supreme Court of Arkansas
Opinion delivered May 8, 1989

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

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

JACK HOLT, JR., Chief Justice. James Neal was found guilty of rape and sentenced to life. He argues on appeal that the trial court erred by mechanically accepting the jury's recommendation of a life term absent any exercise of discretion and that certain evidence should not have been admitted following a break in the chain of custody. We have reviewed these arguments as well as all objections of record decided adversely to appellant. Rule 11(f) of the Rules of the Supreme Court; Ark. Code Ann. § 16-91-113 (1987). Finding no error, we affirm.

There was no objection to the sentence at the time of pronouncement, and our rule on matters raised for the first time on appeal is well settled; we will not consider them. *Addison* v. *State*, 298 Ark. 1, 765 S.W.2d 566 (1989).

The record shows that blood samples taken from Neal after the rape incident were drawn at a hospital by a nurse who labeled and initialed the samples and gave them to a police detective. The officer stored the samples in a refrigerator at the police station. They were later sent to the State Crime Lab, returned to the station, and then stored until trial.

Neal's objection to the chain of custody is that the

refrigerator was not kept locked and was used to store lunches and snacks, thus allowing for the possibility of contamination or tampering. He correctly points out that when an object is subject to positive identification, proof of the chain of custody need not be as conclusive as it should be with respect to interchangeable items, such as the blood samples involved here.

In *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986), we explained that the purpose of establishing a chain of custody is to prevent the introduction of evidence which is not authentic and that minor discrepancies in the chain of custody are for the trial court to weigh. Citing *Munnerlyn* v. *State*, 264 Ark. 928, 576 S.W.2d 714 (1979), we said:

> To allow introduction of physical evidence, it is not necessary that every moment from the time the evidence comes into the possession of a law enforcement agency until it is introduced at trial be accounted for by every person who could have conceivably come in contact with the evidence during that period. Nor is it necessary that every possibility of tampering be eliminated; it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.

Absent evidence of tampering, the trial judge is accorded some discretion in such matters, and we will not reverse the trial judge's ruling unless we find an abuse of discretion. *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1984).

The trial judge determined that the integrity and authenticity of the evidence had been sufficiently established. We agree and note that the refrigerator was in the station's interview room which *was* kept locked. Neal's concern that the samples were stored in an area accessible to officers not working on the case is understandable, but we cannot say that the trial judge abused his discretion in admitting the evidence.

We have reviewed the testimony of the victim and that of the State's other witnesses. The victim described the rape incident in detail and identified Neal as the rapist. Suffice it to say that the evidence was clearly sufficient to support the jury's verdict.

Affirmed.

Willie Lee HENDRIX *v.* STATE of Arkansas

CR 89-16 768 S.W.2d 546

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Rees Law Firm*, by: *David Rees* and *Paul J. Teufel*, for appellant.

*Steve Clark*, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Willie Lee Hendrix was convicted of possession of methamphetamine with intent to deliver and possession of marijuana and received a 41 year sentence. His only argument for reversal is that the trial judge should have granted a new trial because one of the state's primary witnesses, the chief of police of Truman, talked to several members of the jury panel before or during the trial. We affirm the denial of the new trial.

The judge refused to allow the defense to question jury members before the hearing on the motion. He observed that when the verdict was read the appellant's mother, his brothers and other relatives jumped up, yelled and shook their fists at the jury. Jerry Bland, the chief of police, who was also an arresting officer, and two jurors testified that he, Bland, had spoken with them; however, he and the jurors denied anything relevant to the case was discussed.

The testimony of the appellant's witnesses, Judy Booker and Letha Love, Hendrix's sister, indicates that the attorneys for both Hendrix and a codefendant, James Shelly, were told of the incident before or during the trial. Hendrix has different counsel on appeal, and his trial attorney, John Henry, did not testify. The codefendant's counsel, Chet Dunlap, testified, but was not asked whether he knew of the conversations before the end of the trial.

A claim of jury misconduct raised for the first time in a motion for a new trial must be accompanied by an affirmative showing that the defense was unaware of the comments until after the trial. *State* v. *Bollinger*, 560 S.W.2d 606 (Mo. 1978). *See also* 9 A.L.R.3d 1283 (1966). Since this issue was not raised at the first opportunity, we will not consider it on appeal. *See Young* v. *State*, 283 Ark. 435, 678 S.W.2d 329 (1984).

We need not address the question of whether the trial judge erred in preventing counsel from questioning the jurors before the hearings.

Affirmed.

Jean HYDE, et al. *v.* Luke QUINN, et al.

89-117 769 S.W.2d 24

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Dan J. Kroha*, for appellants.

*Wright, Lindsey & Jennings*, for appellees.

DARRELL HICKMAN, Justice. This is the third appeal involving a suit by taxpayers of Sewer Improvement District #142. In *Martin* v. *Quinn*, 294 Ark. 60, 740 S.W.2d 627 (1987), we affirmed the Little Rock Board of Directors' refusal to remove the district's commissioners from office. In *Henderson Methodist Church* v. *Sewer Improvement Dist. No. 142*, 294 Ark. 188, 741 S.W.2d 272 (1987), taxpayers alleged fraud was committed by the commissioners in assessing property within the district.

In this lawsuit, filed October 16, 1987, taxpayers seek to recover money they claim was wrongfully expended by the commissioners in 1980. The trial court decided their claim was barred by the statute of limitations, but we affirm on the basis of the *res judicata* and collateral estoppel doctrines.

We disagree with the finding that the statute of limitations had run. The commissioners failed to file a report of their 1980 expenditures until October 17, 1984, even though they were required by law to file such reports annually. *See* Ark. Code Ann.

§ 14-89-1402 (1987). It was decided in the *Martin* case that the commissioners' failure to disclose their activities was not purposely deceitful. But this breach of a legal duty may be interpreted as constructive fraud. See *Davis* v. *Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987). Therefore, the statute of limitations should have been tolled between the date of the expenditures and the time the report was filed.

Although a trial court announces the wrong reason for its ruling, we will sustain the judgment if it is correct. *Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984). The issues presented in this case were raised or could have been raised in the first and second lawsuits. The taxpayers claim that two contracts made by the district should be declared void because commissioners Quinn and Paschal were directly or indirectly interested in the contracts. One of the central issues in the *Martin* case was whether the Board of Directors erred in finding that neither of the commissioners was interested in these same contracts. Since that issue has already been litigated and was essential to the judgment in *Martin*, the doctrine of collateral estoppel prevents the taxpayers from raising it again. See *Smith* v. *Roane*, 284 Ark. 568, 683 S.W.2d 935 (1985).

The taxpayers could have litigated the issue in the *Henderson Methodist Church* case. In the complaint in that case, the taxpayers made the following claim:

> [T]he Commissioners fraudulently paid money either to themselves or to persons or corporations closely associated with themselves, in violation of their oath of office.

The issue was not actually litigated in that case, but it could have been. Therefore, *res judicata* also precludes the taxpayers from raising this claim. *See Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988).

Affirmed.

GLAZE, J., not participating.

# McEUEN BURIAL ASS'N, et al. *v.* ARKANSAS BURIAL ASSOCIATION BOARD

89-9 769 S.W.2d 415

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Davidson, Horne & Hollingsworth, A Professional Association,* by: *Allan W. Horne* and *Patrick E. Hollingsworth,* for appellant.

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

JOHN I. PURTLE, Justice. After a hearing, the trial court dismissed the appellants' complaint in an action to obtain a declaratory judgment relating to certain rules promulgated by the Arkansas Burial Association Board. The trial court held that no justiciable issue was presented. The appellants argue: (1) that the rules in question are invalid because they fail to insure the financial integrity of all burial associations and (2) that the court erred in holding that there was no justiciable issue. We agree that the trial court erred in finding no justiciable issue, and we reverse and remand the case for further proceedings.

Burial associations originated in Arkansas in the 1930's as a result of the economic distress of the Great Depression. They are non-profit mutual benefit societies which are authorized by Ark. Code Ann. § 23-78-101 (1987). The purpose of the associations is to "defray all or a part of the funeral expenses of its members." The Arkansas Burial Association Board is the governing body for these societies.

Over the years, membership in burial associations has steadily declined and burial costs have constantly increased. By 1987, over 100 of the state's 164 burial associations were insolvent. The 1987 report of the association reflects that 58 of the association members showed losses from their operations during the year.

The General Assembly, in recognition of the precarious situation of many of the associations, addressed the problem through the enactment of corrective legislation. Act 443 of 1987, Ark. Code Ann. §§ 23-78-108, 112, and 122 (Supp. 1987), mandated that the Board "establish actuarial rates and reserve requirements necessary to ensure the financial integrity of all burial associations." This legislation also authorized the burial associations to increase their previous benefit limits from $500 to

$2500 and to adjust their rates accordingly. Another sweeping feature of the act was that it required the burial associations to pay 100 percent of the amount of liability to any funeral home or mortuary service conducting the funeral of a member. Previously, if the burial services were provided by a funeral home not owned by an association, the burial association paid only 80 percent of the face value of the certificate.

In response to Act 443 of 1987, the Board amended its Rule 18 to establish new minimum rates and added Rules 38, 39, and 40. Rule 38 requires each association to maintain a minimum amount of funds or assets on "deposit," based on the number of members and the maximum amount the association desires to write. Burial associations are prohibited by these rules from writing new business without first complying with the deposit requirements. Rule 39 directs burial associations issuing new certificates to comply with the requirements of the rules before writing new business. In order to write new business, each association is required to submit an application for authorization to the Executive Secretary of the Board, who in turn is required to issue a certificate if the association "has sufficient funds on deposit and is sound enough to issue certificates of membership in the amount requested per member." Rule 40 concerns matters of compliance with the guidelines and the application forms to be completed by the burial associations.

The appellants filed a declaratory judgment action in which they sought to have the new rules declared invalid because the rules failed to insure the integrity of all burial associations as required by Ark. Code Ann. § 23-78-108(a)(7). One of the arguments in the complaint was that the regulations applied only to new business to be written and did not make any provisions pertaining to the solvency of the associations already in existence. Furthermore, the complaint continued, the mixing of the new and old funds would not result in achieving the sound fiscal condition required by Act 443.

After a trial, the court dismissed the complaint on the grounds that no justiciable issue had been presented. Specifically, the court based its ruling on the grounds that no association had been denied a certificate and no member had been denied benefits.

During the trial, one witness, Harry Leggett, testified that: "From the standpoint of my own burial associations, the effect of these rules has been that I have just discontinued writing them [new business]." He further stated that he objected to the new rules primarily because there was a mixing of the old funds and the new funds in a common fund. It was his opinion that this would result not only in the failure to bring the insolvent associations up to an acceptable standard, but would serve to pull the new organizations down from the beginning.

Sheldon Madden was a party plaintiff and a duly qualified member as well as secretary of the McEuen Burial Association, and he made it apparent that he too was affected by the new rules and regulations. Several other witnesses testified that, with the commingling of new funds and old funds, there is a substantial likelihood that all the organizations will be weakened and that some associations will be unable to meet their obligations. The trial court itself seemed to imply that the requirements of the new rules would substantially weaken the structure of the new businesses if the funds were mingled.

The appellants challenged the rules pursuant to the Administrative Procedure Act, which provides in part:

> The validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his person, business, or property.

Ark. Code Ann. § 25-15-207(a) (1987). The words of this section of the act clearly establish that it is not necessary that the injury already have occurred or that a person show he was affected by it in order to obtain a declaratory judgment. Either the "threatened application" of a rule or the threat of injury will justify a party in seeking to have such regulations reviewed.

