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ARK.

Wilfredo G. GONZALEZ *v.* STATE of Arkansas

CR 90-279 811 S.W.2d 760

Supreme Court of Arkansas
Opinion delivered June 10, 1991

LaJeana Jones, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. On May 8, 1990, the appellant, Wilfredo Gonzalez, was convicted of five counts of delivery of a controlled substance and sentenced to a term of life in the Arkansas Department of Correction for each count.

Gonzalez alleges two points of error on appeal: 1) that the denial of his motion to dismiss "the remaining five charges" in CR 89-69 was error, and 2) that the admission into evidence of the exhibits in this case constituted error because the proper chain of custody was not established. Neither argument has merit, and we affirm.

Gonzalez was initially charged in a single information on August 21, 1989, with seven counts of delivery of a controlled substance (cocaine). The dates of alleged delivery were December 2 and December 28, 1988, January 2, January 6, January 7, January 14, and May 23, 1989.

The first two counts against Gonzalez were set for trial on December 1, 1989, at which time he was convicted and sentenced to life imprisonment and a $25,000 fine on each charge. We reversed those two convictions and remanded for a new trial. *Gonzalez* v. *State*, 303 Ark. 537, 798 S.W.2d 101 (1990).

Apparently, Gonzalez now claims that the trial court erred in denying his motion to dismiss the remaining five charges contained in the information. However, he cites no authority to support his contention, and we decline to consider this argument on appeal. *Garza* v. *State*, 293 Ark. 175, 735 S.W.2d 702 (1987). In addition, we note that we returned the record to the trial court for settlement on the issue of the severance of these charges. The trial court concluded at the hearing to supplement the record that ". . . we were trying to find a case to try the next day because we had a jury coming in and the two cases against Gonzalez where the chemist was available were the ones suggested by the prosecutor and agreed to by the Court and not objected to by the defendant other than a Motion for a Continuance and that is the reason those two particular charges were severed from the remaining five charges." Gonzalez did not make a request for joinder pursuant to Ark. R. Cr. P. 21.3, and his failure to do so

constituted a waiver of any right of joinder as to the related offenses with which he knew that he had been charged.

Gonzalez contends in his second point of error that the admission into evidence of the exhibits in this case was error because the proper chain of custody was not established.

We note that a party has a duty to make a timely and complete objection to the admission of evidence. *Moore* v. *State*, 303 Ark. 514, 798 S.W.2d 87 (1990) (citing *Dumond* v. *State*, 290 Ark. 595, 721 S.W.2d 663 (1986)). In this case, both Officer W.L. Holbrook, the undercover agent who purchased the cocaine from Gonzalez, and Ms. Mary Buhler, a chemist in the drug section of the Arkansas State Crime Lab who analyzed the substances submitted by Officer Holbrook, testified without objection that the substances obtained from Gonzalez were cocaine. It was not until the physical exhibits themselves were offered as exhibits to the proof already received that defense counsel objected.

Consequently, Gonzalez did not make a timely objection to the testimony that the substances at issue were cocaine, and he is now precluded from raising the issue on appeal. Furthermore, evidence that is merely cumulative or repetitious of other evidence admitted without objection cannot be claimed to be prejudicial. *Dumond* v. *State, supra.*

Pursuant to Ark. Sup. Ct. R. 11(f), we have reviewed the entire record for other reversible error and find none.

Therefore, the judgment of the trial court is affirmed.

Ernest McELROY *v.* C.C. GRISHAM, Bill Doshier, & H.D. McCaleb, Individually and as Partners d/b/a/ BBS Company, a Partnership

91-21 810 S.W.2d 933

Supreme Court of Arkansas
Opinion delivered June 10, 1991

Stephen E. Adams, Ltd., by: *Stephen E. Adams*, for appellant.

Adams & Nichols, by: *Donald J. Adams*, for appellee.

JACK HOLT, JR., Chief Justice. The appellant/cross-appellee, Ernest McElroy, initially filed suit in the Boone County Chancery Court requesting equitable relief in the cancellation of a warranty deed, option contract, and deed for sale, as well as the quieting of title to the real estate in question. These requests were predicated, in part, on Mr. McElroy's allegations that the deed and contracts between him and the appellees/cross-appellants, C. C. Grisham, Bill Doshier, and H. K. McCaleb, individually and doing business as BBS Company, constituted a usurious scheme to loan money.

The chancellor found that the transaction was a usurious loan and that the deed from the appellant to the appellees "was in fact a mortgage" and issued his orders accordingly.

While appellant McElroy agrees with chancellor's finding that the transactions amounted to a usurious loan, he contends, on appeal, that the chancellor erred: 1) in determining the amount of interest he paid; 2) in refusing to award twice the amount of interest paid; 3) in refusing to award him attorney's fees; and 4) in awarding post judgment interest on the balance found due to the appellees.

On cross-appeal, the appellees contend that the chancellor erred in finding the transaction was a usurious loan and in denying their motion for summary judgment, in which they argued that a release signed by Mr. McElroy constituted a release and termination of the contract at issue.

We agree with the chancellor's findings that the transaction was usurious but reverse and remand as to his calculation of interest paid and the award of a penalty. We affirm the trial court as to the appellees' cross-appeal.

Mr. McElroy is engaged in the residential home construction business. In 1984 and 1985, he acquired a total of 104 acres of property for which he paid $238,357. In addition, Mr. McElroy

claims to have invested approximately $19,200 preparing the land for residential development.

By early 1987, Mr. McElroy was experiencing financial difficulties and contacted Mr. C. C. Grisham for help. He claims to have requested an initial loan of $100,000 from Mr. Grisham. This proposal was rejected, but, after lengthy negotiations, the parties agreed that Mr. McElroy would deed the property to Mr. Grisham and his partner, Mr. H. D. McCaleb, in exchange for $80,000. In addition, Mr. McElroy was to receive a contract for deed allowing him to repurchase the property for $120,000, of which $40,000 was to be paid in one year and the balance of $80,000 at the end of two years.

Mr. Grisham referred Mr. McElroy to Mr. Bill Doshier, an attorney, to complete the necessary legal work. Mr. Doshier was subsequently brought into the transaction as an equal partner with Mr. Grisham and Mr. McCaleb, which partnership was named BBS Company. At Mr. Doshier's suggestion, the contract for deed was changed to an option contract and, on February 13, 1987, the parties executed a warranty deed, in which Mr. McElroy conveyed the property to the appellees, and an option contract, wherein Mr. McElroy was given one year to exercise his option to repurchase the property; $40,000 to be paid at the time of purchase and $80,000 to be paid within a total of two years, interest free. The appellees disbursed $80,000 to Mr. McElroy through an abstract and title company and required Mr. McElroy to obtain release of over $120,000 in liens against the property.

Mr. McElroy claims that in February, 1988, before the expiration of the option contract, he approached the partnership about exercising his option. This is disputed by the appellees who claim that Mr. McElroy allowed the option contract to expire. In either event, the parties disregarded the option contract and executed a contract for deed on March 1, 1988, in which Mr. McElroy agreed to pay $125,000 for repurchase of the property (less three lots to be retained by the "sellers"). This price was $5,000 more than the "option price". Mr. McElroy was to pay $16,000 at closing and the balance of $109,000 in installments, at an annual rate of 10%, which was evidenced by a promissory note. The parties have stipulated that during the term of this agreement, Mr. McElroy made payments to the appellees total-

ling $45,195.

In April, 1989, Mr. McElroy was informed by the appellees that he still owed over $86,000 on the debt. He filed suit in the Boone County Chancery Court shortly thereafter.

Following trial, the chancellor entered two opinion letters in which he held that "the underlying and real purpose of this transaction was a loan to plaintiff in the amount of $80,000, and that since it was a loan, under its terms, it exceeded the lawful rate of interest." The court found that Mr. McElroy had repaid $45,195, of which $10,866 was interest, leaving $34,329 paid on the principal and $45,671 owing. This amount was offset by a penalty of $16,300, assessed against the appellees, which resulted in a final judgment of $29,371 in favor of the appellees. Mr. McElroy was ordered to pay the debt within 30 days of judgment or face foreclosure.

Since all the issues before us hinge on the central question of whether there was, in fact, a usurious loan, we address the appellees' arguments on cross-appeal, first.

I. USURIOUS LOAN

Initially, we note that while we review chancery cases *de novo*, we recognize the superior position of the chancellor to weigh issues of credibility and therefore we do not reverse unless the chancellor's findings are clearly erroneous. *Taylor's Marine, Inc.* v. *Waco Mfg.*, 302 Ark. 521, 792 S.W.2d 286 (1990).

In denying that the transactions amounted to a usurious loan, the appellees first contend that the documents were not usurious on their face. While it is true that, taken alone, the original warranty deed and option contract appear to be documents concerning only the sale of land, and no mention of a loan or obligation on the part of Mr. McElroy to repay the appellees is recited, these transactions call to mind an oft quoted maxim: "The law shells the covering and extracts the kernel. Names amount to nothing when they fail to designate the facts." *Sparks* v. *Robinson*, 66 Ark. 460, 515 S.W. 460 (1899). In *Sparks*, we upheld the trial court's conclusion that an absolute bill of sale of a sewing machine, coupled with an absolute right of redemption, amounted to nothing more than a mortgage with a usurious rate of interest.

Here, the chancellor found that the purported sale and option to repurchase were nothing more than a cloaking device to hide the true transaction—a loan in the amount of $80,000 to be repaid in two years, with interest totalling $40,000. Such a transaction has been historically recognized as one of several simple devices to evade Arkansas usury laws. *See* G. Collins and V. Ham, *The Usury Law of Arkansas: A Study in Evasion*, 8 Ark. L. Rev. 399 (1954).

The burden is upon the one asserting usury to show the transaction is usurious, and usury will not be presumed, imputed, or inferred where an opposite result can be fairly reached. *Winkle* v. *Grand Nat'l Bank*, 267 Ark. 123, 601 S.W.2d 559 (1980). The test, however, is not whether the "lender" intended to violate the usury laws, but whether the lender knowingly entered into a usurious contact intending to profit by the methods employed. *See Id.*; *Davidson* v. *Commercial Credit Equip. Corp.*, 255 Ark. 127, 499 S.W.2d 68 (1973). Furthermore, it is unnecessary that both parties intend that an unlawful rate of interest be charged; if the lender alone charges or receives more than is lawful the contract is void. *Superior Improvement Co.* v. *Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980) (decision under prior law).

The chancellor was faced with conflicting testimony throughout the trial in this case. He obviously found Mr. McElroy's version of the events to be the more credible and, deferring to his advantage in observing the witnesses' demeanor and in considering the evidence presented in the record, we cannot conclude that his decision was clearly erroneous.

Mr. McElroy testified that prior to contacting the appellees, he had approached a number of banks and individuals for a loan and had been rejected. He testified that he was in dire financial trouble and that the appellees were aware of his situation.

Mr. McElroy contacted Mr. Grisham and initially requested a loan of $100,000. This request was rejected but, after further discussions, Mr. Grisham agreed to a loan of $80,000, of which $40,000 was to be repaid in one year and another $80,000 within the following year. This agreement later developed into a warranty deed combined with an option to purchase. Mr. McElroy admitted it was he who proposed the terms finally agreed

upon, and we have said that a debtor may be estopped from asserting the defense of usury when the debtor created the infirmity in the contract in order to take advantage of the creditor. *Ford Motor Credit Co.* v. *Hutcherson*, 277 Ark. 102, 640 S.W.2d 96 (1982). Such was not the case here. Mr. McElroy stated that he was in financial straits and testified repeatedly that it was never his intention to relinquish his land, but simply to arrange a loan for temporary financial relief. Clearly, it was the appellees, not Mr. McElroy, who received an unfair advantage.

Furthermore, there was testimony from Mr. McElroy's expert witness that the land was valued at $227,200, and, in fact, Mr. McElroy states that he paid approximately $238,357 for it. This evidence reflects a gross disparity between what Mr. McElroy paid for it, and the appellees' purchase price of $80,000.

There was also disagreement in the record as to the execution of the contract for sale. The appellees maintained that Mr. McElroy simply failed to exercise his option in time and that a lawful contract for deed was then executed after the allegedly usurious transaction was obsolete. Again, the trial court gave credence to Mr. McElroy's testimony that he began discussing the exercise of his option before the February 13, 1988, expiration date. The parties discussed Mr. McElroy selling a condominium to the appellees for $45,000, which could be rolled over to the option contract, but this plan was not carried out. When it became apparent that Mr. McElroy would be unable to make the $40,000 payment, as required by the option contract, the parties renegotiated and executed the contract for deed with new terms of payment. Although the document was signed on March 1, 1988, Mr. McElroy claims that its terms were decided prior to the expiration of the option and introduced into evidence a typewritten memo setting out such terms, which he claims to have signed on February 13, 1988.

In deciding whether a certain transaction is usurious, all attendant circumstances must be taken into consideration. *Sammons-Pennington Co.* v. *Norton*, 241 Ark. 341, 408 S.W.2d 487 (1966). Mr. McElroy's obvious financial troubles, his expressed intent to keep the land, the substantial disparity between what Mr. McElroy paid for the property and the appellees' purchase price, and the appellees' immediate renegotiation of a

contract for deed when it became apparent Mr. McElroy could not "exercise his option," all point to the conclusion that none of the parties intended for the property to come into the hands of the appellees any more than was necessary to secure the loan and for the appellees to make a profit from such loan.

Similar transactions have previously been scrutinized by this court and all were deemed usurious. *See Tillar* v. *Cleveland*, 47 Ark. 287, 1 S.W. 516 (1886); *Sparks* v. *Robinson*, 66 Ark. 460, 51 S.W. 460 (1899); *Banks* v. *Walters*, 95 Ark. 501, 130 S.W. 519 (1910); *Ringer* v. *Virgin Timber Co.*, 213 F. 1001 (E.D. Ark. 1914); *Sleeper* v. *Sweetser*, 247 Ark. 477, 446 S.W.2d 228 (1969). We have no trouble in reaching the same conclusion and uphold the chancellor's finding that all of the transactions constituted one scheme to loan money at a usurious rate of interest.

II. RELEASE

The appellees' second argument on cross-appeal challenges the trial court's denial of their motion for summary judgment in which it was argued that a "release agreement" signed by Mr. McElroy effectively terminated the contract for deed and resulted in Mr. McElroy's forfeiture of the property.

We do not consider this argument, however, since the denial of a motion for summary judgment is not subject to review on appeal, even after a trial on the merits. *See Rick's Pro Dive 'N Ski Shop, Inc.* v. *Jennings-Lemon*, 304 Ark. 671, 803 S.W.2d 934 (1991).

In addition, the appellees' failure to cite any legal authority in support of this argument further merits its dismissal. *See May* v. *Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

Having disposed of the appellees' cross-appeal, we now turn to Mr. McElroy's arguments on direct appeal.

III. INTEREST PAYMENT

Mr. McElroy first contends that the trial court erred in determining the amount of interest he paid on the loan. Ark. Const. art. 19, § 13(a) provides that the maximum rate of interest shall not exceed 5% per annum above the applicable Federal

Reserve Discount Rate. This was established at trial to be 10.5%. Art. 19, § 13 further provides that all contracts having a rate of interest in excess of the maximum lawful rate will be void as to the unpaid interest.

Although the chancellor determined that the usurious transaction at issue involved the initial "loan" of $80,000 at a repayment of $120,000 (i.e. interest in the amount of $40,000), he erroneously relied on appellee Doshier's calculation of interest under the second contract for deed, which called for a payment of $125,000 to be made in installments at a 10% interest rate. These figures were calculated by Mr. Doshier during a discussion with Mr. McElroy concerning his repayments under the contract for deed and the chancellor understandably relied on them as no other calculations regarding the amount of interest already paid by Mr. McElroy were offered. The calculations showed that a total of $46,000 paid by Mr. McElroy, $10,866 of that amount went to interest under the terms of the contract. In determining whether a contact is usurious, it must be viewed as of the time it is entered into. *Hayes* v. *First Nat'l Bank of Memphis*, 256 Ark. 328, 507 S.W.2d 701 (1974). Since the usurious transaction began with the original loan of $80,000 to be repaid at $120,000, the amount of interest paid must be calculated on the basis of that initial transaction, rather than the second contract for deed.

At trial, Mr. Danny Criner, President of Newton County Bank, testified that an $80,000 loan, repaid at $40,000 in one year and $80,00 the following year, would result in an annual interest rate of 30 to 35%. No further testimony or calculations were offered to explain these figures. Mr. McElroy's computations place the illegal rate at approximately 25%.

Because of these discrepancies, we remand the case so that the correct annual interest rate of the original transaction can be calculated.

In addition, we instruct the trial court to determine, in accordance with the dates and amounts of payments made by Mr. McElroy, how much of the payments already made constitutes payment toward the principle debt and how much constitutes interest. There is sufficient evidence of the exact dates and amounts of the payments in the record from which to calculate the interest. Mr. McElroy has suggested a method of calculation

using a 25% rate of interest, and a 365 exact-day interest formula. We note that this is one of four acceptable methods of computing simple interest, and refer the trial court to our discussions in *Martin's Mobile Homes* v. *Moore*, 269 Ark. 375, 601 S.W.2d 838 (1980), and *Ford Motor Credit Co.* v. *Hutcherson, supra*, for guidance as to the appropriate method of calculation.

IV. PENALTY

Mr. McElroy next argues that the chancellor erred in refusing to award twice the amount of interest paid. We agree.

Art. 19, § 13(a)(ii) provides:

> All such contracts having a rate of interest in excess of the maximum lawful rate shall be void as to the unpaid interest. *A person who has paid interest in excess of the maximum lawful rate may recover, within the time provided by law, twice the amount of interest paid.* It is unlawful for any person to knowingly charge a rate of interest in excess of the maximum lawful rate in effect at the time of the contract, and any person who does so shall be subject to such punishment as may be provided by law. (Emphasis added).

The trial court interpreted the above language to be discretionary and awarded only $16,300 as penalty, based on an interest calculation of $10,866. Whether this specific provision is mandatory or discretionary has not been decided by this court, although we have upheld awards for twice the amount of interest paid. *See Taylor's Marine* v. *Waco Mfg., supra.*

In *Taggart & Taggart Seed Co., Inc.* v. *City of Augusta*, 278 Ark. 570, 647 S.W.2d 458(1983), however, we reaffirmed our principle that those things which are of the essence of the thing to be done are mandatory, while those not of the essence of the thing to be done are directory only. 278 Ark. at 574, 647 S.W.2d at 459 (1983) (citing *Edwards* v. *Hall*, 30 Ark. 31 (1875)). Art. 19, § 13, as we interpret it, is penal in nature. This is evidenced by the language following the provision for recovery of interest. The purpose of the article was obviously to discourage ursurious contracts, and to allow the trial courts to dispense with the penalty at their discretion would be to defeat this purpose.

Furthermore, we reminded, in *Arkansas State Racing Comm'n* v. *Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956) that "[i]t is of course a familiar rule of statutory construction that 'may' is to be construed as 'shall' when the context of the statute so requires." Constitutional provisions are construed in the same manner as statutes. *See Shepherd* v. *City of Little Rock*, 183 Ark. 244, 35 S.W.2d 361 (1931); *McDonald* v. *Bowen*, 250 Ark. 1049, 468 S.W.2d 765 (1971).

We hold that the language in Art. 19, § 13 is mandatory, and further remand with directions to award Mr. McElroy twice the amount of the interest to be calculated in accordance with our previous instructions.

V. ATTORNEY'S FEES

Mr. McElroy next argues that he should have been awarded attorney's fees under Ark. Code Ann. § 16-22-308 (Supp. 1989). This statute allows a prevailing party in a civil action to recover reasonable attorney's fees for various causes of action, including breach of contract. Mr. McElroy claims that a usurious transaction falls within this category.

We do not address this argument, however, since the trial court did not rule on the issue. Although Mr. McElroy asked for attorney's fees in his complaint, and in a letter to the trial court following its first opinion letter, the trial court did not rule upon the request, either in its second letter of opinion or in its final order.

The burden of obtaining a ruling is on the movant; objections and matters left unresolved are waived and may not be relied upon on appeal. *Carpetland of N.W. Ark., Inc.* v. *Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991).

VI. POST JUDGMENT INTEREST

Finally, Mr. McElroy contends that if this court decides not to adjust the interest calculation or penalty assessed so as to award a net judgment in his favor, the trial court's decision should be modified to eliminate the requirement that he pay post judgment interest.

Whether or not post judgment is awarded in Mr. McElroy's favor, will depend on the trial court's decision on

remand. However, we do not agree with Mr. McElroy's argument that Art. 19, § 13 bars post judgment interest. Art. 19 voids only the payment of interest under the usurious contract and has nothing to do with the interest due on the judgment amount. Should the trial court award net judgment again in favor of the appellees, it may also again award post judgment interest on that amount.

The decision of the trial court is affirmed in part and reversed and remanded in part, with instructions not inconsistent with this opinion.

Charles TACKETT and Alberta Tackett *v.* FIRST SAVINGS OF ARKANSAS

90-237 810 S.W.2d 927

Supreme Court of Arkansas
Opinion delivered June 10, 1991
[Rehearing denied July 8, 1991.]

Homer Tanner, for appellants.

B. Frank Mackey, Jr. P.A., by: *Rosanna Henry*, for appellee.

JACK HOLT, JR., Chief Justice. The appellants, Charles Tackett and Alberta Tackett, appeal from the chancellor's grant of foreclosure, filed by the appellee, First Savings of Arkansas,

F.A. (First Savings). The Tacketts assert three arguments for reversal: 1) First Savings is not the record, legal owner of the indebtedness sued upon; 2) the contract sued upon by First Savings is usurious; and 3) the trial court had no authority to reopen the record to allow the admission of the certificate of First Federal Savings of Arkansas as to corporate existence. The final argument has merit but does not affect our decision to affirm the chancellor's grant of foreclosure.

On November 30, 1979, Ms. A. Tawanna Minix executed a promissory note, payable to the the order of First Federal Savings and Loan Association of Little Rock (First Federal S&L). The note was to be paid in monthly installments and was secured by a mortgage on certain property located in Pulaski County. The mortgage was executed contemporaneously with the note.

Later, Ms. Minix married Larry D. Tackett and on April 27, 1987, they executed a second mortgage on the property to the appellants, Mr. and Mrs. Charles Tackett.

By December, 1987, Mrs. Minix Tackett was in default on her note to First Federal S&L and a foreclosure suit was filed in Pulaski County Chancery Court. The action was brought under the name of First Federal Savings of Arkansas (First Federal Savings) as First Federal S&L changed its name in 1983 when it became a public corporation and issued stock to the public.

The Charles Tacketts were also served as parties to the foreclosure action and subsequently filed a cross-complaint against Larry Tackett and A. Tawanna Minix Tackett to foreclosure their second mortgage lien.

In April, 1988, First Federal Savings filed an amended complaint stating that Mrs. Minix Tackett had brought her loan current since the filing of its action for foreclosure but was again in default, and praying that its mortgage lien be foreclosed. The Charles Tacketts responded to the amended complaint, claiming the note sued upon was usurious.

During the pendency of this action, First Federal Savings became insolvent and was placed under conservatorship by virtue of federal law—the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA). The Resolution Trust Corporation (RTC) was appointed receiver, and sold substan-

tially all of the assets of First Federal Savings to First Savings of Arkansas (First Savings), a federal mutual savings and loan association created by the Act. The chancellor granted First Savings' motion that it be submitted as the plaintiff and real party in interest, despite the Tacketts' objection that there was no evidence of a proper assignment or endorsement of the note and mortgage from First Federal Savings to First Savings.

The case proceeded to trial, and the chancellor held in favor of First Savings and granted the foreclosure. The Charles Tacketts, as the second mortgage lienholders, now appeal.

We review the findings of the chancellor *de novo* on appeal, and do not reverse unless such findings are clearly erroneous. *Killam* v. *Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990).

I. RECORD, LEGAL OWNER OF THE NOTE

The Tacketts first argue that there was no endorsement on the promissory note, as required by Ark. Code Ann. § 4-3-202 (1987), nor any evidence of an assignment or written transfer of title, either when the note was transferred from First Federal S&L to First Federal Savings, or upon transfer from First Federal Savings to First Savings; therefore, they contend, title of the note and mortgage remains in the hands of First Federal S&L.

In disagreeing that such assignment or written transfer was necessary, the chancellor found that the change from First Federal S&L to First Federal Savings was one of corporate name change only and that the entities were one and the same. As to the change from First Federal Savings to First Savings, the chancellor further found that the FIRREA effected a valid transfer of the note and mortgage by operation of law.

Our *de novo* examination of the record reveals that the chancellor reached the right results, but for the wrong reasons. We are not convinced that the chancellor's findings as to the chain of succession of the successor corporations, such as the finding that First Federal S&L and First Federal Savings were the same entity, but for name change, are correct. However, these findings are of no moment as the evidence before us clearly establishes that valid transfers of the note and mortgage in question occurred

between all three institutions under Ark. Code Ann. § 4-3-201 (1987).

Ignoring section 4-3-201, the Tacketts rely on section 4-3-202, which defines *negotiation* of written instruments, and provides in pertinent part:

> (1) Negotiation is the transfer of an instrument in such form, that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.
>
> (2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.

The Tacketts' assertion that endorsement was required before the document could be transferred is erroneous since negotiation of an instrument cannot be equated with mere *transfer*, as defined in section 4-3-201. This section states:

> (1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.
>
> (2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.
>
> (3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

Note 1, from the Official Comment to U.C.C. § 3-202, explains that: "Negotiation is merely a special form of transfer, the importance of which lies entirely in the fact that it makes the transferee a holder as defined in Section 1-201. . . ." *See also*

Brown v. *Bell*, 291 Ark. 116, 722 S.W.2d 592 (1987) (endorsement unnecessary to transfer an instrument by gift).

Our case law is clear that one can become a *transferee*, with all the rights of the transferor, without negotiation or endorsement. For example, in *Griffith* v. *Griffith*, 250 Ark. 845, 467 S.W.2d 737 (1971), we held that where a mother paid off the balance due on her son's note, which was secured by a mortgage, and the wife of the note holder marked the note paid in full, signed her husband's name, and surrendered the note to the mother, the transaction was, in effect, an assignment of the debt, carrying with it the lien of the mortgage. We explained that the mother "had accounted for her possession of the unendorsed note by proving the transaction through which she acquired it." *Id.*, 250 Ark. at 848, 467 S.W.2d at 739. *See also Brown* v. *Bell, supra*; *Williams* v. *Harrell*, 226 Ark. 115, 288 S.W.2d 321 (1956).

Here, the chain of possession was likewise established. Evidence of First Savings' acquisition of the note was presented primarily through the testimony of its Vice President, Glen Williams. Mr. Williams testified that First Federal S&L was in possession of the promissory note and mortgage when it made the decision to sell private stock. He stated that this decision simply effected a change of corporate title—from First Federal Savings and Loan Association of Little Rock to First Federal Savings of Arkansas—and that "all the assets and all the liabilities accrue to the new corporation and they're just transferred on to the public record." Mr. Williams remarked that "all those documents are filed in the county records."

Whether there was an actual change of entities or whether the change was one of corporate title only is irrelevant since our concern is whether or not there were valid transfers. Here, First Federal Savings clearly acquired the note from First Federal S&L and continued to collect payments from Mrs. Minix Tackett.

Later, the transfer of assets from First Federal Savings to First Savings occurred by operation of law under the FIRREA, Pub. L. No. 101-73, 103 Stat. 183 (1989). The FIRREA created the Resolution Trust Corporation (RTC), which was then appointed receiver for the insolvent First Federal Savings, and the institution was renamed First Savings of Arkansas. *See* 12 U.S.C

§ 1441a(a) and (b) (Supp. 1991).

In addition, Mr. Williams testified that the RTC executed a general assignment to First Savings assigning "all the Assignor's right, title and interest in and to any and all mortgages and other security interests filed for record in the county of Pulaski and State of Arkansas." The Tacketts argue that this assignment was effective only as to the mortgage and not the note. Even assuming this point to be correct, Mr. Williams' testimony established that *transfers*, were nonetheless made between all three entities involved.

II. USURY

For their second point of error, the Tacketts argue that the late charge contained in the terms of the promissory note rendered the contract usurious. We disagree.

The terms of the note provided for monthly payments of $260.70, which were based on an annual interest rate of 9.875% for a $30,000 loan. In addition, the borrower was to pay "a late charge of 4 percent of any monthly installment not received by the holder within fifteen days after the installment is due." The record indicates that Mrs. Minix Tackett had been late with payments since January, 1988, and ceased paying altogether in August, 1988.

At the time the note was executed, Ark. Const. art. 19, § 13 provided that all contracts exceeding an interest rate of 10% per annum would be void. The Tacketts maintain that the 4% charge, when added to the monthly payments and amortized over the 30 year life of the loan, results in a usurious contract. This reasoning is wrong since the charges were to be assessed only for those months in which payment was overdue.

If an instrument is not usurious on its face, the borrower (or the one challenging it) has the burden of proving it is usurious. *See Bunn* v. *Weyerhaeuser Co.*, 268 Ark. 445, 598 S.W.2d 54 (1980). A charge which is labeled a penalty, but which is really a subterfuge for interest, may render a transaction usurious; however, a late charge that is in the nature of a penalty will not. *See Smith* v. *Figure World Plus, Inc.*, 288 Ark. 355, 705 S.W.2d 432 (1986). Although we examine each cause of this type on all of its own particular facts, two of the principal factors in

determining if the charge is truly a penalty are whether the charge is fixed in amount and whether it is assessed as a onetime charge. *Id.*

The late charge here was fixed at $10.43 per month, which is 4% of the monthly installment of $260.70. Also, the terms indicated, and Mr. Williams testified, that the charge was assessed only for the months in which the payments were late. Mrs. Minix Tackett owed a total late fee of $135.46, which is the charge for 13 months in delinquent payments at $10.43 a month.

The situation here parallels that in *Smith supra.* There, the appellant agreed to pay $10 per month for her health club membership. The contract further provided for a $10 late charge for each month in which the payment was overdue. The appellee health club filed suit for overdue membership fees and for $90, for nine months of late charges. We held the charges were nonusurious since they were fixed in amount; were charged only one time, and were not compounded.

Likewise, in *Hayes* v. *First Nat'l Bank of Memphis, TN*, 256 Ark. 328, 507 S.W.2d 701 (1974), we upheld, as nonusurious, an agreement charging 5% or $5, whichever was less, for each month the installment of $83.16 was late. We noted that "agreements for penalties to induce prompt payments are free from usury because the buyer has it in his power to avoid the penalty by discharging the debt when it is due." *Id.* at 331, S.W.2d at 703.

The late charge here was a onetime penalty, of a fixed amount, which could have been entirely avoided by prompt payment. We affirm the chancellor's finding that the contract was nonusurious.

III. SUBMISSION OF CERTIFICATE

Lastly, the Tacketts argue that the trial court had no authority to reopen the record and allow First Savings to include a document not introduced at trial.

At issue, is a certified copy of the document concerning the corporate change of title from First Federal S&L to First Federal Savings. Mr. Williams testified as to the corporate name change, noting that documents supporting this change were filed in the

county records, although he did not have them in court. There were no objections to his remarks in this regard.

Following trial, the parties submitted post-trial briefs. First Savings attached to its brief, a certified copy of a recorded document noting Mr. Williams' testimony concerning the corporate name change. In her opinion letter of March 16, 1990, the chancellor referred to the document and to Mr. Williams' testimony as the bases for her finding that there was no substantial change in entities. The court noted the document was a public record and stated that the trial record would be reopened to allow First Savings to insert a certified copy.

The Tacketts later filed a written request for findings of fact and conclusions of law, which included a request for the court to cite its authority for reopening the record; the court answered the request, in her own handwriting opposite each request, but did not do so until after the entry of the decree of record and after the notice of appeal and designation of record was perfected by the Tacketts.

When filing their record on appeal with the Court of Appeals (the case was later transferred to this court), the Tacketts filed a motion to strike, having discovered that the certified copy had been inserted into the transcript and noting further that the document was never filed marked, was never included as a pleading by any party, and was not proper evidence. As a result, the court of appeals remanded the matter to the chancellor to settle the record.

Although not abstracted by either party, an examination of the record reveals the chancellor, upon remand, conducted a hearing at which the parties were represented by counsel. Following oral arguments, the chancellor formally introduced the certificate into the record and concluded that such introduction, and the hearing, properly settled the record. We disagree.

The purpose in settling the record, under Ark. R. App. P. 6(e) is to ensure that the record "*truly discloses what occurred in the trial court.*" (emphasis added). It is undisputed that the certificate was not introduced at trial, nor does there appear to have been any discussion concerning its introduction.

Furthermore, the procedure by which the certificate

was introduced *after* trial was improper. Granted, a trial court has discretion to reopen the record before entry of a final decree. *See Kennedy* v. *Kennedy*, 243 Ark. 773, 421 S.W.2d 611 (1967). Before doing so, however, the trial must afford both parties the opportunity to be heard on the matter. This was not done. Without entertaining motions or conducting a hearing on the issue, the chancellor merely announced in her opinion letter, that the record is to be opened to allow the insertion of this new evidence. The chancellor entered her final decree on April 3, 1990, without mention of the certificate, yet it appears in the original record as plaintiff's Exhibit 1.

In sum, we cannot approve the procedures utilized by the chancellor in receiving Exhibit 1 as evidence and causing it to be placed into the record, nor can we agree with the chancellor's apparent assumption that by "settling the record" the improper introduction of a certified copy into evidence was cured.

Although considering this certificate as evidence and placing it in the record was error, we do not see that the Tacketts have been prejudiced. Evidence of the corporate name change, and its relation as to the transference of the note between corporations, was sufficiently introduced through the testimony of Mr. Williams. The certificate has no bearing on our decision on the merits.

Based on the foregoing reasons, we affirm.

STATE of Arkansas *v.* David Crockett STUART

CR 91-38 810 S.W.2d 939

Supreme Court of Arkansas
Opinion delivered June 11, 1991

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellant.

Appellant, pro se.

ROBERT H. DUDLEY, Justice. The State seeks to have this interlocutory appeal decided pursuant to A.R.Cr.P. Rule 36.10. We dismiss the appeal for lack of jurisdiction.

On October 29, 1988, Latonya Harris, a deaf and mute sixteen-year-old school girl, was kidnapped from a school playground in Malvern and taken to some nearby woods where she was raped. In the course of the investigation the police took the blouse which the victim had been wearing and submitted it to the State Crime Laboratory for analysis. On it, the laboratory found a blood stain and a semen stain. On April 16, 1990, after a year and a half of detailed police work, appellee was arrested and charged with the crimes. He employed Dan Harmon as his attorney. At the time Harmon was a candidate for Prosecuting Attorney of the judicial district in which the crimes took place. In April 1990, with appellee's consent, the police took a blood sample from him and, also by consent, submitted it to the Federal Bureau of Investigation for deoxyribonucleic acid (DNA) analysis and comparison with the stains found on the blouse. A part of the procedure for DNA analysis involves autoradiography, which is the recording of the radioactive material within the object being examined on a photographic plate, or radiograph.

In May 1990, appellee's attorney became the nominee of the Democratic party for Prosecuting Attorney of the district. The nomination was tantamount to election, and thus, appellee's attorney would be expected to assume the prosecutor's office on January 1, 1991. As a result, both the incumbent prosecutor and appellee's attorney sought to have appellee's trial concluded before January 1.

On August 2, 1990, the prosecutor anticipated that the

DNA analysis would be completed in about two months and asked the trial court to set a trial date. Accordingly, appellee's attorney employed an expert witness to compare the FBI laboratory's DNA analysis with accepted scientific standards. On August 8, the trial court set November 2 as the discovery limitation date and set December 3 as the trial date. The trial court subsequently extended the discovery date to November 22. On November 13, the prosecutor received the result of the DNA analysis which provided "the probability of selecting an unrelated individual at random from the Caucasian population having a profile matching K-2 [appellee's blood sample] is approximately one in six million."

Appellee's attorney asked the prosecutor for the autoradiographs in order for the appellee's expert to examine them. Apparently, the FBI would not release the materials to the appellee's expert until the prosecutor authorized it to do so. In the meantime, the trial court had rescheduled the trial for December 27. On December 14, the FBI sent by telefacsimile thirty (30) pages of the supporting information to the defense expert, but it was not fully legible and could not be interpreted. The expert stated that without legible material, and some additional related materials from the State Crime Laboratory, he could not be prepared to testify on December 27. As a result, on December 17, the appellee's attorney filed a motion to suppress any evidence about the DNA analysis. On that same day the autoradiographs were supplied to the expert but that did not leave him with sufficient time to complete a critique of the FBI's analysis. On December 18, the trial court held a hearing on the motion to suppress the results of the DNA analysis. The State asked for a continuance in preference to a suppression of the DNA analysis.

A continuance was not acceptable to appellee because his counsel, Harmon, was to assume the office of Prosecuting Attorney January 1, 1991, and, consequently, would no longer be able to represent him. The trial court granted the motion to suppress and ordered the case to trial on December 27. The State gave notice of this interlocutory appeal pursuant to A.R.Cr.P. Rule 36.10. We do not reach the merits of the State's appeal because the order from which it is brought is not appealable, a jurisdictional prerequisite which we raise. *State* v. *Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981).

The procedure for appeals by the State in criminal cases is governed by Rule 36.10. Prior to the adoption of the Arkansas Rules of Criminal Procedure, the State had no right to bring an interlocutory appeal. *State* v. *Russell, supra.* A.R.Cr.P. Rule 36.10 provides in pertinent part:

> (a) An interlocutory appeal on behalf of the state may be taken *only* from a pretrial order in a felony prosecution which (1) grants a motion *under Rule 16.2 to suppress seized evidence* or (2) suppresses a defendant's confession.

(Emphasis added.) The Rule clearly limits the instances in which the State may bring an interlocutory appeal to the two (2) specified situations, neither of which is present here. An order suppressing a confession is clearly not involved; neither is an order granting a motion *under Rule 16.2* to suppress seized evidence.

A.R.Cr.P. Rule 16.2 provides in pertinent part:

> (a) Objection to the use of any evidence, *on the grounds that it was illegally obtained*, shall be made by a motion to suppress evidence. The phrase "objection to the use of any evidence, on the grounds that it was illegally obtained," shall include but is not limited to evidence which:
>
> [There follows a list of five (5) examples of illegally obtained evidence.]

(Emphasis added.) Here, the evidence at issue, a DNA test analysis, was not excluded because it was illegally obtained. Rather, the trial court excluded it because it determined that there was not enough time remaining before the scheduled trial for the expert defense witness to adequately evaluate the State's evidence. In balancing the interests of the appellee against those of the State, the trial court determined that the appellee's interest in having his case tried quickly and by the attorney of his choice outweighed the State's interest in presenting the highly probative evidence. Thus, the exclusion of evidence was more closely akin to an exclusion under A.R.Cr.P. Rule 19.7, which provides that a trial court may prohibit the introduction of evidence if it was not properly provided in discovery.

Accordingly, the attempted interlocutory appeal is not brought pursuant to A.R.Cr.P. Rule 36.10, and we are without jurisdiction to hear this appeal.

Appeal dismissed.

Paul A. SCHMIDT, Pauline B. Schmidt, and Paul G. Schmidt *v.* McILROY BANK & TRUST

91-116 811 S.W.2d 281

Supreme Court of Arkansas
Opinion delivered June 10, 1991
[Rehearing denied July 8, 1991.]

Steven D. Tennant, and *C. Thomas Pearson, Jr.*, for appellants.

Robert R. Estes, for appellee.

ROBERT H. DUDLEY, Justice. The appellants, Paul A. Schmidt, Pauline B. Schmidt, and Paul G. Schmidt, were the sole stockholders in the Acro Corporation, a family farming corporation. The corporation held its checking accounts in, and borrowed extensively from the appellee McIlroy Bank and Trust. The notes, security agreements, and mortgage involved in this dispute were executed in the corporation name. After the corporation overdrew one of its checking accounts, the bank declared its loans to the corporation insecure. The bank accelerated payment of the notes, made demand for payment, filed suit in chancery court for foreclosure on the security for the notes, and sought a judgment for the remaining deficiency, if any, against the corporation, as well as the individual appellants as guarantors of the notes. The chancery court suit apparently has not been finally concluded. *See McIlroy Bank & Trust* v. *Acro Corp.*, 30 Ark. App. 189, 785 S.W.2d 47 (1990).

Next, the corporation and the individual appellants filed this "lender's liability" suit against the bank in circuit court. They asked damages for the corporation and damages for themselves as stockholders, but did not ask relief for themselves as guarantors of notes, possibly because the chancery court had not yet determined whether there was a deficiency for the guarantors to pay. The bank filed an answer and a motion for summary judgment with supporting exhibits and affidavits. The corporation and the individual appellants filed an amended complaint and again asked damages for the corporation and themselves as stockholders, but, again, did not ask for damages as a result of the guaranty

agreement.

The trial court granted summary judgment against the corporation on the ground that its charter had been revoked for failure to pay franchise fees, but did not grant summary judgment against the individual appellants.

The bank filed a second motion for summary judgment with attached exhibits showing that all notes, security agreements, and mortgages were executed in the name of the corporation and were only guaranteed by the individual appellants. The appellants field a brief opposing the summary judgment and two of their arguments were that they had "stated a cause of action against the bank under the guarantees" and that "the real parties in interest in this cause of action are the individuals as guarantors." The concluding paragraph of their brief begins as follows: "The plaintiffs [appellants] have clearly shown that the real parties in interest under the facts set forth in the amended complaint are the individuals as guarantors and parties to the notes and extensions. The plaintiffs should be allowed to amend their complaint to permit the real parties to prosecute the action." However, even though ARCP Rule 15(a) provides in part, "a party may amend his pleadings at any time without leave of court," the appellants did not file an amended complaint.