Although there had been no denial of a certificate to any burial association, it is obvious that some of the associations, as a result of the application of the rules, are threatened with denial. Furthermore, Harry Leggett testified that two burial associations he had been connected with had ceased operations because of the new regulations. Pursuant to Ark. Code Ann. § 25-15-207(a), an action for declaratory judgment is a proper method

for testing the validity of rules which, in the plaintiff's view, threaten future damage. Such an action may be brought in the circuit court of any county in which the plaintiff resides or does business, or in the circuit court of Pulaski County. A declaratory judgment may be maintained even if the plaintiff has not requested the agency to rule upon the validity of the rule or regulation in question. See Ark. Code Ann. § 25-15-207(d).

Proceedings under the Administrative Procedures Act are exceptions to the Rules of Civil Procedure so far as Rule 81(a) is concerned. *Whitlock, Commissioner* v. *G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984). Although we do not review administrative agency decisions de novo, we look to see if there was substantial evidence to support the action taken by the agency, and if so, we must affirm. *Arkansas Real Estate Commission* v. *Harrison*, 266 Ark. 339, 585 S.W.2d 34 (1979). See also *Partlow* v. *Arkansas State Police Commission*, 271 Ark. 351, 609 S.W.2d 23 (1980).

Both the General Assembly and the Arkansas Burial Association Board have recognized the desperate financial circumstances under which many burial associations now operate and the need for immediate action in the regulation of burial associations. A matter of such importance should be granted a full hearing and proper consideration by the courts.

We hold that the facts presented to the trial court presented justiciable issues. The case is remanded to the trial court with directions to proceed in a manner not inconsistent with this opinion. The court is not prohibited from reopening the case for further development of facts if its deems it necessary in order to make a more intelligent and informed decision on the issue presented.

Reversed and remanded.

Charles "Chuck" STOBAUGH v. STATE of Arkansas

CR 88-162 769 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered May 8, 1989
[Rehearing denied June 5, 1989.]

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

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

JOHN I. PURTLE, Justice. On October 28, 1987, the appellant was sentenced by the Faulkner County Circuit Court to a term of four years in prison and was fined $10,000 on his guilty plea to a charge of possession of marijuana with intent to deliver. The only point argued for reversal is that the trial court should have found that trial counsel was ineffective and therefore should have allowed the appellant to withdraw his guilty plea. As we find no prejudicial error, the judgment is affirmed.

The appellant was stopped at a roadblock on Highway 64 in Faulkner County, Arkansas, on February 7, 1987. The record indicates that the roadblock was for the purpose of checking operator and vehicle licenses. The police checked the appellant's driver's license and returned it to him; at about the same time, another officer approached the pick-up truck and opened the passenger door. As the door was opened, a brown paper sack containing marijuana fell out of the truck. The appellant was charged with possession of marijuana with intent to deliver.

The cornerstone of the appellant's argument on appeal is that the trial counsel was ineffective when he failed to make a specific motion to suppress the evidence because the roadblock was "patently illegal." Trial counsel filed several pretrial motions, including one to release the pickup truck, which had been seized, on the ground that the seizure was the result of an illegal roadblock. The motions were denied, and apparently some deal was worked out for the return of the truck.

It was revealed at the hearing on the motion to withdraw the guilty plea that trial counsel did not make the additional motion concerning the suppression of the evidence for the reason that he did not wish to anger the trial court. Apparently the defense counsel was trying to place the appellant in a favorable position with the court by having the appellant lecture students concerning the dangers of drug use.

The appellant and his attorney decided to change the plea from "not guilty" to "guilty," and on October 16, 1987, the appellant filled out a "statement by defendant in advance of plea of guilty." The statement was filed on October 28, 1987, when the court accepted the appellant's guilty plea. A judgment and commitment order was filed on October 29, 1987. The guilty plea rendered moot all pending motions inconsistent with the plea.

The sentence by the court was not what had been expected by the appellant and his attorney. The trial attorney prepared and filed a motion for reconsideration on November 3, 1987. Nothing happened, and the appellant then retained his present counsel, who filed a petition to withdraw the plea on November 12, 1987. A hearing was scheduled for February 26, 1988, but was continued until May 20, 1988. The opinion of the court was not filed until July 8, 1988, and on July 16, 1988, the appellant gave notice of appeal.

The motion to withdraw the guilty plea was treated as a Rule 37 petition by the trial court, and relief was denied. It is from that judgment that this appeal is taken.

The sole issue presented on appeal is whether trial counsel was ineffective and thereby prevented the appellant from intelligently and voluntarily entering the guilty plea. We stated in *Huff* v. *State*, 289 Ark. 404, 711 S.W.2d 801 (1986), that "[w]hen a guilty plea is challenged, as here, the sole issue is whether the plea was intelligently and voluntarily entered with the advice of competent counsel." See *Williams* v. *State*, 273 Ark. 371, 620 S.W.2d 277 (1981). Specific errors on the part of the trial attorney are to be evaluated under the *Strickland* v. *Washington*, 466 U.S. 668 (1984), standard. *Strickland* requires the petitioner to demonstrate both that the defense counsel was not functioning as guaranteed by the Sixth Amendment and that his deficient performance resulted in depriving the petitioner of a

fair trial. The burden upon the petitioner in such a case is extremely heavy. *Crockett* v. *State*, 282 Ark. 582, 669 S.W.2d 896 (1984).

The allegations by the appellant enumerate specific instances of conduct said to constitute ineffective assistance of counsel. First, he argues that the failure of the defense attorney to properly raise the unconstitutionality of the roadblock fell below the standard required of counsel. Second, he asserts that, had a motion to suppress the evidence been presented and granted, there would have been insufficient evidence to support a conviction. Third, he insists that he was misled by his trial counsel in entering the guilty plea, having been given the impression that he would receive a suspended or probated sentence.

A defendant who receives a greater sentence than expected is not entitled to have his plea withdrawn solely on that basis. In the absence of a plea agreement or other extenuating circumstances, the fact that a defendant hoped for, or even expected, a lighter sentence is not grounds for withdrawing the plea after an unfavorable sentence is pronounced.

The appellant's attorney appears genuinely to believe that the roadblock was illegal and that all that needed to be done was to move to suppress the evidence on the basis that the search was unconstitutional. It was not disputed that the purpose of the roadblock in this case was to check drivers' and vehicle licenses. We have found neither case law nor statutory or constitutional prohibition declaring that police may not establish a roadblock for such purposes. The appellant relies on cases that prohibit roadblocks for the general purpose of finding out whether anybody is violating laws of any kind. Counsel in fact made a motion on that basis in the trial court when he sought to have the vehicle released because it had been wrongfully seized. The trial court ruled adversely on the motion, and there is some logic to the trial counsel's contention that he did not file the second motion to exclude the marijuana because it would have agitated the judge. Evidently, he felt certain that the judge would make the same ruling on the bag of marijuana that he had made concerning the seizure of the vehicle. Such a decision on counsel's part comes within the purview of trial strategy or tactics.

We do not judge the performance of trial counsel by

hindsight. If there is a rational and logical basis for the manner in which he tried the case we will not second guess him. Trial tactics vary from lawyer to lawyer, and even the same lawyer may act differently in similar circumstances on another occasion. No trial attorney wants to make a trial judge angry. However, an aggressive defense may be made before any competent trial judge without risking additional punishment of the client or reprimand or censure of the attorney. We could no more sanction such treatment by a trial judge than we could ineffective assistance of counsel.

It is mandatory to allow the withdrawal of a guilty plea or a plea of nolo contendere in order to correct a manifest injustice if it is proven to the satisfaction of the trial court that an accused has been denied effective assistance of counsel. A.R.Cr.P. Rule 26.1(c)(i). Unless the judgment of the trial court is clearly erroneous, it will not be disturbed on appeal.

Counsel is presumed competent, and the burden of overcoming that presumption rests with the petitioner. *Huff* v. *State*, supra, and *Maddox* v. *State*, 283 Ark. 321, 675 S.W.2d 832 (1984). The appellant entered his plea after much consultation with the lawyer, his family, and the state's attorneys. At the time he filled out his advance plea form, he stated that he was satisfied with his attorney and understood all of his rights and the minimum and maximum terms to which he could be sentenced. It was only after he failed to receive the sentence he had hoped for that he became dissatisfied. This is understandable. Nonetheless, the facts and the record in this case indicate that his plea was intelligently and voluntarily entered and his counsel was not ineffective.

Affirmed.

UNIVERSAL SECURITY INSURANCE CO. *v.* George RING

89-74 769 S.W.2d 750

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Friday, Eldredge & Clark*, by: *James M. Simpson*, *M. Gayle Corley*, and *Guy Alton Wade*, for appellant.

*Murphy, Post, Thompson, Arnold and Skinner*, by: *Jerry Post*; and *Michael R. Gott*, for appellee.

JOHN I. PURTLE, Justice. This case was tried to the circuit court without a jury, and the appellant was held liable for wrongfully exercising the power granted to it in a letter of credit issued to George Ring. The court awarded compensatory and punitive damages. For reversal the appellant argues: (1) the trial court erred in failing to hold that the letter of credit applied to the facts of this case; (2) the trial court erred in holding that the letter of credit was restricted or dependent upon the financial condition of the appellee; (3) the trial court erred in granting damages to George Ring individually; and (4) the trial court erred in awarding punitive damages. We agree with the appellant that the terms of the letter of credit authorized Universal to take the type of action taken in this matter. Therefore, the case is reversed and dismissed.

George Ring, the appellee, and Jerry Mourer formed Southland General Contractors, Inc., in 1980. The two men each owned 50 percent of the shares of the corporation. Larry Tiffee purchased Mourer's shares before the end of 1980. At the same time the appellee owned 100 percent of Ring Construction Company, Inc. In 1980 Southland signed a general agreement of indemnity in favor of the appellant, Universal Security Insurance Co., which was also guaranteed individually by Ring and Tiffee.

In 1981 Southland obtained a contract in Jackson, Missis-

sippi, for the construction of a Kroger store. The Mississippi Tax Commission required payment of sales tax in advance or a bond for the tax on the materials used in the project. A bond was supplied by the appellant through its agents, Babb & Associates, on October 8, 1982. On November 15, 1982, the appellee requested Babb & Associates to issue a performance bond and a labor and materials payment bond for Southland, which was involved in a construction project in the College Park Shopping Center in Meridian, Mississippi. As a part of the transaction Babb, acting for appellant, required the issuance to the appellant of a letter of credit in the amount of $150,000, which was issued by the Citizens Bank of Batesville. The letter of credit was issued on a standard form used by the banking industry for such purposes. The letter of credit was to protect Universal on its obligation to Southland and authorized Universal, in its sole judgment, to issue drafts up to $150,000 on the Citizens Bank. As part of the consideration for issuance of the letter of credit, the Citizens Bank required Southland to execute a promissory note and Ring and Tiffee in their individual capacities to sign the note. The letter of credit was issued by the bank and the appellant issued the additional bonds for the Meridian construction project.

In December of 1982 the appellee sold his interest in Southland and continued to do business as Ring Construction Co., Inc. Mr. Tiffee died in March of 1983. In August of 1983, the appellant informed Southland that the Mississippi Tax Commission was demanding payment on the sales tax bond for the Jackson project. The payment deadline was set by Universal for September 9, 1983, and Southland was informed that after that date Universal would draw against the letter of credit in the amount necessary to settle the sales tax claim by the state of Mississippi. On November 10, 1983, the appellee was present at the Citizens Bank when the appellant presented a sight draft for $56,000. Over the protests of the appellee that the letter of credit did not apply to the Jackson, Mississippi project, the bank paid the draft. The bank demanded immediate reimbursement from the appellee and he drew a draft on the Ring Construction Company account and paid the claim. The draft depleted the account of Ring Construction Company, and according to the appellee, his company consequently could not renew its license and was forced out of business.

In December, 1984, the appellee filed a complaint against the appellant. The complaint alleged that appellee was damaged by the act of the appellant through its negligence, conversion, fraud and breach of contract and that the acts were willful, deliberate and malicious. The amended complaint alleged the tort of outrage. At the conclusion of the bench trial, the court awarded the appellee $188,122 compensatory damages and $45,000 punitive damages.

It is first argued by the appellant that the trial court erred in not holding that the letter of credit applied to any bonds or bonds issued by the appellant on behalf of Southland, the appellee and Tiffee. The letter of credit contained the following language:

> By your sight drafts drawn on us and accompanied by your statement that you as surety have executed a bond or bonds on behalf of Southland General Contractors, Inc., as principal, and in favor of various obligees, in connection with bonds required, and that a claim has been made or a situation exists under which the sole judgment of the surety, a claim may be made or liability, loss, costs, or expense sustained under said bonds or bonds and that monies represented by your draft or drafts are required at the direction of the surety for its protection under said bond or bonds.

The letter of credit established an irrevocable credit in favor of the appellant against the account of Southland General Contractors, Inc., up to the limits of the letter of credit. See Ark. Code Ann. § 4-5-106(2) (1987). It authorized sight drafts by appellant if as surety Universal had executed a bond or bonds on behalf of Southland. The letter of credit extended to any claim made upon or paid by Universal under said bonds for amounts due on behalf of Southland. The letter could be exercised if, in the "sole judgment of the surety," conditions existed which would serve as a basis for a claim. In addition, there was the requirement that if the draft was for less than the full amount of the credit, the draft must be accompanied by the letter for the purpose of endorsing the amount of the draft on the letter. In the event the claim was for the full amount of credit, the letter must be surrendered for cancellation.

The trial court appears to have treated the letter of

credit as a contract of guaranty. The issuer of a letter of credit is not a guarantor of an obligation of his client conditioned upon some future event. A guarantor's obligation is secondary or dependent upon the existence of the primary obligation on the part of its principal. However, the underlying facts are irrelevant to the obligation of an issuer of a letter of credit. See Ark. Code Ann. § 4-5-109 (1987). The issuer's obligation matures when a draft is presented accompanied by any required documentation. The equities among the other parties have no bearing upon the obligation of the issuer.

In the *Handbook of the Law Under the Uniform Commercial Code* (2d ed. 1980), § 18-2, pp. 711-712, Professors White and Summers stated:

> [The] obligation of the issuer to pay the beneficiary is generally *independent* of any obligation (or lack thereof) of the issuer's customer to the beneficiary under the contract between customer and beneficiary. It follows that it is generally wrongful for the issuer to dishonor on the ground that the beneficiary has failed to perform its underlying obligation to the issuer's customer. In other words, the issuer generally cannot justify refusal to honor on the ground that its customer is not getting what he bargained for from the beneficiary-seller. [Emphasis in original.]

When interpreting a written instrument between an insurer and an applicant, we construe the words as used by the parties in their plain ordinary meaning. In *Farm Bureau Mutual Insurance Co.* v. *Milburn*, 269 Ark. 384, 601 S.W.2d 841 (1980), we stated: "Further, a written instrument, such as a contract, binder, application or memorandum, delivered by the insurer to an applicant, is strictly construed against the insurer where the language employed is ambiguous or susceptible to one or more reasonable interpretations." If a written contract is ambiguous it is construed against the party preparing it. *Manhattan Factoring Corp.* v. *Orsburn*, 238 Ark. 947, 385 S.W.2d 785 (1965). Along with the foregoing rules of construction of a written instrument, we must consider the rule that when two instruments are executed contemporaneously by the same parties in the course of the same transaction, the instruments should be considered as one contract

for the purposes of interpretation. *Stokes* v. *Roberts*, 289 Ark. 319, 711 S.W.2d 757 (1986). The appellant could have proceeded under the indemnity agreement against Southland, Ring, or Tiffee. However, it also had the right to proceed against any of the same parties pursuant to its letter of credit. The bond contained a "General Agreement of Indemnity" under which the appellee was obligated to pay to the appellant monies necessary to satisfy a claim made on the appellant under any bond issued by the appellant on behalf of appellee; further, the appellant was given the right to "pay, settle or compromise any expense, claim or charge" arising from the relationship of principal and surety. The letter of credit authorized the appellant to issue a draft when "in the sole judgment of the surety [appellant] a claim may be made or liability, loss, costs or other expense sustained under said bond or bonds." The bond and the letter of credit were one transaction and must be read together.

We are not unmindful of appellee's testimony that the letter of credit was not supposed to apply to the Jackson, Mississippi, project. However, the plain words of the letter of credit and surety agreement, given their ordinary meaning, establish that this project was included in the bonds and in the authority granted in the letter of credit.

We find nothing in the record to support punitive damages. There was nothing malicious or outrageous in the action of the appellant in enforcing its agreement with the appellee through the letter of credit. It may be that the appellee could have negotiated the tax claim to a lower figure but that is not one of the requirements of the letter of credit. Since the equities among the parties are not to be considered when enforcing a letter of credit, we do not consider them here. Needless to say, we find nothing in the record to support the tort of outrage.

Reversed and dismissed.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I disagree that the finding of the trial judge that the Letter of Credit #33 applied only to the bonds applicable to the College Park Shopping Center project has been shown to be clearly erroneous.

Merely because the word "bonds" is plural rather than singular is not a sufficient basis as I see it, to render the letter of credit beyond doubt as to the intention of the parties. That intention is to be gathered from the entire context of the agreement. *Arkansas Power & Light Co.* v. *Murry*, 231 Ark. 559, 331 S.W.2d 98 (1960). Moreover, this instrument was drawn by the appellant and must be interpreted against the party which prepared it. *American Insurance Co.* v. *Rowland*, 177 Ark. 875, 8 S.W.2d 452 (1978).

I would affirm the trial court.

Benny WILLETT v. STATE of Arkansas

CR 88-205 769 S.W.2d 744

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Frank H. Bailey*, for appellant.

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

JOHN I. PURTLE, Justice. On September 13, 1988, the jury convicted the appellant of possession of a controlled substance with the intent to deliver and, as an habitual offender, he was sentenced to life imprisonment. He argues three points on his appeal: (1) the trial court erred in holding that the police had reasonable cause to stop and search the vehicle; (2) the trial court erred in sustaining the prosecution's objection to identification of the confidential informant; and (3) it was error to justify the search on the basis of "exigent" circumstances. We do not find prejudicial error. The conviction is affirmed.

Officer Lyle Scott, a detective for the Mountain Home Police Department, testified that during the six months prior to the arrest of the appellant on the present charge, he had received information from four or five sources that the appellant and his co-defendants were dealing in cocaine. Between January 19 and 22, 1988, two confidential informants told him that the co-defendants were making weekly trips to Jonesboro for the purpose of picking up cocaine to be brought back to Mountain Home and sold. The informants told him that the defendants would be driving a late model white pick-up truck or a gray primer-colored Pontiac GTO, and that both vehicles were kept at Ray's Auto Repair. The informants further told him that the

supplies went quickly, but that if any was left after the initial sale it was kept in a toolbox at the repair shop. Scott was informed by one of the two confidential informants that he had overheard the co-defendants talking in a local cafe and that he understood they would be going to Jonesboro on January 22nd to get more cocaine. The confidential informants also informed Scott that the defendants usually carried handguns while making a delivery or picking up the cocaine. On the 22nd Scott and another officer drove by Ray's Auto Repair and saw two or three people standing near a late model white pick-up and gray primer-colored Pontiac GTO. The officers then went to a restaurant named Bobby Sue's Dawg House, expecting the suspects to come by and eat before leaving for Jonesboro. The officers were surprised when the suspects did not show up and after waiting for forty-five minutes went back to the repair shop where they found a "closed" sign and the gray Pontiac missing.

Being unable to locate the vehicles in the Mountain Home area, Scott contacted the sheriff's department and a surveillance was established on the roads going to Jonesboro. About 6:30 p.m. the gray Pontiac was observed at the intersection of Highways 5 and 177, near Mountain Home. Officer Parnell had been assigned to the surveillance team and upon noticing the GTO, he fell in behind it. He followed the GTO along the highway until it turned off on the Tracy Ferry Road. While following the car Officer Parnell observed the appellant, in the backseat of the GTO, apparently attempting to hide something. He also observed the passenger on the right front apparently trying to hide something. He turned on his blue light and stopped the vehicle at that time. Two other officers came immediately and helped Parnell place the suspects under arrest and conduct a search of the vehicle. Handguns and controlled substances, including cocaine, were found in the vehicle.

The state refused to identify the confidential informants and after a hearing the trial court agreed with the state. Motions to suppress the evidence were denied. At the pretrial hearing the foregoing information was presented by Officers Scott and Parnell. Officer Bill Beach, narcotics investigator for the state police, testified that he had been working with Scott and that he had received the same information presented by Scott.

The appellant's first argument for reversal is that the court erred in finding the authorities had probable cause to search his vehicle and seize the items therein. He admits, however, that if the facts of this case meet the requirements of a vehicular search as authorized by A.R.Cr.P. Rule 14.1, that it was a valid search. The pertinent part of Rule 14.1 reads as follows:

> (a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:
>
> (i) on a public way or waters or other area open to the public . . . .

Therefore, if the facts and circumstances reveal that the officers had reasonable cause to believe that drugs were contained in the GTO, it was a legal search and seizure.

The state has the burden of proof in this case because it was a warrantless search. *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 (1983). The success of the search will not validate the search if it was unlawful in its inception. *Walton* v. *State*, 245 Ark. 84, 431 S.W.2d 462 (1968). The test for reasonable cause for stopping and searching a vehicle depends upon the collective information of the police officers and not solely on the knowledge of the officer stopping the vehicle. *Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980). An officer has the right to stop a vehicle and make a warrantless search if it is on a public highway and he has reasonable cause to believe the vehicle contains evidence subject to seizure and the circumstances require immediate action to prevent destruction or removal of the evidence. *Tillman* v. *State*, 275 Ark. 275, 630 S.W.2d 5 (1982). Reasonable cause as required by A.R.Cr.P. Rule 14.1 exists when the officers have reasonably trustworthy information, which rises to more than mere suspicion, that the stopped vehicle contains evidence subject to seizure and a person of reasonable caution could be justified in believing an offense has been committed or is being committed. *Mitchell* v. *State*, 294 Ark. 264, 742 S.W.2d 895 (1988). The right to search and the validity of the search are dependent on the reasonableness of the cause the searching officer has for believing

that the contents of the automobile constitute a violation of the law. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978).

On appellate review this court makes an independent determination based upon the totality of the circumstances. *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988). In the present case at least two officers had received several tips from informants that the appellant and his associates were involved in drug dealing. Some of the tips were from sources which were not known to be reliable by the officers. However, nothing prevents an officer from investigating the information furnished to him by even an anonymous phone call. In *Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987), we stated:

> The anonymous tips in the present case were of value to the officers in making their initial investigation. Generally speaking, an officer would indeed be foolish to ignore an anonymous tip. So long as the officer does not invade the privacy and freedom of others, he is free to investigate any police matter in any manner not prohibited by law.

The information received by the officers in the present case was neither prohibited nor illegal. Therefore, they were free to use the information in their investigation in any manner which they deemed proper.