The bank filed a brief in which it responded that 12B Fletcher, *Cyclopedia of Corporations*, § 5916, p. 447(Perm. Ed. 1984) provides that "a personal guaranty *may be* a basis upon which suit can be brought," but that the individual appellants "have not alleged any individual causes of action on the basis of their guaranty contracts." Then, at the hearing on the second motion for summary judgment the bank's attorney stated:

> One other issue that I would like to address is the fact that plaintiffs now raise a cause of action based upon the guaranty contracts. This is not plead in the Complaint, and not plead in the amended Complaint. I cannot find the word "guaranty" or "guaranty contract with guarantor" or any derivative thereof in the Complaint or amended Complaint. (Tr. 1262). The first time "guaranty" shows up is in the plaintiff's response to the Defendant's second Motion for Summary Judgment. A personal guaranty may be a basis upon which a suit can be brought. There is no

> question about that. At no time have plaintiffs plead a cause of action on the guaranty contracts.

The individual appellants' attorney responded, "We ask the court to allow the plaintiffs to amend the complaint for the sole purpose to include the individuals as guarantors and state a cause of action that would not leave any question. . . ." Again, the individual appellants did not amend the complaint, either orally or in writing. Immediately thereafter the court, from the bench, announced that it was granting summary judgment against the individual appellants, and further stated:

> Second, as far as the guarantees, there's no allegation in either the Complaint or amended Complaint which I earlier allowed to stand, is not plead in either one of these two Complaints. I think that, on the day of the hearing on a motion for a summary judgment, is too late to amend the Complaints to include it, so I'm going to deny your oral motion, Mr. Tennant, to amend your Complaint at this particular point in time.

For their first point of appeal, the individual appellants argue that the trial court erred in refusing to permit them to amend their complaint because (1) "the trial court raised the issue on its own motion" and (2) the trial court did not require a showing of prejudice to the bank or undue delay in the disposition of the cause. Under the facts of this case the arguments are without merit.

ARCP Rule 15(a) provides in pertinent part:

> [A] party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding.

The intent of the rule is stated in the reporter's notes as follows: "The Committee believed that the amendments to pleadings should be allowed in nearly all instances without special permission from the court. The court is, however, given discretion

to strike any amendment which would cause prejudice or unduly prolong the disposition of a case." We have followed that stated intent. *See Webb* v. *Workers Compensation Comm'n*, 286 Ark. 399, 692 S.W.2d 233 (1985); *Kay* v. *Economy Fire & Cas. Co.*, 284 Ark. 11, 678 S.W.2d 365 (1984).

Appellants argue that the trial court erred in denying the oral motion to amend "on its own motion." The argument is fallacious. The trial court did not rule "on its own motion." Instead, the trial court responded to appellants' unnecessary motion to amend. It was not a ruling on the court's own motion. If the making of a ruling on that unneeded motion was error, it was invited error. We do not reverse for invited error. *Missouri Pac. R.R. Co.* v. *Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944).

Appellants also argue that the trial court erred because it did not make a finding that the proposed amendment would cause either prejudice or undue delay of the disposition of the case. The argument is without merit for two reasons. First, the matter was not brought to the attention of the trial judge, and we do not reverse for matters raised for the first time on appeal. *Bohannan* v. *Underwood*, 300 Ark. 110, 776 S.W.2d 827 (1989). Second, the proposed amendment was never offered, and the trial court had no way of knowing whether prejudice or undue delay would result. Until the trial court knew the factual details of the allegation, it could not know whether additional depositions or interrogatories were necessary. Similarly, we have no way of knowing, and we will not presume error. The rule requires a finding of prejudice or undue delay only when the court *strikes* a pleading. In that situation the court would naturally have the facts alleged in the amendment before it and would be able to determine whether prejudice or undue delay would occur. The rule does not require a finding of prejudice or undue delay when a party has merely filed an unnecessary motion seeking to amend. The trial court and the other party are entitled to know the factual allegations of the amendment. If our holding were otherwise a party who was responding to a motion for summary judgment and who was worried about the sufficiency of his proof would always file a motion to amend before the hearing solely as a dilatory safety valve. He would always get more time, because the trial judge could not make a ruling on prejudice or delay. The result would be slower and more expensive determination of the action.

That is not the purpose of our rule.

The appellants did not argue below, and do not argue in this appeal, that they orally amended their complaint to state a cause of action as guarantors. Under our long standing procedure, we consider only arguments raised by the parties. We do not consider reversing the trial court for the unargued reason that the appellants orally amended their complaint to state a cause of action as guarantors.

[5] The appellants next argue that the granting of summary judgment was in error because an issue of material fact remained to be decided. In brief, their argument is that when the corporation's charter was revoked for failure to pay franchise fees, the officers and shareholders were considered to be operating the business as a partnership and were individually liable for the obligations of the *de facto* corporation, see *Whitaker* v. *Mitchell Mfg. Co.*, 219 Ark. 779, 244 S.W.2d 965 (1952); *Gazette Publishing Co.* v. *Brady*, 204 Ark. 396, 162 S.W.2d 494 (1942), and since they were subjected to individual liability as partners, they ought to be allowed, in fairness, to bring suit in the same capacity. The argument, while novel, is without merit. The reasoning behind the cases holding officers and stockholders liable is that they ought not be allowed to avoid personal liability because of their nonfeasance. On the other hand, it does not follow that they should be allowed to benefit by their nonfeasance by allowing them to bring suit as partners. The effect of revocation was that the corporation lost its capacity to sue, *Sulphur Springs Recreational Park* v. *City of Camden*, 247 Ark. 713, 447 S.W.2d 844 (1969), and this particular type of corporate cause of action ceased to exist. To allow the individual appellants to bring this cause of action would effectively reverse prior law which prohibits suits by a corporation whose charter has been revoked and, in addition, would reward them for their nonfeasance.

The individual appellants had no standing as shareholders to sue for injuries to the corporation. A motion for summary judgment is appropriate when no issue of fact, properly pleaded, remains to be decided. *Walker* v. *Hyde*, 303 Ark. 615, 798 S.W.2d 435 (1990). The appellants had not pleaded any individual causes of action under their separate guaranty con-

tracts with the bank. Therefore, the trial court did not err in granting summary judgment.

We need not address the appellants' third point of appeal which involves an alternative reason for the trial court's granting summary judgment.

Affirmed.

HOLT, C.J., and BROWN, J., dissent.

ROBERT L. BROWN, Justice, dissenting. The majority's decision on amended pleadings represents a major departure from our past precedent and from the plain language of Ark. R. Civ. P. 15(a). It is now the position of the majority that oral amendments to a complaint are no longer permissible prior to trial and that a trial court has discretion to disallow an amendment on grounds that the amendment is "too late." What is unsettling is that the decision harbingers the erosion of an important civil pleading rule based on the facts of an individual case.

Here, the appellee Bank filed its motion for summary judgment long before any scheduled trial. At the hearing on the motion the Bank's attorney argued to the trial court that the appellants "now raise a cause of action based upon the guaranty contracts." That attorney further alluded to the appellants' response to the Bank's summary judgment motion, where, he said, the guaranty "shows up."

The attorney for the appellants made the following argument in support of bringing the causes of action in the appellants' capacity as guarantors:

> [W]e ask the Court to allow the plaintiffs to amend the Complaint for the sole purpose to include the individuals as guarantors and state a cause of action that would [not leave] any question . . . . [I]t was the *Sacks* . . ., the *Buschmann* . . ., and . . . the *Van Petten* case[s] that said, you do have a cause of action as guarantors on the notes. . . .
>
> Also, . . . we have pled an intentional infliction of emotional distress in our Amended Complaint. That goes to the individuals. The McIlroy Bank has acted on the

> personal guarantees, both on the extension agreements of the notes, and on individual guarantees that were signed in 1983 and 1985. The individuals have suffered the harm, . . . and it's a breach of contract action, and that's what we have pled, not only breach of contract, but the intentional infliction of emotional distress.

What counsel was asking the court to do was permit the causes of action for the individual appellants, who were already plaintiffs to the complaint, to be specifically brought by them as guarantors. His amendment amounted to little more than the inclusion of the word "guarantors" in the complaint because, as he pointed out to the trial court, factual allegations on behalf of the individual appellants had already been pled.

The majority says that the trial court did not know the factual details of the amendment, but that is not the case. The trial court did understand the amendment and declined to allow it for these reasons:

1. There was no allegation of guaranties in the complaint.
2. Amending the complaint on the day of a summary judgment hearing was too late.
3. The appellants/guarantors could bootstrap themselves into circuit court by means of the guaranties.
4. The appellants/guarantors could have dissolved Acro Corporation and had a cause of action against the Bank.
5. Failure to keep Acro in good standing and failure to dissolve the corporation were arguments against allowing the appellants/guarantors to sue as guarantors.
6. The accounts of Acro were frozen — not the accounts of the appellants/guarantors.

The trial court treated the appellants' attempt to include the word "guarantors" in their complaint as both a motion to amend and as an actual amendment:

> Court: I've allowed one amended Complaint this

> morning that was filed in August, but I'm going to deny your amendment at this point in time and your objections will be noted.

In doing so and then in granting the Bank summary judgment, the trial court committed reversible error.

Our rule on amendments to pleadings is exceptionally clear: ". . . a party may amend his pleadings at any time without leave of the court." Ark. R. Civ. P. 15(a). The majority would read into the rule additional requirements that the amendment be in writing and be timely. The rule, however, does not require that. And we should not construe the rule to mean other than what it says. *Mears* v. *Arkansas State Hospital*, 265 Ark. 844, 581 S.W.2d 339 (1979).

The majority raises the spectre of a dilatory tactic by counsel making frivolous oral amendments to pleadings at hearings on summary judgment motions. The alternative is the course which the majority has chosen to follow which is to curtail the parties' freedom to amend in nearly all instances without leave of the court. Reporters' Notes to Rule 15.

The majority justifies its decision in part on the basis that it does not glean from the appellants' argument a contention that they actually amended their complaint. I disagree. The appellants were not allowed to amend their complaint. They argued in this appeal that they "sought only to add the words 'breach of guaranty agreements' to the Complaint." This equated to an amendment, and the trial court certainly recognized it as such when it said, "I'm going to deny your amendment."

The reality of court practice is that an attorney does not say to a trial judge in the middle of a hearing, "I hearby amend my complaint whether you like it or not." It is couched in terms of a request to amend, as a vehicle for offering the proposed amendment. That is what happened here, and all in attendance understood it, including the trial court. The trial court erred when it denied that amendment, and that error is what is before this court.

By advising the trial court of his amendment, counsel for the appellants did what was necessary to comply with Rule 15(a). If the Bank's counsel had an objection to the amendment, he should

have moved to strike it on grounds of prejudice or undue delay as provided under Rule 15(a). The trial court could then have made its decision. That procedure was not followed in this case.

The rules were not adhered to, and for that reason reversal is in order. If there is one axiom under our civil procedure rules, it is that Arkansas recognizes a liberal pleading policy. *See Kay* v. *Economy Fire & Casualty Co.*, 284 Ark. 11, 678 S.W.2d 365 (1984). A corollary to that axiom is our previous statement regarding Rule 15(a) that the rule, in fact, encourages amendments to pleadings. *Id.*

Those policies have been thwarted by the decision in this case.

HOLT, C.J., joins.

Kevin BYLER and Tanya Byler Moore, Mother *v.* STATE of Arkansas

91-102 810 S.W.2d 941

Supreme Court of Arkansas
Opinion delivered June 10, 1991

Linda Scribner, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., *Catherine Templeton*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Kevin Byler is the six-year-old son of appellant Tanya Byler Moore. Mrs. Moore and Kevin bring this appeal from an adjudication order of the Benton Chancery Court, Juvenile Division, finding that the family is in need of services under the juvenile code. That finding is based on a petition of the prosecuting attorney alleging acts of burglary and criminal mischief by Kevin and a ten-year-old companion. The order directs Kevin to apologize to the victim and to attend counseling at the Ozark Guidance Center.

The only error alleged on appeal is that the state failed to meet the criteria for determining a family in need of services, as provided in Ark. Code Ann. § 9-27-303(16) (1987). The statute defines a family in need of services as including, but not limited to, being habitually absent from school without justification, habitually disobedient to the reasonable commands of parent or guardian, or absent from home without sufficient cause.

The testimony before the chancellor portrays an episode of vandalism of startling proportions: Joe Phillips, a contractor, testified that he had just completed the extensive remodeling of a home. He stopped to inspect the property and discovered Kevin and his companion in the process of systematically destroying the home and contents. Over fifty percent of oak cabinet doors throughout had been damaged, all interior doors were destroyed, a stainless steel sink, a garbage disposal and a marble lavatory were thrown over a railing into a ravine and destroyed; an airless spray paint machine and paint were destroyed, as were mattresses and box springs from twin beds; Levelor blinds were destroyed and each glass panel of three four by five Thermapane windows was broken. A refrigerator and stove were turned on their side. The only salvageable item was a compactor, only partially damaged. Mr. Phillips testified that the cost of the damage to him was $5,593.39, not including damaged articles belonging to the home-owners.

Appellants cite several general rules of statutory construction: legislative intent is obtained by considering the entire act [*Knapp* v. *State*, 283 Ark. 346, 676 S.W.2d 729 (1984)]; different sections are construed together [*Noggle* v. *Arkansas Valley Elec. Coop.*, 31 Ark. App. 104, 788 S.W.2d 497 (1991)]; "the express designation by statute of one thing may properly be

construed to mean the exclusion of another," *Chem-Ash, Inc.* v. *Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988). Thus, appellants maintain that had the legislature intended to include conduct other than the three categories expressly covered, it would have said so.

It would be difficult to believe that the legislature meant to compose a statutory scheme that would empower juvenile courts to make an adjudication of a family in need of services based on truancy, disobedience and running away from home, but not on burglary and criminal mischief. However, we need not depend on conjecture, because even giving the maxim on which appellants rely its fullest drift, it is not an absolute: *Cook* v. *Arkansas Missouri Power Corp.*, 209 Ark. 750, 192 S.W.2d 210 (1946) ("Express designation of one thing in a statute *may* properly be construed to mean exclusion of another") [our emphasis]; *Little Rock & F.S.R. Co.* v. *Clifton*, 38 Ark. 205 (1881) ("The express of one thing *sometimes* implies the exclusion of another" [our emphasis.])

Here, it is entirely clear that by using the words "includes, but is not limited to," the legislature intended a broader concept of a family in need of services than the three illustrations listed in the statute. We conclude that the chancellor did not err in the adjudication of family in need of services and therefore the order is affirmed.

SECURITY BENEFIT LIFE INSURANCE COMPANY
v. James H. GRAHAM, Joseph E. Barsocchi, Margaret D. Barsocchi, and Harry H. Kerr, III

90-248 810 S.W.2d 943

Supreme Court of Arkansas
Opinion delivered June 10, 1991

Lord, Bissell, & Brook, by: *R.R. McMahan, Robert A. Knuti*, and *Damon N. Voke* and *Mitchell, Williams, Selig, & Tucker*, by: *Byron Freeland*, for appellant.

Pope, Shamburger, Buffalo, & Ross, by: *John K. Shamburger* and *Joseph L. Buffalo, Jr.*, for appellees.

ROBERT L. BROWN, Justice. The four appellees, James H.

Graham, Joseph E. Barsocchi, Margaret D. Barsocchi, and Harry H. Kerr, III, filed a second amended complaint against appellant Security Benefit Life Insurance Company, alleging that they were owners of a single premium deferred annuity (SPDA) and held their certificates of insurance under a Group SPDA Master Policy originally issued by The First Pyramid Life Insurance Company of America. Their complaint, which was filed on February 6, 1990, alleged breach of contract and sought terminal payments owed them under the policy. The appellees further prayed for class certification and a determination of the liability of Security Benefit to all class members.

A motion for class certification was then filed by the appellees followed by a hearing on that motion. Subsequent to that hearing, but before the trial court's decision, fifteen to seventeen additional SPDA certificate holders filed affidavits for participation in the class. The trial court issued findings supporting class certification and followed the findings with an order on June 22, 1990, certifying the case as a class action. The trial court's order defined the class as all present owners of individual certificates issued by First Pyramid under the Group SPDA Master Policy. The order estimated the number of certificate holders as 600 with residences in thirty-nine states.

Security Benefit lodged this interlocutory appeal, contesting the trial court's decision under Ark. R. Civ. P. 23 on grounds that the proposed class was not sufficiently numerous, that common questions of law or fact did not predominate, and that other methods existed for a fair and efficient adjudication of this dispute.

We affirm the trial court's decision and hold that the case was properly certified as a class action.

The Group SPDA Master Policy, which covers the appellees as certificate holders, was originally issued by First Pyramid, an Arkansas-based insurer, on June 1, 1982. As of June 1, 1986, that contract was assumed by Security Benefit, which is based in Kansas, under a reinsurance assumption agreement. The agreement was approved by the Arkansas Insurance Commission. The annuitants were sent an assumption certificate, which included notice of the assumption by Security Benefit.

Less than a year later, on March 31, 1987, the Group SPDA Master Policy and all associated liability was assumed by Life Assurance Company of Pennsylvania (LACOP). Notice of this transfer and the release of Security Benefit was not sent to the annuitants, according to the appellees. The appellees further contend that no regulatory approval for this transfer was obtained and that Security Benefit continued to service the contracts of certificate holders after March 31, 1987.

On June 14, 1988, still another assumption of the Master Policy and annuity contracts was made — this time, by Diamond Benefits Life Insurance Company. Diamond Benefits, at that point, was a domestic carrier in Arizona. The annuitants were notified of the transfer by letter and assumption certificate which included the fact that LACOP had previously assumed the contracts and would no longer be obligated under them. The appellees contend, however, that the annuitants were never specifically advised that Security Benefit would no longer be obligated to perform under the contracts. Since this assumption by Diamond Benefits, the Arizona insurance commissioner has determined that Diamond Benefits is insolvent, and on December 19, 1988, he put the company into receivership.

While our cases interpreting Ark. R. Civ. P. 23 were somewhat inconsistent prior to 1988, we took pains to clarify our interpretation in a case handed down that year. See *International Union of Elec., Radio & Mach. Workers* v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988). In *Hudson* we observed that though our Rule 23 differed from Federal Rule 23 in text, the spirit of the federal rule existed in our Rule 23. We, therefore, rejected our traditional circumspection toward class actions in *Hudson.*

We also affirmed in *Hudson*, as well as in later cases, the broad discretion given to the trial court in matters relating to class actions. *See Lemarco, Inc.* v. *Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991); *First Nat'l Bank of Fort Smith* v. *Mercantile Bank of Jonesboro*, 304 Ark. 196, 801 S.W.2d 38 (1990). Our Reporter's Note 2 to Rule 23 recognizes the broad discretion in the trial court to protect the rights of class members, and we expanded the scope of that authority in *Hudson* to embrace also the court's decision of whether a class should be certified.

Thus, in deciding the case before us, we must view it in terms

of these twin precepts: our policy change in that we no longer espouse our former circumspection toward class actions, and the broad discretion we have conferred upon the trial court in deciding the class certification issue.

Here, the trial court found that a class existed and that a class action was superior to other available methods for a fair and efficient adjudication of the controversy. At the time of the court's decision the pertinent part of Rule 23 read:

> (a) Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring all before the court within a reasonable time, one or more may sue or defend for the benefit of all.
>
> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[1]

Security Benefit first argues that the parties are not sufficiently numerous to satisfy the requirement of Rule 23(a). We disagree. Security Benefit, itself, admits to 600 certificate holders residing in thirty-nine states. An official with the Arkansas Insurance Department testified at hearing on the day the court's class certification order was issued that the Department had received a letter listing 122 Arkansas certificate holders, all of whom may be potential class members. According to the affidavit of a court-appointed supervisor for the insolvent Diamond Benefits in Arizona, Security Benefit submitted to him a list of 1,419 annuitants in January 1989. Fifteen to seventeen certificate holders in addition to the appellees exhibited a desire to participate in the class action prior to the trial court's decision. There are clearly numerous potential class members in this matter, and it would be impractical to bring them all before the

[1] Paragraph (a) of Rule 23 has since been amended, effective February 1, 1991, and now corresponds to Federal Rule 23.

trial court within a reasonable time. The trial court was correct in finding that the numerosity criterion had been met.

[redacted] We are next confronted with Rule 23(b) and the issue of whether questions of law or fact common to the class members predominate over individual questions. We hold that the trial court was correct in finding that they do. Common questions of fact certainly predominate for the class. For example, it must be determined for all class members whether they were notified by mass mailing of the assumption of Security Benefit's obligation by LACOP or Diamond Benefits; whether regulatory approval was obtained for the assumptions of this obligation; and whether Security Benefit continued to "service" the class members after LACOP assumed the contract. In addition, Security Benefit itself raises the defense against class members that a novation occurred by the later assumptions which relieved Security Benefit of all liability. Under such circumstances we cannot say that the trial court abused its broad discretion in its finding.

Security Benefit's main argument appears to center on the fact that the law of thirty-nine states relative to novation would have to be explored and that this would splinter the class action into individual lawsuits. Accordingly, so the argument goes, this would not result in a fair and efficient adjudication of the matter. We have previously held, however, that even if this were to occur with regard to individual claims, "efficiency would still have been achieved by resolving those common questions which predominate over individual questions." *Lemarco*, 305 Ark. at 4, 804 S.W.2d at 726. Stated another way, resolution of the common questions of law or fact would enhance efficiency for all parties, even if individual claims still remained to be adjudicated.

The mere fact that choice of law may be involved in the case of some claimants living in different states is not sufficient in and of itself to warrant a denial of class certification. *C.f.*, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717 (1988). And though we are not convinced at this stage that reference to the laws of thirty-nine states will be necessary, should it be required, this does not seem a particularly daunting or unmanageable task for the parties or for the trial court.

Because Arkansas is the home state for First Pyramid and because Arkansas law is the law to be applied under the Master

Policy, it is the logical situs for this action. Actions in thirty-nine states, even with considerable joinder, would be inefficient, duplicative, and a drain on judicial resources. Denial of class action status could well reduce the number of claims brought in this matter, but that result is hardly in the interest of substantial justice.

We conclude that a class action which would resolve several common questions would not only be efficient but fair to both parties. Security Benefit, for instance, would only be required to mount its novation defense in one court as opposed to numerous forums, a factor that we have considered in previous cases. *See Lemarco, Inc.* v. *Wood*; *International Union of Elec., Radio & Mach. Workers* v. *Hudson.* Class members, on the other hand, would not be required to file complaints in myriad courts in a matter involving insurance companies which at one time were located in four different states.

The trial court correctly found that the Rule 23 factors had all been met, and we affirm.

GLAZE, J., not participating.

Jim C. PLEDGER, Tim Leathers, et al. *v.* Stanley BOSNICK, et al.

90-39 811 S.W.2d 286

Supreme Court of Arkansas
Opinion delivered June 10, 1991

Winston Bryant, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellant Jimmie Lou Fisher.

Wm. E. Keadle, Revenue Legal Counsel, for appellants Jim C. Pledger and Tim Leathers.

Hilburn, Calhoun, Harper, Pruniski & Calhoun, Ltd., by: *Carrold E. Ray*, for appellee.

ALLEN W. BIRD II, Special Chief Justice. Appellants, Jim C. Pledger, Director of the Arkansas Department of Finance and Administration, and Tim Leathers, Commissioner of Revenues, were charged with the enforcement of the Arkansas Income Tax. Appellees consist of a certified class of Arkansas residents who have retired from employment with various United States civil service agencies, with the various branches of the United States Armed Services, and with other states' agencies and political subdivisions.

Appellees filed suit in the Chancery Court of Pulaski County, Arkansas, against appellants Pledger and Leathers in their respective capacities, along with Jimmie Lou Fisher, in her capacity as Treasurer of the State of Arkansas. Appellees contended that the provisions of Ark. Code Ann. § 26-51-307 (1987), which provided a full exemption from Arkansas Income Tax for the retirement income received by retirees from the Arkansas Public Employees, Teachers, State Highway Police, and State Highway Employees Retirement Systems, while allowing an exemption for only the first $6,000 of appellees' and all other retirees' retirement income, was in violation of the principles of intergovernmental tax immunity by favoring retired employees of the State of Arkansas and local government employees over retired federal employees and retired employees of other states and political subdivisions thereof. The Chancellor, citing the United States Supreme Court case of *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989), agreed with appellees' contention, and on November 1, 1989, ordered the appellants to refund to all members of the class all such income

tax collected on their retirement income since 1985 and awarded appellees' counsel an attorney's fee from a portion of this refund. From this decision and decree entered by the Chancellor appellants have perfected this appeal. We affirm the lower court.

Initially we must determine whether the appeal herein is final for the purposes of Rule 2 of the Arkansas Rules of Appellate Procedure. Neither the appellants nor the appellees have raised this issue; however, we addressed the issue during oral argument of the case. Even though the parties to an appeal do not raise the issue of the appealability of an order, it is the duty of this court to do so, as a determination that the order appealed from is not final would deprive this court of jurisdiction to hear the appeal. *Associates Fin. Serv. Co. of Okla., Inc.* v. *Crawford County Memorial Hosp., Inc.*, 297 Ark. 14, 759 S.W.2d 210 (1988). The existence of a final order is a jurisdictional requirement for bringing an appeal, which this court is obliged to raise even though the parties do not. *3-W Lumber Co.* v. *Housing Auth.*, 287 Ark. 70, 696 S.W.2d 725 (1985); *John Cheeseman Trucking Inc.* v. *Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991).

The Arkansas Rules of Appellate Procedure state at Rule 2:

> (a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:
>
> 1. A final judgment or decree entered by the trial court; . . .
>
> 9. An order certifying a case as a class action in accordance with ARCP Rule 23. . . .

This action was filed as a class action, and the complaint and its amendments specifically prayed that a class be certified pursuant to Arkansas Rule of Civil Procedure 23. The Chancellor entered his order on August 22, 1989, finding that class certification was proper under Rule 23.

In addition, the complaint asked the lower court to: (i) find that the Arkansas Income Tax unconstitutionally discriminates against retired federal employees and retired employees of other states who receive or have received retirement benefits in excess of $6,000; (ii) enjoin the defendants from appropriating and

expending any of the funds collected pursuant to a levy of the illegal income taxes and account for the amounts so collected to date; (iii) refund to the class the illegally collected income taxes, together with interest; and (iv) award reasonable attorney's fees and reimbursement of costs under Ark. Code Ann. § 26-35-902 (1987).

On November 1, 1990, the Chancellor entered his order and (i) found that the Arkansas income tax laws violated the principles of intergovernmental tax immunity and 4 U.S.C. § 111; (ii) enjoined the defendants from collecting the income tax found to be unconstitutional; (iii) ordered an accounting for and refund of the income taxes to all taxpayers represented by the class to the extent such taxes were collected in excess of the lawful taxes as determined by the court; and (iv) stated an intention to allow a reasonable part of the taxes to be refunded as attorney's fees.

The class certification order entered on August 22, 1989, was an appealable order pursuant to Arkansas Rule of Appellate Procedure 2(a)(9). *International Union of Elec., Radio and Mach. Workers* v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988). Although the appellees have not raised the issue of timeliness of appeal of the class certification issue, timeliness of the appeal is also jurisdictional for this court. *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). However, whether the appellants failed to appeal that order in a timely manner is moot because we affirm for the reasons set forth below. The remaining issue on appealability is whether the balance of the appeal is properly before this court as a final order.

The test of finality and appealability of an order is whether the order puts the court's directive into execution, ending the litigation or a separable branch of it. *Mueller* v. *Killam*, 295 Ark. 270, 748 S.W.2d 141 (1988). We have often held that in order for an order to be appealable it must be such a final determination of the issues as may be enforced by some appropriate manner. *Estate of Hastings* v. *Planters and Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1988); *Cigna Ins. Co.* v. *Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988). The members of the class, in the court below, asked for relief common to the class, including a declaration that certain provisions of the income tax laws of the

state are unconstitutional, an injunction against using the funds illegally collected, a refund to the class, and attorney's fees for the attorney. The order of the Chancellor granted the prayer in favor of the members of the class on all of those issues. There appears to be no question that the Chancellor's rulings are final as to those issues which are common to the class. The only real issue as to appealability before this Court is whether the final rulings on those issues are rendered nonappealable when coupled with the ruling awarding attorney's fees in an unliquidated amount, and a requirement that the appellants submit a plan for providing notice to the class of their rights to a refund and establishing the procedures for such refunds.

We view the action left to be taken after the entry of the order appealed from, relating to notice to the members of the class (1) to be remote and collateral to the main issues before the court, (2) to require an examination of factors beyond the issues needed to be decided with the merits of the original complaint, and (3) to be a largely ministerial task similar to assessing the traditional items of cost. Collateral action, such as this, is action that does not make any direct step toward final disposition of the merits of a case, will not be merged in the final judgment, is not an ingredient of the cause of action, and does not require consideration with the main cause of action. Such collateral and ministerial orders need not be final for purposes of Arkansas Rule of Civil Procedure 54 nor Arkansas Rule of Appellate Procedure 2. In *Farm Bureau Mutual Ins. Co.* v. *Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983) we were faced with a property insurer who was faced with a second action based upon a policy. The insurer had confessed judgment and tendered the policy limits, plus penalty and interest into the registry of the court in an action in Hot Spring County. The matter of attorney's fees was still pending in the Hot Spring County action when the insured filed a second action in Pulaski County. We said in that action, "The only part of the Hot Spring County case still pending is that of determining the amount of the attorney's fees to be assessed against [the insurer]. For all practical purposes the original action is not pending." 281 Ark. at 145, 662 S.W.2d at 386.

The same is true in the case at bar. The order appealed from in this matter otherwise terminates the action as it was requested by the moving parties in the complaint on the issue of the

constitutionality of the tax, the injunction and the refund. We view the matter of the details of notice and attorney's fees to be primarily collateral and ministerial and in furtherance of the enforcement of the court's decision. It is not required under our interpretation of Rule 2 that such collateral ministerial matters be final. The order appealed from granted all the relief prayed for in the complaint and was thus final. *See Terket* v. *Lund*, 623 F.2d 29 (7th Cir. 1980).

Upon questioning during oral argument, counsel for the appellees was asked whether he was seeking additional attorney's fees for which additional orders of the chancery court might be necessary. Counsel indicated that he reserved his rights to seek fees pursuant to 42 U.S.C. §§ 1986 and 1988. Does such a stated intention prevent the order from which appeal is taken from being final for the purposes of Rule 2? We think not. Such actions under 42 U.S.C. §§ 1986 and 1988 may in some cases even be by separate action. *See Johnson* v. *Snyder*, 639 F.2d 316 (6th Cir. 1981). Such a claim for attorney's fees raises a collateral and independent claim for determination by the lower court, and thus a judgment on the merits on the other issues raised in the complaint is final as to the relief prayed of that court. *See Obin* v. *Dist. No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers*, 651 F.2d 574 (8th Cir. 1981). It would be fruitless, and, under our interpretation of the rule, we are not required to anticipate all of the relief the parties may ask in the future when making determinations as to finality under Rule 2.

We thus hold that the lower court's order on the issues of class certification, constitutionality of the tax, the injunction, the refund and the right to attorney's fees to be final for purposes of appeal.

DID THE CHANCELLOR ERR IN INCLUDING WITH THE CERTIFIED CLASS MILITARY RETIREES AND RETIREES FROM OTHER STATES' GOVERNMENTAL AGENCIES?

For its first ground for reversal, the appellants argue that the Chancellor erred in including within the certified class military retirees and retirees from other states' governmental agencies. In order to understand the basis for the argument by the appellees, we must consider the United States Supreme Court case upon

which the appellants' case is based, *Davis* v. *Michigan Dept. of Treasury*.

Paul S. Davis is a former federal employee. He brought suit in Michigan seeking a refund of state taxes paid on his federal retirement benefits. He argued that the constitutional Doctrine of Intergovernmental Tax Immunity as codified at 4 U.S.C. § 111 prohibited discrimination against him, when compared with an employee retired from the employment of the State of Michigan. Section 111 allows states to tax pay or compensation for personal services as a federal officer or employee if the taxation does not discriminate against the federal employee because of the source of the pay or compensation. Michigan claimed that its laws did not violate section 111 because Mr. Davis was an "annuitant" rather than an employee and therefore section 111 did not protect him from discrimination. All of the courts in Michigan agreed with the state. *Davis* v. *Dep't of Treasury*, 160 Mich. App. 98, 408 N.W.2d 433 (1987).

Mr. Davis asked the Supreme Court to review the matter. The Supreme Court found that section 111 did protect Mr. Davis because section 111 protected current federal employees as well as retirees. The Supreme Court reasoned that retirement pay, though not actually disbursed during the time an individual is working, is based and computed upon the individual's salary and years of service, and was thus deferred compensation for past service. The Supreme Court reviewed the constitutional Doctrine of Intergovernmental Tax Immunity which bars those taxes that discriminate against a sovereign or those with whom it deals. In *Davis* v. *Michigan Department of Treasury*, the United States Supreme Court pointed out that section 111 constitutes an affirmative statutory grant of immunity from discriminatory state taxation equal to the constitutional Doctrine of Intergovernmental Tax Immunity, which applies between the states and the federal government and among the states themselves. Thus, if we find in this case that the Arkansas tax scheme discriminates against retirees from the federal government or other states when compared to the treatment given retirees from the State of Arkansas, we must find that the tax is in violation of the Constitutional Doctrine of Intergovernmental Tax Immunity. *Phillips Chemical Co.* v. *Dumas Indep. School Dist.*, 361 U.S. 376 (1960).

The appellants argue that in light of our decision in *Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), the Arkansas statutory tax scheme is presumptively valid, which is true. However, that presumption is not conclusive. The appellees argue that *Davis* did not involve military retirees, which is also true. But again, the fact that the taxpayer in *Davis* was not a military retiree is not determinative of how this Court should rule.

The crux of this first point is whether the tax levied by the State of Arkansas discriminates against the taxpayers because of the *source* of the pay or compensation. If the source is the basis for the discrimination, then the state tax cannot withstand the constitutional prohibition found in the Doctrine of Intergovernmental Tax Immunity which forbids such discrimination. If the discrimination is based upon the *nature* of the compensation then the Doctrine does not forbid discrimination. The appellants argue that military pay is not a pension or deferred compensation, but actually represents reduced pay for reduced service, and thus the Arkansas tax is discriminatory only as to the nature of the compensation, *i.e.*, compensation for military service rather than compensation for state civil service. We disagree with the appellants' argument that military pay is reduced pay for reduced service, and believe that those cases which hold that military pay is actually deferred compensation or in the nature of a pension represent the better reasoned application law. *See Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986); *Askins* v. *Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986), *Womack* v. *Womack*, 16 Ark. App. 108, 697 S.W.2d 930 (1985).

Appellants also argue that retirees from another state were not discriminated against under the Arkansas tax laws. Obviously that other state's retirees' pay is in the nature of a pension, just like the Arkansas state retirees. Thus the discrimination between the retired Arkansas civil service employee and the retiree from the civil service of another state is even more clear than in the case of the military retiree. The Arkansas tax levied upon the compensation of the military retirees and retirees from the civil service of other states is discriminatory when compared with the tax levied upon the compensation of the Arkansas civil service retirees. In other words, the tax discriminates based upon the source of the payment, since the source of one payment is the State of Arkansas and the source of the military pay is the federal

government, and the source of the pay to a retiree from the civil service of another state is that other state's government, and therefore such tax violates 4 U.S.C. § 111 and the Doctrine of Intergovernmental Tax Immunity. Finally, since the retirees of the governments of other states and the military retirees are part of the same class of plaintiffs here, and are discriminated against on the same basis, they are properly in the same class. *Ross* v. *Arkansas Communities, Inc.*, 258 Ark. 925, 529 S.W.2d 876 (1975). The Chancellor is given wide latitude in certifying classes, and we find the certification in this case to be correct. *International Union of Elec., Radio & Mach. Workers* v. *Hudson.*

DID THE CHANCELLOR ERR IN AWARDING REFUNDS OF THE ARKANSAS INCOME TAX COLLECTED ON RETIREMENT INCOME OF THE CERTIFIED CLASS?

Next the appellants argue that the Chancellor erred in awarding refunds of the Arkansas income tax collected on retirement income of the certified class. The issue here is whether we are to apply retroactively our finding that the Arkansas tax is unconstitutional. *Davis* is of no value here since there the state of Michigan admitted that under their laws a refund was due. However there is other guidance. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) sets forth three factors which must be considered in determining the retrospective application of *Davis*. As made applicable to this case, they are first if the *Davis* decision establishes a new principle of law, either by overruling clear past precedent on which litigants have relied, or by deciding issues of first impression not clearly foreshadowed, then the decision need not be applied retroactively, otherwise it *must*. *Hanover Shoe* v. *United Shoe Machinery Corp.* 392 U.S. 481 (1968). Second, this court must weigh the merits and demerits of retroactive application based upon the prior history of the doctrine, the purpose and effect and whether retroactive application will further or retard its operation. *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Third, if the retroactive application of *Davis* produces substantial inequitable results, and such hardship may be avoided, the rule need not be applied retroactively. *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

The Supreme Court of Virginia has held that *Davis* need not be applied retroactively. *See Harper* v. *Virginia Dept. of Taxation*, 401 S.E.2d 868 (Va. 1991). The Virginia Court looked to *American Trucking Associations, Inc.* v. *Smith*, ___ U.S. ___, 110 S.Ct. 2323, 110 L.Ed. 2d 148, 58 U.S.L.W. 4704 (1990), and determined that the *Chevron* test must be used. After an analysis of *Chevron* the Virginia court held that retroactivity was not necessary. We respectfully disagree with that holding.

The appellees argue that regardless of the three *Chevron* factors, our ruling here *must* be applied retroactively, citing *McKesson Corporation* v. *Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990), *Dep't of Business Regulation*, 110 L.Ed. 2d 17, (1990), *American Trucking Associations, Inc.* v. *Smith*, ___ U.S. ___, 110 S. Ct. 2323, 111 L.Ed.2d 148 (1990); *Ashland Oil, Inc.* v. *Caryl, Tax Commissioner*, ___ U.S. ___, 110 S.Ct. 3202, 111 L.Ed. 2d 734 (1990) and *National Mines Corporation* v. *Caryl, Tax Commissioner*, ___ U.S. ___, 110 S.Ct. 3205, 111 L.Ed. 2d 740 (1990). Under either theory, we hold that *Davis*, 489 U.S. 803, must be applied retroactively.

In support of the satisfaction of the first *Chevron* prong, the appellants argue that *Davis* and thus presumably our holding here, would be a new principle of law and a case of first impression, and therefore need not apply retroactively. We disagree. We believe that neither *Davis* nor our opinion here establishes a new principle of law. A review of the extensive historical discussion in *Davis* will clearly show that the Doctrine of Intergovernmental Tax Immunity has been applied for decades. The fact that this issue has never been before this court, or the Supreme Court, on these facts does not make this a new principle of law or a case of first impression, just a fresh statement of the applicability of a long standing doctrine.

In support of the applicability of the second *Chevron* prong, the appellants argue that since the General Assembly immediately changed the law to comply with *Davis* retroactivity would not advance the Doctrine of Intergovernmental Tax Immunity. Again, we disagree. Obviously retroactive application will advance the doctrine for the members of this class. Also, a refusal to apply the doctrine in this case may retard the recognition of it in other matters which come before the Arkansas legislature which

might fall under the scope of the doctrine.

As to the third prong, the appellants argue that evidence presented at trial showed that the retroactive application of this decision would create hardships for the State of Arkansas, its political subdivisions, and taxpayers. No doubt the State of Arkansas will suffer financial loss by making a refund to the members of this class who follow the procedures for such refund. However, the third prong of *Chevron* requires that the decision be applied retroactively unless a substantial inequitable result will occur *as a result of the decision.* If inequitable results occur whether retroactively is applied or not, we must make the ruling retroactive. Our decision in this case itself does not create the hardship. It will exist regardless of the outcome of this case. Clearly if the members of this class are not given the relief they have prayed for, they will be treated inequitably in that they will have paid an unconstitutional tax. Someone here will suffer, either the state or the taxpayers. We are not simply picking the class for refund based on need, nor are we penalizing the state. We are determining that since one of two inequitable results must occur, we are required to apply the ruling retroactively.

DID THE CHANCELLOR ERR IN ALLOWING REFUNDS TO MEMBERS OF THE CLASS WHO HAD NOT FILED AMENDED INCOME TAX RETURNS FOR 1985?

Next the appellants urge for reversal the proposition that the Chancellor erred in allowing refunds to members of the class who had not filed amended income tax returns for 1985. Appellants point to Ark. Code Ann. § 26-18-507 (1987) as the authority for its proposition. That statute sets forth the procedure for making a claim for a refund. The appellees argue that requiring strict compliance with § 26-18-507 by every member of the class would ignore one of the bases for class actions suits, i.e. to deal with these types of issues in a single action rather than requiring all members of a class to bring suit. Although this court has not ruled on this precise issue as applicable to tax refunds, there is ample authority for the appellees' position and we adopt that reasoning. *See Santa Barbara Optical Co.* v. *State Bd. of Equalization*, 47 Cal. App.3d 244, 120 Cal. Rptr. 609, (1975); *Ware* v. *Idaho State Tax Commission*, 98 Idaho 477, 567 P.2d

423 (1977); *Clark* v. *Lee*, 273 Ind. 572, 406 N.E.2d 646 (1980); *Thorn* v. *Jefferson County*, 375 So.2d 780 (Ala. 1979); and *Florito* v. *Jones*, 39 Ill. 2d 531, 236 N.E.2d 698 (1968).

Our decision in *International Union of Elec., Radio & Mach. Workers* discusses the issues presented here as applicable to class actions generally, and we believe supports the Chancellor in his application of the rules to this class.

DID THE CHANCELLOR ERR IN AWARDING ATTORNEY'S FEES?

Finally, the appellants argue that the Chancellor erred in awarding attorney's fees in this case. This assignment of error is based upon an argument that only when the attorneys for the class establish or preserve a fund for the class are they entitled to attorney's fees. The appellants maintain that the fund here is established by the legislature as the Income Tax Refund Account for the payment of refunds to all taxpayers. The appellees maintain that the appellants have no standing to argue that attorney's fees should be awarded under the common fund doctrine, citing *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980).