The officers did not act solely upon the advice given by the confidential informants. Such information was used as a catapult to launch a more intensive investigation. As it turned out, most of the information furnished by the informants was true. However, the information was not used as the basis for an arrest and seizure but rather to aid in further investigation. Reasonable cause may be based upon a combination of verified information furnished by anonymous callers and evidence gathered by the police in furtherance of an investigation of the subject matter. *Illinois* v. *Gates*, 462 U.S. 213 (1983). The facts in the present case are quite similar to those in *Gates*, inasmuch as the anonymous letter in *Gates* informed the officers of pending drug transactions. In the present case unidentified informants notified the officers orally that the appellant was about to undertake additional drug dealing operations. The basic holding of the *Gates* opinion abandoned the "two-prong test" of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393

U.S. 410 (1969), in favor of the "totality of the circumstances" test.

The officers in *Gates* acted upon the anonymous letter by investigating the allegations contained in the letter. As it turned out the statements in the anonymous letter proved true up to a point.

> Informant's tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in value and reliability. Rigid legal rules are ill-suited to an area of such diversity. One simple rule will not cover every situation.

*Illinois* v. *Gates*, supra.

The *Gates* decision recognized that unproven allegations or informant's tips may be corroborated by independent investigative work by the police.

The *Gates* opinion did not open the floodgates to mass arrests based upon anonymous and unverified tips. It dealt with one single anonymous letter giving many details of conditions existing at the time the letter was written and projecting future actions to be taken by Gates and his wife. The investigating officers verified several of the tips. All of them proved accurate and reliable. The investigation could not cover what had not yet happened. The decision held that the magistrate issuing the search warrant was justified in placing some reliance on the anonymous letter in view of the affidavit by the police that most of the statements in the letter already had proven accurate.

In the case before us, whether acting on their own or through the use of the tips, the officers spotted the vehicles which were allegedly used on the drug trafficking trips. Although the police would not have been authorized to obtain a warrant based solely upon the information furnished by the unidentified informants, they would have been doing less than their duty had they not investigated the allegations. Although they may have been acting on a mere suspicion at the time they started the surveillance, the suspicion rose to reasonable cause before the vehicle the appellant was riding in was stopped. Most police investigations, no doubt, start with only suspicion. The activity observed by the officer chasing the GTO, along with his prior knowledge, was sufficient to allow a stop of the vehicle. Circumstances excusing

the search without a warrant are exigent when they involve danger to the officers or risk of loss or destruction of evidence. *Moore* v. *State*, 268 Ark. 171, 594 S.W.2d 245 (1980). Certainly the facts and circumstances of this case are sufficient to allow a search pursuant to Arkansas Rules of Criminal Procedure Rule 14.1(a)(i).

The second argument offered by the appellant is that the court improperly refused to allow identification of the confidential informants. This issue has been discussed in the first argument for reversal. Since the arrest and search and seizure were not conditioned upon the information of the confidential informants, it is not necessary to discuss this issue at length. See *Illinois* v. *Gates*, supra. The informants in the present case neither witnessed the crime nor participated in it in any manner. Therefore, it was not necessary to reveal their identity. See *Treadway* v. *State*, 287 Ark. 441, 700 S.W.2d 364 (1985); and A.R.E. Rule 509.

The third argument by the appellant is that the court erred in finding exigent circumstances. This argument has also been disposed of under the first point. The plain wording of A.R.Cr.P. Rule 14.1 authorizes the search and seizure of items in a vehicle if the vehicle is stopped pursuant to the provisions of that rule. We explained reasonable cause for stopping a vehicle in the first part of this opinion and will not discuss it again at this time.

Although anonymous tips standing alone do not constitute reasonable or probable cause, information verified as a result of such tips may support reasonable cause and may be acted upon as though the tips had never been received. In the present case the investigating officers obtained objective evidence in support of their belief that reasonable cause to stop the vehicle existed. The stop and search in this case were not based upon mere conjecture and speculation nor mere suspicion. The search was based upon evidence which confirmed the information furnished by the confidential informants. The reliability of the informants was not an issue under the facts in this case. The arrest may have resulted, at least in part, from the anonymous tips, but it was based upon the observations and information established by the police during their investigation of the facts. Therefore, there was no prejudicial error in the trial court and the conviction is

affirmed.

HICKMAN, J., concurs.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I must disagree with the majority on its finding of probable cause for a search of appellant's vehicle. My disagreement is twofold: the first being the lack of knowledge of probable cause by the arresting officer, Parnell, who made the stop and conducted the search. The majority states that the police were initially acting on a mere suspicion at the time they started the surveillance but that it rose to reasonable cause by the time the vehicle was stopped—that "the activity observed by the officer chasing the GTO, *along with the his prior knowledge*, was sufficient to allow a stop of the vehicle." [My emphasis.]

The problem here is that Parnell had no prior knowledge to add to his observation of activity in the vehicle. The only information that had been been relayed to him was that there was a gray '66 to '68 GTO with two suspects in it; that the suspects could be armed and would probably run; and that he was to follow them until he could get a backup. No other information regarding the prior investigation had been communicated to Officer Parnell.

The investigation of this matter had been carried on by officers Beach and Scott and prior to the stop of appellant's vehicle, the information they had was admittedly insufficient for any stop. The suspicious activity observed by Parnell was therefore critical to having a sufficient basis. Beach and Scott, however were never informed of the activity observed by Parnell, nor was Parnell involved in the investigation or in a sharing of the previous information gathered by Scott and Beach. The record reveals that Parnell was apparently called off of some other duty for this particular surveillance effort, and then was given only a description of the car and a directive to follow the vehicle and, at most to conduct a *Terry* stop. Lacking knowledge of the details of the investigation to that point, there was no way Officer Parnell could have added his observations of activity in the vehicle to the other officers' information and produced a sufficient basis to stop.

While we have made reference to the "collective knowledge" of the police as a legitimate basis for probable cause, as the

majority briefly notes, citing to *Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980), it has not been used in the sense suggested by this case. That is, it has not referred to the finding of probable cause through a piecemeal collection of information from various police officers where no one officer has put that information together to find probable cause. Rather, as in *Tillman*, it has referred to a finding of probable cause when the arresting officer lacks any basis for such a conclusion, but has been directed to make an arrest or search when someone else in the department does have such information. Or as in *Perez* v. *State*, 260 Ark. 438, 541 S.W.2d 951 (1976), where an officer has found probable cause not from his own personal knowledge but from data collected from others in his department. *See also Woodall* v. *State*, 260 Ark. 786, 543 S.W.2d 957 (1976); *Jones* v. *State*, 246 Ark. 1057, 441 S.W.2d 458 (1969). In the case before us, neither the investigating officers nor the arresting officer had enough information individually to support a search. Only by an exchange of information could there have been any possibility of finding grounds for a search by Parnell.

The danger in the method approved in this case is quite obvious. It encourages arrests and searches where there is an insufficient basis, in hopes that an after-the-fact inquiry will turn up additional information to support the police action. "To say in the abstract that probable cause is to be evaluated on the basis of the collective information of the police ignores the underlying assumption—and factual reality—that there is some communication between those officers, who do know facts amounting to probable cause, and those who do not . . . If no officer connected to the arrest knows the facts which might justify it, no officer exercises the judgment required as a substitute for judicial approval. Information scattered among various officers in a police department cannot substitute for possession of the necessary facts by a single officer related to the arrest." *State* v. *Cooley*, 457 A.2d 352 (Del. 1983). "[T]he fellow officer rule . . . is not a means of creating probable cause by using post hoc combinations of information available to the police. The rule does not permit the police to call its archives in hopes of justifying an arrest which is not supported by probable cause." *People* v. *Hazlehurst*, 662 P.2d 1081 (Colo. 1983).

The burden of proof is allocated to the state when a

warrantless search has occurred, and the state must prove the source of its information and the means of its acquisition. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978). The state failed in this case and I would reverse on the basis discussed above. But even if we were to somehow impute the officers' knowledge, one to the other, I would still reverse because the cumulative information of all the officers was insufficient to make a finding of probable cause to support a search.

The majority relies on *Illinois* v. *Gates*, 462 U.S. 213 (1983), for the proposition that an anonymous tip will support the probable cause requirement if there is sufficient corroboration of the tip by independent observation by the police. In *Gates*, the police received an anonymous letter stating that a named couple sold drugs; that the wife would drive to Florida, leave the car and fly back; the husband would then fly to Florida and drive back with the purchased drugs; and that another such trip was about to occur. A few days later the police determined that the husband had flown to Florida and had gone to a hotel where he met his wife. The next day they were both observed leaving in their car heading in a northerly direction toward their home. The court held there was probable cause to support a search warrant. It found: the activity suspicious because Florida was well-known as a source of illegal drugs; the police corroborated several details given in the letter; and the details corroborated concerned future activities which were not easily predicted.

While *Gates* has been criticized as providing a questionable basis for supporting a search warrant, 1 LaFave, *Criminal Procedure*, § 3.3(c), the facts in our case don't even meet the minimum standard of *Gates*. The only information from the tip that was corroborated by the police was that two individuals would leave in a certain car around noon and would return later in the day from the direction of Jonesboro. There was simply nothing untoward about the activity observed and only the most minimal of details corroborated. Neither did the information reveal any future activity that could not be easily predicted. All the police had was that two men had probably gone to Mountain Home on that particular afternoon. If we add to that Officer Parnell's observation that two individuals in the car appeared to be moving around or hiding something, there was arguably a basis for a *Terry* stop, but no more. *See U.S.* v. *White*, 648 F.2d 29

(D.C. Cir. 1981), for a discussion of the quantum of evidence needed for a *Terry* stop and what is needed beyond that to "boost" the case into one constituting probable cause.

Here, the evidence presented by the state had to be sufficient to support a probable cause test or nothing at all. There were no preliminaries by Parnell in the way of an investigatory stop that revealed further facts that would in turn justify a search. *See e.g., Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987). Rather, Parnell simply stopped the vehicle, had the occupants get out, and without further discussion or questioning undertook a search of the automobile.[1] Even if we were to assume, which I could not, that Parnell had knowledge of the other officers' information, the sum of data available to the police did not constitute an adequate basis to support the full-scale search that was undertaken and the motion to suppress in this case should have been granted.

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[1] It appears from the record that Parnell had made this decision on his own or had misunderstood the directive. Officer Beach who was in charge or directing the surveillance effort indicated that no authorization for a search had ever been given:

Q: Now, when you set up this trap to stop the car, the directions were if you saw a gray primer Pontiac GTO coming from the direction of Jonesboro, stop it?

A: Basically, yes, sir.

Q: You used traffic stop in your direct?

A: Yes, sir.

Q: So these officers that were placed out here were to make a stop?

A: That's correct.

***

Q: Now when they stopped this vehicle, they were to search the vehicle to see if there was any contraband in the vehicle?

A: No sir. We didn't give anyone any particular instructions to search. The vehicle was supposed to be stopped, but by the time that we had responded to where the vehicle had been stopped, it had already been searched.

Roosevelt FERGUSON v. STATE of Arkansas

CR 88-213 769 S.W.2d 418

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Maxie G. Kizer*, for appellant.

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

ROBERT H. DUDLEY, Justice. The appellant was convicted of capital murder and sentenced to life in prison without parole. The sole issue on appeal is the sufficiency of the evidence. We affirm

the judgment of conviction.

In considering the sufficiency of the evidence on appeal, we need consider only the evidence favorable to the appellee and affirm if the jury's verdict is supported by substantial evidence. *Moore* v. *State*, 297 Ark. 296, 761 S.W.2d 894 (1988). Substantial evidence is evidence of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other, forcing the mind to pass beyond mere suspicion and conjecture. *Bennett* v. *State*, 297 Ark. 115, 759 S.W.2d 799 (1988). Circumstantial evidence may constitute substantial evidence to support a conviction. *Still* v. *State*, 294 Ark. 117, 740 S.W.2d 926 (1987).