An order of the Chancellor, obtained though the efforts of the attorneys for the appellees, required the Income Tax Refund Account to be maintained at an amount not less than $8,000,000. Presumably this account would have been depleted or returned to the state treasury if not needed for other refunds if the order had not been entered. The attorneys for the class obtained the order which kept the fund at a minimum of $8,000,000 and thus we hold that the common fund was preserved by the attorneys for the class, and thus an award from that fund was proper.

Affirmed.

SPECIAL JUSTICES RAY BAXTER and CAROLYN CLEGG join in this opinion.

HOLT, C.J., and GLAZE and CORBIN, JJ., not participating.

DUDLEY, HAYS, and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. There is no final, appealable order in this case. *See* Ark. R. App. P. 2(a). We,

therefore, lack jurisdiction to hear the appeal. *Wilburn* v. *Keenan Companies, Inc.*, 297 Ark. 74, 759 S.W.2d 554 (1988); *Kilgore* v. *Viner*, 293 Ark. 187, 736 S.W.2d 1 (1987).

The Trial Court's order establishes that the state taxes paid on retirement income received by the appellee class members were unlawfully collected and that the members are entitled, individually, to refunds for a period governed by the statute of limitations. The order then speaks of a "common fund" from which counsel representing the class will be entitled to be paid a fee. The amount of the "common fund" is undecided. We do not know how much money will be returned to the class or to any member. The amount they will receive will depend upon the amount of the attorney's fees to be paid from the fund. A dissatisfied class or class member may wish to appeal with respect to that determination once it has been made.

In *Estate of Hastings* v. *Planters and Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1988), and in *Thomas* v. *McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967), we determined that an order for a money recovery which is not reduced to a specific dollars and cents amount is not a final order. We said it must be such a final determination as may be enforced by execution or in some other appropriate manner. In this case, it is obvious that neither the class nor any claimant can proceed to execute the judgment. While it may be that "some other appropriate manner" would include presentations of individual tax return claims, if indeed there is a "common fund" from which recovery is to be claimed by individuals, the amount of that fund has not been ascertained.

If the question in this case were simply the amount a party was to pay his or her attorney, having nothing to do with the recovery to be awarded ultimately to the party, I might agree with the majority's characterization of the issue as a "collateral" or "ministerial" one. The question here, however, is much more fundamental as it will determine the actual recovery to be had by the class and its individual members.

I predict there will be additional questions, such as prejudgment and post-judgment interest, which may, along with the attorney's fee question, also give rise to questions for appeal in this matter. The reason for our finality rule is to discourage

piecemeal appeals. *Wilburn* v. *Keenan Companies, Inc.*, *supra*; *Mueller* v. *Killiam*, 295 Ark. 270, 748 S.W.2d 141 (1988). It should be applied in this case.

I respectfully dissent.

DUDLEY and HAYS, JJ., join in this dissent.

Mary Anne STEPHENS *v.* Jackson T. STEPHENS

91-94 810 S.W.2d 946

Supreme Court of Arkansas
Opinion delivered June 10, 1991

Philip E. Dixon, W. Michael Reif, Norman Sheresky, and *Lisa Roday*, for appellant.

C.J. Giroir, Jr., Sam Hilburn, Kenneth R. Shermin, Jerry C. Jones, and *Judson C. Kidd*, for appellee.

PER CURIAM. Appellant Mary Anne Stephens (defendant below) brings this interlocutory appeal from the following orders:

Order of March 12, 1991
Order of March 14, 1991
Restraining Order of April 1, 1991
Order for Attorney's Fees of April 11, 1991

Appellant Jackson T. Stephens has moved to dismiss the appeal on the grounds that appellant's Notice of Appeal, filed on April 12, 1991, is untimely as to the March 12 order. Moreover, he contends the orders appealed from are interlocutory and not appealable under Arkansas Rules of Appellate Procedure, Rule 2.

The order of March 12 contains findings of fact and conclusions of law in response to a request by the plaintiff for a protective order as to discovery matters and for closed hearings and trial. Citing Rule 26(c) of the Arkansas Rules of Civil Procedure, which gives the trial court broad authority to enter protective orders, and Ark. Code Ann. § 16-13-318 (1987), empowering chancery courts in domestic cases either upon application of all litigants or upon their own initiative, to hear such matters in chambers, the trial court found and concluded that such orders should be entered. The order of March 14, styled "Protective Order" constitutes the protective order adverted to in the March 12 order.

The order of April 1 is responsive to motions of both parties for restraining orders and generally enjoins either party from disposing of or removing from this jurisdiction any property belonging to the parties except by agreement, ordinary course of business or further orders of the court. "Ordinary course of business" is defined as including transactional moves in both parties' stock and bond trading accounts at Stephens, Inc., including buying and selling of stocks or bonds and payments of calls and dividends to prevent a loss or realize a gain and for the general preservation of the assets reflected by these accounts. The order directs Stephens, Inc. to hold all assets of either party in trust pending a final determination as to ownership.

The order of April 11 is in response to defendant's petition for attorney's fees and recites that some $80,000 has been expended to date on attorney's fees. The order recognizes the plaintiff's ability to pay suit money and the propriety of both

parties having legal and accounting services. The order finds that $400 per hour for defendant's New York counsel is not reasonable by Arkansas standards, that the defendant will be responsible for such portion of attorney's fees from her separate assets but that such out-of-state fees would be considered by the court in the final disposition of assets. The order directs each party to submit monthly requests for fees and costs as they accrue and refers to the final disposition of the case as a determinant of fees.

Appellee's motion to dismiss, as we have noted, is grounded on the premise that these orders merely establish the procedures by which the chancellor will administer this divorce case during discovery and trial and do not finally resolve any separable part of this action. Appellee cites *John Cheeseman Trucking, Inc.* v. *Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991); *Ricks Pro Dive 'N Ski Shop* v. *Jennings-Lemon*, 304 Ark. 671, 803 S.W.2d 934 (1991); *Arkansas Department of Human Services* v. *Lopez*; 302 Ark. 154, 787 S.W.2d 686 (1990); *Tate* v. *Sharp*, 300 Ark. 126, 777 S.W.2d 215 (1989); *Budd* v. *Davis*, 289 Ark. 373, 711 S.W.2d 478 (1986).

Appellant responds that these orders are "injunctive in nature" and therefore appealable under Rule 2. We disagree with that contention. We note that the orders restrain both parties from disposing of marital assets and do not purport to affect one party more or less than the other. They appear to be the type of preliminary order entered routinely in divorce suits and are expressly subject to further orders of the court as the case evolves. Appellant has not shown how the orders operate with finality in any sense and we can conceive of none.

There is a clear and distinct thread that binds our cases relative to appealability and that is that the order must end the litigation or some separable branch of it. *See* generally, *Malone & Hyde, Inc.* v. *West & Co. of L.A., Inc.*, 300 Ark. 435, 780 S.W.2d 13 (1989); *Cash* v. *Cash*, 273 Ark. 32, 616 S.W.2d 13 (1981); *Hyatt* v. *City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982); *Bonner* v. *Sikes*, 20 Ark. App. 209, 727 S.W.2d 144 (1987); *Scoff* v. *Scoff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982).

Appellant contends that Ark. Code Ann. § 16-13-318 (1987), permitting private hearings in divorce actions is unconstitutional, citing *Arkansas Television Co.* v. *Tedder*, 281 Ark. 152,

662 S.W.2d 174 (1983). But the issue in *Tedder* was the extent to which the media can be denied access to a criminal trial and has only scant relevance to this case. Suffice it to say that we are unwilling to address the constitutionality of a legislative enactment in the context of a summary review of the appealability of interlocutory orders, particularly when the Attorney General has been afforded no opportunity to defend those enactments. Arkansas Code Ann § 16-111-106(b) (1987). If there is an appeal after this case is finally concluded at the trial level, and the defendant can demonstrate prejudicial error attributable to the orders of March 12 or March 14, we see no reason it cannot be corrected in conventional fashion, by reversal and remand.

For the reasons stated, the appeal is dismissed.

NEWBERN, J., dissents and would permit the appeal on the basis of Ark. R. App. P. 2(a)(6); GLAZE, J., concurs; CORBIN, J., not participating.

TOM GLAZE, Justice, concurring. Among other things, the appellant seeks to appeal the lower court's order closing all proceedings of the parties' divorce pursuant to Ark. Code Ann. § 16-13-318 (1987). She claims the closure is violative of her First Amendment rights to an open trial which, she argues, the state guarantees under Ark. Code Ann. § 16-10-105 (1987). Appellee responds the lower court's order is interlocutory, not final, and therefore not applicable. While I agree with the majority that the appellant has no right to appeal under ARAP Rule 2, I write to express my concerns.

The chancellor's rejection of the appellant's First Amendment argument effectively eliminates any right she might have to an open trial. True, if she chooses later to appeal from the chancellor's decree on the merits, appellant can then raise her First Amendment issue. But, even if this court agrees with her argument, this court generally decides chancery cases on de novo review, thereby avoiding further trial proceedings below. Thus, while appellant might prevail in her constitutional argument on appeal, the decision granting her an open trial, most likely, would prove moot as to her.[1]

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[1] Of course, if appellant prevailed on appeal, the earlier closed trial proceeding,

Appellant suggests that, because the chancellor's closure ruling effectively precludes her from obtaining an enforceable decision granting her an open trial, she should be able to appeal under Rule 2(a)(2) of the Arkansas Rules of Appellate Procedure. However, that rule provides that an appeal may be taken from an order which in effect determines the action *and* prevents a judgment from which an appeal might be taken, or discontinues the action. Of course, the chancellor's closure order here in no way determines the parties' action even though it might be argued the appellant is effectively prevented from appealing the order. Such difficulty for appellant aside, her request to appeal under the circumstances described simply fails to come within the terms set out in Rule 2(a)(2). Nor can she appeal under the terms of Rule 2(a)(1) because the chancellor's order fails to put the court's directive into execution, ending the litigation or a separable branch of it. *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978).

For the above reasons, I agree with the court's decision to dismiss the appeal. The parties, of course, are free to better develop below the First Amendment — Right of Privacy constitutional arguments posed in this attempted appeal so this court can consider the constitutionality of § 16-13-318 in any future appeal from the lower court's decree in this case.

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which is required to be reported in its entirety, would become open in the sense that a transcript would then be available. *See In the Matter of Administrative Order Number 4*, per curiam (May 6, 1991).

WEINGARTEN/ARKANSAS, INC. *v.*
ABC INTERSTATE THEATRES, INC.
Plitt Southern Theatres, Inc., and Warco, Inc.

90-151 811 S.W.2d 295

Supreme Court of Arkansas
Opinion delivered June 17, 1991

Wilson, Engstron, Corum & Dudley, by: *Wm. R. Wilson, Stephen Engstrom*; and *Rose Law Firm, A Professional Association*, by: *Richard T. Donovan*, for appellant.

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Leanard L. Scott*, and *Frank S. Hamlin*, for appellees.

JACK HOLT, JR., Chief Justice. This case involves a dispute over a lease agreement. We granted certiorari to review the Arkansas Court of Appeals' decision, as the issues involve matters of legal principles of major importance and significant public interest. *See Weingarten/Arkansas, Inc.* v. *ABC Interstate Theatres, Inc.*, 31 Ark. App. 109, 789 S.W.2d 1 (1990).

On June 10, 1975, appellant Weingarten/Arkansas, Inc.

(Weingarten), as owner of the Markham Plaza Shopping Center in Little Rock, leased 12,000 square feet of space in that center to appellee ABC Interstate Theatres, Inc. (ABC). The lease was for a term of 25 years, with an annual rent of $54,000, payable in monthly installments of $4,500. In addition, ABC agreed to pay an additional rent equal to 10% of the gross receipts for each year in which receipts exceeded $540,000.

ABC subsequently assigned the lease to appellee Southern Theatres, Inc. (Plitt) in 1978, who, in turn, assigned the lease to appellee Warco, Inc. (Warco), in 1981. It is undisputed that in assigning the lease, both ABC and Plitt agreed to remain responsible under its terms.

Warco defaulted on the lease in July, 1986, when it ceased making payments. In March, 1987, Weingarten filed suit against the appellees in the Pulaski County Circuit Court alleging joint and several liability for Warco's default.

In its second amended complaint, Weingarten sought possession of the premises without terminating the lease agreement in accordance with section 18.03(b) of its lease agreement. The complaint declared that Weingarten "must obtain immediate possession of the premises, in order to mitigate damages by cleaning and generally making such repairs and improvements as are necessary and to show the premises to prospective tenants." It prayed for a writ of possession and "for all unpaid back rent and rent which continues to accrue."

Warco filed an answer to the second amended complaint on April 22, 1987, stating that it had quit possession of the premises, and praying that the complaint against it be dismissed.

The trial court granted a writ of possession to Weingarten on May 5, 1987. Thereafter, Weingarten conducted a market survey to determine the best rental value for the space and began negotiations with a number of prospective tenants. Weingarten eventually arranged to lease the premises to two retail stores, one of which was to occupy 8,000 square feet and the other to occupy the remaining 4,000 square feet. The leases were of shorter duration and higher rent per square foot.

Thereafter, ABC and Plitt amended their answer to Weingarten's first and second amended complaints by affirmatively

alleging that Weingarten failed to mitigate damages for the period of August 1, 1986 through February, 1988. In addition, they filed a counterclaim for declaratory judgment, requesting the trial court to construe the lease and subsequent assignments as having been "constructively terminated" by Weingarten as to any future liability of ABC and Plitt for the remainder of the lease term. Specifically, ABC and Plitt alleged that Weingarten failed to mitigate its damages by refusing to accept another theatre business for the same rent and, furthermore, that its conduct in completely changing the premises to accomodate retail stores, rather than another theatre enterprise, constructively terminated the lease. Alternatively, they requested a credit for any rents from new lessees, over and above the amount of base rent in the original lease, for the remainder of the term.

A trial was conducted before the circuit judge sitting as jury. The parties stipulated as to the provisions in the lease, Warco's default and abandonment of the building, and the appellees' joint and several liability.

The trial court found that Warco had made its last payment on July 26, 1986, and that charges were due and payable under the terms of the lease from July 1, 1986, through May 5, 1987 (the date Weingarten was granted a writ of possession). The amount owed consisted of rent and general property taxes and totalled $56,878.24. The trial court further found that Weingarten had adequate opportunities, since May 5, 1987, to rent the premises to a Texas based cinema corporation, upon the same terms and conditions set forth in the lease, but refused to do so. It recited the following conclusions of law: 1) Arkansas law imposes a duty on the landlord to mitigate its damages and such duty arose when Weingarten was awarded a writ of possession; 2) Weingarten failed to mitigate is damages when it refused to rent the premises to the Texas theatre corporation and thus all damages ceased accuring as of May 5, 1987; 3) Weingarten was entitled to damages from the appellees, jointly and severally, in the amount of $56,878.24; and 4) Weingarten's remodeling and reletting of the premises did not amount to an acceptance of Warco's surrender of the property; however, the appellees were entitled to a credit against any future liability to the extent of any payments made by present and future tenants. The counterclaim for declaratory relief was otherwise dismissed with prejudice.

On appeal to the Arkansas Court of Appeals, Weingarten raised five points of error, all challenging its duty to mitigate. It claimed damages of $107,367.24, allegedly sustained from July, 1986 through February, 1988. The appellees cross-appealed, claiming that the trial court erred in finding that Weingarten's actions did not amount to an acceptance of surrender of the lease.

The court of appeals declined to address Weingarten's arguments, as it agreed with the appellees that Weingarten's conduct, in refusing to relet the premises to an interested theatre chain and in completely altering the nature of the premises, was so inconsistent with its claim to be acting for the benefit of the appellees, that it amounted to an acceptance of surrender of the lease agreement. Thus, the appellate court affirmed the trial court's judgment holding the appellees liable for lease rentals due before May 5, 1987, but reversed that portion of the judgment holding the appellees liable for any obligation on the lease after that date.

Weingarten's petition to the court of appeals for rehearing was denied. On review, we disagree with the decisions of both the court of appeals and the circuit court and, accordingly, reverse and remand to the circuit court.

Included in Weingarten's petition for review is the question upon which our decision hinges: Can the parties to a lease agreement provide that a landlord's reentry and reletting of the premises will not constitute an acceptance of surrender and, further, that the landlord has no duty to mitigate upon the tenant's default? We hold that they can, if expressly stated in their contract.

The traditional view, under common law, gives a landlord three options when a lessee abandons the premises: 1) he may refuse to accept abandonment, let the premises lie idle, and sue the tenants as the rent matures; 2) accept the keys as a surrender of possession, thereby terminating the lease and reenter on his own account; or 3) reenter and relet for the tenant's account and hold the tenant liable for any difference in the agreed rent and that of the new tenant. *See Grayson* v. *Mixon*, 176 Ark. 1123, 5 S.W.2d 312 (1928); R. Cunningham, W. Stoebuck and D. Whitman, *The Law of Property*, § 6.80, 403 (1984).

Weingarten asserts that in order to avoid any disagreement as to its remedies under these general principles, the parties negotiated a lease agreement containing the following pertinent provisions:

> 18.03 This Lease and the term and estate hereby granted and the demise hereby made are subject to the limitation that if and whenever any Event of Default shall occur, the Landlord may, at its option, in addition to all other rights and remedies given hereunder or by law or equity, do any one or more of the following:
>
> (a) Terminate this Lease, in which event, Tenant shall immediately surrender possession of the premises to Landlord;
>
> (b) Enter upon and take possession of the leased premises and expel or remove Tenant and any other company therefrom, with or without having terminated the Lease;
>
> provided, however,that Landlord shall not expel or remove Tenant from the leased premises or take possession thereof except pursuant to a judgment entered or writ issued in an appropriate legal proceeding.
>
> 18.04 Exercise by Landlord of any one or more remedies hereunder granted or otherwise available *shall not be deemed to be an acceptance of surrender of the premises by Tenant, whether by agreement or by operation of law, it being understood that such surrender can be effected only by the written agreement of Landlord and Tenant.*
>
> * * * *
>
> 18.06 In the event that Landlord elects to repossess the premises without terminating the Lease, then Tenant shall be liable for and shall pay to Landlord . . . all rent and other indebtedness accrued to the date of such repossession, plus rent and other indebtedness hereunder required to be paid by Tenant to Landlord during the remainder of the lease term until the date of expiration of the term as stated in Article I diminished by any net sums thereafter received by Landlord through reletting the leased premises

> during said period (after deducting expenses incurred by Landlord as provided in Section 18.07 hereof). In no event shall Tenant be entitled to any excess of any rent (or rent plus other sums) obtained by re-letting over and above the rent herein reserved. Actions to collect amounts due by Tenant as provided in this Section 18.06 may be brought from time to time, on one or more occasions, without the necessity of Landlord's waiting until expiration of the lease term.
>
> 18.07 In case of an Event of Default, Tenant shall also be liable for and shall pay to Landlord . . . broker's fees incurred by Landlord in connection with re-letting the whole or any part of the premises; the costs of removing and storing Tenant's or other occupant's property; *the costs of repairing, altering, remodeling or otherwise putting the leased premises into condition acceptable to a new tenant or tenants*, and all reasonable expenses incurred by Landlord in enforcing Landlord's remedies, including reasonable attorney's fees. . .
>
> 18.08 In the event of termination or repossession of the premises for an Event of Default, Landlord shall not have any obligation to re-let or attempt to re-let the premises, or any portion thereof, or to collect rental after re-letting; and *in the event of re-letting Landlord may re-let the whole or any portion of the premises for any period, to any tenant, and for any use and purpose.* [Emphasis added.]

Here, Weingarten elected to proceed with remedies under its contract, pursuant to sections 18.03(b) and 18.06, and resume possession of the premises without accepting surrender of the lease agreement. Such a "surrender clause" is well recognized in the law. Normally, if the landlord reenters and resumes the use and enjoyment of the premises for his own account, he terminates the lease, as a matter of law, insofar as his right to recover subsequently accruing rent is concerned. 49 Am. Jur. 2d, *Landlord and Tenant* §620, 592 (1970). *See also Hayes* v. *Goldman*, 71 Ark. 251, 72 S.W. 563 (1903). This rule will not hold true where the lease, via a "Surrender Clause," expressly allows a resumption of possession without surrender. *See Id.*; 52 C.J.S. *Landlord and Tenant* § 493, 433 (1963).

In his treatise, *Friedman on Leases*, Vol. 2 § 16.302 (3d ed. 1990), Milton Friedman cautions, however, that in order for a "surrender clause" to be upheld, it must expressly define the parameters under which a landlord may reenter and assume possession and still hold the tenant liable. Such a clause should, for example, "permit the landlord to make a change in the character of the premises, structurally or otherwise." Section 18.07 of the lease meets this requirement by holding the tenant liable for "the costs of repairing, altering, remodeling, or otherwise putting the leased premises into conditions acceptable to a new tenant or tenants. . ." Section 18.08 further allows Weingarten to "re-let the whole or any portion of the premises for any period, to any tenant, and for any use and purpose." As stated by the Indiana Court of Appeals: "As long as the landlord does no more than exercise the rights accorded to it under the lease, the lessor's conduct will not result in a surrender of the lease by operation of law." *Grueninger Travel Serv. of Fort Wayne, Ind., Inc.* v. *Lake County Trust Co.*, 413 N.E.2d 1034 (1980). The lease provisions here were, admittedly, quite comprehensive. As a result, however, we do not find that Weingarten, in remodeling the premises and reletting to two retail businesses, acted outside its rights provided by the lease agreement.

We remand the case to the Pulaski County Circuit Court for a determination of damages not inconsistent with this opinion.

CORBIN and BROWN, JJ., not participating.

Alvin Bernal JACKSON *v.* STATE of Arkansas

CR 90-257 811 S.W.2d 299

Supreme Court of Arkansas
Opinion delivered June 17, 1991

William R. Simpson, Jr., Public Defender, *Thomas B. Devine III*, Deputy Public Defender, *Jerry J. Sallings*, Deputy Public Defender, by: *Didi H. Sallings*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant Alvin Bernal Jackson was charged with the capital felony murder of Charles Colclasure during an aggravated robbery which occurred on July 30, 1989. Additional counts of the information alleged burglary and theft of property committed on the same date. Other counts included two attempted capital murders on August 2, 1989. The trial court granted a motion to sever the July 30 offenses from the August 2 offenses. Jackson was tried and convicted of capital felony murder, burglary, and theft of property and sentenced to life without parole. Sentences on the lesser offenses were enhanced by reason of three prior felony convictions.

Alvin Jackson appeals from the judgment, asserting that the trial court erred in denying his motion to suppress statements he gave to the police while in custody and used against him in the

trial. Finding no error, we affirm the judgment of conviction.

This case involves a series of incidents in an area of Little Rock known as the "East End." The incidents occurred between July 29 and August 2 of 1989. Subsequently they were found to be interrelated. On July 29 there was a disturbance at National By-Products involving two black males using a .25 calibre pistol. On July 30, a Sunday, Mr. Charles Colclasure went to his office at International Business Forms (IBF) at 1600 East 26th Street in Little Rock but never returned home. On July 31 his wife reported his disappearance to the Little Rock police. Later that day Mr. Colclasure's body was found in the Arkansas River some two or three miles from IBF. He had been shot numerous times with rat shot, but the cause of death was determined later to be a traumatic injury. On August 1 Colclasure's 1985 gray Buick Riveria was found in the 500 block of Bender Street in the East End.

In the early morning of August 2 a guard at Little Rock Crate & Basket Company in the East End discovered two black males inside a security fence engaged in an attempted burglary. Shots were exchanged as the two men fled. One of the men was firing rat shot.

At 1:17 p.m. on August 2 the police responded to a disturbance call from Carlon Marshall at 809 Carson in the East End. He stated that his uncle, Alvin Jackson, and brother, Charles Jackson, had been chasing him with a weapon. He explained that he had been riding with them in a grey Buick automobile which had been impounded the previous day. He told the police that Alvin and Charles Jackson had killed the man who owned the car. Marshall gave the police a description of Alvin and Charles Jackson and both were apprehended in the area within the hour. As Alvin Jackson was being apprehended the police were informed by radio of seven outstanding warrants against him—one for failure to appear, one for fleeing from arrest and five for traffic offenses.

During the afternoon Alvin and Charles Jackson were interrogated separately. Alvin Jackson gave a statement denying any involvement in the murder of Charles Colclasure but admitting that he had driven the Buick, which he said had been given to him by an acquaintance named Eric. During the course of the

interrogation the police obtained a television set from Alvin Jackson's residence which belonged to IBF. In the late afternoon or early evening Alvin Jackson admitted having robbed and killed Charles Colclasure. He confessed soon thereafter to the episode at the Little Rock Crate & Basket Company.

Appellant's theory of error is threefold: One, his statements were the proximate result of an illegal arrest, there being no probable cause to charge him; two, his statements came after he had invoked his right to remain silent; and, three, he did not knowingly and intelligently waive his Fifth Amendment rights against self-incrimination. We can find no merit in the arguments.

Probable cause for appellant's arrest can be grounded on one or all of three factors. Carlon Marshall reported to the police that Alvin Jackson had accosted him with a weapon, a direct accusation of a crime by the purported victim. W. LaFave, *Search and Seizure* § 3.4 (1987); J. Hall, *Search and Seizure* § 5.31 at 224 (Supp. 1988). Marshall also reported to the police that appellant and Charles Jackson had murdered Charles Colclasure, whom the police by then knew to have been the victim of a homicide. Lastly, the police learned in timely fashion that appellant was named in seven warrants of arrest, the validity of which is not challenged. Viewed separately or collectively, the police had ample reason to take Alvin Jackson into custody based on information they had no reason to question. *Woodall* v. *State*, 260 Ark. 786, 543 S.W.2d 957 (1976).

Turning to the allegation that the statements were obtained after appellant asserted his right to remain silent, Jackson points out that the first statement he gave the police admitted only that he and Charles had been in the Colclasure automobile. As the statement was being concluded by the interrogating officer he asked Jackson, "Okay. Is there anything else you want to say?" Jackson said, "No, sir."

Appellant insists that by his response to the final question he made it clear that he was involving his right to remain silent, that under the rationale of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), he was entitled to have that right scrupulously honored. He urges that when an accused in custody indicates *in any manner* that he does not wish to submit to further interroga-

tion, the police may not continue to question. But here it is entirely clear, as the trial court found, that rather than invoking his right to remain silent, the appellant was merely declaring that there was nothing he wished to add to his statement. Similar contentions have been considered by other courts and found wanting: *State* v. *Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985); *Commonwealth* v. *Messere*, 14 Mass. App. 1, 436 N.E.2d 414 (1982).

Finally, appellant maintains that from a totality of the circumstances it is evident he did not knowingly and intelligently waive his Fifth Amendment rights against self-incrimination. He cites the testimony of Dr. Glenn White, a clinical psychologist, who administered tests to the appellant to gauge his intelligence, that he determined Jackson's IQ to be borderline, or possibly mildly retarded. He testified that Jackson's school records and 1986 IQ test of 74 more nearly reflected Jackson's true intelligence, which he estimated to be between 74 and 81.

We have reviewed the testimony elicited at the omnibus hearing independently of the trial court's findings and do not find ourselves at odds with the trial court. *See Giles* v. *State*, 261 Ark. 413, 549 S.W.2d 479 (1977). There is the testimony of the appellant that an officer shoved him against the police car when he was being arrested and his assertion that he was promised a measure of leniency if he would confess, but we cannot say those claims are persuasive against the proof to the contrary. There were issues of credibility and the trial court's findings are largely determinative. *Harvey* v. *State*, 272 Ark. 19, 611 S.W.2d 762 (1981).

Under Ark. Code Ann. § 16-91-113 (1987), as put into effect by our Rule 11(f), we consider all objections brought to our attention in the abstracts and briefs in appeals from a sentence of life imprisonment or death. In this case we find no prejudicial error in the points argued or in the other objections abstracted for review.

Vernon Keith FRANKS *v.* STATE of Arkansas

CR 90-265 811 S.W.2d 301

Supreme Court of Arkansas
Opinion delivered June 17, 1991

David R. Goodson, Greene County Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Sandra Moll*, Asst. Att'y

Gen., for appellee.

DAVID NEWBERN, Justice. Vernon Keith Franks appeals from his conviction of murdering his grandmother, Lou Emma Franks. He contends the Trial Court erred in failing to grant his motion for acquittal due to mental incapacity at the time the crime was committed. He also argues he was entitled to a directed verdict on that issue. In addition, Franks contends a statement he made while in custody should not have been admitted into evidence and the Court erred by not declaring a mistrial because the jury obtained a dictionary for the purpose of looking up the definition of "premeditated" without notice to the Court or counsel.

We affirm the conviction because, (1) the statute allowing a court to dismiss a charge due to mental incapacity is permissive only, (2) there was evidence on which the jury could base its decision that Franks was not mentally incapacitated at the time of the crime, (3) there was evidence from which the court could have concluded that the statement Franks made while in custody was voluntary, resulting from an initiation by Franks of a conversation with a police officer despite the fact that Franks had earlier insisted on "taking the Fifth" and speaking with a lawyer, and (4) the jury's procurement of a dictionary without notice to the court or the parties was improper, but no prejudice resulted.

Allen Hicks was an investigator with the Greene County Sheriff's Department. He testified he was called on September 9, 1988, to a residence occupied by the appellant, Keith Franks, and Lou Emma Franks. Mrs. Franks' body had been found in the yard outside the house lying under a bush. Her head was severely lacerated, and she had blood splashes on her feet. Hicks examined the area and it did not appear to him that a struggle had taken place in the vicinity of the body, nor did it appear that the body had been dragged there.

Hicks went to the residence where he found Keith Franks in the kitchen speaking to Franks' mother on the telephone. Franks was saying to his mother that his grandmother was dead and apparently had been shot. Hicks asked if Franks knew what had happened to his grandmother, and Franks said he had heard her go out with the dog but she had not returned for about an hour, and he had gotten worried and called relatives to help him look for

her, although he had not gone outside to search. Hicks read Franks his rights and told Franks he would like him to come to the sheriff's department to give a formal statement. At that, Franks replied that if he were going to the station he would "plead the Fifth" and wanted to speak to a lawyer. He was taken to the department by another officer.

Hicks and other officers remained at the residence. They found a number of areas and items in the house on which there were stains they suspected to be blood stains. Wet clothing was found on a closet floor, and part of the carpet was wet where apparently there had been an attempt to wash out the stains. Stained towels were found in a dryer. The items and places were later analyzed and found to contain blood.

When Hicks arrived at the sheriff's department later, he was told by Officer Reeves that Franks had asked to speak to him. He had Franks delivered to his office where he asked what Franks wanted. Franks said he wanted to tell what had happened. Hicks readvised Franks of his rights, and a statement was taken. The statement essentially repeated what Franks had said earlier.

After Franks was charged with the crime, he was sent to the State Hospital for mental evaluation. He was diagnosed as schizophrenic and determined to be unable to assist in his own defense. Later, after some five months of treatment, a Dr. Brandt of the State Hospital wrote to the Court that Franks was able to assist in his own defense, but "lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" at the time of the crime.

1. Mental capacity

a. Motion to acquit

Franks moved for acquittal in accordance with Ark. Code Ann. §5-2-313 (Supp. 1989) which provides:

> On the basis of the report filed pursuant to § 5-2-305, the court may, after a hearing if a hearing is requested, enter judgment of acquittal on the ground of mental disease or defect if it is satisfied that, at the time of the conduct charged, the defendant lacked capacity, as a result of mental disease or defect, to conform his conduct to the

> requirements of law or appreciate the criminality of his conduct. . . .

At the hearing on the motion, Dr. Marino, a psychiatrist from the State Hospital, testified that Franks was delusional and mentally ill, and with the exception of the delusions, his illness was in remission. The delusions included, but were not limited to thoughts that Franks was a member of the CIA, the FBI, and a deputy provost marshall. Franks' mother testified about similar delusions Franks had had and that he also had a delusion about his father being someone named "Apocalypse Franks."

In response, the State pointed out that when Hicks asked Franks to come to the Sheriff's office to make a formal statement, Franks wanted to "plead the Fifth" and asked for a lawyer. The State also noted that Franks attempted to eliminate evidence of the crime and thus seemed to appreciate the criminality of his acts.

The motion was denied, and we cannot say that was error. The basis of the motion is the statute quoted above which clearly says that the Court *may* acquit on the basis of the motion, but there is no requirement that it do so. Construing a predecessor to the current statute, this Court wrote in *Westbrook* v. *State*, 274 Ark. 309, 624 S.W.2d 433 (1981), that "the statute permits the trial judge to acquit the defendant 'in cases of extreme mental disease or defect where the lack of responsibility on the part of the defendant is clear,' . . ." While there was strong evidence that Franks has been psychotic for years, we cannot say the Trial Court erred in finding that it was not "clear" that Franks was not responsible for his acts at the time the crime was committed.

b. Directed verdict

At the trial, Dr. Bunten, a State Hospital psychologist, and Dr. Marino testified about Franks psychotic condition, and both opined that Franks was not responsible for his acts at the time of the crime. That evidence was supplemented by testimony of Franks' mother and an aunt, both of whom gave more information about bizarre delusional conduct on his part.

Dr. Bunten and Dr. Marino conceded that their opinions about Franks' condition at the time the crime occurred had to be based on his history, and they could not say with certainty that he

was delusional on that date or that he was suffering any particular delusion having to do with his grandmother.

The State presented the testimony of Dr. Austin, a psychiatrist who had not examined Franks. Dr. Austin responded to a hypothetical question by stating, in effect, that a person who was a severe schizophrenic could have done a killing like the one in question here either in response to a delusion or in response to a longstanding argument. Testimony had been presented indicating that Franks and his grandmother had argued over time about Franks' lack of employment.

Franks cites no authority for the proposition that the Court should have directed a verdict in his favor. In *Campbell* v. *State*, 265 Ark. 77, 576 S.W.2d 938 (1979), Campbell moved for directed verdict on the basis of lack of mental capacity to commit the crime. We noted that the lack of capacity defense is an affirmative defense to be established by the defendant by a preponderance of the evidence, the question being primarily for the jury, and the judge may direct a verdict only when no fact issue exists. See also *McCaslin* v. *State*, 298 Ark. 335, 767 S.W. 2d 306 (1989), in which we affirmed a trial courts' denial of a motion for directed verdict based on the affirmative defense of entrapment because the defendant failed to prove entrapment as a matter of law; *Owens* v. *State*, 300 Ark. 73, 777 S.W.2d 205 (1989), also holding that an affirmative defense is established as a matter of law only if there are no factual issues remaining to be resolved by the trier of fact.

While we agree there was very strong evidence that Franks lacked capacity to appreciate the criminality of his acts at the time the crime was committed, we cannot say he had established the defense as a matter of law. If the jury were to find that Franks killed his grandmother and then took fairly elaborate, although not at all successful, steps to hide the crime, that was to be considered on the issue of capacity. So also was Franks' "pleading the Fifth" and his request for a lawyer. Franks' mental capacity was a factual issue, and we cannot hold it was error to allow the jury to decide it.

2. The statement

Franks' argument with respect to keeping his statement out of evidence is that Officer Hicks interviewed Franks after he had said he wanted a lawyer, but before he was successful in contacting a lawyer. If Officer Hicks initiated the contact, that would clearly have been prohibited by *Edwards* v. *Arizona*, 451 U.S. 477 (1981). At a pretrial hearing on Franks' motion to suppress the statement, Officer Reeves, the officer who told Hicks that Franks wanted to talk to Hicks after Hicks reached the sheriff's department, testified he could not personally say he heard Franks make such a request. Officer Hicks testified that when Franks was brought to him, he asked Franks if he had called his attorney, and Franks replied that he could not get in touch with him. Hicks then testified that Franks "said at that time he wanted to talk to us."

In *Findley* v. *State*, 300 Ark. 265, 778 S.W.2d 624 (1989), we pointed out that when an accused initiates contact with police authorities after having requested counsel the right to counsel may be considered waived. If Hicks' testimony is to be believed, Franks initiated the contact resulting in his statement, and there was no Sixth Amendment violation. The question is one of credibility. *Segerstrom* v. *State*, 301 Ark. 314, 783 S.W.2d 847 (1990); *Findley* v. *State, supra*. We cannot say the Court erred in denying the motion.

3. The dictionary

Without the knowledge of the Court or counsel, the jurors requested that the bailiff bring them a dictionary so they could look up the definition of "premeditation." The bailiff complied with the request. Franks moved for a new trial, and both sides stipulated that the incident occurred as described above. Franks contends it was error to deny his motion for a new trial.

The Trial Court concluded it was error for the jurors to have received the dictionary but, after reading the dictionary definition and the instruction given to the jury on premeditation, held that the error was not prejudicial. The jury was instructed on premeditation as follows:

> In order to find that Vernon Keith Franks acted with a premeditated and deliberated purpose, you must find that

> he formed that intention before acting as a result of a weighing in the mind of the consequences of a course of conduct as distinguished from acting on impulse without the exercise of reasoning powers.

The definitions seen by the jury in the dictionary were:

> Premeditate . . . to think over, premeditate; . . . to think out, plan or scheme beforehand, vi. to think or meditate beforehand.
> Premeditation . . . a premeditating; specifically, in *law* a degree of planning and forethought sufficient to show intent to commit an act.

We do not reverse the refusal to grant a new trial unless we find the trial court abused its discretion. *Mitchell* v. *State*, 299 Ark. 566, 776 S.W.2d 332 (1989); *Langston* v. *Hileman*, 284 Ark. 140, 680 S.W.2d 89 (1984).

We find no abuse of discretion here. An annotation at 35 ALR4th 626, 645, cites many cases in which a jury has somehow obtained a dictionary and looked up words, and it has been held that no prejudice resulted. While we agree that, generally, it is misconduct for a jury to seek out reading material without the knowledge of the court and the parties, prejudice does not occur in every case. We tend to agree with the Trial Court that the dictionary definitions quoted above were clearer than the lawyer words "conscious object" found in the instruction and that nothing in the dictionary definitions was prejudicial to Franks.

Affirmed.

ARKANSAS ALCOHOLIC BEVERAGE CONTROL DIVISION, Robert S. Moore, Jr., Administrator; and Dr. Carl Hyman, James N. Walters, F.E. Scott, Robert J. Jones and Reid Holiman *v.* Kenneth M. COX, Jr., d/b/a The Cotton Patch, Inc., And James M. Cox

91-6 811 S.W.2d 305

Supreme Court of Arkansas
Opinion delivered June 17, 1991

Donald R. Bennett, for appellants.

Hoofman & Bingham, P.A., by: *Clifton H. Hoofman* and *Friday, Eldredge & Clark*, by: *Michael G. Thompson*, for appellees.

TOM GLAZE, Justice. This appeal involves the appellees' (Coxes') request to transfer the location of a retail liquor and beer permit to a site on Highway 67 near the Miller County-Hempstead County line. At approximately the same time, a competitor, Margaret Gleason, made a similar request for a permit for a store to be located within a few hundred feet from where the Coxes would have their outlet. The Director of the Arkansas Alcoholic Beverage Control Division (ABC) denied both requests. However, the Coxes and Gleason appealed the Director's decision to the ABC Board, which granted Gleason's application, but then denied the Coxes' request.

The Coxes, who were intervening parties in Gleason's ABC Board proceeding, appealed the Board's decision granting a liquor permit to Gleason and that appeal was filed in the Sixth Division, Pulaski County Circuit Court. The Coxes also appealed the Board's denial of their permit request, but their appeal was lodged in the Second Division, Pulaski County Circuit Court. While these cases appeared to be companion cases, they were not consolidated. However, depositions of two of the ABC Board members, James N. Walters and Reid Holiman, were taken in the Sixth Division proceeding and, over ABC's objection, admitted into evidence at the trial in the Second Division Circuit Court.

After the trial judge reviewed the records of the Coxes and Gleason proceedings before the ABC Board, the Board's orders rendered in those hearings, and the Walters and Holiman depositions, he reversed the Board's denial of the Coxes' liquor permit request. The ABC Board appeals the trial court's decision, arguing the lower court erred (1) in admitting into evidence and considering the Gleason record before the Board and the deposi-

tions of the two Board members, (2) in ruling the two Board members had improperly engaged in *ex parte* communications concerning the Coxes' and Gleason's applications and (3) in deciding no substantial evidence existed to support the Board's denial of the Coxes' liquor permit request.

The ABC Board's first two arguments focus on separate communications made by Senator Jon Fitch and Betsy Wright of the Governor's Office to Board members Holiman and Walters regarding the pending requests of Gleason and the Coxes. Walters said that Ms. Wright called and told him the Governor's Office had "received considerable phone calls about the Cox case, that Walters should be aware there had been calls made, and that 'they' knew he [Walters] would do what was right." Holiman testified that Senator Fitch contacted him about the Gleason's and Coxes' requests and wanted to know how Holiman intended to vote. Holiman said that he told Fitch that "he [Fitch] couldn't expect me to try and help him politically in less than a day, if I could do it." Holiman said, "[Fitch]" wouldn't tell me where he was coming from although I believe I know." Both Walters and Holiman testified that these contacts did not affect their votes on either the Coxes' or Gleason's applications.

However, in reversing the Board's denial of the Coxes' application, the trial judge, in his order, stated, in addition to finding the evidence was insufficient to support the Board's denial, that the foregoing contacts with the two Board members had violated the Administrative Procedure Act and that those discussions (contacts) "so tainted the entire proceeding that there is an appearance of impropriety." The specific statutory provision to which the judge referred is Ark. Code Ann. § 25-15-209(a)(1987). That law in relevant part provides that ABC Board members or employees assigned to render a decision in any case shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party nor in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

In its argument, the Board does not actually question the court's finding that the two contacts described above violated § 25-15-209(a). Instead, it contends the Board members' depositions relating or describing the two contacts should not have been

admitted and considered by the trial judge because Ark. Code Ann. § 25-15-212(g) limited his review of the Coxes' appeal to the record made by the parties in the ABC Board proceeding. In other words, because the Coxes had not presented evidence regarding the ex parte communications in their appeal to the Board, the trial court could not later consider those matters in its review. We disagree.