The evidence, viewed in the light most favorable to the State, is as follows. The victim, Annie Bell Hall Killingsworth, the owner of an apartment complex, was murdered on the night of July 31, 1986. Medical evidence showed that she died of simultaneous suffocation and strangulation. The medical examiner testified that the simultaneous suffocation and strangulation was evidence that two people physically participated in the murder. Entry into the victim's apartment was gained by removing the glass from a window. Milton Jones's fingerprints were found at the place of entry. The victim had about $10,000.00 in cash in her apartment, and it was gone when her corpse was found. The foregoing is circumstantial evidence that Milton Jones and someone else burglarized the victim's apartment and in the course of, or in the furtherance of the burglary, murdered the victim. This meets the definition of capital murder. *See* Ark. Code Ann. § 5-10-101(a)(1) (1987).

The evidence further reveals that Erma McCoy saw Milton Jones and the appellant behind the victim's apartment late on the night of July 31st. Ms. McCoy testified that when she saw them, the appellant told Milton Jones, "Milton, get Erma, grab Erma." Immediately afterwards he said, "She's dead." Since Ms. McCoy is still alive, the jurors were free to infer that the latter statement was about the victim.

After the murder the appellant fled to Kansas City and later to California. Jones was arrested shortly after the murder, was convicted of capital murder, and sentenced to life without parole. *Jones* v. *State*, 296 Ark. 135, 752 S.W.2d 274 (1988). Appellant

was not apprehended until April of 1988. At that time he gave a statement in which he confessed that he and Jones had been drinking on July 31st when Jones suggested that they rob Ms. Killingsworth. He said Jones removed the window glass and went in first. Appellant followed. Jones was in the victim's bedroom looking for money when she saw him. Appellant said that Jones killed Ms. Killingsworth because he thought she recognized him. He said he personally went in for the sole purpose of taking the cash.

At trial he took the stand and changed his story. He testified that by the time he went through the window, Jones had already killed Ms. Killingsworth and was sorting through her belongings. He said he only took a pillow off her face and put it on her chest.

Clearly there was sufficient proof to support the verdict of guilty. Direct evidence places the appellant at the scene of the crime and taking part in the burglary. Circumstantial evidence shows him participating in the murder. The jury was free to accept some parts of appellant's testimony and reject other parts. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). Further, his flight to avoid arrest can be considered as corroboration of evidence tending to establish guilt. *Yedrysek* v. *State*, 293 Ark. 541, 739 S.W.2d 672 (1987).

Pursuant to Rule 11(f) of the Rules of the Supreme Court and the Court of Appeals of Arkansas, we have reviewed all objections decided adversely to the appellant and find no prejudicial error.

Affirmed.

# ARKANSAS STATE BOARD OF EDUCATION v. MAGNOLIA SCHOOL DISTRICT NO. 14 OF COLUMBIA COUNTY

88-261 769 S.W.2d 419

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Steve Clark*, Att'y Gen., by: *Tim Humphries*, Asst. Att'y Gen., for appellant.

*Rita S. Looney* and *Samuel A. Perroni*, for appellee.

DAVID NEWBERN, Justice. This is an appeal from an order certifying the case as a class action. Appeals of class action certifications, although interlocutory, are specifically permitted by Ark. R. App. P. 2(a)(9); *Ford Motor Credit Co.* v. *Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985). The appellee, which is the

Magnolia School District No. 14 of Columbia County, sought to have the appellants, who are the Arkansas State Board of Education and its members in their individual and representative capacities, enjoined from using state school money to satisfy obligations of the Little Rock and South Conway School districts resulting from federal court desegregation rulings. The Magnolia board was granted class action certification upon its claim to represent all other Arkansas school districts similarly situated. The state board appeals from the certification but raises only issues of sovereign immunity and standing to sue. We dismiss the appeal because these issues are not proper ones to be raised pursuant to Rule 2(a)(9).

The state board argued sovereign immunity and lack of standing in a motion for dismissal or summary judgment. It did not wait for the chancellor to rule on the motion but appealed her order certifying the class, arguing the positions they asserted in their motion. No issues of numerosity or common question of law or fact are even discussed.

The state board argues the chancellor erred in certifying the class because she lacked jurisdiction, given the claims of sovereign immunity and the Magnolia board's lack of standing as a member of the class. The only case cited in support of the argument that the chancellor lacked jurisdiction to certify the class because of a failure of standing is *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), which did not so hold but noted in *obiter dicta* that the members of the purported class had not shown the requisite "case or controversy" for federal jurisdiction. There had not even been a class certification proceeding in the U.S. district court. Class action certifications are not appealable under the federal rule, and the citation is of no benefit to the position asserted here by the state board.

We might have been willing to treat this appeal as a request for a writ of prohibition had we concluded that the chancery court lacked jurisdiction. We have been provided no authority whatever to the effect that the points raised, *i.e.*, the defenses of sovereign immunity and lack of standing would, if proven, deprive the court of jurisdiction, nor are we aware of any such authority in this court.

Our holding in the *Ford Motor Credit Co.* case was

premised, in part, on the fact that the certification issue should be separately appealable because it is separable from the merits of the case. It was not our intention in changing Rule 2(a) to allow any issue to be presented here under the guise of an appeal of a class certification other than ones concerning compliance with Ark. R. Civ. P. 23.

In an interlocutory appeal from a certification order we will hear only argument on whether the judge abused her discretion in certifying the class under Ark. R. Civ. P. 23. The state board's points may be raised on appeal from a final judgment.

Appeal dismissed.

Charles SUMMERS v. STATE of Arkansas

RC 89-16 771 S.W.2d 16

Supreme Court of Arkansas
Opinion delivered May 8, 1989

*Lynn Plemmons*, for appellant.

No objection.

PER CURIAM. Appellant, Charles Summers, by his attorney, Lynn F. Plemmons, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to 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* per curiam dated February 5, 1979, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964; *Terry* v. *State*, 272 Ark. 243, 613 S.W.2d 90 (1981).

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

Daniel R. BRUNDAGE *v.* STATE of Arkansas

CR 88-216 770 S.W.2d 122

Supreme Court of Arkansas
Opinion delivered May 15, 1989

*Robert S. Blatt*, for appellant.

*Steve Clark*, Att'y Gen., by: *Ann Purvis*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. The appellant's motion to set

aside his plea of *nolo contendere* was denied by the trial court. We reverse and remand.

The motion was filed after a commitment order was entered, making it untimely under A.R.Cr.P. Rule 26. But the trial judge addressed the merits of the motion, so we will consider this an appeal from a denial of A.R.Cr.P. Rule 37 relief.

The trial judge failed to comply with the most fundamental requirements of accepting a plea from a defendant. *See Boykin* v. *Alabama*, 395 U.S. 238 (1969). Brundage was charged with breaking or entering and burglary and was sentenced for both offenses, but he never entered a plea on the burglary charge. A plea of *nolo contendere* shall be received only from the defendant himself in open court. A.R.Cr.P. Rule 24.3(a).

Brundage did plead *nolo contendere* to breaking or entering and was eventually sentenced to three years on that charge. But upon accepting that plea, the judge originally imposed a sentence of seven years with four years suspended, which was actually the intended sentence for burglary. The plea agreement signed by Brundage reflected only one sentence — the seven years with four suspended. The three years for breaking or entering was not part of the plea agreement.

The record also reflects that the judge misstated the penalty for breaking or entering, saying it carries a maximum fine of $2000 instead of $10,000. That error alone would not justify setting aside a plea. But the accumulation of errors, the obvious confusion at the plea hearing, and the complete failure to obtain a plea on one charge, cast serious doubt on the intelligent nature of the appellant's plea. Under the circumstances of this case, the appellant's motion to set aside his plea should have been granted.

Reversed and remanded.

Darrell Allen WILSON *v.* STATE of Arkansas

CR 88-166 770 S.W.2d 123

Supreme Court of Arkansas
Opinion delivered May 15, 1989

*Daniel D. Becker*, for appellant.

*Steve Clark*, Att'y Gen., by: *Tim Humphries*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. The appellant was charged and

tried for aggravated robbery and theft of property in Garland County, Arkansas. He had been previously tried in Saline County for the offenses of kidnapping, rape, and battery. All the criminal acts grew out of the same criminal episode which commenced with the robbery in Garland County and ended with the rape and battery in Saline County. The appellant received sentences of forty years and ten years, plus a ten thousand dollar fine in Garland County. For reversal the appellant contends that the court erred in overruling his motion in limine to prevent introduction of the evidence of the subsequent crimes in Saline County when the case was tried in Garland County. We hold that the Garland County Circuit Court did not err in admitting the testimony concerning the Saline County crimes.

We affirmed the appellant's conviction for the Saline County crimes in *Wilson* v. *State*, 297 Ark. 568, 765 S.W.2d 1 (1989). The same facts are applicable to both cases and reveal that on December 5, 1987, a gunman entered a grocery store on Highway 5 in Garland County, Arkansas, and demanded and took money from the cash register. He forced the store operator into a car and drove her to a secluded area in Saline County where she was raped, choked unconscious, and then shot. At the commencement of the trial in Garland County, the appellant confessed that he had indeed committed armed robbery and theft of property as charged. He moved for suppression of the evidence relating to the crimes committed in Saline County. The trial court overruled the motion. There is no separation in time or distance between the Garland County and Saline County crimes, except for the distance and the time it took to drive an automobile between the two points.

Under Ark. Code Ann. § 16-88-108(c) (1987), when a criminal offense "is committed partly in one county and partly in another, or the acts, or the effects thereof, requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county."

Arkansas Rules of Criminal Procedure, Rule 23.1(a) provides that the court may consolidate two or more charges for trial purposes if the charges could have been joined in a single indictment or information without prejudice to the defendant's rights to move for severance pursuant to Rule 22.3. Rule 23.1(b)

provides that "the court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution."

In *Cozzaglio* v. *State*, 289 Ark. 33, 709 S.W.2d 70 (1986), we held that separate crimes committed in one continuous episode in more than one county required joinder if defendant requested it. The defendant had moved for joinder of the kidnapping charge, which occurred in Washington County, and the rape charge, which occurred in Madison County. In *Cozzaglio* we recognized that either county had venue to try either or both charges. We reversed and dismissed the subsequent conviction and sentence in Washington County, holding that the trial court had erred in denying the appellant's motion for joinder of the charges in the first trial. That is not the question in the case before us because no motion for joinder was made by the appellant.

The appellant's argument that evidence of the Saline County crime should not have been submitted was answered by this court in *Thomas* v. *State*, 273 Ark. 50, 615 S.W.2d 361 (1981), where we discussed the procedural matter of allowing evidence of other criminal conduct to be used at trial against an accused for a crime which is not at issue. The court held that "all the circumstances connected with a particular crime may be shown, even if those circumstances would constitute a separate crime."

We will not reverse the trial court's decision to admit evidence unless there has been a clear abuse of discretion. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979). A case in point is *David* v. *State*, 286 Ark. 205, 691 S.W.2d 133 (1985), where we stated that "a defendant is not empowered to prevent the introduction of relevant evidence by stipulating to the fact which such evidence tends to prove. The admission of evidence to prove matters already stipulated is within the discretion of the court."

In view of the fact that the appellant did not seek joinder we hold that he waived that right. For the reasons stated above, the trial court did not commit prejudicial error in allowing evidence of the other crimes to be presented.

Affirmed.

Vincent BURIN *v.* STATE of Arkansas

CR 88-206 770 S.W.2d 125

Supreme Court of Arkansas
Opinion delivered May 15, 1989

*F.N. "Buddy" Troxell*, for appellant.

*Steve Clark*, Att'y Gen., by: *Ann Purvis*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The primary issue in this case is whether the appellant's confession should have been suppressed because of his mental subnormality. We affirm the trial court's ruling denying the motion to suppress. We set out the applicable law in some detail, even on points not argued, because there was obvious confusion below about the burden of proof, and the distinction between insanity as a defense and the lack of voluntariness of a confession due to mental subnormality.