Section 25-15-212(g) not only provides that the court's administrative review shall be conducted by the court without a jury and confined to the record before the agency, it also states that, in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony may be taken before the court. In addition, Ark. Code Ann. § 25-15-212(d)(4) (1987) provides that a court may require or permit subsequent corrections or additions to the record. Here, the third-party contacts made to Board members Holiman and Walters violated § 25-15-209(a) and, as procedural irregularities, were properly allowed by the trial court as added testimony describing those contacts and communications.

The Board alternatively claims that even if the contacts were properly considered by the trial court, the third party conversations, as related, amounted to "a big nothing," were *de minimus* and no prejudicial error was shown. The trial court found these violations alone would require the Board's order to be set aside, but, later in the same order, the court said that it did not intend to suggest either member of the Board had been compromised. Regardless of whether the ex parte communications alone warrant reversal of the Board's decision denying the Coxes a permit, we believe the trial court must be affirmed based upon its further holding that insufficient evidence existed to support the Board's decision.

In examining the record before the ABC proceeding, the trial court did so in view of the Board's findings that the Coxes' proposed outlet was remote and presented a law enforcement problem, their store would be located in an area of limited population and sufficient outlets (including the one the Board just granted Gleason) existed to serve the area, and the economic survival of the permit granted to Gleason would be brought into question if the board granted the Coxes' application. These

findings, the trial court stated, were negated by contrary findings made by the Board when granting Gleason's permit.

At this point, we note the Board's argument that part of the Gleason's proceeding and the Board's decision in that proceeding were erroneously made a part of the record by the trial court. The Gleason decision, however, was introduced without objection and, while the Board's challenge of the Gleason transcript is for other reasons dubious as well, the trial court's decision does not in any way appear to have been affected by the inclusion of the transcript. Instead, the trial court relied on the findings and conclusions set out in the Board's Gleason order and the testimony taken in the Coxes' proceeding before the Board.

In its review, the trial court found that the Coxes' outlet was to be located in the same area of Gleason's, and if Coxes' store posed a law enforcement problem, Gleason's outlet would as well. Nonetheless, in granting Gleason's permit, the Board never mentioned any law enforcement problem. The trial court also set out testimony that, since 1984, appellee Kenneth M. Cox had operated a deli and beer outlet on Highway 67 without criminal incident or disturbance and that the sheriff and state police stopped and checked the store occasionally. Next, bearing on the Board's finding existing permit holders, including Gleason, could not economically survive if the Coxes' application was approved, the trial court pointed out the evidence showing just the opposite. The court in its order set out evidence presented showing that 1,600 people had signed petitions supporting Coxes' application, that Highway 67 had a traffic count of over 2,000 cars per day and that the area would support two liquor outlets. The court also noted the significant absence of any evidence to support the Board's finding that sufficient outlets existed to serve the area or its conclusion that competitors, like Gleason, could not economically survive.

In conclusion, we believe the trial court, in its review, took a critical, detailed and fair look at the Board's findings and conclusions made in the Coxes' and Gleason's applications. As a result, it held correctly that the two Board decisions were inconsistent and the determinations reached in the Coxes' case were not supported by the evidence and therefore arbitrary. Therefore, we uphold the trial court's analysis and affirm its

decision reversing the Board and remanding this case to the Board with directions to grant the Coxes' application.

The CITY OF FAYETTEVILLE, Arkansas, and the Board of Trustees of the University of Arkansas *v.* Sue PHILLIPS, Assessor, and Washington County Board of Equalization

90-311 811 S.W.2d 308

Supreme Court of Arkansas
Opinion delivered June 17, 1991

Ginger P. Crisp, Fred H. Harrison, Jeffrey A. Bell, and *Jerry E. Rose*, for appellants.

George E. Butler, Jr., for appellees.

TOM WOMACK, Special Justice. This appeal results from a decision of the Washington County Circuit Court that the appellants, the City of Fayetteville and the Board of Trustees of the University of Arkansas, are not entitled to an exemption from ad valorem taxes during the construction of a jointly-owned arts center.

In 1988, the appellants acquired real property in Fayetteville on which they planned to construct the Walton Arts Center. By application to the Washington County Assessor, the City and University sought an exemption from property taxation under article 16, § 5(b), of the Constitution of Arkansas, contending that the site for the Center is public property being used exclusively for public purposes. The appellee county assessor denied the application for exemption on the basis that the property was not currently being used for an exempt purpose, the possibility existed that the Center, when completed, would be available for private functions, and the Center would compete with similar facilities in the area which were not being taxed.

The appellants then applied for relief to the appellee, Washington County Board of Equalization, and the request for exemption was again denied. An appeal was taken by the

appellants to the Washington County Court, which ruled after a hearing that the property was exempt from ad valorem taxation. The appellees then appealed to the circuit court, which found that the property was not exempt, and the appellants now appeal from that decision. Additionally, the appellees have cross-appealed that part of the circuit court's ruling holding that public property can, under some circumstances, be exempt from taxation during a period of construction. We affirm the decision of the trial court and deny the tax exemption to the appellants.

The facts are presented on stipulation of the parties and exhibits. The City and University entered into an Interlocal Cooperation Agreement in 1986 to finance, construct, and manage a center for the arts. Under the agreement, each contributed $4,500,000 for construction and an endowment to operate and maintain the facility. The primary source of the funds for the University's contribution was a private donation from Sam and Helen Walton of Bentonville. The City's contribution consisted of $1,000,000 from its general fund and $3,500,000 from a sales tax capital improvement bond issue backed by the City's portion of county sales tax revenues. The bond issue was approved by Fayetteville voters in October 1986.

A city block was designated as the site for the Walton Arts Center. The property in the north half of the block was purchased in May of 1988 and is the subject of the present appeal. By January 1, 1989, existing buildings on the property had been vacated, and it had been determined that asbestos abatement would be necessary before demolition of the buildings could begin. Asbestos abatement began in January 1989 and was completed in March 1989. Construction of new buildings was delayed pending the outcome of a condemnation suit concerning the property in the south half of the block. Later in the year, that suit was resolved in favor of the City and University, both in chancery court and on appeal to the Arkansas Court of Appeals.

The Center was designed to consist of two buildings, one to contain two classrooms equipped for art education and offices to be used by area non-profit organizations and Center staff, and a second to contain some additional offices, an exhibition gallery for fine arts, crafts and other exhibitions, a main hall equipped for theatrical productions, and a smaller auditorium outfitted for

other arts presentations. A primary consideration in the planning of the Center was the provision of performance space for use by all segments of the public. According to the Center's executive director, any group or individual requesting use of the facility would be allowed to do so upon payment of a designated rental fee. The amount of rental fees were not determined initially, but were to be kept low in order to encourage maximum utilization of the Center. According to the record, no decision had been reached as to whether those groups and persons renting space would be required to open their events to the public, either on a paying or non-paying basis.

The plans called for operating funds to be derived from earnings on the endowment, rental rates, ticket sales, corporate and foundation grants, gifts and bequests, class registration fees, and state and federal grants. The programs to be offered by the Center would complement conferences and educational programs offered by the Continuing Education Center in Fayetteville, although they might attract the same segments of the general public who would otherwise attend arts programs at the Arts Center of the Ozarks, a private, non-profit arts center in the area whose property was not exempt from ad valorem taxation.

This case calls for an interpretation of the property tax exemption provision of our Constitution, article 16, § 5(b), which states:

> The following property shall be exempt from taxation: *public property used exclusively for public purposes*; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity.

(Emphasis supplied.)

In its letter opinion and Order, the circuit court, in reviewing the evidence submitted, made the following findings:

1. Property must be "actually and directly and exclusively" used for a public purpose to be entitled to an exemption from taxation.

2. The actual type of use to which property may

ultimately be put is determinative as to questions involving entitlement to an exemption during construction. If the type of use contemplated by the entity seeking the exemption is exclusively public, as well as the actual character of the use to which the property can be put, the property will be entitled to tax-exempt status.

3. If a possibility exists that the property can or will be used for non-public purposes and that issue is raised by the taxing authority, the tax exemption will not be applied prospectively during construction of the facility.

4. Issues related to the use of the Walton Arts Center after construction are not ripe for a decision by the court.

5. The defendants have failed to meet the strict burden of proof imposed upon entities seeking an exemption from ad valorem taxation.

The appellants bring this appeal asserting two points for reversal: (1) The circuit court committed error in ruling that public property under construction for a public purpose shall be denied a tax exemption if there exists an issue as to whether the property may be used for a non-public purpose once completed; and (2) The court erred in finding the appellants had failed to meet their burden of proving that the Walton Arts Center was being used exclusively for public purposes on January 1, 1989. On cross-appeal, the appellees urge error in the circuit court's ruling that the property would have been exempted during the construction period had the appellants met their burden of proof.

As this Court has consistently held, taxation is the rule and exemption the exception. Exemptions from taxation must always be strictly construed, regardless of merit, in favor of taxation and against exemption. *Hilger* v. *Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960); *Off-Street Parking Development Dist. No. 1* v. *City of Fayetteville*, 284 Ark. 453, 683 S.W. 2d 229 (1985). As stated in *Brodie* v. *Fitzgerald*, 57 Ark. 445, 22 S.W. 29 (1893):

> [E]xemptions, no matter how meritorious, are acts of grace, and must be strictly construed, and every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property

from its due proportion of the burden of taxation.

The prior cases underscore the limiting language of the constitutional provision and emphasize the heavy burden on those seeking an exemption. Most recently the Court concurred with this approach in *Arkansas Conf. Ass'n of Seventh Day Adventists, Inc.*, v. *Benton County Bd. of Equalization*, 304 Ark. 95, 800 S.W.2d 426 (1990).

Article 16, § 5(b) requires that exempt property be public property and be used for public purposes. *B.D.T. Inc.* v. *Moore*, 260 Ark. 581, 543 S.W.2d 220 (1976). In this case there is no dispute as to the "public property" requirement. The ownership of the tract in question is held in a tenancy in common by two obviously public entities. The issue is whether the property was, at the time in question, "used exclusively for public purposes." In *City of Springdale* v. *Duncan*, 240 Ark. 716, 401 S.W.2d 747 (1966), a city with sewage disposal problems acquired land for use at some undetermined time in the future as a buffer zone for sewage facilities, but had not actually used the lands in this manner, but instead leased them to an individual. A property tax exemption was denied because actual use for a public purpose is required, an expected, intended or contemplated future use not being sufficient to meet the constitutional requirement.

The cases of *Hudgins* v. *Hot Springs*, 168 Ark. 467, 270 S.W. 594 (1925), and *Forsee* v. *Bd. of Directors of Bergman Special School Dist.*, 213 Ark. 569, 211 S.W.2d 432 (1948), cited by appellants, while both permitting exemptions, demonstrate that an existing or prior tax exempt use is required for exemption. In *Hudgins*, land was acquired and used for city landfill purposes, although the use was subsequently discontinued due to lack of road access. Finding that actual use for public purposes had occurred and that there had been no change in use, this court upheld an exemption. In *Forsee*, a public school case, an existing structure had been razed by the school district, which intended to make later use of the property by erecting another school building on the old foundation. The Court found that the actual use of the land for school purposes had not ceased, and that its exemption from taxation should continue. Under *Hilger* v. *Harding College, supra*, which contains a review of the "exclu-

sive use" cases, the principles and rules for exemptions of property used for school purposes, for public purposes, and for charity were declared the same due to the similarity of language employed as to each category in article 16, § 5. Consequently, our decisions in the school cases cited, which turn on actual and direct use, readily apply to the present facts.

Appellants further rely on *Wayland* v. *Snapp*, 232 Ark. 57, 334 S.W.2d 633 (1960), as authority for the proposition that construction by a public entity of a facility to be used for a public purpose is an exclusive public use under the constitutional provision in issue. We do not concur with this contention because *Wayland* v. *Snapp*, *supra*, concerns an industrial development project facilitated by amendment 49 to the Constitution and Act 9 of the 1960 General Assembly. Both the amendment and the legislative act were intended to facilitate procurement of industry, and the amendment specifically describes such an activity as a public purpose. There is no comparable constitutional or statutory authority indicating that an arts center, prior to its actual operation, will constitute an exclusive public purpose activity.

For ad valorem tax purposes, January 1 of the year in question is the date of determination of property value and right to the exemption. Ark. Code Ann. § 26-26-1201 (1987). On the tax assessment date in the present case, January 1, 1989, the construction of an arts center was proposed, some work had begun in preparation for the removal of existing buildings from the site, but new construction had not commenced. While the record reflects an intent to use the land for the stated purposes, which were stipulated to be generally of a public nature, there had been no actual nor exclusive public use as mandated by the Constitution on the date in question. As correctly stated by the court below, issues of prospective use after construction were not ripe for decision by the court because, as will be shown *infra*, the evidence showed that the use of the Center after construction might not be exclusively public.

The burden of proving entitlement to the exemption rested with appellants, and we can find no error in the circuit court's holding that they failed to sustain the burden. Evidence was required that the Center was being used exclusively for

public purposes on January 1, 1989. Under the tax exemption statutes, the burden on the party claiming the exemption is to prove entitlement beyond a reasonable doubt. *See Ragland* v. *Dumas*, 292 Ark. 515, 732 S.W.2d 118 (1987). We cannot accept any lesser standard for a tax exemption case arising under the Constitution. The evidence before us, including the statement of the executive director of the Center, indicates that fees would be charged for use of the facilities, which may be rented by private individuals, and that, in some instances, events at the Center could be closed to the public at large. The stipulated facts indicate the Center may be used for non-public purposes. Such anticipated private use, regardless of any fee arrangements, could prevent property from being used exclusively for public purposes, which is the constitutional standard. *Holiday Island Suburban Improvement Dist. #1* v. *Williams*, 295 Ark. 442, 749 S.W.2d 314 (1988).

In a prior case this Court affirmed the denial of a tax exemption to property of the City of Fayetteville which was leased to the University for its use and for use by the general public, because the facilities were being rented to private organizations for substantial amounts and in competition with local hotels. *Off-Street Parking Development Dist. No. 1* v. *City of Fayetteville*, *supra*. Quoting language from *Hilger* v. *Harding College*, *supra*, that decision denied exemption where occasional use was for non-public purposes. In this case, in addition to the use by private groups, there is some evidence, as presented by the statement of the director of the Arts Center of the Ozarks located in Fayetteville, that the Walton Arts Center would be appealing to the same elements of the general public as that private organization, which does not have tax exempt facilities. Consequently, there was evidence before the circuit court which cast at least a reasonable doubt on the actual use of the Center when completed, causing the appellants to fail to sustain their burden of proof regarding the use requirement as of January 1, 1989.

In reference to the circuit court's holding that a tax exemption for public property under construction may be summarily denied based on the taxing authority's belief that the property might be used for a non-public purpose when completed, we disagree. The public entity seeking an exemption should be permitted appropriate opportunity to establish by proof its claim

of exemption under the standard herein enunciated, otherwise all public property under construction might be subject to taxation based on some perceived chance of a non-public benefit or use. In none of the many cases decided under article 16, § 5(b), is there reference to a standard based on speculation of use by the taxing authority. While this was not reversible error, we must modify the circuit court's decision in this respect, believing that each case should be judged on its own facts.

In conformity with our holdings on direct appeal, we affirm on the cross-appeal by appellees. If the public property in question had been used in the past for a public purpose, or the applicants for exemption had satisfactorily substantiated an intended exclusive public use, an exemption from taxation would be appropriate. *Hudgins* v. *City of Hot Springs*, *supra*; *Yoes* v. *City of Fort Smith*, 207 Ark. 694, 182 S.W.2d 683 (1944); and *Forsee* v. *Bd. of Directors of Bergman Special School Dist.*, *supra*.

Affirmed as modified.

Special Justice HAMILTON SINGLETON joins in this opinion.

NEWBERN and BROWN, JJ., not participating.

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Larry CRUTCHFIELD *v.* STATE of Arkansas

CR 91-35 812 S.W.2d 459

Supreme Court of Arkansas
Opinion delivered June 24, 1991
[Supplemental Opinion on Denial of Rehearing October 14, 1991.*]

* Dudley, J., would grant rehearing.

William R. Simpson, Jr., Public Defender, by: *Brett Qualls*, Dept'y Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Pamela Rumpz*, Asst. A'tty Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant was charged with, and convicted of, aggravated robbery and possession of drug paraphernalia. We affirm the conviction for aggravated robbery, but reverse and dismiss the conviction for possession of drug paraphernalia.

1. Aggravated robbery

At about 2:30 a.m. on the night of May 26, 1990, Steven Barnes' car ran out of gas near the intersection of 23rd and Izard Streets in Little Rock. He knew there was a gas station at a

nearby intersection, so he walked there, only to discover that it was closed. Outside the station he saw some men standing beside a blue sports car. He walked over to them and asked if they would take him to get some gas. One of the men was the appellant. As Barnes was talking to the appellant, another of the men, known as Bullwinkle, slipped up behind Barnes and began beating him on the head with a large pistol. Barnes tried to run away, but appellant and Bullwinkle chased him about half a block and caught him. Bullwinkle again started pistolwhipping him and ordered the appellant to grab his wallet. The appellant grabbed Barnes' wallet, and he and Bullwinkle ran to the corner of 26th and Arch where the blue sports car was waiting. They got in the car and drove away.

Appellant was convicted of a violation of Ark. Code Ann. §5-12-103(a)(1) (1987), which provides:

> A person commits aggravated robbery if he commits robbery as defined in § 5-12-102, and he: (1) Is armed with a deadly weapon or represents by word or conduct that he is so armed; . . . .

Ark. Code Ann. § 5-12-102 (1987) provides, in part:

> A person commits robbery if, with the purpose of committing . . . *a theft* . . ., he employs or threatens to immediately employ *physical force* upon another.

(Emphasis added.)

Appellant first argues that the proof was not sufficient to show his intent to commit a theft because he only acted on Bullwinkle's command. The argument is without merit. The evidence does not show that appellant protested when Bullwinkle began to beat Barnes, instead he joined in the affray by chasing Barnes when he tried to run away. He took Barnes' wallet and fled the scene of his own volition. Taking the wallet and running away with it are strong evidence that he intended to deprive Barnes of his property. Depriving another of his property is the essence of theft. See Ark. Code Ann. § 5-36-103 (1987).

Appellant next contends that there was no evidence that he used physical force on another person. Barnes testified that "they caught me. They kept beating me in the head with a

pistol." Appellant argues that "they" is not substantial evidence that he was involved in the beating because there were at least three people present when the victim first approached the group of men to ask for a ride. We reject the argument because Barnes testified that "the both of them started chasing me," and that after they caught him, "the other guy with the pistol ordered that guy right there [appellant] to take my wallet out of my pocket." It is clear that "both" referred to appellant and Bullwinkle. The jury did not have to resort to conjecture to establish that appellant participated in using physical force against the victim, Barnes.

Appellant also contends that there was no evidence introduced to show that he was armed with a weapon. We reject this contention since the evidence established that appellant's companion was armed with a pistol and beat Barnes in the head with it. Although appellant never actually possessed the gun, he was liable as an accomplice because he assisted and actively participated in the crime.

Ark. Code Ann. § 5-2-403(a)(2) (1987) provides:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> . . .
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it.

When two persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. A participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Parker* v. *State*, 265 Ark. 315, 325, 578 S.W.2d 206, 212 (1979).

Here, appellant and Bullwinkle chased and caught Barnes. Bullwinkle was beating Barnes when the appellant took Barnes' wallet, and then appellant fled with Bullwinkle. The jury could reasonably infer that appellant and Bullwinkle were acting together. Further, fleeing from the scene of the crime is relevant to the issue of guilt. *Jones* v. *State*, 282 Ark. 56, 665 S.W.2d 876 (1984). Therefore, there is substantial evidence to support

appellant's conviction for aggravated robbery, and that conviction is affirmed.

2. Possession of drug paraphernalia

At the time of appellant's arrest, the officer performed a pat-down search and, in appellant's right front trouser pocket, found a small piece of chrome plated metal tubing that appeared to be a three or four inch piece of automobile radio antenna. Inside the tube was a "piece of screen or mesh, wire-type mesh, or metal material of some kind." The outside appeared to have been burned or heated.

Immediately before trial, appellant's attorney made a motion asking that the State's witnesses not be allowed to refer to the piece of antenna as a "crack pipe." The trial judge granted the motion. In addition, the appellant moved that the State be precluded from showing that pieces of antenna are commonly used as drug paraphernalia. The trial court also granted that motion. Immediately afterward, the following colloquy occurred:

> MS. BALL: [Deputy Prosecutor] Okay, I'll just tell you what I was planning on asking. If you don't want me to, I won't ask it. He is a patrolman. He knows about what devices are used, just through his everyday work, to smoke for ingesting cocaine. I was going to ask him if he had an opinion as to what this was used for and what was the basis for his opinion, and then he would talk about all the arrests he has made with devices such as this and what it is used for and if he has gone to seminars, etcetera.
>
> THE COURT: I don't think we need that for this case.

Appellant argues that the evidence is insufficient to support a conviction for possession of drug paraphernalia. The argument is well taken. Appellant was charged with violating Ark. Code Ann. § 5-64-403(c)(1) (1987) which provides:

> It is unlawful for any person *to use*, or *to possess with intent to use, drug paraphernalia*, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise *introduce into the human body a controlled substance in*

> *violation of subchapters 1-6 of this chapter.* Any person who violates this section is guilty of a Class C felony.

(Emphasis added.)

In short, the statute provides that it is a crime to use, or to possess with intent to use, drug paraphernalia to inhale or ingest drugs. The State argues that the chrome tube is drug paraphernalia by statutory definition. Ark. Code Ann. § 5-64-101(v) (Supp. 1989) defines drug paraphernalia and contains a partial list of included items, as well as fourteen (14) factors to be considered in determining whether an object is drug paraphernalia. Subsection 12(A) provides:

> Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
>
> (A) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; . . .

Ark. Code Ann. § 5-64-101(v)(12)(A) (Supp. 1989).

It would amount to sheer speculation to hold that this piece of antenna was possessed for drug use without some testimony that such a tube is often used for inhaling drugs. However, we need not dwell on the issue because, even if it fits the statutory description of drug paraphernalia, the State must prove that appellant used or possessed it with intent to introduce a controlled substance into the human body. The State's proof falls short on that element. No proof was offered to show that there was a residue of a controlled substance inside or outside the tube; in fact, the tube was not tested for drug residue. No drugs were found on appellant or in his residence, and he was not linked in any way to drug use. Without something more to connect the piece of car antenna to controlled substances, the jury had to speculate to conclude that the appellant intended to use it for the prohibited purpose.

[redacted] In determining whether there is sufficient evidence to support a jury verdict, this court views the evidence in the light most favorable to the appellee and affirms the verdict if there is

substantial evidence to support it. Substantial evidence is that which is of sufficient force to compel a conclusion one way or another. It must be more than mere speculation or conjecture. *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990). Because the jury had to speculate that appellant possessed the piece of chrome tube with an intent to use it to inhale controlled substances, the evidence is not sufficient to support the conviction for possession of drug paraphernalia and that conviction must be reversed.

The State asks that we not consider the appellant's insufficiency argument because, it contends, the appellant did not specifically argue, in his motion for a directed verdict, that the tube was not covered under the statute. We reject the contention because (1) the appellant's attorney referred by number to the specific statute involved and (2) discussed at length the intent issue.

Next, the State tacitly admits that it did not prove that the tube was used or intended to be used as drug paraphernalia, but argues that the trial court's erroneous ruling caused the failure of proof and that "the sufficiency of the State's proof of appellant's guilt should be evaluated on the basis of the evidence the State proffered to the trial court, not on the basis of the evidence the trial court actually admitted" and that "the State should not be denied a conviction because admissible evidence was excluded."

Initially, we note the trial court did err in its ruling against the State. Ark. Code Ann. § 5-64-101 (Supp. 1989) provides:

> In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:
>
> . . .
>
> (14) Expert testimony concerning its use . . . .

Further, A.R.E. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact of issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

However, such an evidentiary error by the trial court does not mean that a jury conviction can be affirmed on appeal by the appellate court's consideration of matters which the jury did not hear. Our Court of Appeals has expressly held that such evidence may not be considered. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). We agree with the reasoning of that case.

The State cites the case of *Webster* v. *Duckworth*, 767 F.2d 1206 (7th Cir. 1985) as authority for the proposition that, upon trial court evidentiary error, evidence proffered by the State may be considered by an appellate court to affirm a conviction. We do not so read the case.

The conviction for aggravated robbery is affirmed; the conviction for possession of drug paraphernalia is reversed and dismissed.

SUPPLEMENTAL OPINION ON REHEARING
OCTOBER 14, 1991

816 S.W.2d 884

Winston Bryant, Att'y Gen., by: *Pamela Rumpz*, Asst. Att'y Gen., for petitioner.

William R. Simpson, Jr., Public Defender, *Omar F. Greene II*, Deputy Public Defender, by: *Bret Qualls*, Deputy Public Defender, for respondent.

TOM GLAZE, Justice. In its petition for rehearing, the state disagrees with that part of our original opinion that reverses and dismisses this case. Instead, it suggests we should reverse and remand for retrial on the charge of possession of drug paraphernalia. We agree.

In our earlier opinion, we agreed with the state that the trial court erred in excluding the state's proffered expert testimony indicating the chrome metal tubing with wire-type mesh possessed by appellant was drug paraphernalia. We further said that such evidentiary error by the trial court did not mean that a jury conviction can be affirmed on appeal by our consideration of matters which the jury did not hear. Of course, we were correct in this observation. However, we further cited and relied on language in *Webster* v. *Duckworth*, 767 F.2d 1206 (7th Cir. 1985), wherein that court stated that where a trial court erroneously excludes prosecution evidence, retrial is barred. The *Webster* court then mistakenly summarized the rule to be that a defendant could not be retried after his conviction was reversed due to the state's failure to produce evidence sufficient to sustain a verdict of guilty beyond a reasonable doubt *and that the insufficiency of the evidence, whether or not caused by an erroneous trial court ruling, was the constitutional equivalent of an acquittal.*

The *Webster* court later amended its opinion deleting the language summarized above. In doing so, the court acknowledged that, under *Burks* v. *United States*, 437 U.S. 1 (1978), a defendant may be retried when the government offered sufficient evidence only to have the court erroneously exclude an essential portion. *Webster*, 767 F.2d at 1215. Stated in other terms, the *Burks* rule is that the double jeopardy clause prohibits retrial when a conviction is reversed for insufficient evidence as opposed to trial error. *Burks*, 437 U.S. at 14.

In the present case, insufficiency of the evidence does not exist. Instead, the state offered expert evidence, erroneously excluded by the trial court, which bore on the issue of whether the chrome tube found on Crutchfield was drug paraphernalia and therefore intended for use to inhale controlled substances. Even though the trial court excluded such evidence, it still permitted the possession of drug paraphernalia charge to go to the jury which returned a conviction on the charge. In other words, the

trial court never entered an acquittal because of its erroneous ruling nor did the jury acquit Crutchfield because the evidence was excluded. Thus, this case is unlike the case of *Sanabria* v. *United States*, 437 U.S. 54 (1977), upon which the dissenting opinion relies. *See also United States* v. *Jenkins*, 420 U.S. 358 (1975).

In sum, with the above expert testimony, the trial evidence was sufficient to support Crutchfield's conviction for possession of drug paraphernalia. *See Lockhart* v. *Nelson*, 488 U.S. 33, 41 (1988); *Palmer* v. *Grammer*, 863 F.2d 588 (8th Cir. 1988); *cf. Rogers* v. *State*, 293 Ark. 414, 738 S.W.2d 412 (1987); *see also* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81,147 (1979). Under the *Burks* rationale, the state is entitled to present its proof. Thus, we reverse and remand this case for retrial on the charge of possession of drug paraphernalia. In all other respects, our earlier opinion is reconfirmed.

DUDLEY, J., dissents.

ROBERT H. DUDLEY, Justice. In our original opinion we held that the trial court had erroneously excluded a part of the State's evidence. As a result, the State was not able to prove one of the elements of the crime but, even so, the jury returned a verdict of guilty. On appeal, we reversed because of the insufficient evidence concerning the missing element.

We dismissed the charge since the reversal was based upon insufficiency of the evidence. On rehearing, the State asks that we remand rather than dismiss. The majority today grants rehearing to change the disposition of the case to remand. I dissent.

On June 14, 1978, the Supreme Court of the United States decided three (3) cases which made clear its interpretation of the Double Jeopardy Clause of the Fifth Amendment. That trilogy of cases provide that when a criminal case is reversed solely because of trial error, retrial is not prohibited, but when a case is reversed because of insufficiency of evidence, retrial is prohibited.

The first of the three (3) cases is *Burks* v. *United States*, 437 U.S. 1 (1978). The unanimous opinion of the Court reasoned that an appellate court's determination of insufficient evidence is tantamount to holding that the trial court should have directed a

verdict of acquittal. Had the trial court done so, there could be no retrial. The mere fact that the appellate court is the one to declare the insufficiency of the evidence is irrelevant. A determination of some court has been made that the evidence was insufficient. After that determination, no retrial is permissible. *Id.* at 16.The key fact is the *acquittal*, and it matters not whether it is granted at the trial level or the appellate level.

The second case, *Greene* v. *Massey*, 437 U.S. 19 (1978), applied the *Burks* decision, a federal decision, to state proceedings. The question in this case was whether a state could retry a defendant whose case was reversed by a state appellate court because of the insufficiency of the evidence. The Supreme Court held that since the original reversal had been based on the "view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree," double jeopardy barred retrial. *Greene* v. *Massey*, 437 U.S. at 25.

The third case decided that same day was *Sanabria* v. *United States*, 437 U.S. 54 (1978). In it, the Court held that even when an erroneous exclusion of evidence causes the insufficiency of evidence, retrial was barred. The court wrote: *"[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' the legal rulings leading to that judgment might be." Id.* at 75 (Citation omitted. Emphasis added.)

In 1981, the *Burks* decision was affirmed in *Hudson* v. *Louisiana*, 450 U.S. 40 (1981). In 1982, the Court reiterated that the *Burks* doctrine applied to reversals based on insufficiency of the evidence, but explained that it did not apply to a reversal based upon the weight of the evidence. *Tibbs* v. *Florida*, 457 U.S. 31 (1982). (The *Tibbs* case arose in Florida which has a rule directing the State Supreme Court to "review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." *Id.* at 46. *Tibbs'* reversal "rested upon a finding that the conviction was against the weight of the evidence, not upon a holding that the evidence was legally insufficient to support the verdict." *Id.* at 47.)

Professors Singer and Hartman have accurately summa-

rized the law on this point as follows:

> *Effect of Reversal on Appeal.* When the defendant's case is reversed on appeal, retrial is barred by the rule against double jeopardy if the reversal is based upon insufficiency of the evidence. If it is based upon procedural error at the trial, retrial is not prohibited. This principle is applicable in both state and federal proceedings. However, if the reversal is based upon the weight of the evidence as opposed to the insufficiency of the evidence, retrial is not barred.

S. Singer & M.J. Hartman, *Constitutional Criminal Procedure Handbook*, § 16.23, at 590 (1986). In short, retrial is barred in the case at bar, since the reversal was for insufficient evidence.

In contrast to the bright line drawn by the Supreme Court of the United States, the majority opinion cited dictum from 7th Circuit's case of *Webster* v. *Duckworth*, 767 F.2d 1206 (1985). Even that dictum would not mandate reversal and, more importantly, the holding of the case does not support the majority opinion. Accordingly, I would not grant rehearing and dissent to the majority's so doing.

FIRST ELECTRIC COOPERATIVE CORPORATION *v.* Mark S. and Suzanne CHARETTE

91-46 810 S.W.2d 500

Supreme Court of Arkansas
Opinion delivered June 24, 1991

James C. Baker, Jr., for appellant.

Charles Phillip Boyd, Jr., for appellees.

ROBERT H. DUDLEY, Justice. Plaintiffs, Mark and Suzanne Charette, bought a three-acre wooded corner lot in a subdivision in Saline County. For the next year and a half, they removed pine trees and cleared undergrowth and damaged hardwood so that the healthy hardwood would grow. They plan to build a lake on the southern part of their lot and to build their home on the northern part of it. They left a grove of the best hardwood trees along the road on the west side of their property so that they could have a tree-lined drive beside their home. Unfortunately, First

Electric Cooperative Corporation made a mistake about the location of its easement and cut down twenty-one (21) of plaintiff's trees along the road.

The plaintiffs sued First Electric for its destruction of the hardwood trees. They prayed for the replacement value of the destroyed trees and for treble damages for intentional destruction of the trees pursuant to Ark. Code Ann. § 18-60-102 (1987). At trial, the jury heard evidence of the cost of replacing the trees, as well as evidence of the fair market value of the land before and after the removal of the trees. At the close of all the evidence, and over the objection of First Electric, the trial judge instructed the jury that if it found for the plaintiffs, it should determine the amount of money which would compensate the plaintiffs for the reasonable expense of necessary repairs to the damaged property. The jury found that First Electric was negligent in cutting down the trees, but that it had not intentionally destroyed them, and it awarded plaintiff recovery in the amount of $8,300.00. The trial court entered judgment in that amount. We affirm.

Appellant First Electric argues that allowing the replacement measure of damages can result in an unfair recovery to the trespasser when, as in the present case, the evidence shows that the cost of replacing trees is almost as much as the value of the land. Plaintiff Mark Charette testified that he and his wife, Suzanne, purchased the land in the spring of 1987 for $13,900.00 and that the land was worth $24,000.00 in the fall of 1989, before appellant cut the trees along the road. On the other hand, First Electric's expert, a real estate appraiser, testified that the fair market value of the land was only $14,000.00 before the appellant cut down the twenty-one (21) trees and that the land was worth more after the trees were cut. Plaintiffs' expert, a nurseryman, testified that it would cost $16,555.00 to replace the trees.

[redacted] In the recent case of *Worthington* v. *Roberts*, 304 Ark. 551, 803 S.W.2d 906 (1991), we adopted the rule that when ornamental or shade trees are injured, the use made of the land should be considered and the owner compensated by damages representing the cost of replacement of the trees. We also said that the evidence in each case will determine whether an instruction on the difference in the value of the land before and after an occurrence (AMI 2222) or one on the cost of restoration

(AMI 2223) should be given.

In the present case, the evidence showed that the appellant had destroyed a relatively small number of hardwood trees. The plaintiffs had intentionally left these trees growing along the roadside because they wanted a beautiful tree-lined road by their home. In effect, the trees that First Electric destroyed were part of the landscaping the plaintiffs had undertaken in preparation for building their house. Under these facts, we cannot say that the trial court abused its discretion in instructing the jury on the replacement measure of damages. Certainly we can envision fact situations in which recovery of the replacement cost of trees would yield a result grossly disproportionate to the fair market value of the land and would, therefore, be an inappropriate measure of damages, but this is not such a case.

First Electric secondly argues that the replacement measure of damages was improper in the present case because the plaintiffs had not yet put the land to their intended use for it by building their house or lake. This argument has no merit. In another recent case, *Revels* v. *Knighton*, 305 Ark. 109, 805 S.W.2d 649 (1991), we held that it is proper for a trial court to consider the intended use of property when determining the appropriate measure of damages. In that case, we allowed replacement value damages for shade trees on property which the appellees intended to use as a trailer park.

Affirmed.

Jo DODSON *v.* David DICKER

91-7 812 S.W.2d 97

Supreme Court of Arkansas
Opinion delivered June 24, 1991

Mashburn & Taylor, by: *W.H. Taylor* and *Lindlee Baker*, for appellant.

Harry McDermott, for appellee.

STEELE HAYS, Justice. This is a defamation and invasion of

privacy action arising from a letter written by the appellant, Ms. Jo Dodson, on October 18, 1988, to the State Board of Therapy Technology, with copies sent to the Governor, Attorney General, a reporter and several others.

Ms. Dodson's letter focused on the actions of the president of the State Board of Therapy Technology, Marinetta Dicker, and also included references to her husband, appellee David Dicker.[1] The letter asserted, among other things, that David Dicker assisted Marinetta Dicker in rewriting the test for licensing of therapy technicians, which may have been done for profit; the Dickers drafted the budget for the board without the approval of other board members; the Dickers drew up a proposed license law for presentation to the Arkansas legislature without the approval of the board; and, David Dicker has imposed himself as the sixth member of the board. Dodson also stated that, in her opinion, the board had slandered a fellow therapist, Steve Schechter, and David Dicker's letter to the Rolf Institute was a good example of it; and she wrote "he [Dicker] has such a 'hate' for Steve, and to be fair, Steve does not have any great love for him either, and in fact neither do I. I hate a bully . . . especially a sneaky bully, which is what he appears to be in my opinion."

David Dicker filed suit against Ms. Jo Dodson in Washington County Circuit Court. After a jury trial on June 7, 1990, a verdict was returned in favor of Dicker and he was awarded $7,000 in actual damages and $5,000 in punitive damages.

[redacted] Dicker offered two alternative theories to the jury, namely, invasion of privacy and libel, specifically, libel per se. Both causes of action may be joined in the same suit, nevertheless, there can be only one recovery for any particular publication. *Dodrill* v. *Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979). Ms. Dodson insists that her directed verdict motion should have been granted on both the invasion of privacy and libel theories and we agree.

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[1] There were other issues raised in Ms. Dodson's letter that did not concern the appellee, David Dicker, however, the letter in its entirety is too long to reprint for this opinion.

I.

The Libel Claim

First, we consider Dicker's libel action. In doing so we note that in cases raising First Amendment issues the United States Supreme Court has repeatedly held that an appellate court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S., at 284-286.) *See also NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 933-934 (1982); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U.S. 6, 11 (1970); *St. Amant* v. *Thompson*, 390 U.S. 727, 732-733 (1968). We have exercised independent judgment on this issue and conclude that a finding of libel would constitute a forbidden intrusion on free expression because the words involved are not capable of sustaining a defamatory meaning.

In *Milkovich* v. *Lorain Journal Co.*, ___ U.S. ___, 110 S.Ct. 2695 (1990), the Supreme Court established that the threshold question in defamation actions is not whether a statement could be considered an "opinion" but rather whether a reasonable factfinder could conclude that the statement implies an assertion of an objective verifiable act. *Id.* at 2707; *See generally*, Note, *Freedom of Speech - No Separate "Opinion" Privilege in Defamation Actions*, 13 U.A.L.R. L.J. 517 (1991). The holding in *Milkovich* was recently applied in *Unelko Corp.* v. *Rooney*, 912 F.2d 1049 (9th Cir. 1990). In order to determine whether a statement could be viewed as implying an assertion of fact, the Ninth Circuit set forth three factors to be weighed: (1) whether the author used figurative or hyperbolic language that would negate the impression that s(he) was seriously maintaining implied fact; (2) whether the general tenor of the publication negates this impression; and (3) whether the published assertion is susceptible of being proved true or false. *Id.* at 1053. We think the Ninth Circuit's method of analysis is a reasonable extension of the *Milkovich* doctrine, therefore, our examination of Dodson's statements follow the *Rooney* considerations. As this court enters an area of defamation law where we have not previously

ventured, we caution that every set of circumstances subsequently considered under this analysis must be examined on a case-by-case basis.

In this case it is not necessary to discuss Dodson's statements under each category because evidence supporting the second category—the tenor, or general drift of thought of Dodson's letter—completely negates any impression that Dodson's statements were presented as an assertion of objective facts about David Dicker. This letter was about Dodson's protestation of the actions of a state board and her views on what she perceived to be Mr. Dicker's interference with its operations. It is most significant that the board's own policy required that all requests and concerns addressed to it by therapists be submitted in writing. That is precisely what Dodson was doing. Her letter was expressed in terms of her "opinion" and "protest." It criticized not only Dicker, but also his wife who was president of the state board and the state board itself. In fact, her letter opens with the following statement, "I do hereby formally and strongly protest the actions of the President of the State Board of Therapy Technology, Marinetta Dicker." Dodson, as a massage therapist, had a substantial interest in the conduct of the State Board of Therapy Technology and her freedom to engage in uninhibited debate over its actions is both legitimate and desirable.[2] The fact that she referred to David Dicker with intemperate language does not convince us that the statements, in their totality, were the type of assertions of objective facts about Mr. Dicker that give rise to liability in a defamation action. Dodson's statements do not meet the threshold requirement for a defamation action thus, the trial court erred in denying a directed verdict on the libel theory.

II.

The Invasion of Privacy Claim

Next, we consider the denial of Ms. Dodson's motion for a directed verdict on the issue of invasion of privacy.[3] Dodson

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[2] It is noteworthy that Ms. Dodson was subsequently appointed to the board by the Governor, nominated for board president by Marinetta Dicker and elected to that position by board members.

[3] Because we dispose of the invasion of privacy/false light claim under this analysis

argued that David Dicker did not present sufficient proof of malice to produce a submissible issue for the jury.

This court applies certain standards when reviewing the denial of a directed verdict. A motion for directed verdict should only be granted if the evidence is so insubstantial as to require a jury verdict to be set aside. *Bice* v. *Hartford Acc. & Indem. Co.*, 300 Ark. 122, 777 S.W.2d 213 (1989). In determining the propriety of the trial court's action concerning a motion for directed verdict, the evidence is given its highest probative value and viewed in a light most favorable to the party against whom the verdict is sought. *Id.*

The right to recover for an invasion of privacy requires the plaintiff to demonstrate:

> (1) the false light in which he was placed by the publicity would be highly offensive to a reasonable person, and (2) that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. RESTATEMENT (SECOND) OF TORTS, § 652 E. (1977).

Dodrill v. *Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979).

In *Dodrill* we made it clear that, where the plaintiff is not a public figure and the publication is of matters of general or public concern the plaintiff must prove actual malice by clear and convincing evidence. The question, then, presented under this section is whether Mr. Dicker prevailed on his burden of establishing actual malice as part of his prima facie case of invasion of privacy.

Statements made with actual malice are those made with knowledge that the statements were false or with reckless disregard of whether they were false or not. *New York Times Co.* v. *Sullivan* 376 U.S. 254, 279-280 (1964). The constitutional definition of malice is concerned with showing the author's

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we need not decide whether the actual malice standard, which is carried over from defamation actions, could be examined under the *Milkovich/Rooney* balancing test.

subjective disregard for accuracy of his statements. The Supreme Court emphasized the subjective nature of the inquiry when it commented that the actual-malice determination in the case before it "rests entirely on an evaluation of [the author's] state of mind when he wrote his initial report, or when he checked the article against that report." *Bose*, *supra* at 494. *See also* R. Smolla, *Law of Defamation* § 3.13 - 3.15 (1991). And in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) the United States Supreme Court stated:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Additionally, we have recognized that a failure to investigate does not in itself establish the bad faith inherent in malice. *Gallman* v. *Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973).

With these principles in mind, we cannot say that David Dicker proved actual malice with clear and convincing evidence. There was no evidence that Dodson entertained actual doubts as to the accuracy of her statements. Even though Dodson was unable to back up her allegations with proof, the majority of her comments were not completely without basis. Dodson testified, and Marinetta Dicker substantiated her testimony, that Mrs. Dicker had said publicly that she was rewriting the test for therapy technicians. The board's secretary and treasurer testified that several therapists and massage therapy school owners thought that David and Marinetta Dicker wrote the test. Gordon Bradford, a licensed massage therapist testified that Mr. Dicker's comments indicated that Dicker and his wife planned to formulate a new law to submit to the legislature. Ms. Dodson explained that her comment about the budget was based on Marinetta Dicker's comment at a board meeting where she said, "we have drawn up the budget and it has been approved." The appellee makes much of Dodson's statement, that in her opinion Steve Schechter had been slandered by board members and Mr.

Dicker's letter to the Rolf Institute was a good example, because a letter was actually written by the Rolf Institute. However, Dodson admitted that was an error and testified that it was actually a telephone call that David Dicker made to the Rolf Institute.

The statements made in Dodson's letter, we believe, reflect the inevitable inaccuracies that accompany debates on controversial issues innate in the public arena, and especially in a governmental board such as the one in this case. A subjective inquiry into Dodson's state of mind when she wrote the letter reveals that she was motivated by dissatisfaction with the board's operations. While it is conceded that our "society has a pervasive and strong interest in preventing and redressing attacks upon reputation" that interest must be weighed against protecting our First Amendment's "vital guarantee" of free and open discussion of public issues. *Milkovich* at 2707. In this case, our First Amendment guarantee of free speech necessarily prevails.

Reversed and dismissed.

CORBIN, J., concurs.

Charles and Wilma SUMMONS, Individually and as Next Friends of Kellen and Tanya Summons *v.* MISSOURI PACIFIC RAILROAD and Union Carbide Corporation

90-230 813 S.W.2d 240

Supreme Court of Arkansas
Opinion delivered June 24, 1991
[Rehearing denied September 16, 1991.]

Youngdahl, Trotter, McGowan & Farris, by: *Jay Thomas Youngdahl, McHenry, Choate & Hartsfield*, by: *Robert M. McHenry* and *Green Law Offices*, by: *Brent Baber*, for appellants.

Herschel H. Friday and *Frederick S. Ursery*, for appellee Missouri Pacific Railroad.

Wright, Lindsey & Jennings, by: *Gordon S. Rather, Jr.* and *Clifton M. Smart III*, for appellee Union Carbide.

DAVID NEWBERN, Justice. This is an interlocutory appeal of a circuit court's refusal to certify a class action. The appellants are Charles and Wilma Summons who brought the action on behalf of themselves and their children, Kellen and Tanya Summons. They seek to represent a class of several thousand persons who were evacuated from their homes or businesses as the result of a railroad accident in which a chemical tank car overturned in North Little Rock. The appellees are Missouri Pacific Railroad (MOPAC), which operated the train, and Union

Carbide Corporation, the shipper of the chemical. We agree with the Summonses' argument that the Trial Court abused its discretion in refusing to certify the class, and thus the decision is reversed and remanded.

The accident occurred mid-morning on July 8, 1987. A liquid substance was observed to be leaking from the overturned car which was carrying ethylene oxide, an allegedly highly volatile and toxic chemical. The evacuation began with an order by local emergency services personnel at approximately 10:40 a.m. The order was lifted at approximately 4:15 p.m. when it was determined that the liquid leaking from the car was not ethylene oxide, but a non-hazardous refrigerant which was part of the overturned car's container system.

The Summonses alleged that they and others who were evacuated were frightened, their lives were disrupted, they were forced to spend money for food, clothing, and shelter, and that they suffered pain and mental anguish. They alleged that some persons were forced to seek medical treatment. They contended that MOPAC and Union Carbide were wilfully and wantonly negligent, and they asserted a strict liability claim based on shipment of an ultra-hazardous product.

The complaint stated that the class the Summonses sought to represent consisted of about 5,000 persons, that joinder of so many claims would be impractical, that there were questions of law and fact common to the claims, and that the interests of the class outweighed those of individual members. It was also alleged that the Summonses' claim was typical of members of the class, they had obtained competent counsel, they were aware of their responsibilities as members of the class, and a class action was the superior method of deciding the claims of the class members.

In its answer, MOPAC denied negligence, denied that the transportation of ethylene oxide was an ultra-hazardous activity giving rise to strict liability, and denied all of the allegations supporting the certification of the class. Union Carbide filed a similar answer, adding that the injuries claimed were the result of actions of parties over whom Union Carbide had no control or were the result of intervening causes.

A hearing was held on the Summonses' motion to certify the

class. Janet Jones, an employee of McHenry Law Firm, testified that she compiled a list of persons claiming damages as a result of the evacuation. The list numbered 5,321 persons, many of them living in the Eastgate Terrace, Shorter Gardens, and Dixie Addition sections of North Little Rock. On cross-examination Ms. Jones testified about the differences in the claims. She said some were for motel and meal expenses, and some were for loss of work because, for example, of inability of claimants to return to their homes to obtain uniforms to wear. Also, on cross-examination, Ms. Jones pointed out that she had no first-hand knowledge that anyone from MOPAC or Union Carbide assisted the North Little Rock police in the evacuation procedure.

Testimony was also taken from potential class members about the general effect of the evacuation upon their lives on the day in question.

The operative portion of the Court's order was as follows:

> 1. A class action proceeding would result in indeterminate and chaotic litigation and would cause judicial extravagance rather than judicial economy.
>
> 2. A class action would be an inappropriate method of dealing with the proposed claims.
>
> 3. This action should not be maintained as a class action because the prerequisites of Rule 23 . . . have not been satisfied. . . .

1. Rule 23 requirements

At the time the decision was made, Rule 23(a) contained the "prerequisites" to a class action as follows: "Where the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring all before the court within a reasonable time, one or more may sue or defend for the benefit of all." The Rule has since been amended to list the prerequisites as follows:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly

and adequately protect the interests of the class.

Whichever version is applied, we find the prerequisites satisfied.

a. Numerosity

The Trial Court stated in his conclusory remarks that "you could have conceivably some 3,500 plaintiffs in a case," and that he knew of no rule which would prohibit it. There was no explanation why a class action would not be superior where there is such an "unwieldy" number of plaintiffs. Joinder of so many claims is obviously, in the language of the Rule, "impracticable."

In *City of North Little Rock* v. *Vogelgesang*, 273 Ark. 390, 619 S.W.2d 652 (1981), we held that 17 potential plaintiffs was too small a number to satisfy the Rule. In *Cooper Communities, Inc.* v. *Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986), we held that 184 were enough. In *International Union of Electrical, Radio & Machine Workers* v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), we held that "at least several hundred" class members were enough. The fact that there are several thousand claimants in this case is enough to satisfy the numerosity requirement.

b. Common questions

MOPAC's brief seems to concede that there are common questions of law and fact relating to its conduct and that of Union Carbide. It argues, however, that they do not predominate the issues of causation and damages which will be different with respect to each claimant. Union Carbide's brief adds the contention that plaintiffs who suffered physical injury may be entitled to recover for mental anguish but that the many who do not claim to have suffered physical injury will have to show wilful and wanton misconduct to recover.

It may indeed be true that the class can be and will be divided into subclasses with respect to theory of recovery *if* it is determined that MOPAC and Union Carbide were engaged in mere negligence, wilful and wanton negligence, or an ultrahazardous activity. The predominate question, however, in any case will be factual. The defendants' actions will have to be determined, and then it will have to be determined if those actions were wrongful and to what degree. We have no hesitancy in

saying there are common questions.

As to whether the common questions predominate others, such as causation in terms of class definition and damages, there is a clear overlap with the question of whether the class action is a superior method of handling the litigation in prospect. *See* H. Newberg, *Class Actions*, § 4.22 (1985). We will discuss it below along with the abuse of discretion standard of review.

c. Typicality

MOPAC and Union Carbide contend that the Summonses' claim or claims are not typical of those of the other members of the class they seek to represent because, unlike some members, the Summonses allege no physical harm and only seek to recover for their inconvenience and fear in having to leave their home and for the expense of eating out.

The typicality requirement is discussed in H. Newberg, *Class Actions*, § 3.13, *supra*, as follows:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims. [Footnotes omitted.]

Although the Summonses' allegations as to their injuries and damages are different from those they describe for other members of the class, their claims are typical in the sense that they arise from the alleged wrong to the class which includes the wrong allegedly done to them, and that is sufficient.

d. Representation

[redacted] Mrs. Summons testified that she understood her obligations in undertaking representation of the class and the possible costs involved. She said she would do whatever was necessary in that respect. The Summonses have alleged that they are represented by counsel competent to handle a class action, and MOPAC and Union Carbide have given us no reason to doubt that allegation.

2. Rule 23 (b)

Whether common questions of law or fact predominate and whether a class action is a superior method of deciding the case are, to a degree, necessarily subjective questions and very much related to the broad discretion conferred on a trial court faced with them.

[redacted] In *International Union of Electrical, Radio and Machine Workers* v. *Hudson*, *supra*, we discussed the line of cases in which we have held that a trial court has broad discretion to protect the interests of the members of the class and to allow or disallow an action to proceed as a class action. The essence of the case now before us is the decision we must make whether the Trial Court abused its discretion in refusing the certification, and the questions of predominance and superiority are integral to that decision.

If the predominance of the liability aspects of the claims of the class members were to be judged solely on the basis of the number of cases in which the same issues of liability are to be decided, predominance of the common questions would undoubtedly be established. We recognize, however, that there are other factors to be considered.

In its brief, MOPAC emphasizes its contention that each of the potential class members will have to demonstrate the element of causation, and cites *Ryan* v. *Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C. 1979), in which a United States District Court determined a class action would be inappropriate. The claim in that case was on behalf of daughters of mothers who had been administered a drug manufactured by the defendant. The drug which was used by the mothers resulted in an abnormal vaginal

condition in the daughters. The Court discussed the fact that there would be varying factors with respect to liability as follows:

> In deciding the issue of predominance this Court must predict the evidence likely to be introduced at trial. This is particularly true when purported class members are not standardized. See *Windham* v. *American Brands, Inc.*, 68 F.R.D. 641 (D.S.C. 1975). Standardized in this sense refers to a class of individuals whose claims against a common defendant arise out of essentially identical fact patterns. The case at bar presents a different class of plaintiffs. The mothers of the proposed plaintiffs in this case each used a synthetic estrogen; however, the length of exposure, the reason for the drug's use, the specific chemical formulation of the drug, the state of the art at the time of consumption or the manufacturer's knowledge of synthetic estrogen's carcinogenic effect and possible medical result in the absence of the estrogens are all specific points going toward proximate causation which will require proof for each individual class member. The Court is aware of decisions such as *Samuel* v. *University of Pittsburgh*, 506 F.2d 355 (3rd Cir. 1974); wherein a bifurcation of trials between the liability and damages issues was held appropriate. Bifurcation here would not cure the deficiencies of the instant class action, since the liability issue alone will require individual proof as to each party plaintiff. It is the necessity of such separate evidentiary showings that leads this Court to conclude the common questions of fact do not predominate.

In this case, the liability question may be complicated in terms of the theories of liability advanced, however, those issues may be the same with respect to each of the claimants, and unlike the *Ryan* case, they will at least be the same as to members of subclasses such as those who claim physical injury and those who do not.

Cases such as *Strauss* v. *Long Island Sports, Inc.*, 60 A.D. 501, 401 N.Y.S.2d 233 (1978), cited by Union Carbide, are not as easily distinguished. In the *Strauss* case, certification of a class of plaintiffs claiming injury from misleading advertising was held to be an abuse of discretion because each member of the class

would have had to prove reliance. While we might say that that holding differs because each member of the class would have to prove an element of the tort, we cannot see a real difference from this case in which each claimant must, after proving basic negligence or other tortious conduct, prove causation, or that he or she was uprooted, disrupted, and otherwise injured by the acts of the defendants. We can only assume that the *Strauss* case is a traditionally hostile interpretation of the New York class action rule of the sort from which we are willing to part.

The Court in the *Ryan* case points out that the Advisory Committee to the Federal Rules of Civil Procedure commented that the class action is "ordinarily not appropriate" in "mass accident" torts because questions not only of damages but of liability and defenses to liability may affect different claimants in different ways. In 7B C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure*, § 1783 (1966), both sides of the controversy are presented. The other side is as follows:

> In many ways [Federal] Rule 23(b)(3) seems particularly appropriate for some tort cases of this type. Thus, some courts have ignored the Advisory Committee's doubts and have allowed mass tort cases to be brought under subdivision (b)(3). The central issue of liability, for example, may be a difficult one that occasionally will require lengthy expert testimony, perhaps concerning the physical condition of a vehicle or the state of a technological art in a particular field of transportation or manufacturing. If the various tort claims were tried individually, the evidence would have to be repeated time and again. . . . [Footnotes omitted.]

The repeated litigation of the liability question and the attendant possibilities of inconsistent results in a case like this one outweigh the admitted fact that each claimant will have different damages evidence. A factor we recognized in *Drew* v. *1st Fed'l S & L Ass'n of Ft. Smith*, 271 Ark. 667, 610 S.W.2d 876 (1981), and in the *International Union* case, and which is central to the result we reach here is the basic consideration of fairness. An ingredient of that consideration is the point of our decision in the *International Union* case:

> By limiting the issue to be tried in a representative

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

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

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

Our opinion in the *International Union* case was hardly an exhaustive review of all the considerations leading to the conclusion that the class action is the superior manner of deciding the typical mass tort case. That has been done, however. D. Rosenberg, *Class actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L. Rev. 560 (1986-1987). Here are some excerpts from the article:

> In mass tort cases involving claims or personal injury, which pose daunting problems of causation and remedy, the price of individual justice is notoriously high. Because they typically involve complex factual and legal questions, mass tort claims are exceedingly, if not prohibitively, expensive to litigate. The questions of whether the defendant's conduct failed to satisfy the governing standard of liability frequently entail interrelated technological and policy issues that require extensive discovery, expertise, and preparation to present and resolve adequately. Equally demanding are the causation issues in mass tort cases, such as whether the plaintiff's condition was caused by exposure to the substance in question or to some other source of the disease risk.
>
> The case-by-case mode of adjudication magnifies this burden by requiring the parties and courts to reinvent the wheel for each claim. The merits of each case are determined de novo even though the major liability issues are common to every claim arising from the mass tort accident, and even though they may have been previously determined several times by full and fair trials. These costs exclude many mass tort victims from the system and sharply reduce the recovery for those who gain access. Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.
>
> ***
>
> These conditions generally disadvantage claimants. Because defendant firms are in a position to spread the litigation costs over the entire class of mass accident claims, while plaintiffs, being deprived of the economies of scale afforded by class actions, can not, the result will usually be that the firms will escape the full loss they have

> caused and, after deducting their attorney's shares, the victims will receive a relatively small proportion of any recovery as compensation. As a consequence, the tort system's primary objectives of compensation and deterrence are seriously jeopardized.
>
> ***
>
> Because of their cost-spreading advantages, a defendant firm typically can afford not only to invest more in developing the merits of the claim than the opposing plaintiff attorney, but also to finance a "war of attrition" through costly discovery and motion practice that depletes the adversary's litigation resources. The consequences of redundantly litigating common questions thus skews the presentation of the merits, promotes abusive strategic use of procedure, needlessly consumes public resources, and ultimately drains away a large amount of the funds available to redress by judgment or settlement, victim losses.

We can cite no case like this one where it has been held that the trial court abused its discretion by denying certification. We can, however, cite a very similar case where it was held that the trial court did not abuse its discretion in certifying a class alleging injury as the result of a chemical fire caused by a railroad accident. *Reynolds* v. *CSX Transportation, Inc.*, 55 Ohio App.3d 19, 561 N.E.2d 1047 (Ohio App. 1989). In that case, a master recommended against certification because there would be five ill-defined sub-classes of plaintiffs. The Trial Court disagreed. The Court of Appeals held there was no abuse of the Trial Court's discretion.

In applying Ohio Civil Procedure Rule 23A, which was apparently like the Federal Rule and like the current Arkansas Rule, and Rule 23B containing the same rather subjective criteria as the parallel sub-sections of the Arkansas and Federal Rules, the Trial Court was quoted as follows:

> One time answers can be had to the issues of negligence and malice, such as: What were the duties of the respective defendants? What did they undertake to do or not do in respect to those duties, if any? Was there a breach

> of duty? Was there a conscious disregard for the rights and safety of others that had a great probability of causing substantial harm?

The Court of Appeals then wrote:

> We conclude that the trial court's decision to certify the plaintiffs' case as a class action to the issues of negligence and malice was not an abuse of discretion. The court's order was not unreasonable, arbitrary or unconscionable. Rather, it was a well-reasoned decision based upon the trial court's unique ability to determine which procedural devices are best for handling such unwieldy cases.

As noted above, the *Reynolds* decision was a bow to a trial court's discretion, and thus hardly in direct support of our conclusion here. It does, however, provide an example of a case where that which the plaintiffs ask here has been found to be reasonable under very similar circumstances.

We are well aware of our remark in the *International Union* case that, had the Trial Court refused to certify the class we might well have affirmed, but we have not held that a trial court's discretion is so broad on this issue that it cannot be reviewed. If a trial court's decision not to certify a class action in this type case is at all reviewable, then this is the time and the sort of case in which to review it. That is especially so when it is possible that a large number of persons who *may* have legitimate claims not worth pursuing because of the costs of our system of justice may lose those claims if they are not allowed to proceed together as a class. By not certifying a class, a trial court can cause the problem to "go away" to the extreme disadvantage of the claimants unless that decision is reviewable. It is especially important that we review an order such as the one in this case given the newness of our decision in the *International Union* case and the recent changes in Rule 23(a).

[redacted] Given our conclusion that the Trial Court erred in stating that the facial prerequisites of Rule 23(a) were not satisfied, we are left with consideration of the Trial Court's remarks at the conclusion of the certification hearing and the final order. Most of the factors he noted seem to us to support

certification. The language of the Trial Court's order is not helpful to an understanding of the decision because it consisted only of conclusions without reasons.

We conclude this opinion with a caveat; the only issue we have addressed is whether the class should have been certified. We have not intimated, nor have we meant to intimate, that any of the class members will or should recover. The question of liability is not at all before us.

The order refusing to certify the class is reversed and remanded for proceedings consistent with this opinion.

HAYS, J., dissents.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I agree with the majority opinion but feel constrained to emphasize an additional point. We have held many times that broad discretion vests in the trial courts to grant class certifications. *See, e.g., Security Benefit Life Insur. Co.* v. *Graham*, 306 Ark. 39, 810 S.W.2d 943 (No. 90-248, June 10, 1991); *Lemarco, Inc.* v. *Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991); *First Nat'l Bank of Fort Smith* v. *Mercantile Bank of Jonesboro*, 304 Ark. 196, 801 S.W.2d 38 (1990); *Cooper Communities, Inc.* v. *Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986); *Drew* v. *First Federal Savings & Loan Assoc. of Ft. Smith*, 271 Ark. 667, 610 S.W.2d 876 (1981). We have also held that that broad discretion does not mean unlimited discretion. *See Ford Motor Credit Co.* v. *Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1985).

The decision today, in my judgment, does not weaken or undermine this wide grant of authority in the trial courts or in any way signal that we intend to decide class certification issues on a case-by-case basis. The decision, rather, emphasizes once more the policy this court first recognized in 1988 not to disfavor class actions. *See International Union of Electrical Radio and Machine Workers* v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

Here an accident occurred common to all potential class members. The alleged liability, injury, and damages emanating from that accident embrace common issues such as duty of care and foreseeability which predominate over issues affecting only

individual members. Thus, a critical criterion of Ark. R. Civ. P. 23(b) is satisfied. By deciding common issues, efficiency is achieved, even though other issues remain to be decided, and we have previously recognized that fact. *See Lemarco, Inc.* v. *Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991). That is not to say that considerable variance may well exist among class members relating to causation, injury, and damages — a state of affairs that clearly troubled the trial court. But, again, the common predominating issues compel certification, and I see no superior method for adjudication.

STEELE HAYS, Justice, dissenting. Beginning with *Drew* v. *First Federal Savings and Loan Association*, 271 Ark. 667, 610 S.W.2d 876 (1981), through our most recent case, *Lemarco, Inc.* v. *Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991), this court has recognized the broad discretion of the trial judge in deciding whether to certify a case as a class action. Even though we saw a need to liberalize class actions in Arkansas in *International Union of Electrical, Radio and Machine Workers* v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), we explained that the court's broad discretion cuts both ways:

> [t]he trial judge in this case could have refused to certify that action as a class action, and we might well have upheld him in that exercise of his broad discretion. *Id* at 121, 747 S.W.2d at 88-89.

If the principle of "broad discretion" is to have any substance, the trial court's decision to deny class certification in this case should be affirmed.

The majority is concerned that if a trial court's discretion is too broad there is the possibility it cannot be reviewed on appeal. I would not propose giving trial courts carte blanche, only that the trial court here did not abuse its broad discretion in denying class certification.

There was no actual chemical spill from the tank car, therefore, the appellants' claims are limited to the period of time they were evacuated from their homes or businesses. They allege expenditures were incurred for food, clothing, shelter, and medical treatment and that they suffered pain and mental anguish. At the class certification hearing the first witness was

Janet Jones, an employee of the McHenry Law Firm. She testified that she had been working on a list of people who believed they had been harmed by the evacuation. Her list included over 5,000 people and she had personally talked with about 1,000 of them. She said that one complaint was for fright attributable to a chemical leak and worry about getting out of the area. Some individuals believed they smelled a dangerous chemical. Others indicated they had experienced physical problems such as a runny nose, watery eyes, sore throat and headaches, however, the class attorney testified that claims due to chemical exposure would not be included in the suit. Jones further testified that some potential class members claimed lost wages ranging from a few hours to the entire day. Jones also knew of one man who stayed at a motel and others who bought meals at restaurants. Athena Mae Wilson, an evacuee, testified that her only claim was for transportation costs for a neighbor to drive her from Eastgate Terrace to Pulaski Heights in Little Rock. The class representatives, Wilma and Charles Summons, alleged that their claims were typical of the class members, yet Mrs. Summons answered the following questions in this manner:

> Q: Did any of the people that you talked to indicate to you that [they were forced to seek medical treatment?]
>
> A: None that I talked to.
>
> * * *
>
> Q: Did anyone lose wages?
>
> A: I don't know that.
>
> * * *
>
> Q: Were some of the people forced to spend money for motels and hotels?
>
> A: If they didn't have anywhere else to go, I'm quite sure they did.
>
> Q: Of your own knowledge, do you know whether they did?

A: I don't know that.

Q: Do you know whether people were forced to spend money for food?

A: I was.

Q: What about other people?

A: I didn't have dinner with anybody else, I don't know.

Although party representative Charles Summons was not at the hearing, in his deposition he testified that besides the cost of the evening meal his only injury was "inconvenience." The final witness was Sam Martin who testified merely that the police advised him to leave the area, so he drove his truck to his son's house.

The trial judge assessed the witnesses firsthand and concluded this was not manageable as a class suit. I agree. The majority is now directing the judge to hear this as a class action. Heretofore, we have reversed the trial court's decision regarding class certification only once and that was where the court granted certification. *See Ford Motor Credit Co.* v. *Nesheim*, 278 Ark. 78, 696 S.W.2d 732 (1985). Thus we have never previously ordered a trial court to grant certification. This is not to imply there should never be a reversal of an order denying class certification, only to observe that we are deviating from prior case law in a situation that clearly supports the application of our principle of broad discretion in class action certification. In *Looper* v. *Madison Guaranty Savings & Loan Ass'n.*, 292 Ark. 225, 729 S.W.2d 156 (1987), we wrote:

> When we examine a discretionary decision made by a chancellor, the question is not what we would have done, but whether, as a matter of law, discretion was abused—was the judgment call arbitrary or groundless? *Keirs* v. *Mt. Comfort Enterprises, et al.*, 266 Ark. 523, 587 S.W.2d 8 (1979); *Robbins* v. *Guy*, 244 Ark. 590, 426 S.W.2d 393 (1968).

Nothing in the majority opinion supports the conclusion that this court has done anything other than merely substitute its own discretion for the trial court's.

James C. PLEDGER, Commissioner of Revenues,
Dep't of Finance and Administration,
State of Arkansas *v.*
ILLINOIS TOOL WORKS, INC.

90-242 812 S.W.2d 101

Supreme Court of Arkansas
Opinion delivered June 24, 1991

[redacted]

John Theis, William E. Keadle, Robert L. Jones, Cora Gentry, David Kaufman, Malcolm Bobo, Beth B. Carson, and *Joyce Kinkead*, by: *Rick L. Pruett*, for appellant.

Jack, Lyon & Jones, P.A., by: *Eugene G. Sayre*, for appellee.

TOM GLAZE, Justice. This tax case addresses for the first time the effect of the "unitary business principle" on Arkansas's Uniform Division of Income for Tax Purposes Act (UDITPA), Ark. Code Ann. §§ 26-51-701 —to— 723 (1987, Supp. 1989). This Act governs how Arkansas imposes its respective corporate and franchise taxes on the earnings of corporations that have multistate and multinational entities. UDITPA is designed to fairly apportion among the states in which a corporation conducts its multistate business a fair amount of value or business income earned by the corporations' activities in each state. Generally, under UDITPA, net taxable "business income" of a corporate taxpayer involved in a multistate business is apportioned upon a well-recognized three factor formula of tangible property, sales, and payroll.

Appellee, Illinois Tool Works (ITW), is a multistate and multinational corporation having a worldwide business in the manufacturing of tools, fasteners, packaging products and the leasing of machinery. ITW has operating divisions in seventeen places in the United States and conducts business in several foreign countries. One of ITW's manufacturing plants is located in Pine Bluff, Arkansas. Its corporate headquarters or "commercial domicile" is in Chicago, Illinois.

ITW determined that, for UDITPA purposes, certain capital gains income it had earned in 1981 through 1983 from six different capital assets was "nonbusiness income;" thus it excluded this income when calculating its allocation of taxes to this state.[1] Instead, ITW allocated the income from the sale of these capital assets to its "commercial domicile," in Chicago and the income was taxed under the Illinois corporate income tax laws. ITW's six capital assets were stock in two Japanese manufactur-

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[1] We note that there were originally seven capital assets in dispute, but the appellant conceded that income from the sale of preferred stock was "nonbusiness income" under UDITPA.

ing companies, NISCO and NIFCO; stock in Computer Products, Inc.; undeveloped real property located near ITW's headquarters in Chicago; U.S. Treasury Notes and foreign currency transactions.

The appellant, Arkansas Department of Finance and Administration, disagreed with ITW's classification of this income, asserting that the income constituted "business income" for purposes of Arkansas's UDITPA. Accordingly, appellant assessed ITW additional taxes of approximately $45,164 for the years 1981-1983. After losing an appeal in an administrative hearing, ITW paid the additional taxes under protest and appealed to the chancery court.

The chancery court, relying on five United States Supreme Court cases decided in the 1980's, held that the "unitary business principle" must be utilized in determining whether or not intangible income of multistate or multinational corporate taxpayer is to be classified as "business income" or "nonbusiness income" for UDITPA purposes. In applying the principle in this case, the chancellor further concluded that ITW's aforementioned income from the sale of its six capital assets was not taxable by the state because the income was in no way connected with ITW's Arkansas business activities. The appellant appeals from the lower court's holding, arguing that the chancellor misapplied the law and made erroneous findings of fact. We find no error and therefore affirm.

Under the UDITPA, "business income" is defined as follows:

> Income arising from transactions and activity in the regular course of the taxpayer's trade or business includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Ark. Code Ann. § 26-51-701(a) (Supp. 1989). As we noted previously, all "business income" is apportioned to this state using an established formula. Ark. Code Ann. § 26-51-709 (1987). Also, under the Act, "nonbusiness income" is defined as all income other than "business income," § 26-51-701(e), and is

allocated specifically to the state having the most logical nexus with the asset producing the "nonbusiness income" (usually its "commercial domicile") rather than being apportioned among the states where the corporation conducts its business.

In the mid-1970's, the Revenue Division of the Arkansas Department of Finance and Administration adopted certain corporate income tax regulations to implement the provisions of Arkansas's UDITPA. Arkansas is a member of the Multistate Tax Compact and the regulations it (and other states) adopted were suggested by the Multistate Tax Commission (MTC). These regulations were generally referred to as "full apportionment" regulations because they broadly construed the concept of "business income" and very narrowly construed the concept of "nonbusiness income" for UDITPA purposes.

In *Qualls* v. *Montgomery Ward & Company*, 266 Ark. 207, 585 S.W.2d 18 (1979), this court adopted the "full apportionment" rationale. In *Qualls*, Montgomery Ward received interest from loans made to subsidiary and related corporations none of which were located or did business in Arkansas. Because there was no activity in Arkansas in relation to the loans, Montgomery Ward contended that the interest was "nonbusiness income" taxable in its "commercial domicile" in Illinois. This court disagreed and held that Montgomery Ward's interest income was "business income," not "nonbusiness income," based upon the fact that the interest income was commingled with the company's other general funds to be used for general corporate purposes, which included its business activities in Arkansas.

[redacted] After the *Qualls* decision, the U.S. Supreme Court changed the "full apportionment" rationale by adding the following two requirements under the Due Process Clause of the fourteenth amendment: 1) a minimal connection or nexus between the interstate activities and the taxing state; and 2) a rational relationship between the income attributed to the state and the intrastate values of the enterprise. *Mobile Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425 (1980). The first nexus requirement is met if the corporation avails itself of the substantial privilege of carrying on business within the state. The Supreme Court labeled the second due process requirement, the "unitary business principle," and explained the application as

follows:

> (T)he linchpin of apportionability in the field of state income taxation is the unitary business principle. In accord with this principle, what appellant (taxpayer) must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that state.

The cases following *Mobil* all cited the above language and utilized the "unitary business principle" analysis. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980); *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *F.W. Woolworth Co.* v. *Taxation & Revenue Dept.*, 458 U.S. 354 (1982); *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159 (1983). Under the "unitary business" rationale, as expressed in these decisions, the general test for determining whether a diversified group of businesses had a "unitary business" relationship was to determine whether the income that the state was attempting to tax resulted from functional integration, centralization of management, and economies of scale utilized by the corporate group.

In response to the Supreme Court cases cited above, the Arkansas Revenue Department adopted Regulation 1984-2, which recognized the Supreme Court's due process limitation but applied the "unitary business principle" only to dividend income. In this appeal, the appellant relies on this regulation to argue that since ITW's capital gains were not derived from dividend income, the income is still taxable. We do not agree with the appellant's reading of these Supreme Court cases as limiting the "unitary business principle" analysis only to dividend income.

In *ASARCO*, the Supreme Court addressed Idaho's argument that dividend income received by ASARCO should be considered a part of a "unitary business" if the intangible property is acquired, managed or disposed of for purposes relating or contributing to the taxpayers' business. The Court rejected Idaho's "full apportionment" argument and held that the dividend income of ASARCO was not taxable by Idaho. In so holding, the Court stated the following:

> This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently, *all* of its operations, including any investment made, in some sense can be said to be "for purposes related to or contributing to the [corporation's] business." When pressed to its logical limit, this conception of "unitary business" limitation becomes no limitation at all.

Although the main dispute in *ASARCO* concerned dividend income, Idaho also attempted to tax certain ASARCO interest and capital gains from stock sales. However, Idaho and ASARCO had agreed that interest and capital gains derived from these sales should be treated in the same manner as the dividend income. The Supreme Court concurred with the parties' agreement, stating that "One must look principally at the underlying activity, not at the form of investment to determine the propriety of apportionability." The Supreme Court then proceeded to hold that Idaho's attempt to tax this other income also violated the due process clauses.

Clearly from reading *ASARCO*, the Supreme court did not intend for the "unitary business principle" to apply to dividend income only. Accordingly, we hold that the chancellor here was correct in applying the "unitary business principle" analysis to the facts of this case. In sum, we believe the appellant's reading of the Supreme Court cases is much too narrow, and those cases in no way can be construed to uphold the constitutionality of appellant's Regulation 1984-2.

We note the appellant's suggestion that the Supreme Court backed off of its *ASARCO* holding in its most recent case, *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159 (1983). In *Container*, the Court stated that there was a requirement that the out-of-state activities of the purported "unitary business" be related in some concrete way to the in-state activities. The Court explained that the functional meaning of this requirement is that there be some sharing or exchange of value not capable of precise identification or measurement — beyond the mere flow of funds arising out of a passive investment or a distinct business operation — which renders formula apportionment a reasonable method of

taxation.

Again, we disagree with the appellant's reading of this Supreme Court case. We do not see how the "flow of value" analysis in *Container* benefits the appellant's case here. It appears to be just a rewording of principles set out in the earlier cases. Further, we do not read the *Container* case as limiting the Court's holding in *ASARCO*. To the contrary, *ASARCO* is cited with approval throughout the *Container* case.

In sum, we agree with the chancellor that, in complying with the holdings in the foregoing Supreme Court cases, he was obliged to utilize the "unitary business principle" in this case. Those holdings also require us to overrule the case of *Qualls* v. *Montgomery Ward*, 266 Ark. 207, 585 SW.2d 18 (1979), and to declare appellant's Regulation 1984-2 to be unconstitutional. As a side comment, we note that Arkansas is not the first state to have to reevaluate its taxation of multistate corporations after the above Supreme Court cases were decided. *See, e.g., James* v. *Intern. Tel. & Tel. Corp*, 654 S.W.2d 865 (Mo. banc 1983); *American Homes Products Corp.* v. *Limbach*, 49 Ohio St. 3d 158, 551 N.E.2d 201 (1990); *Corning Glass Works* v. *Va. Dept. of Tax*, 402 S.E.2d 35 (Va. 1991). Now that we have affirmed the chancellor's application of the law in this case, we must address the appellant's challenge that the chancellor's findings of fact in regard to ITW's capital assets are clearly erroneous.

First, in applying the "unitary business principle," the chancellor found that ITW's capital gains income from the sale of its stock interest in NISCO, NIFCO, and CPI was "nonbusiness income" for Arkansas UDITPA purposes. We agree. At no time did ITW hold the majority of the stock in these companies, and while ITW had two or three directors on the companies' boards, there is no showing that ITW had a controlling interest or part. The potential to operate a company as part of a "unitary business" is not dispositive, when in fact there is a discrete business enterprise. *F.W. Woolworth Co.* v. *Taxation & Revenue Dept.*, 458 U.S. 354 (1982). There were no common employees or officers, and ITW did not provide any administrative services to the companies. While NISCO and NIFCO did utilize some of ITW's patented technology, they paid a royalty to ITW for the use of that technology and that royalty income was taxed by ITW

as "business income." In sum, the record shows that these companies were operated as discrete and separate businesses and not as a part of a "unitary business."

[redacted] Further, the record also clearly supports the chancellor's finding that ITW's capital gains from the redemption of U.S. Treasury Notes, foreign currency transactions, and the installment sale of undeveloped land located in Chicago were not an integral part of ITW's regular manufacturing and leasing businesses carried on at the Pine Bluff plant. Instead, we agree with the chancellor's classification of these assets as normal or passive investments of ITW. As pointed out so clearly in *ASARCO*, the business of a corporation requires that it earn money to continue its operations and to provide a return on its invested capital but the use of this money for the business does not fit the "unitary business principle" test.

[redacted] For the foregoing reasons, we affirm the chancellor's findings of fact and conclusions of law in applying the "unitary business principle" to the facts of this case. In conclusion, we briefly mention ITW's argument that the chancellor erred in denying its request for attorneys' fees. We simply are unable to reach this issue because ITW failed to file a notice of a cross appeal as required under ARAP Rule 3(d). *See Independence Fed'l S&L Ass'n* v. *Davis*, 278 Ark. 387, 646 S.W.2d 336 (1983).

Affirmed.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I respectfully disagree with the majority, as I believe it has rushed to judgment in an area that will have substantial impact upon our state, and is at the same time, complex, transitional and, above all, abstruse. *See* P. Hartman, *Federal Limitations on State and Local Taxation* § 9:30 (Supp. 1990).

While the United States Supreme Court has begun work on the unitary business principle, as the majority discussed, the application and impact of that principle has generated much litigation and very little harmony. *Id.* at 396. As evidenced just by the complexities of the discussion of this issue, answers are not easily ascertainable and few have been provided by the Supreme Court decisions. *See* e.g., P. Hartman, *Federal Limitations on*

State and Local Taxation § 9 (1981 and Supp. 1990); J. Hellerstein, *State Taxation, Corporate Income and Franchise Taxes* §§ 8 and 9 (1983 and Supp. 1989); *Constitutional Law* 96 Harv. L. Rev. 62 (1982); C. Floyd, *The Unitary Business in State Taxation: Confusion at the Supreme Court?*, 1982 B. Y. U. L. Rev. 465. It has even been suggested that because of its complexities, the issue is one the courts are not equipped to handle:

> Given the limitations within which the court must operate, it is entirely possible that it would be infeasible for the court to examine all of the intricacies of the unitary business and formula apportionment in order to determine whether a business is unitary and fairly subjected to taxation by a standardized apportionment formula. *Fair formula apportionment of divers kinds of business involves a substantial knowledge of the operations of a great variety of industries that are taxed, as well as technical problems of accounting. Courts are hardly equipped satisfactorily to handle such problems. Perhaps the complexities of the problem suggest some broad legislative guidance, fair to the states and the taxpayers, as part of a solution.* [Our emphasis.]

P. Hartman, Federal Limitations on State and Local Taxation, § 9:29 (1981).

With that in mind, I think it improvident to decide, as the majority does, the constitutionality of a question that the Supreme Court itself has not yet passed on, and which still stands as good law. The argument presented by the state in this case is closely related to the issue in *Qualls* v. *Montgomery*, 266 Ark. 207, 585 S.W.2d 18 (1979), and has not yet been addressed by the United States Supreme Court, much less overruled, as pronounced by the majority.

In *Qualls*, we addressed the question of interest from loans made by Ward to relative subsidiaries and corporations and whether that should qualify as "business income" and, hence, apportionable. Our current statute provides the same definition relevant in *Qualls*:

> 26-51-701(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income and

> tangible and intangible property if the acquisition, management and disposition of the property constitue integral parts of the taxpayer's regular trade or business operations.

We held that the interest was *business* income, not, as the majority states, simply because funds were commingled, but because the loans constituted transactions in the "regular course of Ward's business," pursuant to the statutory definition.

We addressed Ward's contention that the corporate relatives were not part of a unitary business, and responded, in essence, that that question need not be answered if the income came from activities that were in the regular course of the taxpayer's trade or business. Or, to put it in terms the United States Supreme Court would now employ, the fact that the loan transactions were part of Ward's regular course of business, was sufficient to find these transactions were part of a unitary business. This is essentially what the state is arguing here—that the investment income is part of ITW's unitary trade or business because the investment activities make up part of ITW's *regular trade and business.*

The Supreme Court's discussions in those cases cited by the majority involved only whether there was unity between the taxpayer and the income source on the basis of the extent and quality of interconnectedness of the taxpayer and the questioned operation. The court did *not* address the question of an income source being part of the taxpayer's unitary business, solely on the basis of the frequency or regularity of an activity, as was the situation in *Qualls*, and specifically here, as argued by the state, that investments were a regular and integral part of its business.

This approach is not novel with either *Qualls* or the appellant. In fact, as pointed out in P. Hartman, *Federal Limitations on State and Local Taxation* § 9:30 at 437-439 (Supp. 1990), in *ASARCO* v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982), cited by the majority, ASARCO's own counsel agreed that while not present in its case, investments could be an "adjunct to the actual conduct of the taxpayer's own business," and could be found to be part of a unitary business, and apportionable. And while the United States Supreme Court has not addressed this question, several lower courts have and the inclination is to allow apportionment in those cases. *See* e.g.,

Bendix Corp. v. *Director Div. of Tax.*, 568 A.2d 59 (N.J. Super A.D. 1989); *NCR Corp.* v. *Comptroller of the Treasury*, 313 Md. 118, 544 A.2d 764 (1988); *Welded Tube Co. of America* v. *Comm.*, 515 A.2d 911 (Pa. Comwlth 1986); *Lone Star Steel Co.* v. *Dolan*, 669 P.2d 916 (Colo. 1983).

The other important factor which the majority fails to mention is the burden of proof in these cases. It is not incumbent upon the state to show sufficient nexus between the apportioned income and the taxpayer. Rather, there is no question but that the burden is on the taxpayer. The state's taxation is of course presumptively constitutional, *Fisher* v. *Perroni*, 299 Ark. 227, 771 S.W.2d 766 (1989); *Love* v. *Hill*, 297 Ark. 96, 759 S.W.2d 550 (1988), and to overcome this presumption, the taxpayer has the "distinct burden of showing by clear and cogent evidence," that the statutory scheme "results in extraterritorial values being taxes." *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980). The question in this case then, boils down to whether ITW showed by clear and cogent evidence that taxation on the investment income was unconstitutional.

There was evidence, as noted by the majority, to show a lack of interconnectedness between ITW and the companies or sources in which it had invested, that is to say, ITW did not have a majority share in its holdings and had no controlling interest, had no common officers or employees and did not provide any administrative services to the companies.