## I. The Privilege

In *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966), the Supreme Court recognized that custodial interrogations inherently produce "compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." To neutralize this inherent compulsion and give true meaning to the Fifth Amendment privilege against self-incrimination, the Court in *Miranda* imposed a clear standard for police to follow in their dealings with an accused. Prior to the initiation of questioning, they must fully apprise the suspect of the state's intention to use his statements to secure a conviction and must inform him of his rights to remain silent and to have counsel present, if he so desires. *Id.* at 468-470. The police must respect the rights guaranteed by the Fifth Amendment. A suspect's waiver of these rights is valid only if it is made "voluntarily, knowingly and intelligently." *Id.* at 444. The inquiry into waiver has two distinct dimensions. *Colorado* v. *Spring*, 479 U.S. 564 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986).

### A. Voluntary Waiver of the Privilege

"First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran*, 475 U.S. at 421. This "voluntary" requirement is concerned with any sort of coercive police activity. An incriminating statement obtained on the basis of a waiver must be excluded unless the state establishes the voluntariness of the waiver by the evidentiary standard of a preponderance of the evidence. *Colorado* v. *Connelly*, 479 U.S. 157, 168 (1986). In the case at bar the appellant does not question the voluntariness of his confession. The exclusion of the statement because of police overreaching is not an issue.

### B. Knowing and Intelligent Waiver of the Privilege

"Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a

court properly conclude that the *Miranda* rights have been waived." *Moran*, 475 U.S. at 421. In *Colorado* v. *Spring*, 479 U.S. 564 (1987), the United States Supreme Court wrote:

> The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. *Moran* v. *Burbine*, *supra*, 475 U.S. 412, 106 S. Ct., at ___; *Oregon* v. *Elstad*, *supra*, at 316-317, 105 S. Ct. at 1298. The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect. The *Miranda* warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.

In this case the appellant argues that the trial court erred in admitting his confession because: (1) he failed to understand the basic privilege guaranteed by the Fifth Amendment; and (2) he did not understand the consequences of speaking to the police.

C. Facts of this Case

The prosecuting attorney and appellant's attorney first questioned appellant's competency to stand trial. In response the trial court ordered that the appellant be given a psychiatric evaluation by Dr. James H. Hickman, who found that appellant had some retardation in the borderline to upper mildly retarded range, but was able to conform his behavior to the requirements of the law.

The appellant then filed a motion to suppress the confession because of appellant's mental subnormality. In order to meet its evidentiary burden at the suppression hearing, the State called Charles Fullmer, a deputy sheriff who testified that he spent about forty-five minutes explaining the standard *Miranda* form to the appellant. In his opinion the appellant understood his privilege and waived it. Further, another deputy sheriff, Ollie

Willborg, testified that he knew the accused was not a knowledgeable person, and therefore, he broke down the rights form and took the time to explain each individual right to the appellant. He stated that he tried to get on appellant's level in the explanation of his rights. In his opinion, the appellant understood his rights and their waiver.

The appellant then called Michael Prince, a psychologist who holds a Doctor of Philosophy degree. He testified that the appellant was in the mildly retarded range group, but that his abstract reasoning ability was extremely poor. He testified that the appellant was susceptible to suggestions and he was very gullible. He stated that the appellant could neither read nor understand the following words in the rights form: write, advise, silent, consulting, lawyer, desire, statement, and without. He testified that the appellant could understand only two or three sentences in the waiver of rights form and, in general, neither understood his basic Fifth Amendment privilege nor the consequences of speaking to the police.

At the conclusion of the hearing, the trial judge, having considered the evidence concerning competency to stand trial and the evidence from the suppression hearing, refused to suppress the statement. We cannot say the trial judge's finding was clearly erroneous.

■ A low intelligence quotient will not, in itself, render a waiver of the privilege involuntary. *Hatley* v. *State*, 289 Ark. 130, 709 S.W.2d 812 (1986); *see also* Annotation, *Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession*, 8 A.L.R.4th 16 (1981; Supp. 1988). Other factors to be considered are the defendant's age, experience, education, background, and the length of detention. *Fare* v. *Michael C.*, 442 U.S. 707 (1979), and *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985). Here, the appellant was nineteen years old, in the eleventh grade in a special education class of the local public school, and owned and drove an automobile. He was not held for a prolonged period before the *Miranda* rights were carefully explained to him.

■ The trial judge saw and was in a position to determine the credibility of the witnesses. We are in no position to redetermine that credibility. In *United States* v. *Oregon State Medical*

*Society*, 343 U.S. 326, 339 (1952), the Supreme Court commented on the deference which it gave to the findings of a District Court on direct appeal from a bench trial:

> As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

We cannot say the findings of the trial judge were clearly erroneous on the issue of knowingly and intelligently waiving the privilege.

II. The Prosecutor's Closing Argument

For his second point of appeal, the appellant contends that the prosecutor's closing argument was inflammatory and that the trial judge erred in refusing to grant a mistrial. The argument is without merit. The issue arose in the following manner. During cross-examination of appellant's psychologist, the prosecutor asked if the appellant would be likely to commit sexual abuse in the future. The appellant did not object to the question. The psychologist answered, "yes, I would suppose that if a person were guilty of sexual abuse before, with this profile, with these results, I would have to predict that it would happen again." On re-direct the appellant's counsel asked a similar question, to which the psychologist responded, "If he had done it before, then it would be a fairly safe prediction to say he would do it again." Of course, the State did not object. The appellant's attorney again asked a similar question, and the prosecutor objected. The appellant's attorney asked to strike the question. After both sides had rested, the appellant's attorney moved for a mistrial because of the prosecutor's original question. It was too late. The evidence was already before the jury without objection.

During closing argument the prosecutor commented on these questions and answers. The appellant again moved for a

mistrial. The trial judge refused to grant it. The trial judge's ruling was correct. A prosecutor is allowed to argue any inference reasonably and legitimately deducible from the admitted evidence. *Floyd* v. *State*, 278 Ark. 86, 643 S.W.2d 555 (1982).

Affirmed.

HICKMAN, J., not participating.

Joe Henry JOHNSON *v.* STATE of Arkansas

CR 88-88 770 S.W.2d 128

Supreme Court of Arkansas
Opinion delivered May 15, 1989
[Rehearing denied June 12, 1989.]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

*Lohnes T. Tiner* and *Chet Dunlap*, for appellant.

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

STEELE HAYS, Justice. This is a second appeal of a rape conviction. Appellant was arrested in April 1985, and charged with the rape of his nine-year-old stepson. A jury trial was held and appellant was found guilty and sentenced to forty years imprisonment. The conviction was appealed and in *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987), the case was reversed.

In *Johnson I*, the victim had reported to several individuals, including his mother and a physician, that he had been sexually molested by appellant, but at trial he testified he had made up the accusations because he was mad at appellant for not taking him fishing. An examining physician, Dr. Kemp, testified the boy had told him the appellant had engaged in anal and oral intercourse with him. He further testified that he believed the boy was telling the truth. Others testified that the boy had made similar accusations as those told to the doctor and that the boy had recanted the accusations but then renewed them. We reversed because the trial court had permitted Dr. Kemp to state an opinion as to the truthfulness of the boy's statements, which we said was not beyond the understanding of the jury. However, we upheld Dr. Kemp's testimony of the victim's accusations under A.R.E. Rule 803(25).

At the second trial, the state again introduced testimony by Dr. Kemp, but without his opinion as to the victim's truthfulness. The state also presented the testimony of two officers who had questioned the appellant. Both officers testified that appellant had admitted to them that he had engaged in both oral and anal intercourse with the boy. The appellant testified, denying the charge, and the victim testified, denying the truth of his original accusations, and again explaining that they were prompted by his anger at the appellant.

The jury found appellant guilty and sentenced him to fifteen years in the Department of Correction. From that judgment,

appellant brings this appeal, arguing four points for reversal.

Appellant first argues the trial court committed reversible error by not granting a directed verdict, contending there was no evidence in the record, apart from the confession, that any crime had been committed. Appellant argues that there must be corroboration of a confession to sustain a conviction, and in this case the only evidence in addition to his confession was Dr. Kemp's testimony of what the boy had told him, the truth of which the boy now denied. Furthermore, appellant points out that the doctor testified that from his examination of the boy there was no physical evidence that anal intercourse had occurred. We cannot sustain the argument.

Unless made in open court, a defendant's confession standing alone will not support a conviction except where "accompanied by other proof that the offense was committed." Ark. Code Ann. § 16-89-111(d). The test of correctness under this statute is not whether there was sufficient evidence to sustain a conviction, but whether there was evidence that such an offense was committed, or, in other words, "proof of the corpus delicti." *Sawyer* v. *State*, 284 Ark. 26, 678 S.W.2d 367 (1984).

The other proof that the offense was committed came from the testimony of Dr. Kemp, who testified that the boy told him he had been having sex with appellant. When the doctor asked him what he meant, the boy told him the man had put "his thing in my bottom," pointing to his penis and his anal opening to clarify what he meant. The boy told him it had happened "lots of times." The doctor further stated that he had made a complete physical exam and that the results were normal, and while he saw no signs of injury nor anything to indicate anal intercourse, he also stated that neither could he rule out anal intercourse on the basis of his examination.

Prior to the adoption of A.R.E. Rule 803(25), the doctor's testimony as to the boy's statements would have been hearsay, but this was changed by the rule, and such statements, if they meet the criteria set out by the rule, will not be excluded as hearsay. In *Johnson I* we considered an attack on the constitutionality of the rule based on due process and equal protection arguments. We rejected those contentions, not on their merits, but for lack of supporting authority cited by the appellant. *Dixon* v. *State*, 260

Ark. 857, 545 S.W.2d 606 (1977). In this appeal, neither Rule 803(25) nor the admissibility of the boy's statements is challenged. The boy's statements, as exceptions to the hearsay rule, can of course serve as substantive evidence. E. Clearly, *McCormick on Evidence*, § 251 at 744 (3d ed. 1984). Appellant does not dispute this point but simply argues the evidence as a whole is insufficient as a matter of law.

The appellant wants us to disregard the boy's statement to the doctor and others because he recanted them under oath. He argues the only "substantial" evidence the jury heard was the boy's sworn statement the abuse did not occur. But the boy admitted he told the doctor and others that the abuse did occur and those statements were received as evidence and were substantial in nature. Hearsay evidence, when admitted, is substantial evidence that will support a verdict. *Ply* v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980); *Boone* v. *State*, 264 Ark. 169, 568 S.W.2d 229 (1978).

Appellant maintains that in this case there should be corroboration by some physical evidence. We disagree. Appellant has pointed to no authority for this position and we can find none. The rule as long applied has never contained a requirement of that nature and has in fact been applied when it is clear there is no physical evidence to corroborate the victim's testimony. As recently as *Cope* v. *State*, 292 Ark. 391, 730 S.W.2d 342 (1987), we upheld a rape conviction on the testimony of a six year old victim. There was no physical evidence and no testimony by any other witnesses. Similarly in *Waterman* v. *State*, 202 Ark. 394, 154 S.W.2d 813 (1941), a conviction for carnal abuse was sustained on the testimony alone of a girl less than fourteen years old. No other evidence was presented and this court held the evidence sufficient. *See also*, *Bond* v. *State*, 63 Ark. 504, 39 S.W. 554 (1897).

The question in this case, however, is not whether the boy's statements alone are sufficient to convict, but whether they offer sufficient corroboration of the appellant's confession. Given the foregoing authority of uncorroborated statements being sufficient evidence in themselves to convict, we have no doubt that the boy's statements are sufficient to corroborate appellant's confession under § 16-89-111(d) which requires a lesser standard

of evidence. *Sawyer* v. *State*, *supra*.