While this may or may not have been clear and cogent evidence of interconnectedness, such a finding is not controlling here. Rather, we look at the evidence in light of the state's argument that investing was a regular part of the business so as to make the investing operations part of ITW's unitary business. There is no discussion of such evidence in either the appellee's brief or the majority opinion, yet a mere glance at the record substantiates the state's claim. The most critical evidence on this point was given by ITW's vice president and treasurer, David Byron Smith, who testified that all the management of investments was handled through his office; that it was a significant part of the treasurer's operations; that he would spend an hour or so each day working on investments, and that such investments were

one of four priorities of the company. He further testified the money received from investments was used as working capital, and working capital was used for investment purposes, but the testimony was ultimately inconclusive on this point. In the face of this testimony, it is clear, to me at least, that ITW has failed to meet its burden.

As the direction of the United States Supreme Court is unsettled, and the consequences far reaching, I cannot join the majority's venture in this area, particularly, where the record has not been sufficiently developed on this question and the appellee's burden of proof was consequently lacking.

Angela G. GATLIN *v.* T. Gary GATLIN

91-133 811 S.W.2d 761

Supreme Court of Arkansas
Opinion delivered June 24, 1991

Hartsfield & Mixon, P.A., by: *Larry James Hartsfield* and *H. Clarke Mixon*, for appellant.

Judieth P. Balentine, for appellee.

DONALD L. CORBIN, Justice. This is an appeal from a July 16, 1990 order of the First Division of the Chancery Court of Pulaski County holding appellant, Angela G. Gatlin, in contempt for failure to comply with a previous order of the court. Jurisdiction of this appeal is in this court pursuant to Ark. Sup. Ct. R. 29(1)(a).

Appellant makes three assignments of error, two of which are based on insufficient evidence. The third is based on the constitutionally guaranteed prohibition against imprisonment for debt. We find no merit in any of appellant's arguments and affirm.

In a decree filed November 3, 1988, the chancellor granted appellee, T. Gary Gatlin, an absolute divorce from appellant. The decree provided for joint custody of their child, with no provision for child support or alimony. All marital assets were sold and the proceeds of the sale were divided between the parties. Included in the decree was an order that "the parties are each responsible for one-half of the indebtedness owed to the Internal Revenue Service. The parties are to make individual payment plans with the Internal Revenue Service for their portion. The Plaintiff is

responsible for all other debts."

On June 22, 1989, appellee served appellant with a motion to show cause, asserting he had continued to make regular monthly payments on the Internal Revenue Service (hereinafter referred to as IRS) indebtedness. Appellee alleged that neither had appellant made payments to the IRS nor had she set up any payment plan with the IRS by which to discharge the indebtedness. On August 23, 1989, the chancellor entered an order finding that appellant had made reasonable efforts to make payments to the IRS, but that no payments had been accepted by the IRS, as the appropriate documentation was not in appellant's possession.

On March 22, 1990, appellee filed a motion with the court claiming to have made all payments to the IRS since the date of the decree. In the motion, appellee requested the court to order that he be responsible for making payments to the IRS and that appellant be required to make payments through the court payable to him until she paid her half of the indebtedness.

On June 28, 1990, appellee filed a second motion to show cause. He alleged that though appellant reportedly went to the IRS, she had not made any payments toward retiring the debt. The chancellor ordered appellant to appear on July 16, 1990, to show cause why she should not be cited for contempt of the previous order. A show cause hearing was held as scheduled and the court announced from the bench that appellant was in willful contempt of the November 3, 1988 order of the court for failure to pay one-half of the indebtedness due the IRS. The court ordered appellant to be incarcerated until such time as she posted a $5,400.00 cash bond to absolve herself of contempt.

In its written order, which was filed July 17, 1990, the court made the following findings:

> 3. That pleadings have been filed before this Court as to the contempt of Angela G. Gatlin in failing to comply with this provision of this Court Order on more than one occasion, and Angela G. Gatlin has continued, despite prior Motions, to fail to make payment on this indebtedness.
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> 4. That evidence before the Court is that Angela G. Gatlin has been regularly employed since the date of the

Decree and is now earning more than $1,700.00 per month.

. . . .

6. That this Court finds Angela G. Gatlin to be in willful and open contempt of the Orders of this Court and to have made no attempt to pay this indebtedness since the Decree of this Court of November 3, 1988. Angela G. Gatlin is ordered to be held in the Pulaski County Jail until she has paid $5,400.00, being $4,600.00 she was ordered by the Court to pay on November 3, 1988 and the $800.00 in interest which T. Gary Gatlin has been required to pay to the Internal Revenue Service due to her failure to pay her share of this indebtedness.

On July 18, 1990, appellant paid $5,400.00 to the Pulaski County Sheriff and was released from jail. The court in an Order of Release filed July 20, 1990, ordered that she be released from custody, that all contempt charges against her be dismissed, and that the funds be released to appellee's attorney to forward to the IRS.

I.

THE COURT BELOW ERRED WHEN IT ISSUED A CONTEMPT CITATION BASED UPON INSUFFICIENT EVIDENCE THAT DEFENDANT HAD FAILED TO OBEY THE PREVIOUS ORDERS OF THE COURT.

In support of this point appellant first asserts that the findings made by the chancellor in the orders of August 23, 1989, and July 17, 1990, are inconsistent. She cites *Leslie* v. *Leslie*, 174 Conn. 399, 389 A.2d 747 (1978), for the proposition that where the court's findings in a contempt proceeding are inconsistent and the conclusions are ambiguous to the extent they are irreconcilable, a remand for a new trial on the issue of contempt is required.

The order of August 23, 1989 was entered following a motion by appellant to modify visitation and custody and the counter motion by appellee for appellant to show cause for failure to comply with the order of the court to pay her portion of the indebtedness to the IRS. The court on August 23, 1989 recognized that appellant had not been in possession of the appropriate

documentation to make payments to the IRS but that appellee provided her with the same that day. We fail to see that this order is so ambiguous or inconsistent with the other order as to require a new trial. Clearly appellant was still under order of the court to take necessary steps to retire one-half the debt to the IRS.

Appellant also maintains that fair play and due process require that she be put on notice as to what was required of her to avoid or to purge contempt. She maintains both that the November 3, 1988 order was too inconsistent to inform her of what she was required to do as it set neither a final payment date nor a minimum payment, and that prior to July 16, 1990, she was not ordered to pay the $800.00 interest which had accrued on her part of the debt. It is her position that she could not be incarcerated for failure to pay amounts she had never been ordered to pay by a written order of the court and, therefore, the inclusion of the $800.00 in the purge amount requires reversal of the contempt citation.

Disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it may constitute contempt; punishment for such contempt is an inherent power of the court. *Hilton Hilltop, Inc.* v. *Riviere*, 268 Ark. 532, 597 S.W.2d 596 (1980). The general rule is that before a person may be held in contempt for violating a court order, that order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied. *Warren* v. *Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986).

In the decree filed November 3, 1988, the chancellor clearly ordered the parties "to make individual payment plans with the Internal Revenue Service for their portion" of the indebtedness. The record shows that appellant has not established a payment plan. After hearing appellant's testimony, the chancellor found that she had made no payment toward retiring the debt.

Our review of a finding of contempt is limited to examining the findings of the trial court and we reverse only if the trial court's decision is against the preponderance of the evidence. *In the Matter of Brown* v. *Brown*, 305 Ark. 493, 809 S.W.2d 808 (1991). From our review of the record before us, we are unable to say the order was indefinite or the trial court's finding of contempt is clearly against the preponderance of the evidence.

II.

THE COURT BELOW ERRED WHEN IT ISSUED A CONTEMPT CITATION BASED UPON INSUFFICIENT EVIDENCE THAT DEFENDANT'S FAILURE TO OBEY THE PREVIOUS ORDERS OF THE COURT WAS WILLFUL.

In support of this point appellant makes the same argument she made previously concerning the inconsistent findings in the orders of August 23, 1989 and July 17, 1990. In her first argument, it was her position that a new trial was required. However, now she contends that a reversal of the contempt citation is required. For the reasons stated there, this argument is without merit.

Appellant also maintains that even if she failed to comply with the previous order of the court, her noncompliance was not willfull. She relies on *Barker* v. *Barker*, 271 Ark. 956, 611 S.W2d 787 (1981) in making the assertion that Arkansas case law demands that before a party may be incarcerated for contempt, the trial court must specifically find an ability to pay and a willful refusal to do so. She maintains that her uncontroverted testimony establishes that she was at all times unable to make substantial payments on the IRS debt, and that her inability to pay was the reason for her failure to comply.

We find no merit in this argument. The chancellor was not required to believe appellant's testimony. After hearing appellant's testimony regarding her income and expenses, the chancellor in making his ruling from the bench stated, "[s]he's had enough income to [make] at least some payment. She hasn't made any." In the order filed July 17, 1990, he specifically found appellant "to be in willful and open contempt of the Orders of this Court and to have made no attempt to pay this indebtedness since the Decree of this Court of November 3, 1988."

On appeal from a finding of contempt this court will reverse only where the finding of the chancellor is against the preponderance of the evidence. *C.R.T., Inc.* v. *Brown*, 269 Ark. 114, 602 S.W.2d 409 (1980). Based on the foregoing, we cannot say the chancellor's finding willfulness in appellant's failure to comply with his previous order is against the preponderance of

the evidence.

III.

THE COURT BELOW ERRED WHEN IT ISSUED A CONTEMPT CITATION AND JAILED DEFENDANT FOR FAILURE TO PAY A DEBT TO A THIRD PARTY.

Appellant relies on the Ark. Const. art. 2, § 16 as limiting the court's authority to use contempt proceedings to enforce its orders. Section 16 states that, "[n]o person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." Appellant maintains that while generally orders for alimony, maintenance or support are not considered debt for the purposes of the constitutional prohibition, an order for a property division is such a debt.

On July 25, 1990, appellant filed a motion to sequester the $5,400.00 until such time as an appeal could be taken from the contempt order. On July 26, 1990, appellant filed a motion to set aside the entry of the July 18, 1990 order pending a hearing on the July 25, 1990 motion.

On July 30, 1990, a hearing was held to consider the two motions. Appellee's attorney stated that she forwarded the funds to the IRS and that they were received there on July 26, 1990. Appellant's counsel stated that following the July 16, 1990 hearings, the orders were entered without his knowledge, and, as the $5,400.00 was already paid to the IRS, the sequestration of the funds was a moot issue. He also said that at the hearing on the 16th he was in the process of making an argument to the court when the court made its ruling on the contempt issue and that he would like to make a record of that argument for purposes of appeal. The objection made for the record was that the court did not have authority to incarcerate someone for contempt of the court for failure to pay a third party debt. However, appellant's counsel failed to obtain a ruling on the matter. Failure to obtain a ruling constitutes waiver of the issue on appeal. *McDonald* v. *Wilcox*, 300 Ark. 445, 780 S.W.2d 17 (1989).

For the reasons stated above we affirm the rulings of the chancellor.

Richard A. HUBBARD *v.* STATE of Arkansas

CR 90-262 812 S.W.2d 107

Supreme Court of Arkansas
Opinion delivered June 24, 1991

Raymond R. Abramson, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. A'tty Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant shot his ex-wife, Paula M. Hubbard, in the presence of police officers at the parking lot of the McDonald's restaurant in Brinkley, Arkansas. Approximately one month after the shooting, the victim died and

appellant was charged by amended felony information with murder in the first degree, a violation of Ark. Code Ann. § 5-10-102 (1987). Appellant was tried and convicted by a Monroe County jury; he was then sentenced to life in prison without parole. He appeals the judgment of conviction of first-degree murder entered by the Monroe Circuit Court. We affirm.

There are five issues presented in this appeal. Appellant's counsel assigns four points of error to the trial court. We discuss these in the language and in the order in which they were presented to us. Finally, we discuss the issue of whether appellant received a speedy trial, an issue on which appellant received our permission to argue *pro se*.

I.

THE COURT ERRED IN ADMITTING DR. MICHAEL SIMON'S TESTIMONY EXPRESSING AN OPINION AS TO APPELLANT'S MENTAL CAPACITY BECAUSE HE WAS NOT QUALIFIED AS A PSYCHIATRIST.

The only testimony offered by the state concerning appellant's mental capacity was that of Dr. Michael Simon, a forensic psychologist at the Arkansas State Hospital. Appellant claims Dr. Simon's opinion as to appellant's capacity to conform his conduct to the requirements of the law should not have been admitted because Dr. Simon is not a psychiatrist; appellant maintains the trial court's order for appellant's psychiatric evaluation required the evaluation be conducted by a psychiatrist. Appellant argues further that Dr. Simon's testimony did not comply with the requirement of the court's order and Ark. Code Ann. § 5-2-305 (1987) in that neither did he express an opinion as to whether appellant possessed the requisite culpable mental state for first-degree murder nor, in making his evaluation of appellant, did he consider any of appellant's prior psychiatric and psychological records.

Appellee responds by stating that the trial court's order tracks the language of section 5-2-305 and that while the order requires psychiatric evaluation of appellant, the statute does not so require. Appellee argues it is reasonable to assume that since the trial court's order tracks the statutory language, it intended

that the statutory procedure be followed. In support of this argument, appellee cites *Ball* v. *State*, 278 Ark. 423, 646 S.W.2d 693 (1983), for the proposition that there be substantial compliance with section 5-2-305.

Appellant's challenge is to the admission of Dr. Simon's testimony. In evidentiary determinations, the trial court has wide discretion, and we will not reverse absent an abuse of that discretion. *State* v. *Massery*, 302 Ark. 447, 790 S.W.2d 175 (1990). Determinations of an expert's qualifications lie within the sound discretion of the trial court; the standard for measuring an expert's qualifications is flexible, and if some reasonable basis exists from which it can be said that the witness has knowledge of the subject beyond the knowledge possessed by ordinary persons, his testimony is admissible. *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988). As Dr. Simon is a forensic psychologist who evaluated appellant pursuant to the trial court's order, we cannot say the trial court abused its discretion in allowing Dr. Simon to testify concerning his evaluation of appellant's mental capacity. The trial court acted within its discretion in permitting Dr. Simon's testimony.

Whether Dr. Simon's evaluation substantially complied with the trial court's order appears to be a sub-issue argued by appellant. The trial court entered three commitment orders in this case. On October 7, 1988, the trial court entered an "Order for Commitment of Indigent Defendant for Psychiatric Examination." This order committed appellant to "the East Arkansas Regional Mental Health Center, Helena, Arkansas, as an outpatient, for expert medical and psychiatric observation, examination, and treatment." On February 16, 1989, the trial court entered a second "Order for Commitment of Indigent Defendant for Psychiatric Examination." *Inter alia*, this order acknowledged that the court had previously entered a commitment order on October 4, 1988, re-committed appellant to the East Arkansas Regional Mental Health Center, and stated:

5.

> That the "psychological evaluation conducted by the East Arkansas Regional Mental Health Center does not address itself to the issue of the Defendant's lack of capacity; that it is necessary for the indigent defendant to

be evaluated by a qualified psychiatrist for a determination of his psychiatric state at the time of the offense alleged.

6.

That the defendant has informed his counsel that he has been institutionalized for psychiatric problems several times in the past, and the records from such former institutionalization should be made available to a qualified psychiatrist for a determination of his lack of capacity to commit the crimes with which he is charged.

Following these previous two orders, on October 6, 1989, the court entered *nunc pro tunc* an "Order for Commitment to the Arkansas State Hospital for Psychiatric Evaluation."

The relevant statute, section 5-2-305, states in pertinent part:

(a) Whenever a defendant charged in circuit court:

(1) 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 of the defendant will or has become an issue in the cause; or

(2) Files notice that he will put in issue his fitness to proceed, or there is reason to doubt his fitness to proceed, the court, subject to the provisions of §§ 5-2-304 and 5-2-311, shall immediately suspend all further proceedings in the prosecution. . . .

(b) Upon suspension of further proceedings in the prosecution, the court shall enter an order:

(1) Directing that the defendant undergo examination and observation by one or more qualified psychiatrists at a local regional mental health center or clinic; or

(2) Appointing at least one (1) qualified psychiatrist to make an examination and report on the mental condition of the defendant; or

(3) Directing the Director of the Arkansas State Hospital to examine and report upon the mental condition of the defendant; or

(4) Committing the defendant to the Arkansas State Hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty (30) days, or such longer period as the court determines to be necessary for the purpose.

(c) Upon completion of an examination at a local regional mental health clinic or center pursuant to subsection (b) of this section or in lieu of such an examination, the court may enter an order providing for examination pursuant to subsections (b)(2) or (3) of this section and may further order the defendant committed to the Arkansas State Hospital for further examination and observation if the court determines that commitment and further examination and observation are warranted.

(d) The report of the examination shall include the following:

(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;

(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; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

The October 6, 1989 Commitment Order mirrors the language of section 5-2-305 and states that:

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Defendant shall be admitted to the Arkansas State Hospital for inpatient psychiatric evaluation to determine the competency of the

> Defendant to stand trial on the charges filed herein; that the psychiatrist shall provide the Defendant, the State and the Court with 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; and also for an opinion as to the capacity of the Defendant to have the culpable mental state that is required to establish an element of the offense charged, namely, intent.

We have previously held that a trial court must substantially comply with the requirements of section 5-2-305. *Ball* v. *State*, 278 Ark. 423, 646 S.W.2d 693 (1983). In *Ball*, we held there was substantial compliance with the statute where a psychiatrist issued his report in the form of two letters. The letters contained all the statutorily required information, although they were not written in the language of the statute.

We adhere to the view that the statute requires substantial compliance. The trial court's actions did indeed substantially comply with section 5-2-305. We note that while parts of the statute speak in terms of "psychiatric" examination or "psychiatric" evaluation, section 5-2-305(b)(4) speaks only in terms of "the examination" which is to be conducted during a thirty day stay at the state hospital. Thus, the examination conducted during appellant's stay at the state hospital by Dr. Simon, who is admittedly a psychologist rather than a psychiatrist, substantially complies with the statute.

The record is abounding with evidence of the trial court's concern with appellant's psychiatric evaluation. The trial court committed appellant for evaluation, then re-committed him for further evaluation after having determined the initial evaluation was lacking in some respects. After the second commitment order was entered, the trial court, apparently still not satisfied with the report of appellant's evaluation, entered *nunc pro tunc* an order committing appellant to the state hospital for further psychological evaluation. At trial then, the court allowed Dr. Simon's testimony over appellant's objections. Given the detailed attention of the trial court to the issue of appellant's evaluation, we are confident the trial court was satisfied that Dr. Simon's testimony

was in substantial compliance with section 5-2-305. Again, we cannot say the trial court abused its discretion in allowing Dr. Simon's testimony.

II.

THE COURT ERRED BY ALLOWING THE PROSECUTING ATTORNEY TO CONFUSE THE JURY ON THE ISSUE OF STANDARDS FOR INVOLUNTARY COMMITMENT TO THE STATE HOSPITAL.

Dr. George Jones, witness for the defense and clinical psychologist at East Arkansas Regional Medical Health Center, testified that he examined appellant, pursuant to the trial court's order, to determine appellant's fitness to stand trial and aid in his defense. On cross-examination, during the same general discussion, Dr. Jones testified about the standards for both involuntary commitment to the state hospital and the standards for determining a mental disease or defect for criminal purposes.

Appellant relies on Ark. R. Evid. 403 and argues the standards concerning involuntary commitment are wholly irrelevant to the standards concerning the legal definitions of mental disease and defect and are of no probative value to this case, but serve only to confuse or mislead the jury. The trial court allowed Dr. Jones' testimony regarding the standards for involuntary commitment over appellant's relevance objection because Dr. Jones had referred to these standards in his written report.

Ark. R. Evid. 403 provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. "The relevancy or prejudice matter must be decided by someone. The trial court has been assigned that responsibility in our system and it is the logical and proper place to make such determination. Unless that discretion is abused, we will not reverse the trial court." *Hoback* v. *State*, 286 Ark. 153, 158, 689 S.W.2d 569, 572 (1985). We cannot say the trial court abused its discretion here.

III.

THE COURT ERRED BY ALLOWING A SERIES OF LETTERS EXCHANGED BETWEEN APPELLANT AND HIS EX-WIFE, THE VICTIM, TO BE INTRODUCED INTO EVIDENCE.

During May and June of 1988, several months prior to the murder on September 9, 1988, appellant and his victim exchanged a series of letters relating their personal lives. These letters were admitted by the state as evidence of appellant's state of mind during the period after the divorce from his victim until the time he shot her.

Appellant argues the letters were too remote in time to the date of the offense to be relevant and that their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The balancing of probative value against prejudice is a matter left to the sound discretion of the trial court, and his decision on such a matter should not be reversed absent a manifest abuse of discretion. *Bennett* v. *State*, 297 Ark. 115, 759 S.W.2d 799 (1988). As the letters were written just a few months prior to the murder and as they related to appellant's motive or state of mind, we cannot say the trial court abused its discretion in admitting the letters into evidence.

IV.

THE COURT ERRED BY REFUSING TO GIVE A PROPOSED JURY INSTRUCTION TO THE EFFECT THAT AN ACQUITTAL ON THE BASIS OF MENTAL DISEASE OR DEFECT WOULD NOT MEAN THAT APPELLANT BE SET FREE.

Appellant proffered a jury instruction concerning the consequences which result when a defendant is acquitted on the grounds of mental disease or defect. The trial court denied appellant's proposed instruction which was based on Ark. Code Ann. § 5-2-314 (1987). The proffered instruction stated that if appellant were acquitted on the ground of mental disease or defect, he would be committed to the custody of the Director of the Department of Human Services, and he would have the burden of proving by clear and convincing evidence that his

release therefrom would not create a substantial risk of bodily injury to another person or serious damage of property of another due to mental disease or defect.

We have held that a jury is not to be told the options available to the trial court when a defendant is found not guilty by reason of mental disease or defect. *Love* v. *State*, 281 Ark. 379, 664 S.W.2d 457(1984); *Curry* v. *State*, 271 Ark. 913, 611 S.W.2d 745 (1981). We have most recently affirmed this position in *Robertson* v. *State*, 304 Ark. 332, 802 S.W.2d 920 (1991).

Appellant concedes this argument is contrary to our present case law. However, appellant asks us to reverse the current law and adopt his view that since the jury is informed about the possible sentences if appellant were to be found guilty, the jury should also be informed about the nature and extent of the consequences to appellant should he be acquitted by reason of mental disease or defect. Appellant cites us to no authority supporting his position and we decline to reverse our current law to adopt his viewpoint. The trial judge was correct in refusing appellant's proposed instruction.

V.

SPEEDY TRIAL.

On motion, appellant received our permission to argue *pro se* the speedy trial issue. The dates which are relevant to the speedy trial date are as follows. On September 9, 1988, appellant was arrested for shooting his wife. On October 7, 1988, on appellant's motion, the trial court entered its first order committing appellant to the East Arkansas Regional Mental Health Center for psychiatric evaluation. On November 17, 1988, the East Arkansas Regional Mental Health Center issued its report of appellant's psychological evaluation. As a result of deficiencies in this report, a second order for commitment to the East Arkansas Regional Mental Health Center was entered on February 16, 1989. After experiencing delays in obtaining the ordered evaluation, an order for the commitment of appellant to the state hospital was entered on October 6, 1989 *nunc pro tunc* to February 16, 1989. On December 29, 1989, appellant filed a motion to dismiss on speedy trial grounds pursuant to Ark. R. Crim. P. 28.1 and 28.2(a). His motion was dismissed, and

appellant was tried on February 13, 1990.

Pursuant to Ark. R. Crim. P. 28.1, the state has twelve months from the time provided in Ark. R. Crim. P. 28.2 to bring appellant to trial, excluding only such periods of necessary delay as provided in Ark. R. Crim. P. 28.3. It is undisputed that the time for trial commenced running on September 9, 1988, the date of appellant's arrest. The trial was some five months after the speedy trial deadline.

Once it is determined that a trial is held after the speedy trial date has expired, the state has the burden of showing that any delay was the result of appellant's conduct or was otherwise legally justified. *See Gooden* v. *State*, 295 Ark. 385, 749 S.W.2d 657 (1988). We hold the state has met its burden here. The period of delay resulting from an examination and hearing on the competency of the defendant is excludable from the twelve-month period. *Nelson* v. *State*, 297 Ark. 58, 759 S.W.2d 215 (1988); Ark. R. Crim. P. 28.3(a).

Here, the speedy trial date was September 9, 1989, and appellant was tried on February 13, 1990. Clearly then, with the period in excess of eight months excluded as a result of appellant's psychiatric evaluations, the state has complied with the speedy trial rules.

In holding that appellant was not denied a speedy trial, we note appellant's argument that the trial court failed to make a written order or docket entry stating the number of days to be excluded as required by Ark. R. Crim. P. 28.3(i). We have previously stated that a trial court should enter written orders or make docket notations specifying the reasons for the delays and the specific dates or number of days to be excluded. *Cox* v. *State*, 299 Ark. 312, 772 S.W.2d 336 (1989). However, we have also stated that a trial court's failure to comply with Ark. R. Crim. P. 28.3(i) does not result in automatic reversal. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). When a case is delayed by the accused and that delaying act is evidenced by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of Ark. R. Crim. P. 28.3(i). *Id.*; see *Key* v. *State*, 300 Ark. 66, 776 S.W.2d 820 (1989); *Kennedy* v. *State*, 297 Ark. 488, 763 S.W.2d 648 (1989).

Here, the details relating the specifics of exactly when appellant was admitted for his various examinations, the length of his stay, and the date any reports were filed are absent from the record. However, the commitment orders entered in this case reveal that appellant made one petition for commitment and two motions for psychiatric evaluation. All three of these actions resulted in commitment orders and consequent psychiatric evaluations of appellant. Appellant cannot now complain about the delays he requested for psychiatric evaluation. We hold the record is sufficient to satisfy the requirements of Ark. R. Crim. P. 28.3(i).

As required by Ark. Sup. Ct. R. 11(f), the objections decided adversely to appellant have been abstracted; we have reviewed these objections and find that none of them merits reversal.

For the foregoing reasons, the denial of appellant's motion for new trial is affirmed.

John P. GILL; W.W. Elrod, II; Joseph D. Calhoun, III; and Gill Law Firm n/k/a Gill and Elrod, and Arkansas Partnership
v. ARKANSAS EMPLOYMENT SECURITY DIVISION of the Arkansas Department of Labor, et al.

91-15 812 S.W.2d 114

Supreme Court of Arkansas
Opinion delivered June 24, 1991

[redacted]

Gill and Elrod, by: *Glenn E. Kelly*, for appellant.

Ronald A. Calkins, for appellee.

ROBERT L. BROWN, Justice. The appellants, including John P. Gill, filed a complaint wherein they contended that they were entitled to participate in the experience rate of Gill's predecessor law firm for purposes of determining their unemployment compensation taxes. After answering, the appellees, which include the Arkansas Employment Security Division (AESD), moved for summary judgment, and the chancery court granted that motion. The appellants appeal from that order.

The facts reveal numerous communications involving the three entities: AESD, Gill's predecessor law firm, and the present Gill law firm. On April 1, 1986, Gill officially terminated his relationship with his old firm. Shortly thereafter, he was advised by AESD that the agency had established 3.4 percent (the amount fixed by statute for new employers generally) as the experience rate applicable to his new firm. Ark. Code Ann. §§ 11-10-702 (1987) and 11-10-706 (Supp. 1989). At John Gill's predecessor law firm, the unemployment compensation rate was 1.3 percent due to its favorable past experience. Gill began a campaign to convince AESD that his new firm should have part of the favorable experience associated with his old law firm transferred to it. From April 1, 1986, to June 1987, Gill negotiated with his predecessor law firm over the percentage of business

acquired and the portion of the experience to be transferred.

On May 29, 1986, Gill sent a Report to Determine Liability form to AESD, which showed that he had acquired 40 percent of the predecessor business. He was subsequently advised by letter that his new firm qualified as an employer for unemployment compensation purposes and that if he disagreed with the decision, he could ask for a hearing. Gill requested a hearing the next day, June 20, 1986. In August 1986, AESD sent a second letter advising him of his new employer status and right to a hearing. He again requested a hearing on his liability status on September 2, 1986.

The communications between Gill and AESD came to a head on September 15, 1986, when William D. Gaddy, administrator of AESD, wrote Gill a letter explaining his status:

> This is to confirm the telephone conversation you had with one of our staff attorneys, George Wise, Jr., on September 10, 1986, wherein it was agreed that the administrative hearing scheduled for your law firm on October 29, 1986 would be cancelled.
>
> As Mr. Wise explained, we thought your request for a hearing was to contest the liability of your law firm for unemployment contributions. It appears, however, you are seeking a transfer of a portion of the experience rate of your former law firm. This is a procedure for which no hearing is allowed by law or actually needed. To request such a transfer you simply need to send me a petition (it may be in letter form) signed by all interested parties (your former law partners) setting out the percentage of experience that should be transferred. The relevant law is found at *Ark. Stats. Ann.* §81-1108(c)(2).
>
> Mr. Wise tells me that you have agreed to submit your petition by October 29, 1986. If you are unable to submit such a petition, we will have no choice under the law but to deny the transfer request.

Neither Gill nor his former law partners filed a petition by October 29, 1986. It should be noted in this regard that an AESD supervisor wrote Gill a letter dated August 15, 1986, in which he stated that a spokesman for Gill's predecessor law firm had told

the supervisor on three occasions that the firm would not agree to any transfer of the experience to Gill's new firm. The next contact between AESD and Gill occurred in March 1987, when AESD advised Gill that his experience rate would be 3.4 percent. In reaction to this, Gill wrote his predecessor law firm on March 30, 1987, and requested that the firm execute an authorization transferring 35 percent of the firm's experience in accordance with "our settlement agreement."

Rather than execute the authorization form, Mike Rainwater, on behalf of the predecessor firm, wrote AESD administrator Gaddy on April 2, 1987, advising him that the firm and Gill had reached an agreement for the assignment of 35 percent of the firm's experience to Gill. Rainwater stated that the agreement further provided that if the assignment cost the firm additional expense, Gill would pay the amount to the firm. Rainwater then asked Gaddy to provide him with the amount of any additional cost to the firm that might be occasioned by the transfer. Rainwater concluded by saying that his firm would assign 35 percent of the experience to Gill after receiving figures for any additional cost from AESD.

Gaddy replied to Rainwater by letter dated April 10, 1987, notifying him that any future costs could not now be calculated. Gaddy then set out the position of AESD relative to Gill's failure to meet the October 29, 1986 deadline:

> Efforts by members of our Contribution staff to resolve the transfer of experience issue last summer proved futile. One of our staff attorneys, George Wise, Jr., explained our position to Mr. Gill in a telephone conversation last September 10, 1987. Mr. Gill agreed to submit a petition requesting transfer of the experience rate signed by all interested parties by October 29, 1986. In confirming this agreement, I advised Mr. Gill that should he be unable to meet the October 29, 1986, deadline, we would have no choice under the law but to deny his request.
>
> Although you may submit a petition requesting transfer of the experience rate, a petition submitted now would be untimely. Your letter of April 2, 1987, is not acceptable as a petition as it is not signed by all interested parties. Further, in our opinion, a petition may not be conditioned

on future experience rates (see Arkansas Statute Annotated Section 81-1108(e)(2).

Gill was not sent a copy of this letter until the latter part of 1987.

From April 1, 1986, forward, Gill paid unemployment compensation taxes based on the 1.3 percent experience rate assigned to his former firm. AESD, however, adhered to the 3.4 percent rate and assessed additional taxes and interest against Gill in the amount of $4,860.70. To enforce the assessment, AESD filed liens against the appellants' property. On October 6, 1988, the appellants filed their complaint against the appellees in chancery court and prayed 1) to enjoin AESD from executing on the liens and to expunge those liens; 2) to declare that AESD's actions were violative of Gill's due process rights; and 3) to order a transfer of part of the experience from Gill's predecessor law firm to his present law firm. AESD moved for summary judgment on May 1, 1989, and the chancery court granted the motion.

Gill argues first that there were issues of material fact that militate against summary judgment in this case. The appellants are correct that we have held many times that summary judgment is an extreme remedy; that if there are issues of material fact to be decided, summary judgment is not appropriate; that the burden of proving no issues of material facts was on the appellees; and that all proof submitted must be viewed in favor of the appellants and all inferences and doubts resolved against the appellees. *See, e.g., Car Transportation* v. *Garden Spot Distributors*, 305 Ark. 82, 805 S.W.2d 632 (1991); *Morris* v. *Valley Forge Ins. Co.*, 305 Ark. 25, 805 S.W.2d 948 (1991); *Guthrie* v. *Kemp*, 303 Ark. 74, 793 S.W.2d 782 (1990); *see also* Ark. R. Civ. P. 56(c).

In this case, however, the law is clear and specific on what is required to transfer part of a predecessor firm's experience from one employer to another. *See* Ark. Code Ann. § 11-10-710(b)(1) (1987). The statute first contemplates an acquisition by the successor employer of part of the predecessor's business. It then requires that "if the successor desires to obtain any benefit of his predecessor's experience, the successor must file with the administrator a petition, signed by all interested parties, within thirty (30) days after the transfer setting out the percentage of the predecessor's experience that should be transferred to the succes-

sor's account." Under the statute, if the AESD administrator finds the facts "substantially as represented," he shall transfer the proportionate share of the predecessor's experience to the new employer. *See* Ark. Code Ann. § 11-10-710(b)(2) (1987).

Here, no petition signed by all interested parties was ever filed with AESD. Indeed, under the facts before us there is no evidence that Gill's predecessor law firm and his new law firm ever consummated a transfer of experience. Rainwater's letter to Gaddy only contemplates such a transfer. And under the statute it is the consummated transfer that triggers the filing of the petition. Moreover, according to the complaint and discovery, Gill and his predecessor firm did not even agree on the portion of the predecessor business acquired by Gill until June 1987. The percentage of the business acquired would have a bearing on, if not be conclusive of, the portion of experience to be transferred.

Gill argues before us that the Rainwater letter to Gaddy dated April 2, 1987, was, in effect, evidence of the transfer of the experience rate to Gill and that it should have been treated also as a petition to AESD for the transfer of the segregable experience under Ark. Code Ann. § 11-10-710(b)(1).

But the Rainwater letter only sets forth the percentage of the experience tax rate to be transferred, and therein lies the problem. If no portion of the experience had been *finally* transferred as of April 2, 1987 (and the letter from Rainwater to Gaddy confirms that), there could be no valid petition to submit to AESD. A transfer of the experience between employers must necessarily precede the filing of the petition signed by all interested parties under § 11-10-710(b)(1). Even had a transfer occurred as of the date of Rainwater's letter, the letter does not qualify as substantial compliance with the petition requirement because it does not ask for approval and was not signed by all interested parties. The chancellor, therefore, was eminently correct in her finding of lack of compliance with the requirements of § 11-10-710(b)(1).

We have held in the past that substantial compliance with §11-10-710(b)(1) is sufficient for the transfer of a predecessor's experience. *See Hayes* v. *Ward Ice Cream Co.*, 258 Ark. 309, 523 S.W.2d 923 (1975). In *Hayes* the new employer mailed to AESD the Report to Determine Liability signed by him and reflecting

the names and addresses of the predecessor and successor firms and the date of acquisition of a portion of the business. The successor employer did not file a petition with AESD, however, requesting a transfer of part of the predecessor's experience rating. Nevertheless, we held that the information contained in the Report to Determine Liability was enough information to constitute an application for a portion of the predecessor's experience rating. It bears mention, however, that the acquisition in *Hayes* occurred in 1970, which was prior to the enactment of Act 35 of 1971. Act 35 required for the first time that a petition, signed by all interested parties, be filed with the AESD. (*See*, for example, Act 93 of 1963, which was in effect in 1970 and which required that only an "application" be submitted by the successor employer.)

Here, insufficient information was provided to AESD to evidence a definite acquisition of part of the business by Gill or any transfer of part of the predecessor's experience. First, Gill does not argue that his Report to Determine Liability was in the nature of a petition, as was done in *Hayes*, though that Report, filed on June 2, 1986, shows an acquisition of 40 percent of the predecessor firm. He argues instead that Rainwater's letter to Gaddy dated April 2, 1987, was in the nature of a petition. Yet, that letter quotes their agreement whereby the predecessor firm will "use their best efforts" to assign 35 percent of their rating to Gill, conditioned on there being no additional cost to the firm. By its terms the letter is void of the definiteness and specificity necessary to qualify for a factual finding by the AESD administrator that a transfer of experience should occur.

The chancery court was further correct in finding that Gaddy's response to Rainwater did not amount to a "determination" by AESD under the Code. *See* Ark. Code Ann. § 11-10-710(d)(1) (1987). Without the completed acquisition of a portion of the predecessor's firm's business and without the actual transfer of a specific percentage of the predecessor firm's experience and without a petition filed with AESD and signed by all interested parties so that AESD could finalize the transfer, it logically follows that there can be no determination of the allocated experience by the AESD administrator. Under these circumstances the existence of a determination was not a material issue of fact remaining to be decided.

[redacted] Nor did the chancery court err in finding that Gill never sought a hearing before AESD regarding its acquisition of part of the predecessor firm in June 1987. It is clear that Gill requested two hearings pertaining to his liability as a new employer in 1986. But equally as clearly, those requests could not have related to a June 1987 acquisition and the resulting transfer of experience, and it is that acquisition to which the chancery court referred. Even if Gill is correct that the experience transfer was evidenced by Rainwater's April 2, 1987 letter, requests for hearings made in 1986 were premature. Moreover, § 11-10-710(b)(1) does not contemplate hearings on experience transfers, and Gaddy so advised Gill in his letter of September 15, 1986.

But the statute does provide ample opportunity for a disgruntled employer to pursue his remedies. First, he has the right to file an application for review and redetermination within twenty days of a determination. Ark. Code Ann. § 11-10-711(d)(1) (1987). Gill believed that the AESD administrator made a determination in his April 10, 1987 letter to Rainwater, but Gill did not apply for review. An employer's remedies also lie in chancery court. *See* Ark. Code Ann. § 11-10-710(d)(3) (1987); *Jones* v. *Crouch*, 231 Ark. 720, 332 S.W.2d 238 (1960). And this is the course that Gill chose to pursue.

[redacted] For his second issue Gill argues that a material issue of fact exists regarding whether the General Assembly has delegated to predecessor employers the authority to control successor employers' unemployment compensation taxes. To be sure, § 11-10-710(b)(1) appears to contemplate an agreement between predecessor and successor employers on the experience to be transferred, when it refers to a petition "signed by all interested parties." Contrary to Gill's argument, however, the General Assembly has not delegated taxing authority to the predecessor firms. The tax rate for new employers is fixed by legislative enactment. See Ark. Code Ann. §§ 11-10-702 (1987) and 11-10-706 (Supp. 1989). The General Assembly has also specifically established a statutory mechanism for AESD to administer transfers of portions of a predecessor's experience, when the predecessor and successor employers agree. In effect, the AESD administrator performs a ministerial function in examining the accuracy of the experience to be transferred. In the event there is no agreement, or, as Gill argues, the predecessor firm is recalci-

trant, the successor employer may pursue his remedies against the predecessor in court. These remedies against the predecessor are in addition to any remedies that the successor employer may have against AESD under the statute, as already noted. Here, Gill pursued his remedy in chancery court, and the chancellor found no illegal delegation due to the requirement that the predecessor firm concur in the petition to transfer. We agree.

Nor does the process set out in Ark. Code Ann. §11-10-710 constitute an illegal exaction due to predecessor control for the reasons already stated.

The chancery court order is affirmed.

NEWBERN, J., not participating.

Gerald W. DILLON *v.*
RESOLUTION TRUST CORPORATION, as Conservator
for
Madison Guaranty Savings and Loan Association

90-334 811 S.W.2d 765

Supreme Court of Arkansas
Opinion delivered June 24, 1991

Crockett & Brown, P.A., by: *Richard E. Worsham*, for appellant.

Wetzel & Pruniski, by: *Frederick S. Wetzel III*, for appellant.

WILLIAM I. PREWETT, Special Justice. On March 21, 1985, appellant Dillon executed a promissory note in the principal amount of $14,000 providing for 23 monthly payments of $161.53 plus a 24th payment of the principal amount of $14,000 plus $161.53. The stated interest rate was 13% per annum. Payments of $161.53 per month as provided in the note with the 24th payment being in the amount of the original principal plus the monthly stated amount is an interest charge of 13.84543% per annum at a time when the maximum legal rate was 13%. The trial court found the note to be usurious; the monthly payment of $161.53 was obviously intended in interest only. However, the trial court further found interest in excess of the maximum lawful rate had not been paid and awarded no relief for the usurious contract. Dillon has appealed from the refusal of the trial court to award relief.

We reverse and remand to the trial court for further proceedings in accordance with this opinion.

Although appellee does not admit the 1985 note is usurious, no serious argument is or can be raised with this decision by the trial court. The principal amount of the note was $14,000 at the time of its execution. The final and 24th payment provided for a balloon payment of $14,000 plus the monthly installment of $161.53. Subsequent to the filing of this litigation, appellee caused to be prepared a schedule whereby an amount equal to thirteen percent (13%) per annum was allocated to interest with the balance of the payment allocated to principal. The fallacy in this is threefold: (1) it directly conflicts with the specific payment provisions of the note; (2) the note provides for a "Finance Charge" of $3,876.50 (24 x 161.53); and (3) the principal allocations were not made during the term of the note. Dillon paid 23 installments, all of which were interest under the terms of the note. The issue in this appeal is whether interest in excess of the maximum lawful rate was paid by appellant. Article 19, § 13 of the Arkansas Constitution provides: "A person who has paid interest in excess of the maximum lawful rate may recover, within the time provided by law, twice the amount of interest paid."

According to the payment history submitted by appellee, the first payment of $161.53 was made on April 16, 1985; interest at thirteen percent (13%) per annum to the date of the first payment was $129.64. As stated by the trial court, "the note did not contemplate or authorize the lender to allocate such payments in part to principal and in part to interest. . . . Defendant (appellant) correctly argues that interest payments of $161.53 exceed the maximum permissible rate of 13% per annum, and render the note usurious." We agree. The after-the-fact payment history presented by appellee credits the excess payment of $36.82 to principal, but under the terms of the note, the $36.82 was interest and appellant thereby paid interest at a rate in excess of the maximum lawful rate.

Appellee correctly states that findings of fact made by the trial court shall not be set aside unless clearly erroneous. The facts in this case are not in dispute. Terms of the note and dates of payments are admitted. It requires no expert testimony to compute the interest which would be owed at 13% per annum.

From the first payment, the interest paid was in excess of the maximum lawful rate. In *Brookshire* v. *Coffman*, 287 Ark. 112, 115, 696 S.W.2d 748, 750 (1985), this court stated, "[W]e will not countenance an attempt to evade our pre-Amendment 60 usury law through tricky, multiple transactions." Once it is determined that a charge of excess interest is made by the terms of the note, it is usurious. Subsequent unilateral action whereby the excess interest is called principal will not give new life to the usurious contract. The usurious nature of the 1985 note simply cannot be purged by the subsequent allocation of a part of the interest payment to principal. *Davidson* v. *Commercial Credit Equipment Corp.*, 255 Ark. 127, 499 S.W.2d 68 (1973).

[redacted] The trial court, in holding no interest in excess of the maximum rate was paid, used the total dollars of $3,683.60 paid by appellant from the first payment of April 21, 1985, to the date of the Modification Agreement of September 23, 1987, and concluded that appellant had failed to pay any "excess interest" since 12% per annum on $14,000 for this period of time would be more than the sum of $3,683.60. The computation by appellee, however, shows that payments totaling $3,876.73 (including unilateral principal allocations) were made through March 24, 1987; accrued interest according to appellee's computation at that date was $3,716.74 (included interest on $1,151.00 from July 1, 1986, to October 17, 1986, for insurance purchased by appellee). By appellee's own computation, it received $159.99 more than the lawful interest. Amendment 60 becomes operative when interest is paid at a rate in excess of the maximum lawful rate.

[redacted] Assuming all payments were made on the exact due date, appellee intended a "Finance Charge" of $3,876.50 when the maximum of 13% would be $3,640.00. During the first year, appellant made payments totaling $1,938.46; in its reconstruction, appellee calls $1,798.39 interest and allocates the difference of $140.09 to principal. However, under the terms of the note, this was not principal; it was interest. The test of whether the note is usurious is judged as of the time the note was made. *General Contract Corp.* v. *Duke*, 223 Ark. 938, 270 S.W.2d 918 (1954).

[redacted] Amendment 60 amended Art. 19 § 13 of the Arkansas Constitution to specifically make the contract "void as to

unpaid interest;" thus the 1985 note was void (not voidable) from the beginning as to unpaid interest thereby making all interest paid unlawful. Recovery of twice the "amount of interest paid" is authorized provided the obligated person "has paid interest in excess of the maximum lawful rate." Amendment 60 does not limit the recovery to "excess" interest but provides that a person who has paid interest in excess of the maximum lawful rate may recover "the amount of interest paid." Appellant argues that the part of Amendment 60 "making it unlawful for any person to knowingly charge a rate of interest in excess of the maximum lawful rate" brings into effect the permissible recovery of interest; we do not consider the argument as it is not necessary to determine the meaning of this provision for this appeal. Nor is it necessary to decide what the effect would be if the total payments did not exceed the maximum lawful interest even though the appellee charged a rate in excess of the maximum lawful rate.

On September 23, 1987, Dillon executed a "Modification Agreement" to pay $14,543.75 at 11% interest per annum (the legal maximum) installments of $300 per month. In addition, he paid back interest on October 29, 1987, in the amount of $1,097.31, commenced the $300 per month installments on November 28, 1987, and last made a payment on April 11, 1988. This litigation then ensued.The 1987 Modification Agreement is not in itself usurious but is clearly a continuation of the 1985 note. The 1985 note is still in effect modified as to interest and payment amount by the 1987 Agreement. Usury is determined as of the inception and the subsequent modification will not purge the original vice.

Appellant paid interest in excess of the maximum lawful rate. We reverse the trial court's finding that no excess interest was paid and remand to the trial court for a determination of the amount appellant is entitled to recover. The trial court has not passed on the questions of whether appellant is entitled to recover all interest paid or only the "excess" interest nor has it addressed the application or lack of application of the double interest provision; accordingly, we leave these questions for the trial court.

We remand for further proceedings and assessments under Amendment 60 not inconsistent with this opinion.

Reversed and remanded.

BROWN, J., not participating.

Daniel L. MEDLOCK, et al. *v.* James C. PLEDGER, et al.

89-89 809 S.W.2d 822

Supreme Court of Arkansas
Opinion delivered June 24, 1991

Jack, Lyon & Jones, P.A., by: *Eugene G. Sayre*, for appellant.

William E. Keadle, Revenue Legal Counsel, for appellee.

Henry Law Firm, by: *Joseph Morphew* and *David P. Henry*, for appellee.

Robert Parker, Benton City Att'y, for appellee.

Steve Clark, Att'y Gen., by: *Frank J. Wills III*, Asst. Att'y Gen., for appellee.

Larry Vaught, Pulaski County Att'y, for appellee.

James N. McCord II, for intervenor/appellee, City of Fayettville.

PER CURIAM. After a *per curiam* order was delivered on June 3, 1991, a motion by the appellants to establish a briefing schedule was submitted. The appellants wish to brief both the equal protection issue referred to in the mandate of the United States Supreme Court and an issue concerning federal legislation and the supremacy clause which they raised, but which was not considered, in the first appeal. The appellants will be permitted to brief both issues. The briefing schedule is amended so that the appellants' brief will be due 40 days from this date, and the times for remaining briefs to be filed will be governed by the provisions of Rule 7 of the Rules of this Court.

Herbert WILSON a/k/a Herbert Jones *v.* STATE of Arkansas

CR 91-23 810 S.W.2d 337

Supreme Court of Arkansas
Opinion delivered June 24, 1991

J.F. Atkinson, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant is appealing the denial by the trial court of a petition for post-conviction relief filed pursuant to Criminal Procedure Rule 37. The appellant's brief filed by the attorney appointed to represent the appellant is flagrantly deficient in that there is no abstract of the information, judgment and commitment order, the Rule 37 petition, or the court's order denying the Rule 37 petition. Counsel now seeks permission to supplement the abstract. The state argues that it would be unfair to permit the appellant to remedy the deficiencies with a supplemental abstract after the state's brief has already been filed.

Although the appeal is from an order denying post-conviction relief and the right to effective assistance of counsel under the sixth amendment does not extend to collateral attacks on a judgment, we will not penalize the appellant by dismissing the appeal because his attorney prepared a deficient brief. If appellant had been proceeding *pro se* and had submitted a deficient abstract, we would not hesitate to affirm pursuant to our Rule 9 since a litigant who elects to proceed *pro se* is required to conform to the rules of procedure. *Peterson* v. *State*, 289 Ark. 452, 711 S.W.2d 830(1986). Where the error was made by appointed counsel, however, we will permit the abstract to be

supplemented.

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

Motion granted.

DUDLEY and BROWN, JJ., concur.

GLAZE, J., dissents.

ROBERT L. BROWN, concurring. There is a dramatic inconsistency in the majority's treatment of the appellant, Herbert Wilson, and his court-appointed counsel in this case and the treatment of a *pro se* inmate a few short months ago. *See Fruit* v. *Lockhart*, 304 Ark. 457, 802 S.W.2d 930 (1991). In *Fruit* the majority held that an inmate without the benefit of counsel who failed to abstract testimony in his brief had no recourse under Ark. Sup. Ct. R. 9(e)(2). The trial court judgment in *Fruit* which denied the inmate relief was summarily affirmed.

Now, since the appellant has court-appointed counsel, the majority has decided that it is unduly harsh to affirm the trial court judgment, and we are giving an appellant with counsel a second chance to correct a deficient abstract at his own expense. Why was the situation not unduly harsh, when a *pro se* inmate was effecting on his own and neglected to abstract the record? The appellant in this case had the benefit of counsel who presumably was familiar with our Rule 9(e)(2), or should have been. The same cannot be said of an inmate without counsel. Yet we give the appellant with counsel a second chance. We should have held just the opposite in this case and in *Fruit* v. *Lockhart*. The clear message from these two decisions is that an unrepresented appellant does not receive the same consideration under our rules as an appellant with counsel.

John McGALLIARD *v.* STATE of Arkansas

CR 91-147 813 S.W.2d 768

Supreme Court of Arkansas
Opinion delivered July 1, 1991

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

Ron Fields, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, John McGalliard, was convicted of sexual abuse in the first degree and sentenced to seven years imprisonment and a $2,000 fine.

On appeal, he argues that the Arkansas Criminal Code's

definition of "sexual contact" is unconstitutionally vague and that there was insufficient evidence to support the verdict. We disagree with both arguments and affirm.

The evidence of abuse in this case came primarily from the testimony of the victim, who stated that McGalliard touched her "between my legs . . . (indicating) right there in the middle . . . my private parts." She stated that the touching occurred for "about an hour" and that "if I told, he would beat me black and blue."

Because the victim was a nine year old minor, McGalliard was charged with violation of Ark. Code Ann. § 5-14-108(a)(3) (1987), which provides:

> (a) A person commits sexual abuse in the first degree if:
>
> * * * *
>
> (3) Being eighteen (18) years old or older, he engages in sexual contact with a person not his spouse who is less than fourteen (14) years old.

"Sexual contact" is defined as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(8) (1987). McGalliard contends that because "sexual gratification" is not defined, the statute does not give fair warning of what behavior is prohibited and, therefore, violates the due process clause of both the Arkansas and the United States Constitution.

[redacted] A law is void for vagueness if it lacks ascertainable standards of guilt such that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989). We fail to see how section 5-14-101(8) compels such persons to guess at its meaning and application.

[redacted] "Sexual" is defined in *Webster's Third International Dictionary*, unabridged (1961), as "of or relating to the male or female sexes or their distinctive organs or functions" or "of or relating to the sphere of behavior associated with libidinal gratification." "Gratification" is defined as "something that

pleases." *Id.* When construed in accordance with their reasonable and commonly accepted meaning, and in context with the specific acts described in section 5-14-101(8), the words leave no doubt as to what behavior is prohibited under the statute.

Furthermore, we are guided by our rationale in *Williams* v. *State*, 298 Ark. 317, 766 S.W.2d 931 (1989). There, Williams was convicted of rape in that he engaged in deviate sexual activity with the victim. The code's definition of "deviate sexual activity" also includes acts involving "sexual gratification". Williams argued that although there was evidence he inserted his fingers into the victim's vagina, there was no evidence he did so for "sexual gratification" as required by the statutory definition of "deviate sexual activity." We reasoned thusly:

> 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.

298 Ark. 320, 766 S.W.2d at 934. Likewise, we may assume that McGalliard touched the victim for sexual gratification and it is not necessary that the State prove that he was so motivated.

McGalliard's second contention, that the evidence was insufficient to support the verdict, is also without merit. The trial court noted that McGalliard raised this objection through timely motions for directed verdict. On appeal, we view the evidence in the light most favorable to the party against whom the motion is made and a directed verdict is only proper when there is no substantial evidence from which a jury could possibly find for the non-moving party. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *see also Prince* v. *State*, 304 Ark. 692, 805 S.W.2d 46 (1991).

The victim clearly described and indicated where she was touched. The victim's testimony need not be corroborated to be sufficient. *Jackson* v. *State, supra.* Also, "even though the

child may not use the correct terms for the body part but instead uses her own terms, or demonstrates a knowledge of what and where those body parts referred to are, that will be sufficient to allow the jury to believe that the act occurred." 290 Ark. at 385, 720 S.W.2d at 287.

We affirm the judgment of conviction.

Jay SAMPLES *v.* Genell SAMPLES, D.L. Sitton Motor Lines, Inc., A Missouri Corporation, and Mark A. Summers

91-68 810 S.W.2d 951

Supreme Court of Arkansas
Opinion delivered July 1, 1991

Merritt & Rooney, Inc. by: *Michael T. Rooney*, for appellant.

Hardin, Jesson, Dawson & Terry, by: *Robert T. Dawson* and *Gregory L. Crow* for appellee Genell Samples.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Richard N. Watts,* and *Brian Allen Brown* for appellee D.L. Sitton Motor Lines, Inc. and Mark A. Summers.

JACK HOLT, JR., Chief Justice. This case involves a negligence suit brought by the appellant, Jay Samples, arising from an automobile accident. Mr. Samples was a passenger in a Ryder

truck driven by his wife, appellee Genell Samples, that was struck from behind by a truck driven by appellee Mark Summers during the course of his employment duties with appellee, D.L. Sitton Motor Lines.

On June 11, 1990, the trial court entered a judgment reflecting the jury's verdict that none of the appellees were negligent and dismissed the case. Mr. Samples appeals and alleges 1) that the trial court committed reversible error when it improperly instructed the jury on the issue of "sudden emergency" where all of the evidence supported a finding of negligence on the part of one or all of the defendants, 2) that where a jury instruction is given that confuses or misleads a jury, the judgment must be reversed, and 3) that the jury's verdict was not supported by substantial evidence because there was no evidence adduced at trial that the accident was unavoidable and all of the evidence clearly demonstrated negligence on the part of one or all of the defendants.

We are unable to consider Mr. Samples's plea for reversal because of a total noncompliance with Ark. Sup. Ct. R. 9. Rule 9(d) requires, in part, that an appellant's abstract should consist of an impartial condensation 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 the court for decision.

A key issue in the case below, and the principal point on this appeal, concerns a contested jury instruction on sudden emergency. Yet, that jury instruction, though referred to in argument, is not abstracted. The abstract is likewise flagrantly deficient with regard to Mr. Sample's claim of insubstantial evidence in that he has not included a motion for directed verdict, a material part of the proceedings with regard to this issue. *See Willson Safety Prod.* v. *Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990); Ark. R. Civ. P. 50(e).

Additionally, in *Logan County* v. *Tritt*, 302 Ark. 81, 787 S.W.2d 239 (1990) (citing *Jolly* v. *Hartje*, 294 Ark. 16, 740 S.W.2d 143 (1987)), we stated that a summary of the pleadings and the judgment appealed from are the bare essentials of an abstract. With particular reference to the pleadings in this case, Mr. Samples has failed to abstract the appellees' answer, the

notice of appeal, and the judgment.

In sum, then, Mr. Samples's entire abstract of a 619 page, four-volume record consists of his petition and snippets of testimony, which are totally inadequate for an understanding, much less for a resolution, of the issues presented. *Logan County* v. *Tritt, supra.* We also note that Mr. Samples was given a second opportunity to appropriately abstract the record on appeal, yet he has failed to conform his abstract to our rules.

Consequently, the judgment is affirmed.

Glaze, J., not participating.

Billy J. WAWAK and Earlene WAWAK, His Wife *v.* AFFILIATED FOOD STORES, INC.

90-296 812 S.W.2d 679

Supreme Court of Arkansas
Opinion delivered July 1, 1991

Hoofman & Bingham, P.A., by: *B. John Biscoe Bingham*, for appellant.

David E. Smith, for appellee.

STEELE HAYS, Justice. By this appeal we must decide which of two conflicting claims to security interests in the inventory of a supermarket is subordinate under Article 9 of the Uniform Commercial Code.

Appellants Billy J. Wawak and Earlene Wawak began operating the Oak Grove Supermarket in 1978. The Wawaks acquired their stock from appellee Affiliated Food Stores, Inc., which secured its account with them by a security agreement and U.C.C. financing statement covering the inventory of the supermarket.

In 1986 the Wawaks made arrangements to sell the supermarket to Robert S. Davis, operating under the names Bob's Thriftway and Bob's Supermarket of Arkansas. Davis and the Wawaks signed an agreement under which Davis began operating the supermarket on January 28, 1986, while the documents of sale were being prepared.

Davis made immediate arrangements with Affiliated Food Stores to purchase inventory for the Oak Grove supermarket and executed a security agreement and financing statement with Affiliated covering the inventory of the supermarket. The financing statement and security agreement were properly recorded on February 6, 1986.

In April Davis and the Wawaks completed their transaction

and Davis executed a security agreement and financing statement covering the inventory to secure the indebtedness due the Wawaks. These instruments were properly recorded on April 8, 1986.

After some eighteen months Davis declared bankruptcy and on January 15, 1988, the Wawaks took possession of the supermarket and inventory from the trustee in bankruptcy. The Wawaks sought a declaratory judgment that their security interest was prior and superior to the security interest of Affiliated Food Stores, Inc. The circuit court ruled that the security interest of Affiliated Food Stores, Inc., was prior to that of the Wawaks and they have appealed. Since we agree with the trial court that the security interest of Affiliated was prior to that of Wawak, we affirm the judgment.

Appellants maintain that under Ark. Code Ann. §4-9-203(1) (1987) a security interest does not attach until the debtor has "rights in the collateral". They contend that Davis had no rights in the inventory of the supermarket, the collateral, until April 7, 1987, when the sale was completed. Prior to April 7, they submit that Davis was merely a "manager" or "bailee," citing several authorities interpreting "rights in the collateral" under § 4-9-203: *Uniform Commercial Code*, 3d Ed., § 22-6 (1988); B. Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* § 2.4 (1980); D. Baker, *A Lawyer's Guide to Secured Transactions* §2.4 at 85 (1983).

[redacted] But those treatises are largely general, and relate to different situations, situations in which goods are owned by third parties, with mere possession by a debtor proving insufficient to establish rights in the collateral. In contrast, it can hardly be disputed that Davis had more than naked possession. He was effectively the buyer in possession of a going concern, fully empowered to convey title to the collateral to purchasers in the ordinary course of business. Ark. Code Ann. § 4-9-307 (1987). The profits, as well as the losses, were his from and after January 28, when he took possession and began operating the supermarket. Moreover, the final sale documents reflect that the sale to Davis became "effective as of January 27, 1986." The fact that the sale was still in process on February 7, 1986, does not mean he was without rights in the collateral within the context of § 4-9-203.

While the code does not define "rights in the collateral," and this court has not had occasion to construe the term, other states have done so, compatibly with the result we reach. *See e.g., First Security Bank of Idaho, N.A.* v. *Woolf*, 111 Idaho 680, 726 P2d 792 (1986):

> Possession of the collateral, accompanied by a contingent right of ownership, has been held sufficient for a security interest to attach. *Amfax Mortgage Corp.* v. *Arizona Mall of Tempe*, 618 P2d 240 (Ariz. App. 1980). An interest greater than naked possession has been deemed a sufficient right in the collateral to satisfy the requirements of statutes similar to I.C. Sec. 28-9-203 (1)(c). *See Morton Booth Co.* v. *Tiara Furniture, Inc.*, 564 P2d 210 (Okla. 1977); *Evans Products Co.* v. *Jorgensen*, 421 P2d 978 [3 UCC Rep. Serv. 1099] (Or. 1966).

Appellants urge that in *Exchange Bank and Trust Co.* v. *Glenn's Marine, Inc.*, 265 Ark. 508, 579 S.W.2d 358 (1979), we recognized that possession alone, without ownership, was not a sufficient interest to allow a secured party of the debtor to attach the collateral in question, stressing that we looked to the actual agreement between the third party and the debtor to determine who had title to the collateral. But that case has only a passing likeness to the case at bar. There the issue was narrowed to the limited question of when title passes in a sale on approval, and we were not considering the question of a debtor's rights in collateral being sufficient to sustain a security agreement under § 4-9-203.

Another factor militates for affirmance. Ark. Code Ann. § 4-9-303(1) (1987) provides that when all the applicable steps to perfect a security interest are taken before the interest attaches, it is perfected at the time it attaches. T. Quinn, *Uniform Code Commentary and Law Digest*, § 9-303[B] (1978) has this comment;

> Perfection [the completion of all security agreement steps, plus filing] under §4-9-303 does not require a particular sequence of events. Thus, a security interest was perfected even though the financing statement was filed prior to the time the security interest attached. *In re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

Here, even if we could agree that Davis's rights in the collateral did not mature until April 7 when the sale was concluded, the Wawaks' security interest was not perfected until April 8 when their documents were filed, whereas under § 4-9-303(2) the security interest of Affiliated Food was perfected on April 7 at the instant Davis's rights in the collateral attached.

Finally, appellants propose in the alternative that these competing interests be prorated according to the equities. But appellants have cited no authority, nor have we found any, that considers such a remedy when, as here, the collateral is inventory. For a discussion of the limited situations where such a remedy might be applicable, *see* B. Clark, *The Law of Secured Transactions* § 3.09[5] (1988).

Affirmed.

ARKANSAS DEPARTMENT OF HUMAN SERVICES, Child Support Enforcement Unit *v.* John Henry PORTER, Jr.

90-262 810 S.W.2d 949

Supreme Court of Arkansas
Opinion delivered July 1, 1991

L. Suzanne Penn and *Joe Childers*, for appellant.

Baxter, Eisele, Duncan & Jensen, by: *Karen Wallace Duncan*, for appellee.

TOM GLAZE, Justice. This case involves the appellee's arrearages in child support for his two children. Under the divorce decree filed on May 8, 1980, appellee was ordered to pay $40.00 per week in child support for his two minor children, a son, Stacy Porter, and a daughter, Joyce Porter. Because of the appellee's failure to pay the child support, the Arkansas Department of Human Services, appellant, filed a motion for citation and petition for relief on March 14, 1989. In his response, the appellee argued that since his son turned eighteen on February 23, 1988, the child support on that child should have abated on his birthday, thus reducing the amount of child support arrearage to $20.00 a week from that date.

Before the hearing, the parties stipulated that the appellee's arrearage would be $3,747.00 if no abatement or allowance was made for when the son turned eighteen, or the arrearage would be $1,787.00 if the court abated the son's child support effective on his eighteenth birthday. The chancellor chose the latter and awarded $1,787.00 to the appellant. The appellant appeals from this ruling arguing that the chancellor erred in retroactively reducing the appellee's child support arrearages. We agree and therefore on *de novo* appeal, we reverse and direct the chancellor to award $3,747.00 to the appellant.

Before addressing the merits of this appeal, we note that the appellant failed to abstract the parties' final divorce decree. However, the appellee provided the pertinent paragraph in his brief, and we will consider that as a supplemental appendix offered by the appellee. *See Bolstad* v. *Pergeson*, 305 Ark. 163, 806 S.W.2d 377 (1991). For the purposes of this appeal, the essential paragraph in the divorce decree provides the following:

> The Court further finds that two children were born to this marriage, to wit: Stacy Tyrone Porter, born 2/23/70 and Joyce Porter, born 2/4/73, who are presently in the care and custody of the plaintiff who is a fit and proper person for their care and custody. That the defendant is an able-bodied man capable of earning a livelihood and should pay

> to plaintiff the sum of $40.00 per week as child support for said minor children. . . .

The appellant argues that the chancellor could not reduce the appellee's child support arrearages since he never filed a motion to modify the child support when his son turned eighteen. Clearly, the appellant is correct. In *Jerry* v. *Jerry*, 235 Ark. 589, 361 S.W.2d 92 (1962), this court held that the father could not, on his own volition, reduce his $200 child support payment when one of his children turned eighteen. In support of its holding, the court gave the following three reasons: 1) the court (and the court alone) had the right to change the amount of the award for the support of the children; 2) the court could have continued the original award for the child who had become eighteen; and 3) the award of $200 was for the maintenance for three children, and the appellant had no right to conclude that $66.67 or an equal $^1/_3$ was for the child who had become eighteen. *See also Thompson* v. *Thompson*, 254 Ark. 881, 496 S.W.2d 425 (1973).

The *Jerry* decision and underlying rationale apply to the present case. Clearly there was no showing that the $40.00 per week child support in the parties' decree was to be split equally between the two children. In this same vein, the chancellor, only, had the right to change the amount of support, and in fact, did so during this proceeding below by setting child support for the remaining minor child, Joyce, in the amount of $32.50 per week. Although appellee complains that it is inequitable to require him to file a petition to terminate child support payments when a child attains majority, this court has pointed out that such a procedure or resulting litigation can be avoided by setting forth in the decree under what circumstances child support payments will terminate without the necessity of a court's intervention. *Id.*, 254 Ark. at 884, 496 S.W.2d at 427.

Further, statutory law supports this holding. In particular, Ark. Code Ann. § 9-12-314 (Repl. 1991), provides the following:

> (b) Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court shall be final judgment as to any installment or payment of money which has accrued until the time either party moves through proper motion filed with the court and

served on the other party to set aside, alter, or modify the decree, judgment or order.

(c) The court may not set aside, alter, or modify any decree, judgment, or order which has accrued unpaid support prior to the filing of the motion. . . .

In sum, since the appellee did not file a motion to modify child support when his son turned eighteen, the chancellor could not retroactively reduce the appellee's child support arrearages which had become final judgments. We reverse the chancellor's holding and award the appellant $3,747.00, the parties' agreed sum for the appellee's child support arrearages.

Vina Mae THOMPSON *v.* STATE of Arkansas

CR 90-193 813 S.W.2d 249

Supreme Court of Arkansas
Opinion delivered July 1, 1991

Charles L. Stutte, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant appeals from her conviction for first degree murder sentencing her to life imprisonment. In her appeal, the appellant argues four points of error concerning evidentiary rulings by the trial court. We find no reversible error and therefore affirm.

The appellant and the victim, William Craig Barker, had an off-and-on relationship for approximately eight years. All of the witnesses agreed that they often fought. Throughout her trial, the appellant admitted shooting Barker, but she contended that she did so in self-defense. According to the appellant's account, she and Barker had been fighting on the day of the shooting. Around 3:00 p.m., the appellant, after having visited with her mother, returned to Barker's sister's house where he was alone cooking beans.

Appellant recounts that Barker yelled at her and called her names for being late and accused her of being with her ex-husband. He then allegedly grabbed her and shoved her into the

stove. Appellant testified that Barker told her, "You, bitch, you're finally going (to) get what you deserve." At this time, Barker went to the drawer and started pulling something out. Appellant stated that her first thought was that it was a gun and all that she could see was the handle as he was pulling it out. The only weapon the police found at the scene was a butcher knife. Appellant claimed that she shot at Barker, and continued shooting as he came towards her and until he went out the door. Barker died later at the hospital from four gunshot wounds. The medical examiner testified that the majority of these bullets were in the victim's back.

The appellant's first two points concern the admissibility of two statements made by Barker after he was shot. The trial court admitted into evidence, as a dying declaration hearsay exception, Barker's statement, "Vana Thompson shot me," but refused to admit into evidence under the same exception, Barker's statement "Don't do anything to harm Vina."[1] In order to qualify as a dying declaration under A.R.E. Rule 804, the statement must be made by a declarant while believing that his death was imminent, and it must concern the cause or circumstances of what he believed to be his impending death. *See Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). We have held that the trial judge determines whether evidence is admissible, and on review, we reverse the decision only if there is an abuse of discretion. *See, e.g., Marx* v. *State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

We first address the appellant's argument that the trial court erred in not admitting into evidence Barker's statement that he did not want anything to harm appellant. As noted above, the appellant based her argument for admissibility on the dying declaration hearsay exception. Clearly, this statement does not fall within this hearsay exception because it in no way concerned or described the cause or circumstances of the declarant's impending death. Accordingly, the trial court was correct in excluding this statement.

We next consider the appellant's alternative argument

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[1] Paramedic William Layman who heard Barker's statement testified that he thought Barker said Vana and not Vina shot him, but admitted that he had to get low to the ground to hear because of all the commotion going on.

that the trial court committed reversible error in admitting into evidence Baker's other statement as a dying declaration, viz., that the appellant shot him. Appellant discusses in some detail that this statement was inadmissible as a dying declaration because no showing was made that Barker believed his death was imminent when he made it. While we could refer to evidence that runs counter to appellant's position on this point, we find it unnecessary to do so because even if we could agree with the appellant's argument, the trial court's admission of Barker's statement into evidence would be harmless error.

From the outset of appellant's trial, she never denied that she shot Barker. As we have previously stated, appellant conceded she shot Barker, but she did so in self-defense. During voir dire of the jury, appellant's counsel told the jurors that appellant would take the stand and further advised them that she had fired the gun that killed Barker. In addition, state's witness Detective Steven Coppingner testified without objection that "it was made known to us through other emergency service personnel that Mr. Barker had named his assailant, and it was from that information that we started looking for Vina Mae Thompson." And finally, the appellant, in her own case-in-chief, testified that she shot Barker in self-defense, thus confirming what her counsel had told the jury members earlier in voir dire. This court has held that a trial court's error in admitting evidence is harmless where the same evidence has been introduced by other witnesses and was properly before the jury for its consideration. *Orr* v. *State*, 288 Ark. 118, 703 S.W.2d 438 (1986). In light of the foregoing, we conclude no reversible error ensued from the trial court's admitting Barker's second statement even if that statement failed to meet the requirements of a dying declaration.

[redacted] Next, we address the appellant's argument that the trial judge erred in refusing to allow the appellant to introduce foundation testimony for the battered woman's syndrome defense without first committing to calling expert witnesses on the subject. After the appellant testified that she had been sexually abused when she was eleven years old by her little brother's father, the state objected to the relevancy of this evidence. The trial judge ruled that unless the appellant's attorney intended to offer expert opinion evidence on the battered woman's syndrome defense, the evidence would not be relevant. Appellant's counsel

responded that he did not know if he would call an expert because it depended upon how appellant's testimony went. Counsel made no proffer on appellant's foundation testimony pertaining to the battered woman's syndrome defense, nor did he proffer what the expert testimony might be. Thus, we summarily dismiss the appellant's argument on this point because appellant failed to proffer such testimonies. This court has held numerous times that where error is assigned in the refusal of the court to hear testimony of a witness, the record must disclose the substance or purport of the offered testimony, so that this court may determine whether or not its rejection was prejudicial. *See, e.g., Orr*, 288 Ark. 118, 703 S.W.2d 438.

Finally, the appellant argues that the trial court erred in limiting testimony showing the victim's violent character to one year before the shooting. Under A.R.E. Rule 405(b), in cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may be made of specific instances of his conduct. Again, the appellant asserted a self-defense theory at her trial, and we have held that evidence of a victim's violent character is relevant to the issue of who was the aggressor and whether or not the accused reasonably believed he was in danger of suffering unlawful deadly physical force. *Smith* v. *State*, 273 Ark. 47, 616 S.W.2d 14 (1981). Thus, as an essential element of her defense, appellant clearly had the right to introduce specific instances of Barker's violent character that were directed at her or within her knowledge. *See Halfacre* v. *State*, 277 Ark. 168, 639 S.W.2d 734 (1982).

Appellant's mother testified concerning the brutality Barker inflicted upon the appellant. The mother related her observations of the bruises, black eyes and split lips her daughter exhibited from fights with Barker. Appellant made no proffer of testimony concerning specific acts of violence that had occurred more than one year prior to Barker's death. As a consequence, we have no way of knowing if the alleged acts of Barker in those other years were different from or merely cumulative to those acts already described by appellant's mother. Appellant did relate Barker's violent acts against her which included physical and sexual abuse as well as threats with a gun that Barker kept on his person at all times. Besides this testimony, Jackie Post, an emergency room nurse, testified that when she asked the appellant why she did it,

appellant replied Barker had hurt her a lot of times.

In sum, appellant proffered no testimony of specific acts that extended over the entire period of appellant's relationship with Barker. While there is no arbitrary point in time as to when a recital of such acts may prove needlessly repetitive, we conclude that, based upon the cumulative nature of the evidence presented here, we cannot say the trial court abused its discretion in limiting such evidence as it did. *See Lee* v. *State*, 266 Ark. 870, 587 S.W.2d 78 (1979); A.R.E. Rule 403.

For the reasons stated above, we affirm. Pursuant to Ark. Sup. Ct. R. 11(f), we have reviewed the record for rulings made adversely to the appellant, and find no reversible error.

MAPCO, INC. *v.* Linda PAYNE

90-214 812 S.W.2d 483

Supreme Court of Arkansas
Opinion delivered July 1, 1991
[Rehearing denied September 16, 1991.*]

* Hays, J., would grant rehearing.

Penix, Penix & Lusby, by: *Bill Penix*, for appellant.

Keith Blackman, for appellee.

DONALD L. CORBIN, Justice. Appellee, Linda Payne, filed suit against appellant, Mapco, Inc., her former employer. Appellee alleged in her complaint that appellant violated the provisions of Ark. Code Ann. § 11-9-107 (1987) by refusing to reemploy her when she completed her convalescence from knee surgery for a work-related injury. She alleged this was retaliatory conduct in violation of the public policy of the State of Arkansas. The jury awarded appellee a $15,000 verdict. Appellant challenges the verdict, claiming there was insufficient evidence for submission of the case to the jury and that unemployment benefits should have been deducted from the $15,000 award. We affirm.

In 1983, appellant employed appellee as a clerk at a Mapco convenience store and gasoline station in Trumann, Arkansas. She received a job-related injury to her knee on August 25, 1986. She did not work that week or a large part of the following week. She returned to work full-time on September 1, 1986. She testified that although her knee continued to bother her, she continued to work for eight or nine months. She testified that the company gave her permission to see Dr. Ball, who performed surgery on her knee on August 7, 1987. She filed workers' compensation claims relating to this knee injury.

Appellee testified about her attempts to return to work following her surgery. She said she went to the Mapco store on

more than one occasion to talk to Brenda Davis and J.B. Broadway, her immediate supervisors, about returning to work. She said they ignored her. She also stated that in October 1987 when she went to the store, she received a note from Mr. Broadway telling her to turn in her uniforms. On December 26, 1987, she went back to the store to submit a doctor's release, at which time Mr. Broadway gave it back to her, saying, "I don't need this." When she called back on December 28, 1987, to tell Mr. Broadway she would be available to work on January 4, 1988, Ms. Davis told her, "We still don't need you."

The evidence reveals that at least five other people were either hired or fired, or quit from December 1, 1987 to May 29, 1989. Cheryl Covey, a co-employee, testified that J.B. Broadway and Brenda Davis ignored appellee. She said they went into the office, shut the door, and told appellee they were too busy to talk to her. They also avoided appellee's telephone calls. She overheard Mr. Broadway and Ms. Davis saying they were going to have to do something with appellee because "she was going to cause the company grief." Mr. Broadway and Ms. Davis instructed Ms. Corey not to talk about appellee.

In its brief, appellant states the first point of this appeal as follows:

> If this case is affirmed, the law of Arkansas will be that failure to reemploy a worker after an injury, for whatever reason, constitutes evidence of discrimination sufficient to sustain a jury verdict for damages.

In support of this claim, appellant argues there was insufficient evidence of discrimination to submit the case to the jury. Appellant also argues that the public policy exception to our employment-at-will doctrine should not be extended to apply to this case. We disagree.

Section 11-9-107 states:

> Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his claiming benefits under this chapter or who in any manner obstructs or impedes the filing of claims for benefits under this chapter shall be guilty of a misdemeanor and on conviction shall be

> punished by a fine of not to exceed one hundred ($100) dollars, or by imprisonment of or not to exceed six (6) months, or by both fine and imprisonment.

True enough, this statute is basically penal in nature and the remedy it provides is pursuable through administrative action before the Workers' Compensation Commission. However, we take the view that this remedy is not exclusive. This statutory provision is the clearest announcement by our legislature of a strong public policy that condemns retaliatory conduct by an employer who refuses to reemploy an employee for exercising a statutorily confirmed right to compensation for job-related injuries. Such conduct by an employer gives rise to an exception to our employment-at-will doctrine. *See Sterling Drug, Inc* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). Thus, appellant could properly bring this action for damages for the retaliation. *See Wal-Mart Stores, Inc,* v. *Baysinger*, 306 Ark. 239, 806 S.W.2d 385 (1991).

Necessarily, the burden of proving a retaliatory discharge is properly placed upon the employee. *See* 2A A. Larson, *The Law of Workmen's Compensation*, § 68.36(c) (1990). Here, appellee had the burden of proving that she was not rehired in violation of the public policy of this state, namely the policy stated in section 11-9-107. The prima facie case should be made by a showing that the workers' compensation claim was a cause for the retaliation. This may be proved, as in most any other action, by circumstantial evidence. As Professor Larson points out in his treatise, ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as his motive. Larson further elaborated that proximity in time between the claim and the firing is a typical beginning-point, coupled with evidence of satisfactory work performance and supervisory evaluations. *Id.* Once the employee has made a prima facie case of retaliatory discharge, the burden shifts to the employer to raise a defense of non-retaliatory reasons for the discharge. *See* 2A A. Larson, *The Law of Workmen's Compensation*, § 68.36(d) (1990).

Clearly, appellee presented sufficient facts to justify the court in letting the case go to the jury. Appellee presented evidence of a job-related injury. She also presented evidence that,

following the filing of her workers' compensation claim and convalenscence from surgery to treat a job-related injury, her supervisors ignored her and avoided any attempt she made to communicate with them regarding her claim or reemployment. Mr. Broadway and Ms. Davis admitted they were mad at her for allowing the doctor to schedule surgery so as to interrupt Ms. Davis' vacation plans. They also were overheard stating that appellee could cause the company grief. Finally, it was established that there were vacancies at appellee's previous place of work. There were no averments that appellee had been anything but an exemplary employee since 1983.

[redacted] Following the presentation of the foregoing evidence, appellant offered very little evidence of non-retaliatory reasons for the refusal to re-hire appellee. The evidence that was offered was contradicted by appellee's evidence. There was substantial evidence to support the jury verdict.

As its second claim in this appeal, appellant argues that the $2,418.00 unemployment benefits paid by the State of Arkansas to appellee should not be classified as a collateral source and should be deducted from the judgment.

[redacted] In *Green Forest Public Schools* v. *Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985), a case of first impression in Arkansas, this court noted that the Federal District Court in *Collins* v. *Robinson*, 568 F. Supp. 1464 (E.D. Ark, 1983), *aff'd per curiam*, 734 F.2d 1321 (8th Cir. 1984), had adopted the proposition that unemployment compensation benefits are considered a collateral source in tort cases. The *Green Forest* court adopted the same rule in employment cases. We refuse to reverse ourselves in this regard and reaffirm our position thus announced in *Green Forest, supra.*

Affirmed.

HAYS and BROWN, JJ., dissent.

STEELE HAYS, Justice, dissenting. I respectfully dissent for the reasons stated in Judge Brown's dissenting opinion, in which I join, and for the reason stated in a dissent to the majority opinion in *Wal-Mart* v. *Baysinger*, also issued today.

ROBERT L. BROWN, Justice, dissenting. Like the majority, I

agree that our cases recognize a public policy exception to the employment-at-will doctrine and that the exception extends (and should extend) to cases where employees are terminated because they have filed a workers' compensation claim. This policy has been codified by the General Assembly and is clear. *See* Ark. Code Ann. § 11-9-107 (1987). The public policy exception, however, should not extend to the facts of this case, where no intent or motive by the employer to violate that public policy was shown. Under such facts the trial court was remiss in not directing a verdict for the appellant.

All that was presented by Linda Payne in the way of proof was that she was ignored by the cashier, Brenda Davis, and the manager, J.B. Broadway, when she returned to work after her operation and that she was not rehired. There was also vague testimony from an employee who had been fired by Brenda Davis that she heard Davis and Broadway say that Payne "was going to cause the company grief." On the other hand Davis and Broadway testified that Payne had been back at work for almost a year since hurting her knee when she scheduled her operation. The operation was scheduled immediately after she returned from vacation and was in conflict with Davis's own vacation which had to be cancelled. Davis and Broadway admitted that they were angry at Payne for doing this. They denied that filing the worker's compensation claim itself had anything to do with the refusal to rehire.

Admittedly, proving motive and intent in these cases is difficult. Yet, something more must be shown in the way of circumstantial evidence beyond the mere filing of a worker's compensation claim and a subsequent refusal to rehire. Nonetheless, that is really all that was shown by Payne in this case. Here, Broadway had valid reasons for not taking Payne back: interference with Davis's vacation, prolonged telephone conversations, and customer complaints. On the other hand, the evidence at trial that filing the worker's compensation claim was the real reason for not rehiring was highly speculative. The majority cites proof that Payne was ignored by Davis and Broadway. Both individuals conceded that they were angry at Payne for other reasons. Rude treatment and vague statements to a fired employee are not sufficient in my judgment to find a public policy violation.

Reversing a jury verdict should be done with caution, and I espouse such a course reluctantly. But for us to uphold a jury verdict, the evidence must be substantial. *See Wal-Mart Stores* v. *Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). In this case, the evidence presented was far from substantial but was sufficient only to raise suspicion and conjecture. I have no other choice but to dissent.

HAYS, J., joins.

Robert L. BARKER *v.* C. Dean NELSON, Robert A. Barker, II, Sherry Barker, Daniel Thomas Barker and Pamela Barker

91-60 812 S.W.2d 477

Supreme Court of Arkansas
Opinion delivered July 1, 1991

[redacted]

Arnold, Hamilton & Streetman, by: *Thomas S. Streetman*, for appellant.

Griffin, Rainwater, & Draper, P.A., by: *Gary M. Draper*, for appellees.

ROBERT L. BROWN, Justice. Appellant Robert L. Barker appeals an order of the chancery court finding a valid conveyance of certain land by him and his former wife, Helen Barker, to their sons, Robert A. Barker, II and Daniel Thomas Barker, and to their wives by means of a 1982 warranty deed.

The facts leading up to the execution of the deed and the aftermath are widely disputed. According to the sons, Robert and Daniel, they were called to their parents' home with their wives on the night of September 1, 1982, and presented with a warranty deed executed by Barker and his wife deeding them four lots in the city of Crossett, with the parents retaining a life estate in all four lots. One of the lots described in the warranty deed had previously been sold to Daniel in 1979. Another lot was the parent's homestead. At the meeting, according to the sons' testimony, the original deed was passed around the table and shown to them, and each son paid consideration of $1.00 for the deed. At the conclusion of the meeting, Barker and his wife retained possession of the deed.

The catalyst for the meeting and the grant, according to Robert, was an investigation by a government agency into the fact that Barker was drawing two disability checks from the Civil Service and the Marine Corps. According to Robert, Barker was concerned that he might have to pay some of the disability money back to the government, and because of that he decided to deed his real property to his sons. Barker denied that the disability checks prompted the execution of the deed and further denied that the September 1, 1982 meeting with his sons even took place. He testified, rather, that the deed was made because Helen Barker was in poor health, and they both wanted to avoid losing the land to the state if he or his wife had to enter a nursing home.