When the defense presented its case, the boy testified that what he told Dr. Kemp was untrue and that he had fabricated the story because he was mad at appellant. Appellant argues that this testimony should change the result and cites us to *Eaton* v. *State*, 255 Ark. 45, 498 S.W.2d 648 (1973). That case, however, is easily distinguishable, as the *only* evidence presented by the state in *Eaton* was the confession of the defendant.

Aside from the *Eaton* case, the victim's recantation offers no obstacle to our decision. The Eighth Circuit considered a similar factual situation and arrived at the same result. In *United States* v. *Renville*, 779 F.2d 430 (8th Cir. 1985), the appellant was accused of sexual abuse of his eleven year old stepdaughter. A doctor and a deputy sheriff were allowed to testify as to statements made by the girl, identifying the stepfather as her abuser. The victim also testified, recanting her earlier accusations and denying having told anyone except the deputy sheriff that appellant was the abuser. As to the child's recantation the court said, "Although the declarant testified at trial that these earlier statements were lies, this simply provided the jury with a routine question of credibility." *Id.* at 440. The court also pointed out that it was significant that the declarant admitted she made the out-of-court statement to the deputy, making this a very different situation from that where the declarant testifies that an earlier inconsistent statement was never made, raising concerns of manufactured evidence. *Id.* at 440.

So, in the case before us, any inconsistencies presented by the victim's testimony were for the jury to resolve. *Cope* v. *State*, 293 Ark. 524, 739 S.W.2d 533 (1987); *Ellis* v. *State*, 279 Ark. 430, 652 S.W.2d 35 (1983); *United States* v. *Renville*, *supra*. In addition to other indicia of reliability as established by the trial court under A.R.E. Rule 803(25), concerns of manufactured evidence were minimized by the victim's admission that previous statements, contrary to those made at trial, were in fact made. *United States* v. *Renville*, *supra*. We conclude that the trial court did not err in refusing to grant appellant's motion for a directed verdict.

Appellant also contends that the state failed to prove the date of the offense as having occurred within the statute of

limitations as required by § 5-1-111(d), which in this case was within six years of the filing of the information on May 6, 1985. The record refutes the contention. Appellant was arrested on April 27, 1985, and his confession was taken on that date by Officer Beck. Beck testified that he asked appellant if he had oral sex with the boy "on that day" and appellant responded that he had. There was no evidence presented by appellant to indicate the offense was committed prior to six years of filing the information, nor does appellant even argue that was the case. The officer's unequivocal and undisputed testimony on this point eliminates any further argument.

As his second point for reversal, appellant argues that the trial court erred in not allowing him to voir dire the jurors on two points: 1) if there were no physical or documentary evidence, would the jury disregard the prosecutor's references to same; and 2) what was the jury's feeling regarding hearsay evidence versus direct evidence. Both matters included questions of law which were not proper ones for the jury. Beyond that, the extent and scope of voir dire examination is largely a matter of judicial discretion and boundaries of that discretion are rather wide. The restriction of voir dire examination will not be reversed on appeal unless that discretion is clearly abused. *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977). We could not say that there was any clear abuse of that discretion.

Appellant next contends the trial court erred by commenting on the assertion of the doctor-patient privilege in the presence of the jury. In an attempt to keep Dr. Kemp from testifying, the victim and his mother informed Dr. Kemp and the trial court that they were not waiving the doctor-patient privilege. At a pretrial conference the court found the boy's communications to the doctor were not intended to be confidential and were therefore not privileged under A.R.E. Rule 503. *See Baker* v. *State*, 276 Ark. 193, 637 S.W.2d 522 (1982). When the trial commenced, and the doctor began his testimony, there was an objection and then a bench discussion concerning a continuing objection to the privilege. When the discussion concluded the court stated: "Let the record indicate also that an objection has been made under the doctor-patient privilege and the Court has denied that motion and you are ordered and directed to testify, Doctor." Appellant promptly objected on the basis of A.R.E. Rule 512, which limits

comments on claims of privilege. Appellant moved for a mistrial which was denied. On appeal appellant argues the comment was error and the mistrial should have been granted.

A.R.E. Rule 503 recognizes a privilege between patient and doctor which may be claimed by the patient, his guardian or conservator or the personal representative of a deceased patient. A.R.E. Rule 512 applies to all privileges and restricts comment on the claim of privilege:

> RULE 512. Comment upon or inference from claim of privilege-instruction.
>
> (a) Comment of Inference Not Permitted. The claim of a privilege whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> (b) Claiming Privilege Without Knowledge of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> (c) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from claim or privilege is entitled to an instruction that no inference may be drawn therefrom.

Appellant urges that a comment on the privilege is comparable to a comment on a defendant's failure to testify and that the appellant had a right not to have an unfavorable inference drawn from any comment from the court. The state's response is that appellant has no standing to complain because the privilege of Rule 503 does not extend to him. While this is true, it does not appear that the "Comment" Rule, 512, is similarly limited. The person invoking the privilege may not be a party, but an inference could nevertheless be drawn that is unfavorable to a party. See 2 Louissel and Mueller, *Federal Evidence*, (1985) § 249. Furthermore, the language in Rule 512 suggests it would include one who was not involved with the privilege directly, but who could be prejudiced by the mention of it. Rule 512(c) states that "Upon request, *any* party against whom the jury might draw an adverse inference . . ." is entitled to relief from that inference. However, even if appellant can invoke the rule, it is of little help.

The prejudice the rule seeks to avoid would appear to have dissipated when the claim to the privilege has not been sustained, as was the case here, and the jury can actually hear and evaluate the testimony to which the privilege claim was directed. See generally, *id.* § 249. Any prejudice from a remark pertaining only to an unsuccessful attempt to claim the privilege is minimal at best.

Furthermore, the rule does not provide for an absolute prohibition against mention of a claim of privilege. While 512(a) states the standard that a claim of privilege is "not a proper subject of comment," it recognizes in the next section that it will at times be mentioned: ". . . proceedings shall be conducted, *to the extent practicable*, so as to facilitate the making of claims of privilege without the knowledge of the jury." [Our emphasis.] The rule also recognizes the extent of damage by such mention in Rule 512(c), by authorizing a party to request a cautionary instruction when an adverse inference might be drawn.

Even if we were persuaded that error had occurred in this instance, the rule itself provides the appropriate sanction, a cautionary instruction to the jury. No such instruction was requested, and we think the trial court's denial of a mistrial was not an abuse of discretion. *Birchett* v. *State*, 294 Ark. 176, 741 S.W.2d 267 (1987).

As his final point, appellant contends the trial court made an unwarranted rebuke of defense counsel in the presence of the jury. Prior to resting, the state offered a certified copy of the victim's birth certificate into evidence and the court stated it could be received. There seems to have been a pause, after which the defense announced its objection to the introduction of the exhibit. The court then stated: "It took you a long time to make up your mind, overruled." Counsel approached the bench and objected to the court's addressing counsel "in that way" in the presence of the jury, and requested a mistrial. The court responded:

> When something is proffered I pause and hesitate a respectful period of time to give you an opportunity to look at it and make any objection. And if there is none, then I assume that there is no objection and I rule its admissibil-

> ity. A certified copy of a birth certificate is, under the laws and statutes, admissible in evidence. So I will overrule your objection and your motion for a mistrial will be denied.

In *McDaniel* v. *State*, 283 Ark. 352, 676 S.W.2d 732 (1984), we attempted to distinguish between the kinds of remarks that could result in reversal, that is, those that are suggestive of a deliberate intent to ridicule or demean counsel, and those which seemingly emanate merely from impatience or annoyance. This remark, we believe, belongs to the latter category. If counsel felt aggrieved by the remark, he could have asked for an admonition to the jury. There was no such request. The only motion was one for a mistrial, which under the guidelines set out in *McDaniel*, was clearly not warranted.

The judgment is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. This is a sad story indeed. It all started when a little boy was going fishing with his mother's boyfriend (the child's present stepfather) but learned at the last minute that someone else was to take his place. The child became upset and unruly, and took his spite out on his little sister. His mother, on discovering what he had done, imposed punishment by way of a spanking. After the boy had been put in a corner, he was still unhappy about the fishing trip and at that time told his mother that her boyfriend, the appellant, had sexually molested him. The mother immediately took her child to a doctor, who decided to send him on to a hospital where he received a more complete examination and evaluation.

After the initial examination at the doctor's office, both the mother and her boyfriend returned home at about the same time. The mother, for fear of arousing the ire of the appellant, told him that the boy had to be taken to the hospital because he had not been to the bathroom in three days. The appellant, who had returned home for some item that he had forgotten, dismissed his fishing partner and insisted on carrying the boy and his mother to the hospital.

Neither the mother nor the child told the appellant the real reason for their trip to the hospital. After the child indicated he did not want to go through with the examination, the appellant,

who at that point did not know that he had been accused, insisted on the child being examined. On two occasions before reaching the examination room, the appellant had to employ stern language to get the boy to go through with the examination.

The boy, apparently with reluctance, told the hospital personnel that the appellant had molested him. Two officers then went to the waiting room and arrested the appellant. This was his firs knowledge, according to his testimony at trial, of what was happening. The father was taken away to jail, and the boy and his mother went home. Shortly thereafter the child recanted his story.

Before recanting the story, the child told a deputy sheriff, a social worker, and the examining doctor that he had been molested. The doctor found no evidence of physical or sexual abuse. At the trial the child denied that he had ever been molested by the appellant. The evidence at trial consisted solely of hearsay testimony. Generally speaking, their testimony was simply that the child had told them that the appellant had molested him. The boy freely admitted at trial that he had told the doctor and others that he had been molested, but insisted that he was mad about the fishing trip and that he made up the story.

Neither the initial examination nor the examination at the hospital revealed any evidence whatsoever of physical or sexual abuse of the child. The only evidence of abuse presented at trial was the recanted story the child had given on the date he was knocked out of the fishing trip.

The only other evidence of abuse presented at the trial was the testimony of the deputy sheriff that the appellant had admitted the act soon after he had been taken into custody. The appellant testified that he never admitted that he had sexually abused the child.

At the trial, the alleged victim testified that he was twelve years of age and was making A's and B's in the seventh grade; he stated that he was vice-president of the student council, a member of the science club, starting tackle on the football team, and a church member. He very clearly explained his understanding of the oath to tell the truth and swore that the appellant had never molested him.

The result in this case is yet another product of the hysteria of crime paranoia that has gripped this nation for some time. I cannot understand why this child's original story should be believed when he made the accusations while he was upset with the appellant, and then recanted the story soon thereafter. Furthermore, this young man is a devoted member of his church and obviously comprehends the responsibilities of taking an oath. He testified under oath that he had lied on the earlier occasion and that the appellant had never molested him sexually. The only reason I can think of for the jury not believing him while he was under oath and believing him when he was not is the attitude among many citizens that a defendant in a criminal trial is guilty or he would never have been charged.

An additional error by the trial court concerns the voir dire of the jury by defense counsel. It is my opinion that the voir dire was unjustifiably restricted. Counsel proposed to ask the jury the following question: "If there was not any physical or documentary evidence, would the jury disregard the prosecutor's reference to same?" Counsel also attempted to inquire of the jury panel members concerning their attitudes on hearsay evidence as opposed to direct evidence. The court refused to allow this inquiry also. The whole purpose of voir dire is to discover if there is any basis for a challenge for cause and to intelligently exercise peremptory challenges. *Sanders* v. *State*, 278 Ark. 420, 646 S.W.2d 14 (1983). Although the scope of voir dire examination is generally vested within the sound discretion of the trial court, and we will not reverse in the absence of abuse of this discretion, the trial court nevertheless should not unduly restrict the extent of voir dire. *Fauna* v. *State*, 265 Ark. 934, 582 S.W.2d 18 (1979); and *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977). I believe these questions were within the legitimate scope of voir dire and should have been permitted.

It was prejudicial error to allow the doctor to testify in view of the fact that the boy and his mother had both given the doctor a written statement that they were not waiving the doctor-patient privilege. Their refusal to waive the privilege was reserved for objection throughout the trial. The doctor was called as a witness and testified about what the boy and his mother had told him. The objection by defense counsel was overruled, and the court stated in the presence of the jury: "Let the record indicate also that an

objection has been made under the doctor-patient privilege and the court has denied that motion and you are ordered and directed to testify, doctor." It is my belief that this was an improper comment by the judge on the privilege which had been asserted. Arkansas Rules of Evidence, Rule 512, states:

> COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE — INSTRUCTION.
>
> (a) Comment or Inference Not Permitted.
>
> The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> (b) Claiming Privilege Without Knowledge Of Jury.
>
> In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

Even if Arkansas Rules of Evidence Rule 803(25)(A) were valid, it is not a license to prosecute any adult upon nothing more than the hearsay statement of a minor that an adult has abused him or her. Nevertheless, under the precedent of today's decision, a person can be convicted upon the hearsay statement of a child in spite of the fact that the child testified under oath that the statement was never made.

I am of the opinion that what is called A.R.E. Rule 803(25)(A) is unconstitutional for the reasons stated in *Cogburn* v. *State*, 292 Ark. 564, 732 S.W.2d 807 (1987); *Hughes* v. *State*, 292 Ark. 619, 732 S.W.2d 829 (1987); and *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987). Although one would not know it from a reading of the majority opinion, this court has never expressly ruled that A.R.E. Rule 803(25) is constitutional. Had we in some previous opinion made so significant a holding — one bearing such weight with respect to the vital question of the separation of powers — surely the majority opinion would have quoted the historic language. Because, however, no such explicit approval of the General Assembly's enactment of A.R.E. Rule 803(25) may be found in *Cogburn*, *Hughes*, *Johnson*, or any other decision of this court, you will search the majority opinion in

vain for the magic phrase.

Of course, the reason why this court has not held A.R.E. Rule 803(25) constitutional is because it realizes that this enactment, which was not included in the adoption of the Arkansas Rules of Evidence in *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986), violates the Sixth Amendment to the United States Constitution. Justice Dudley, concurring in *Johnson* I, stated that, after our ruling in *Ricarte*, "[t]he Legislature later enacted Rule 803(25), but this Court has not adopted such a rule, and probably will not do so." 292 Ark. at 652, 732 S.W.2d at 828. Yet the majority speaks of the "adoption of A.R.E. Rule 803(25)" and refers to the court as having "upheld the rule" in *Johnson* I, thus appearing to concede to the General Assembly by default what Justice Dudley in his "caveat" termed the "separation of powers issue."

We have never squarely addressed this important question. But in any event, the state cannot impose rules on this court. Why should we allow the trial courts to operate pursuant to a nonexistent rule, whether constitutional or not?

The errors in the trial court were sufficient to require a reversal.

Gary Frank BONDS *v.* STATE of Arkansas

CR 89-73 770 S.W.2d 136

Supreme Court of Arkansas
Opinion delivered May 15, 1989
[Rehearing denied June 5, 1989.]

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

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

DAVID NEWBERN, Justice. The appellant, Gary Frank Bonds, pleaded guilty to theft and burglary and was placed on five years probation. A petition was filed seeking revocation of his probation, alleging failure to report to the probation officer, failure to pay fines, costs, or fees, and failure to notify authorities of address and employment change. Bonds filed a "motion for discovery" seeking information such as the names of the witnesses and documentary evidence against him. The state did not respond, and at the beginning of the revocation hearing Bonds renewed his motion for discovery. The prosecutor argued there was no need for further notice to Bonds of the allegations with which he was faced. The judge denied Bonds's motion as well as his motion for a preliminary hearing. We find no prejudicial error, as Bonds testified at the revocation hearing and admitted his failure to comply with the conditions of his probation.

We agree that due process of law entitled Bonds to disclosure of the evidence against him. *See Black* v. *Romano*, 471 U.S. 606 (1985). However, given Bonds's testimony admitting the violations with which he was charged, we find he suffered no prejudice.

Lisa Ray, the probation officer, testified that Bonds committed all the violations alleged. Bonds testified he had a conversation with Ms. Ray in which she had advised him of his obligations. He testified he later changed addresses without telling her, did not report, and relied on his wife to make the payments on his fine and costs, knowing that these were his responsibilities and not those of his wife or mother.

We do not reverse where an alleged error is not prejudicial. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). Bonds has

not demonstrated he could in any way have benefitted from the information of which he sought disclosure. We are convinced beyond a reasonable doubt that, given Bond's testimony admitting the probation violations, there was no prejudice to his case. *Chapman* v. *California*, 386 U.S. 18 (1967).

Affirmed.

William Bruce TAYLOR *v.* STATE of Arkansas

CR 89-20 770 S.W.2d 135

Supreme Court of Arkansas
Opinion delivered May 15, 1989

*Appellant*, pro se.

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

DAVID NEWBERN, Justice. William B. Taylor has asked us to reverse the decision of the trial court revoking the probation and sentencing him to imprisonment for concurrent terms of ten years for attempted murder, ten years for terroristic threatening and six years for aggravated assault. He pleaded guilty to those offenses after we had reversed an earlier conviction, *Taylor* v. *State*, 284 Ark. 103, 679 S.W.2d 979 (1984), and he was fined $2,000 and placed on supervised probation for five years. In his pro se brief he argues his sentence to imprisonment upon revocation should be no longer than his probation period. He also argues double jeopardy. As Taylor has presented no abstract of the record, we must affirm.

Pro se litigants are held to the abstracting requirements of Arkansas Supreme Court and Court of Appeals Rule 9. *Pennington* v. *Lockhart*, 297 Ark. 475, 763 S.W.2d 78 (1989); *Bryant* v. *Lockhart*, 288 Ark. 302, 705 S.W.2d 9 (1986). The rule permits affirmance if the abstract is flagrantly deficient. As no abstract was presented, we affirm.

Affirmed.

Letha DAVIS, Individually and as Executrix of the Estate of C.G. Davis, Deceased, et al. *v.* W.A. GRIFFIN, et al.

89-38 770 S.W.2d 137

Supreme Court of Arkansas
Opinion delivered May 15, 1989

*Woodward and Epley*, for appellants Letha Davis and Charles Brandon.

*Kinard, Crane & Butler, P.A.*, for appellants Georgia Daniel Anderson and Robert W. Anderson, her husband; and Joe M. Daniel and Erma Daniel, his wife.

*Smith, Stroud, McClerkin, Dunn & Nutter*, for appellees.

TOM GLAZE, Justice. This appeal originated from an interpleader action by UPC Falco to determine the ownership of royalty interest in the oil the company was purchasing. The oil was produced from wells located on land originally owned by J.M. Daniel. Daniel died intestate and was survived by his widow Estherlee Wellborn and eight children, from three different marriages.[1] Under our intestate laws, Daniel's descendants received his estate subject to the widow's dower and homestead rights. In October of 1935, Wellborn and Daniel's descendants signed an instrument entitled "Agreement," which provided that Wellborn agreed to receive a one-ninth interest in all royalties, rentals, purchase price and other returns derived from any oil and gas lease in lieu of her dower and homestead rights in any oil or

[1] Since the time of J.M. Daniel's death, his widow has remarried. For clarity purposes, she will be referred to by her new married name, Wellborn, throughout the opinion.

gas lease, royalty or mineral deed. In 1959, Wellborn conveyed mineral interests in royalty deeds to C.G. Davis, who later conveyed one-half of his interest to John McDonald. Wellborn, Davis and McDonald are now deceased.

In the interpleader action, the chancellor was asked to interpret what interest was conveyed to Wellborn by the "Agreement." The chancellor found that the instrument did not convey a fee simple interest in the mineral rights to Wellborn and therefore any interest she had terminated upon her death. The personal representatives of Davis and McDonald along with Daniel's and Wellborn's two children appeal from this finding. The appellees are the rest of Daniel's descendants. We affirm.

In reviewing instruments, this court's first duty is to give effect to every word, sentence and provision of a deed where possible to do so and give effect to the intention of the parties. *Constant* v. *Hodges*, 292 Ark. 439, 730 S.W.2d 892 (1987). Since an instrument conveying oil and gas interests is viewed as a conveyance of an interest in land, it is subject to the same formalities. *See Helms* v. *Vaughn*, 250 Ark. 828, 467 S.W.2d 399 (1971). Although formal words are not required, a deed must contain sufficient words to convey the interest. *See Harper* v. *McGoogan*, 107 Ark. 10, 154 S.W. 187 (1913); *Malin* v. *Rolfe*, 53 Ark. 107, 13 S.W. 595 (1890). In *Griffith* v. *Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S.W. 218 (1913), this court stated that in order to convey legal title, it was absolutely necessary that there be words expressing the fact of a sale or transfer of the title, such as the words "grant, bargain and sell." *See also* Ark. Code Ann. § 18-12-102(b) (1987).

In our case, the part of the "Agreement" which should contain the granting language provides in pertinent part the following:

> Now therefore for and in consideration of the sum of $1.00 cash in hand paid by parties of the first part (descendants of Daniel) to the second part (Wellborn), the said party of the second part does hereby agree that if and when a lease or royalty or mineral deed for oil, gas and other minerals shall have been executed by the parties hereto, . . . that in lieu of such sums as party of the second part would have received under such lease for oil and gas . . . that she shall

receive thereunder a one-ninth interest.

As one can clearly see from the above language, no words of conveyance are present. Therefore, we find the instrument void of language necessary to convey a fee simple interest.

In addition to requiring sufficient words to convey a fee simple interest, our law requires courts to give effect to the parties' intent, if possible, when construing an instrument. *See Schnitt* v. *McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968). We are to acquaint ourselves with the persons and circumstances and place ourselves in the same situations as the parties who drafted the instrument. *Id.* We believe that the parties' intent in our case supports the finding that there was no conveyance of a fee simple interest.

From the language of the instrument itself, we are told that the parties wanted to settle what share Wellborn would receive from any proceeds from oil and gas leases, royalties, and mineral deeds, so that the parties could be in a position to lease the lands without delay.[2] Importantly, the instrument also contained the following language: "It being understood that this instrument in no way affects the dower and homestead rights of [Wellborn] in said lands except as to leases, royalty or mineral deeds to be executed and the proceeds to be derived therefrom." We believe this language strongly reflects that the parties' intent was only to come to an agreement on how much Wellborn would receive from the proceeds of the mineral rights. Accordingly, we conclude that only Wellborn's dower and homestead interest in proceeds from leases, royalties and deeds were affected by the instrument. She retained her dower and homestead rights to the undeveloped mineral estate and in the land itself. The fact that these dower and homestead rights were purposely not affected clearly shows that the parties could not have intended a conveyance of a fee simple estate.

In reviewing the parties' circumstances and the instrument

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[2] The appellants strongly rely on the fact that Wellborn made conveyances of mineral rights in 1959 to show that she thought that the instrument conveyed a fee simple interest. In light of the lack of words of conveyance and the language of the instrument itself, we do not find this fact persuasive.

they drafted, we must affirm the chancellor's construction of the instrument as only defining what Wellborn would receive in lieu of her dower and homestead and not as a conveyance of an absolute estate to one-ninth interest in the mineral rights.

For the reasons stated above, we affirm.

[redacted]

[redacted]

[redacted]

[redacted]