Within one or two days after the meeting, Robert and Daniel testified, each received a photostatic copy of the warranty deed from their parents—Daniel got his from his mother and Robert

got his from his father. Barker denies that he gave either son a copy of the deed. According to both sons, their mother urged them to record their copies of the deed. The original deed stayed in the possession of Barker and his wife, and they placed it in their safe. It was not recorded. Three years later, in 1985, one of the lots described in the deed was sold by Barker and his wife to third parties, apparently with the knowledge of Robert and Daniel. From 1982 forward Barker paid real estate taxes on the property, continued to reside on one of the lots, and received rental income from the lease of two of the lots.

Helen Barker died on November 13, 1988. In March or April 1989, Barker met with his sons and their wives at a restaurant and informed them that he might remarry. Angered by this news, Robert and Daniel recorded one of the copies of the warranty deed in the Ashley County Circuit Clerk's office on May 12, 1989. Thereafter, Barker did remarry. The original deed remains in Barker's possession and was never recorded.

On July 12, 1990, Barker filed suit against his sons, their wives, and the circuit clerk (collectively, the appellees) to cancel and expunge the recorded deed on grounds that it was a copy without original signatures and further to void the 1982 conveyance for failure to deliver. The chancellor found that the warranty deed was delivered and was a valid conveyance of real property, but that the deed, as a photocopy, should not have been recorded and must be expunged. In his incorporated findings, the chancellor further agreed with the sons that Barker and his wife intended to deliver the property to them in order to remove it from the possibility of loss to the federal government. The chancellor, however, refused to void the conveyance, and Barker has appealed on that issue.

Barker's sole argument is that no delivery of the original deed to the sons transpired and, accordingly, no conveyance of title occurred. In advancing this argument, Barker contends that there was no intent to deliver as evidenced by the fact that one lot included in the 1982 grant was conveyed to a third party in 1985, without objection from the sons. As additional evidence of no intent, Barker points to the prior grant of another lot to his son Daniel in 1979. Finally, he argues that he and his former wife continued to reside on one of the remaining lots and to pay the real

estate taxes on that property.

We begin by acknowledging that a delivered deed passes title as between the parties even though it has not been recorded. *See Ferguson* v. *Haynes*, 224 Ark. 342, 273 S.W.2d 23 (1954). Ordinarily, for there to be a delivery of a deed we have said that the grantor must intend to pass title immediately, and the grantor must lose dominion and control over the deed. *See e.g., Crowder* v. *Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990); *Broomfield* v. *Broomfield*, 242 Ark. 355, 413 S.W.2d 657 (1967); *Smith* v. *Van Dusen*, 235 Ark. 79, 357 S.W.2d 22 (1962). In the *Broomfield* and *Smith* decisions, we further held that the intention to convey title must be manifested by what is said and done by the grantor and grantee. This statement partially echoes past authority where we stated that the question of delivery of a deed is one of intention of the grantor, as manifested by his acts or words or both. *See Cribbs* v. *Walker*, 74 Ark. 104 (1905), *citing* 9 Am. & Eng. Enc. Law p. 154.

Where the deed includes the reservation of a life estate in the grantor, however, the requirements of delivery are different. *See Grimmett* v. *Estate of Beasley*, 29 Ark. App. 88, 777 S.W.2d 588 (1989); *Cribbs* v. *Walker*. In *Cribbs* we reversed the chancellor's decision and held that when a husband deeded property to his wife and showed her the deed, but reserved a life estate in himself and kept the deed in his personal safe, there was an effective delivery. To the same effect, the Arkansas Court of Appeals reversed the chancellor in *Grimmett* v. *Estate of Beasley* on similar facts and held that when the grantor reserved a life estate, delivery of a deed to the grantor's brother (the grantee) occurred when she showed the instrument to her brother, even though she kept the deed in her possession, used the property, and paid real estate taxes on the property. Also, in *Grimmett* the grantee had copies of the deed in his possession with the original signature of the grantor. Again, as was the case in *Cribbs* v. *Walker*, the distinguishing factor in the *Grimmett* case was the reservation of a life estate in the grantor. Since actual possession of the property by the grantee would not occur until the grantor's death, physical control of the deed by the grantee was not required in either case.

We hold that the distinction made in *Cribbs* and *Beasley* is a legitimate one and that when a life estate is retained

by the grantor under the deed and the grantee is shown the original deed by the grantor, possession of the original deed instrument need not be transferred to the grantee in order to effect a delivery.

Moreover, the chancellor in the case before us made precise findings of fact, among which was the critical finding that in 1982 Barker intended to convey the remainder interest in his property to his sons, while reserving a life estate in himself and his wife. A second critical finding was that Barker delivered the deed to his sons at his home on September 1, 1982, when he passed the original deed around the table and showed it to them. The chancellor further gave credence to the testimony of the sons that the reason for the conveyance was Barker's fear of losing the property to the federal government. Lastly, the chancellor, by not referencing the transaction in his findings, apparently discounted the effect of Barker's 1985 transfer of one of the lots to a third party. In addition, though the chancellor did not make a specific finding on this point, we do note that the sons had a photostatic copy of the deed in their possession which they used for recordation in 1989. They testified that the copy came from their parents and that their mother urged them to record their copies.

In sum, the chancellor heard testimony from multiple witnesses and had full opportunity to observe the witnesses and evaluate their credibility. He found that the evidence preponderated in favor of the appellees. We are unable, under these circumstances, to say that the chancellor's findings were clearly erroneous. *See* Ark. R. Civ. P. 52(a).

We, therefore, affirm.

Judy L. BLACK *v.* Charles R. BLACK, III

91-8 812 S.W.2d 480

Supreme Court of Arkansas
Opinion delivered July 1, 1991

Penix, Penix & Lusby, by: *J. Robin Nix II*, for appellant.

Snellgrove, Laser, Langley & Lovett, by: *David N. Laser*, for appellee.

ROBERT L. BROWN, Justice. This case comes to us on the sole question of whether the chancellor actually referred to the Arkansas Family Support Chart in making his decision on child support, as required, and sufficiently rebutted the presumption that the support chart is correct.

The facts in this case are not in issue. Appellant Judy L. Black and appellee Charles R. Black, III, were divorced on June 10, 1986. At the time they had four minor children. As part of the property settlement, the appellant received approximately $280,000 in cash and an interest in the appellee's pension fund. At the time of the decree the appellant was not working. The chancellor, in his decree, ordered the appellee to pay $500 a month for each minor child as child support. He further ordered a $1,000 alimony payment to the appellant for one year only.

On October 3, 1989, the appellant filed a petition to modify the decree due to material changes in circumstances involving the needs of the children and the appellee's ability to pay. In her petition she referred to the fact that two of her four children had reached their majority, and child support was, as a consequence, no longer being paid on their behalf. Total child support each month for the remaining two minor children was, therefore, $1,000.

At the trial it developed that the appellee was indeed earning more income. Whereas in 1986 his income had been about $186,500, his income tax return in 1989 reflected earnings of about $276,500, and in addition to that he received between $18,000 to $20,000 a year in non-taxable income. Accordingly,

his annual income had increased over $100,000. It further developed at the trial that all four children still lived with the appellant, and no child was working. The appellant was employed and earned about $800 a month. Of the $280,000 cash settlement, she had some $12,000 remaining. Since the divorce, she had bought a larger home, new furniture totaling approximately $10,000, jewelry worth about $4,500, and a car for her oldest daughter requiring monthly payments. She testified her monthly expenses were $4,000 to $4,500. The appellee had made gifts to his four children in varying amounts for college or for commencement of careers, which were revocable.

The chancellor, in his letter opinion dated August 1, 1990, referred to the change in the appellee's income, the status of the four children, the financial condition of the appellant, and the appellee's gifts to the four children at some length. After doing so, he determined that an increase of $250 per month for the two remaining minor children for a total monthly child support payment of $1,500 was appropriate. On September 6, 1990, the chancellor ordered the increased payment, and incorporated his letter opinion by reference into his order. In both his letter opinion and the order, he made mention of the child support chart. In his letter opinion he said that the court "may consider" the child support chart with a number of other factors to determine change of circumstances. The chancellor then added: "It should be noted at this point that the child support chart is not mandatory and the court may disregard it in making any change or refusing to make any change." He cited *Ross* v. *Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989), as authority for these propositions. In his order, he further stated:

> For the reasons set forth in the letter dated August 1, 1990, attached thereto and incorporated herein by reference, the support chart is not mandatory and is not followed in the specific amount of increased support awarded by this court.

The controlling law on what is required to determine child support was made clear by Act 948 of 1989, now codified in part as Ark. Code Ann. § 9-12-312(a)(2) (1991):

> (a)(2) In determining a reasonable amount of support, initially or upon review to be paid by the non-

> custodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the support chart, shall the presumption be rebutted.

Also, by Per Curiam order dated February 5, 1990, we emphasized that the child support chart created a rebuttable presumption of the amount that was appropriate, and we listed factors to be considered by the court in arriving at the amount of support:

> In adopting this per curiam, the Court creates a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for dissolution of marriage, separation, or child support.
>
> It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support chart is correct, if the court enters in the case a written finding or specific finding on the record that the amount so calculated, after consideration of all relevant factors, is unjust or inappropriate.
>
> Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:
>
> 1. Food;
> 2. Shelter and utilities;
> 3. Clothing;
> 4. Medical expenses;
> 5. Educational expenses;

6. Dental expenses;
7. Child Care;
8. Accustomed standard of living;
9. Recreation;
10. Insurance;
11. Transportation expenses; and
12. Other income or assets available to support the child from whatever source.

Additional factors may warrant adjustments to the child support obligations and shall include:

1. The procurement and/or maintenance of life insurance, health insurance, dental insurance for the children's benefit;
2. The provision or payment of necessary medical dental, optical, psychological or counseling expenses of the children (e.g. orthopedic shoes, glasses, braces, etc.);
3. The creation or maintenance of a trust fund for the children;
4. The provision or payment of special education needs or expenses of the child;
5. The provision or payment of day care for a child; and
6. The extraordinary time spent with the non-custodial parent, or shared or joint custody arrangements.

In Re: Guidelines for Child Support Enforcement, 301 Ark. 627, 784 S.W.2d 589 (1990).

In his letter opinion the chancellor stated that the child support chart is not mandatory. That is essentially correct. We

have previously held, as has the Arkansas Court of Appeals, that there may be other matters in addition to the child support chart that have a strong bearing in determining the amount of support. *See Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987); *Ross* v. *Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989). The factors listed in our Per Curiam order are examples of such other matters.

The case of *Ross* v. *Ross*, though, does not hold that a chancellor may disregard the child support chart completely. Nor is the matter of referencing the chart discretionary with the chancery court in light of Act 948 of 1989 and our February 5, 1990 Per Curiam order. Reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate.

We are mindful that the chart did not contemplate monthly income as high as that of the appellee. But using the chart as a guide, an amount could have been extrapolated. In this regard we point to a recent case where we held that it was sufficient for a chancery court to use figures on the existing support chart to project monthly support amounts appropriate for a party with monthly income exceeding the chart amounts. *See Scroggins* v. *Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). In *Scroggins*, after projecting such an amount, the chancery court explained in written detail, after consideration of all relevant factors under our Per Curiam order, why that amount should not be followed. We held that that was the appropriate procedure.

Here, the chancellor's letter opinion gives a detailed explanation for his decision to modify the child support. He discusses specific changes in circumstances in 1989, the year of the petition to modify, as compared to 1986, the year of the divorce, and concludes that the support must be increased. But other than mentioning in his letter opinion that the child support chart may be considered and disregarded, there is nothing to confirm that he indeed referred to the chart in making his decision, projected a support chart amount premised on the appellee's monthly income, and presumed that amount to be correct. Nor can we confirm that he weighed the factors set out in our Per Curiam order and because of those factors determined that the amount

extrapolated from the support chart would be unjust or inappropriate. Certainly, the chancellor's written findings are not couched in those terms. His order does say that he declined to follow the chart, but, again, that does not confirm that he ascertained the chart amount and found it to be unjust or inappropriate.

We are, therefore, unable to determine in the case before us whether the chancellor followed the correct procedure. Certainly, there is no family support chart amount set out in his letter opinion or order. Moreover, his letter and order are not informative on whether all relevant factors were considered, though clearly some were.

We have the power to decide chancery cases *de novo* on the record before us, but in appropriate cases we also have the authority to remand such cases for further action. *See Schuh* v. *Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Lynch* v. *Brunner*, 294 Ark. 515, 745 S.W.2d 115 (1988). This case requires a remand. We leave it to the discretion of the chancellor to decide whether a more detailed and explanatory opinion will suffice to meet the requirements of our Per Curiam order and Ark. Code Ann. § 9-12-311(a)(2), or whether further proof from the parties is necessary on the applicable factors and other relevant matters.

Reversed and remanded.

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. I dissent. The majority seems to be rigidly linked to the family support chart. It requires strict adherence to a recitation by the chancellor that the court has sifted through the relevant factors announced in our Per Curiam of February 5, 1990, one by one to determine the appropriate amounts of child support. The majority admits it is essentially correct that the support chart is not mandatory. The majority does hold that a reference to the chart is mandatory. I have no difficulty in reading and understanding that the chancellor did "reference the chart" when he stated in his order that he declined to follow the chart. I would affirm.

CMS JONESBORO REHABILITATION INC. d/b/a Northeast Arkansas Rehabilitation Hospital, Inc. *v.* Boyd and Delores LAMB

91-70 812 S.W.2d 472

Supreme Court of Arkansas
Opinion delivered July 1, 1991

[redacted]

Hillburn, Calhoon, Harper, Pruniski, & Calhoun, Ltd., by: *James M. McHaney, Jr.* and *Paula Jamell Stonegard* and *Lyons & Emerson*, by: *Jim Lyons*, for appellant.

Rees Law Firm, by: *David Rees*, for appellees.

ROBERT L. BROWN, Justice. This appeal arises from a default judgment entered against the appellant, CMS Jonesboro Rehabilitation, Inc. d/b/a Northeast Arkansas Rehabilitation Hospital, Inc. ("CMS"), and in favor of the appellees, Boyd Lamb and Delores Lamb, in the amount of $23,572.75. CMS advances the arguments that the service was defective and, alternatively, that the failure of CMS to answer was due to excusable neglect and unavoidable casualty or misfortune.

We do not agree, and we affirm the judgment.

The appellees filed their complaint against CMS and its parent company, Continental Medical Systems, Inc. ("Continental"), on July 25, 1989, alleging damages to the appellees' residence caused by a dirt-pounding process associated with the construction of a CMS facility that sent shock waves and vibrations to the appellees' property. The appellees sought to serve CMS by serving its agent, The Corporation Company, with complaint and summons on July 25, 1989, by certified mail,

return receipt requested. The receipt was signed by R.L. Wright on the "Signature-Agent" line on July 28, 1989. Under the category on the receipt entitled "Type of Service," the "Certified" box was marked with an "x." No check or mark of any kind was made in the "Restricted Delivery" box on the receipt. At the time of service a Standing Delivery Order form was on file with the U.S. Postal Service showing that R.L. Wright was an authorized agent of The Corporation Company to receive unrestricted and restricted delivery mail. After receiving the complaint and summons, The Corporation Company forwarded the same to CMS.

Approximately four and one-half months after the certified mail receipt was signed, and specifically on December 11, 1989, the appellees took a default judgment against CMS and Continental in the amount of $23,572.25. CMS and Continental did not discover the default judgment until April 25, 1990, and moved to set it aside on May 3, 1990. The trial court reviewed affidavits submitted by the parties and evidentiary depositions and heard testimony from a witness and arguments of counsel at a hearing on August 15, 1990. By order entered on August 17, 1990, the trial court denied the motion to set aside with regard to CMS but granted it with regard to Continental, due to lack of in personam jurisdiction.

CMS argues, first, that service of process by the appellees did not satisfy the dictates of Ark. Rule Civ. P. 4(d)(8)(A), which authorizes service of summons and complaint by mail:

> Service of a summons and complaint upon a defendant . . . may be made by the plaintiff or an attorney of record for the plaintiff 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. Service pursuant to this paragraph shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee.

Ark. R. Civ. P. § 4(d)(8)(A). In the case before us, the mail was appropriately addressed to The Corporation Company, which

was the registered agent of CMS, with a return receipt requested. A receipt signed by R.L. Wright on behalf of The Corporation Company is also in the record. These facts are not in dispute.

CMS's argument, however, centers on whether the mailing by the appellees was a "delivery restricted" to The Corporation Company under Rule 4(d)(8)(A). We hold that it was. It is true that the Restricted Delivery box was not checked on the U.S. Postal Service form. Nevertheless, the procedure followed by the postal service and The Corporation Company was the designated procedure under Rule 4(d)(8)(A) had the box been checked: a person authorized to accept restricted mail did so and signed the required receipt which was returned to the appellees and is now part of the record.

It is undisputed that R.L. Wright was authorized to accept restricted mail on behalf of The Corporation Company. Evidencing this fact was the card on file with the postal authorities at the time which was signed by Wright and which contained the added notation: "This authorization is extended to include Restricted Delivery." Furthermore, Wright signed for and accepted the mail containing the complaint and summons, the same as he would have done had the "Restricted Delivery" box been marked. Under such facts it would strain credulity to hold that the delivery was not, in fact, carried out in restricted fashion and that the purposes and objectives of Rule 4(d)(8)(A) were not, in fact, met.

We particularly note the language in Rule 4(d)(8)(A) which provides when service can be the basis for a default judgment. The rule states that a default judgment shall not be entered "unless the record contains a return receipt signed by the addressee or the agent of the addressee." That is exactly what was done in this case—a return receipt signed by the appropriate person, R.L. Wright, on behalf of The Corporation Company was made part of the record. The object of the rule is to give CMS knowledge of the appellees's suit, and that object has clearly been met. For reasons unrelated to service of process, CMS simply failed to respond to the complaint.

In its argument CMS relies heavily on a prior case of this court handed down in 1989 which had somewhat similar facts. *See Wilburn* v. *Keenan Companies, Inc.*, 298 Ark. 461, 768

S.W.2d 531 (1989). In *Wilburn* the trial court also refused to set aside a default judgment where service of complaint and summons was by certified mail, return receipt requested, but where the "Restricted Delivery" box was not marked. However, in *Wilburn*, the person who received the certified mail with the complaint and summons was not authorized by the defendant to receive restricted delivery in accordance with U.S. Postal Service regulations. We reversed the trial court and voided the default judgment. In our decision we referred to both the failure to mark the "Restricted Delivery" box *and* the recipient who was not authorized to receive restricted mail:

> 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.

298 Ark. at 463; 768 S.W.2d at 532.

The facts in this case are distinguishable from the *Wilburn* case. Delivery was made in this case as if the "Restricted Delivery" box had been marked. Moreover, in this case R.L. Wright was clearly authorized by The Corporation Company to receive restricted deliveries.

CMS next argues that R.L. Wright could not accept service for The Corporation Company under Ark. R. Civ. P. 4(d)(5), because that rule limits service on a domestic corporation to delivery of the complaint and summons to "an officer, partner other than a limited partner, managing or general agent, or any agent authorized by appointment or by law to receive service of summons." Here, CMS is a domestic corporation with The Corporation Company as its agent for service of process. Mr. Wright was the agent authorized to receive restricted and unrestricted mail, including process, for The Corporation Company. Indeed, Wright did sign for and accept the process sent by mail to The Corporation Company pursuant to Rule 4(d)(8)(A). We find no merit in CMS's argument.

In the same vein, CMS points to the Arkansas Code and

specifically to a statute directed to service of process when a corporation is the registered agent, which is the situation in the case before us:

> Service of any process, notice, or demand upon a corporate registered agent, as agent, may be had by delivering a copy of the process, notice, or demand to the registered agent, president, vice-president, the secretary, or an assistant secretary of the corporate registered agent.

Ark. Code Ann. § 4-26-503(a)(2) (1987). But, again, Rule 4(d)(8)(A) clearly provides for service by mail to be received by an agent of the addressee. Accordingly, the argument of CMS is without merit. We note that alternative means of serving process, such as the alternative set out in Rule 4(d)(8)(A), are contemplated under the statute advanced by CMS in support of its argument:

> (c) Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

Ark. Code Ann. § 4-26-503(c) (1987).

CMS finally argues unavoidable casualty or excusable neglect under Ark. R. Civ. P. 55(c) and unavoidable casualty or misfortune under Ark. R. Civ. P. 60(c)(7).[1] In our cases, we have recognized that defaults are not favored in the law and that a default judgment may be a harsh and drastic result affecting the substantial rights of a party. *See Burns* v. *Madden*, 271 Ark. 572, 609 S.W.2d 55 (1980). CMS offers as grounds for relief that it contacted its insurance carrier on receipt of the complaint and summons, and the carrier agreed to defend the action on behalf of CMS. The carrier apparently reneged subsequently and advised CMS to demand a defense by the general contractor. This was done, and according to CMS the general contractor agreed to assume the defense. No defense, however, was mounted by the

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[1] By Per Curiam order effective February 1, 1991, Rule 60(c) was amended to apply to judgments other than a default judgment. Subparagraph (7) of Rule 60(c) was deleted and replaced by former subparagraph (8). Rule 55(c) was amended to include "mistake," "inadvertence," and "surprise" as grounds for setting aside a default judgment.

general contractor.

[redacted] We have held in the past that misunderstandings about who will defend an action are not sufficient to show unavoidable casualty or misfortune under the old Rule 60(c). *See McGee* v. *Wilson*, 275 Ark. 466, 631 S.W.2d 292 (1982). And we have further held that a party cannot invoke the aid of this court under Rule 60(c) when that party ignored the action and failed to stay informed. *See Diebold* v. *Myers General Agency, Inc.*, 292 Ark. 456, 731 S.W.2d 183 (1987); *Jetton* v. *Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978).

[redacted] Nor do we hold that the misunderstanding on the part of CMS is sufficient to constitute excusable neglect. Unlike the case of *Burns* v. *Madden*, where the attorney for the plaintiff had previously represented the defendant and had advised the defendant to contact his insurance carrier, here there was no previous attorney/client relationship involved and no potential for that kind of misunderstanding to develop. There is no question that there was neglect by CMS. The only question is whether it was excusable. The trial court's remarks on this point are instructive:

> I don't think that because their client made a deal with the contractor or with the insurance company or with someone else and then forgot about it and didn't follow up, I don't think that's excusable neglect or unavoidable casualty. I think that's not attending to your business.

We agree. CMS did nothing to assure that the general contractor was indeed defending it. And four and one-half months did pass from the date of filing the complaint to the date of entry of a default judgment during which time CMS apparently did not monitor the case. More was required of CMS than was shown in this case, and that formed the basis for the trial court's finding. We have previously held that the decision to grant or deny a motion to set aside a default judgment lies within the sound discretion of the trial court, and the question on appeal is whether the trial court abused that discretion. *See Burns* v. *Madden*; *Jetton* v. *Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978). There was no abuse of discretion in this case.

Affirmed.

DUDLEY and NEWBERN, JJ., dissent.

CORBIN, J., not participating.

DAVID NEWBERN, Justice, dissenting. The question in this case is whether the service of process was defective. The Rule governing service by mail is Ark. R. Civ. P. 4(d)(8)(A) which provides, in relevant part:

> Service of a summons and complaint upon a defendant . . . may be made by the plaintiff or an attorney of record for the plaintiff 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.

Because delivery was not "restricted to the addressee or the agent of the addressee," there was no compliance with this provision.

The Court's opinion makes much of the fact that a person authorized to receive restricted deliveries actually received the process, and the fact that in holding service was invalid because delivery was not restricted in *Wilburn* v. *Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989), we mentioned that the recipient was not a person authorized to receive restricted delivery. That does not cure the problem. The fact remains that the plaintiff did not choose a form of mail with delivery restricted. The service was defective no matter who received it.

Rule 4(e)(3) was amended in 1983 to make requirements for mailing of service outside Arkansas consistent with the mailing requirements for service in the State. The Reporter's Note accompanying the 1983 revision makes it clear with the "restricted delivery" contemplated is the method of delivery so described in postal service regulations. In the *Wilburn* case we discussed the applicable postal regulation, pointing out that Section 933.41 of the postal regulations directs carriers to deliver mail marked "Restricted Delivery" only to the addressee or agent.

The majority opinion also refers that portion of Rule 4(d)(8)(A) which states "Service pursuant to this paragraph shall not be the basis for . . . default . . . unless the record contains a return receipt signed by the . . . agent of the addressee." All that needs to be said about this segment of the

Rule is that service was clearly not had "pursuant to this paragraph" because delivery was not restricted to the addressee or agent of the addressee.

It is easy to make light of the failure to "check the box" indicating restricted delivery, but unless the box is checked, the mail is not marked "Restricted Delivery," and delivery is thus not restricted. The problem caused by this decision is a serious one. R.L. Wright was not given the process as a result of his having been designated to receive restricted deliveries. He received it because he happened to be the person who showed up. Holding that the service was valid because a person authorized to receive restricted deliveries actually received it is analogous to holding that actual notice is sufficient even though the law did not require that notice be given directly to the defendant, a practice thoroughly condemned as a violation of due process in *Wuchter* v. *Pizzuti*, 276 U.S. 13 (1928). Actual knowledge of a proceeding does not validate defective process. *Tucker* v. *Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). *See also Wilburn* v. *Keenan Companies, Inc., supra.*

As we wrote in the *Wilburn* case,

> 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.

In *Edmonson* v. *Farris, supra*, the Trial Court had determined that the fact that service was not precisely in accordance with the then applicable statutory requirement was a mere "technical distinction" insufficient to invalidate the service. Writing for a unanimous Court, Justice Frank Holt made short work of responding to that position by stating that the service requirements of the statute are in derogation of the common law and must be "exactly complied with." Otherwise, the service

results in void judgment.

The compliance in this case was not exact. The service was defective. The judgment is void.

I respectfully dissent.

DUDLEY, J., joins in this dissent.

Jeff ENGLAND and Don Ragar *v.* DEAN WITTER REYNOLDS, INC. and Robert W. Bass

90-321 811 S.W.2d 313

Supreme Court of Arkansas
Opinion delivered July 1, 1991

David M. Hargis, for appellants.

Friday, Eldredge & Clark, by: *Michael G. Thompson, Elizabeth J. Robben* and *Tonia P. Jones*, for appellees.

EDWIN B. ALDERSON, JR., Special Chief Justice. Appellants appeal an Order of Dismissal of the lower court which granted the Appellees' Motion to Compel Arbitration and for Dismissal. The court in that Order dismissed Appellants' Complaint and stated ". . . if they desire to further pursue their alleged claims against

the Defendants, (Plaintiffs) must do so in accordance with the arbitration agreements entered into by the parties".

Appellants, Jeff England and Don Ragar, (along with Keith French who joined in the complaint in the lower court but did not appeal the decision) while working in the Little Rock branch of E. F. Hutton negotiated in the Fall of 1987 with Appellees Dean Witter Reynolds, Inc. and Appellees Robert W. Bass, a Vice President of Dean Witter and the branch Manager for its Securities Operations in Little Rock. The negotiations concluded with agreement among the parties that Appellants would become employees of Dean Witter. The parties executed a letter agreement dated December 11, 1987, an Account Executive Employment Agreement dated December 15, 1987 and a Uniform Application for Securities Industries Registration or Transfer dated December 16, 1987 known in the industry as a "Form U-4". The December 15 Agreement provided for arbitration and also that it would be governed by Arkansas Law. The Form U-4 contained a comprehensive arbitration agreement providing for arbitration of "any dispute, claim or controversy that may arise . . ." in accordance with Rule 347 of the New York Stock Exchange which likewise calls for arbitration of any controversy arising out of the employment.

Almost instantly problems arose between Appellants and Appellees and Appellants' employment ceased in early 1989. England, Ragar and French filed their complaint in the lower court in August, 1989 alleging fraudulent inducement, intentional misrepresentation, gross negligent misrepresentation, *prima facie* tort and tort outrage. Their prayer was for unspecified compensatory damages plus $20,000,000 punitive damages. Appellees filed a Motion to Compel Arbitration and for Dismissal of the Complaint. The Order of Dismissal granting the motion and dismissing the Complaint was entered in February, 1990.

The Points of Appeal relied on by the Appellants are as follows:

1. All authorities, state and federal, require an agreement to arbitrate the specific subjects involved and the matter is one of contract.

2. The "choice of law by agreement" issue was entirely omitted from the lower court's ruling.

3. The lower court failed to follow the rules for construction of contracts under Arkansas Law.

4. The lower court ignored the rules requiring jury determination when the making of an agreement to arbitrate is in issue.

5. The lower court erred by its determination of material and disputed fact issues which is an unconstitutional usurpation of the jury function and a denial of the right to a jury trial.

All parties admit that the Form U-4 was executed by the parties. As a contract involving interstate commerce it is covered by the Federal Arbitration Act. The Federal Arbitration Act provides that if the making of the Arbitration Agreement is in issue a party may demand a jury trial. Notwithstanding the plethoric arguments by Appellants' counsel it was clear to the lower court and it is clear to this court that there was indeed an agreement to arbitrate. In this connection we think that the lower court should have made a specific finding that there was no material issue of fact to be determined.

While the substantive issues are determined by the Federal Arbitration Act the procedural issues are determined by Arkansas Law. Appellees argue that the order of the lower court is not appealable. Most states which have adopted the Uniform Arbitration Act have held that an order compelling arbitration is not appealable. In *Chem-Ash, Inc.* v. *Arkansas Power and Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988) this court held that the lower court's order compelling arbitration is not appealable. The court stated:

> If we permit an Appeal from every order referring a case to arbitration, the policy favoring arbitration would be frustrated, and we would be twice reviewing a case.

Substantively the lower court made the correct decision, however its order must be modified to show a clear determination that with respect to the existence of an agreement to arbitrate

there was no material issue of fact to be determined. In addition the lower court is directed not to dismiss the action but to retain jurisdiction of the controversy until the arbitration process has been concluded. Accordingly, the Appeal is dismissed and Mandate issued consistent with this Opinion.

Special Justice JANET L. BURTNESS joins in this opinion.

HOLT, C. J., DUDLEY, J. and BROWN, J., not participating.

Guy THOMAS, By His Guardian, the City National Bank of Ft. Smith, et al. *v.* VALMAC INDUSTRIES, INC. and Tyson Foods, Inc.

91-30 812 S.W.2d 673

Supreme Court of Arkansas
Opinion delivered July 1, 1991

Matthew P. Horan, Nicholas H. Patton, and *Gregory A. Hoover,* for appellants.

Bassett Law Firm, by: *Woody Bassett* and *Gary V. Weeks*, for appellees.

CONSTANCE G. CLARK, Special Justice. Guy Thomas, a truck driver for Tyson Foods, Inc., was injured on May 13, 1987, while working on a trailer in the course and scope of his employment with Tyson. On March 23, 1990, Mr. Thomas's guardian, the City National Bank of Fort Smith, and his wife, Mary Thomas, filed suit in Johnson County Circuit Court to recover damages for personal injuries sustained as a result of the accident. The plaintiffs named as defendants in the action Valmac Industries, Inc., Tyson Foods, Inc. and four other persons not parties to this appeal. Mr. Thomas claimed that his injuries were the proximate result of the defendants' negligence and the unreasonably dangerous condition of the trailer, which he alleged was owned by and had been defectively modified pursuant to instructions from Valmac. The complaint also alleged that on May 25, 1988, Valmac merged with Tyson and that Tyson thereby succeeded to the liabilities of the predecessor corporation.

Valmac and Tyson filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) and (b)(6) of the Arkansas Rules of Civil Procedure. They contended that the plaintiffs' exclusive rights and remedies were those provided under the Arkansas Workers' Compensation Act and, therefore, the circuit court lacked jurisdiction over the subject matter of the action and the complaint failed to state facts upon which relief could be granted. The trial court granted the motion and dismissed the complaint as against Valmac and Tyson. Pursuant to the joint motion of the parties, the court then entered a final judgment under Ark. R. Civ. P. 54(b), paving the way for this appeal by the Thomases. We conclude that the trial court did have jurisdiction of the subject

matter of the action and that the complaint stated facts upon which relief could be granted and, therefore, reverse.

The issue presented by this appeal is one of first impression in this state—does the exclusivity provision of our Workers' Compensation Act bar an injured worker from pursuing a tort claim against his employer as the successor to the liabilities of the alleged tortfeasor? We find that an injured employee who would otherwise have a valid third-party claim against the alleged tortfeasor should not be barred from pursuing his action simply because the tortfeasor merged with the injured worker's employer.

[redacted] It has long been settled that, as a general rule, an employer who carries workers' compensation insurance is immune from liability for damages in a tort action brought by an injured employee. *Fore* v. *Circuit Court of Izard County*, 292 Ark. 13, 727 S.W.2d 840 (1987); *Brown* v. *Patterson Constr. Co.*, 235 Ark. 433, 361 S.W.2d 14 (1962). This so-called exclusivity doctrine arises out of Ark. Code Ann. § 11-9-105 (1987), which provides that "[t]he rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee . . . ." Certain narrow exceptions to the general rule have been carved out by the courts. For instance, an employer who wilfully and intentionally injures his employee is not immune from a common law tort action. *Heskett* v. *Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950).

[redacted] Litigants in some states attempted to circumvent the exclusive remedy principle by professing to bring suit against their employers in some capacity other than as employers—for example, as owners of property upon which a job-related injury occurred or as manufacturers or vendors of hazardous equipment causing injury on the job. Under this dual capacity doctrine, an employer who would ordinarily be protected from tort liabilities by the exclusivity rule could become liable in tort if, in addition to his relationship as employer, he occupied some other capacity that could be said to confer upon him obligations independent of those imposed upon him as an employer. Professor Larson explains in his treatise why the dual capacity doctrine formerly embraced by some courts has now fallen into disfavor:

> When one considers how many such added relations an employer might have in the course of a day's work—as landowner, land occupier, products manufacturer, installer, modifier, vendor, bailor, repairman, vehicle owner, shipowner, doctor, hospital, health services provider, self-insurer, safety inspector—it is plain enough that this trend could go a long way toward demolishing the exclusive remedy principle. 2A A. Larson, *The Law of Workmen's Compensation*, § 72.81(a) (1990).

Professor Larson goes on to state that while the dual capacity doctrine is unsound, the dual persona doctrine, which recognizes the duality of legal persons, is a legitimate concept. Thus, says Larson,

> An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person. 2A A. Larson, *The Law of Workmen's Compensation*, § 72.81 (1990).

It is the dual persona doctrine which the appellants urge us now to adopt.

We recently discussed the dual capacity and dual persona doctrines in *Landers* v. *Energy Systems Management Co.*, 305 Ark. 267, 807 S.W.2d 33 (1991). The plaintiff in that case, Kenneth Landers, was employed by PSC Laboratory Management Services, which was participating in a joint venture with Energy Systems Management Co. (Ensco). Landers' suit against Ensco for negligence was barred by the trial court on the ground that the plaintiff's remedy was limited to workers' compensation benefits. The plaintiff argued that Ensco should not be immune from tort liability because, in addition to its role as a joint venturer and employer, it occupied a second, or dual, capacity that conferred upon it obligations independent of those imposed upon it as an employer. Specifically, Landers argued that Ensco owned the property on which the joint venture did business, it was required to but failed to provide a barrel tilter (an implement required by federal safety regulations), and its employee was responsible for safety within the entire Ensco premises.

While not rejecting the dual persona concept, we concluded in *Landers* that the doctrine did not apply to the facts of that case. In fact, it is apparent that in the *Landers* case, we were really dealing with a dual capacity argument and not one founded on the dual persona theory. The plaintiff merely alleged that Ensco occupied a capacity or relationship in addition to that of joint venturer and employer. He could not establish that Ensco possessed a second persona completely independent from and unrelated to its status as an employer.

In contrast to *Landers*, the appellants in this case bring their action against Tyson not as Guy Thomas's employer, but as the successor corporation to Valmac. The appellants look to the Arkansas Business Corporation Act to establish liability on the part of Tyson. Ark. Code Ann. § 4-26-1005(b) (1987) provides that when a merger has been effected:

> (1) The several corporations parties to the plan of merger or consolidation shall be a single corporation which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation . . . .
>
> (2) Subject to § 4-26-1008, the separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.
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> * * *
>
> (6) Such surviving or new corporation shall henceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated. Any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if the merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. . . .

The appellants contend that under the language of this statute, Tyson, as the surviving corporation, is responsible for any liabilities of Valmac, the merged corporation. We find that this is precisely the type of situation which calls for the application of the dual persona doctrine.

One of the first cases to embrace the dual persona theory was the decision of the Court of Appeals of New York in *Billy* v. *Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980). In *Billy*, the plaintiff's decedent, an employee of USM Corporation, was killed when a 4,600 pound "ram" from a vertical boring mill broke loose and struck him. Although the decedent's widow applied for and received workers' compensation benefits, she also brought a tort action against USM Corporation, the parent corporation of USM and three other corporations which had been absorbed by USM through corporate mergers prior to the accident. USM moved for summary judgment on the basis of the exclusive remedy provision of New York's workers' compensation law. The lower courts agreed with USM that the exclusivity provision of the workers' compensation act barred the common law tort claim, but the Court of Appeals reversed.

After first rejecting the dual capacity doctrine, the *Billy* court adopted what is now known as the dual persona doctrine, reasoning that USM should not be permitted to avoid the obligations it inherited through corporate merger simply because of the "fortuity" that the injured party was its employee. The court went on to explain:

> Conceptually, the deceased employee's executrix is suing not the decedent's former employer, but rather the successor to the liabilities of the two alleged tortfeasors. That USM also happens to have been the injured party's employer is not of controlling significance, since the obligation upon which it is being sued arose not out of the employment relation, but rather out of an independent business transaction between USM and Farrel. . . .
>
> Through its merger with Consolidated and Farrel, USM voluntarily assumed any obligations that those corporations may have had to individuals who might suffer injury as a result of a defect in their product. It would be grossly inequitable to permit USM to avoid its assumed obligations solely because the injured party was coincidentally an employee and the injuries in question arose in the course of his employment. 51 N.Y.2d at 161-62, 412 N.E.2d at 940, 432 N.Y.S.2d at 884-85.

Accord Robinson v. *KFC National Management Co.*, 171 Ill. App. 3d 867, 525 N.E.2d 1028 (1988); *Gurry* v. *Cumberland Farms, Inc.*, 406 Mass. 615, 550 N.E.2d 127 (1990); and *Schweiner* v. *Hartford Accident & Indemnity Co.*, 120 Wis. 2d 344, 354 N.W.2d 767 (Ct. App. 1984).

This court believes the application of the dual persona doctrine is called for even more strongly here than it was in *Billy*. There, the merger of Consolidated and Farrel (the designer and installer, respectively, of the "ram" that killed the decedent) into USM occurred a number of years prior to the accident. Here, the merger of Valmac into Tyson, according to the unrefuted allegations in the plaintiffs' complaint, did not take place until May 25, 1988, one year after the accident. Thus, in this case, Guy Thomas clearly had a third-party claim against Valmac at the time he sustained his injury.

Tyson's argument centers around the assertion that, prior to his injury, Guy Thomas was an employee of Valmac. Tyson also maintains in its brief that in October of 1984, Tyson "acquired Valmac through a tender offer" and, shortly thereafter, "assumed responsibility and control of Valmac operations and Valmac employees, including Thomas, became Tyson employees." Thus, Tyson contends that even if it succeeded to any liability on the part of Valmac, it also succeeded to the immunity from suit which Valmac possessed as Mr. Thomas's employer.

The problem we have with this argument is that Tyson does not dispute the complaint's allegation that on May 13, 1987, the date of his injury, Guy Thomas was an employee of Tyson. Furthermore, Tyson offered no evidence, in the form of an affidavit or otherwise, to refute the allegation of the complaint that the merger of Valmac and Tyson occurred on May 25, 1988. Tyson's argument is based entirely upon statements contained in its brief. We have previously held that it is incorrect to base a decision on a motion to dismiss (or a motion for summary judgment) upon allegations contained in the parties' briefs. *Guthrie* v. *Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985). In this case, taking the unrefuted allegations of the complaint as true, Valmac was not Mr. Thomas's employer on the day of his injury. Consequently, Tyson had no immunity to inherit when the merger took place one year later.

In conclusion, we find that under the particular facts of this case, the exclusivity provisions of our Workers' Compensation Act do not bar the appellants from maintaining their tort action against Tyson Foods, Inc. Because the trial court does have jurisdiction of the subject matter of this action, and because the complaint on its face states facts upon which relief could be granted, we hold that the trial court erred in granting the motion to dismiss.

We would add that the appellants also asserted that the trial court may have treated the appellees' motion to dismiss as one for summary judgment pursuant to Ark. R. Civ. P. 56. The appellants submit that if the trial court did treat the motion to dismiss as one for summary judgment, it improperly dismissed the complaint because there were genuine issues of material fact. We do not find it necessary to reach this issue, inasmuch as we conclude that the trial court's ruling on the Rule 12(b)(1) and (b)(6) motion was in error.

Reversed.

HAYS, J., dissents.

BROWN, J., not participating.

STEELE HAYS, Justice, dissenting. The trial court granted a motion by Valmac Industries, Inc. and Tyson Foods, Inc., to dismiss for lack of jurisdiction and failure to state facts upon which relief could be granted. Ark. R. Civ. P. 12(b)(6). I would affirm on both counts.

The complaint names six defendants[1] and alleges that Guy Thomas "was injured while working on a trailer manufactured, distributed, sold, owned, and modified by the defendants . . . caused by the defective and unreasonably dangerous condition when sold and subsequently modified." Thomas further alleges that the defendants were negligent in failing to inspect the trailer, failing to instruct as to the proper and safe use of the trailer, failing to warn of the dangers in the use of the trailer, in placing the release handle in a position that it could not be operated safely

[1] S. & T. Manufacturing Co., Inc.; Steco Sales, Inc.; Saul Spector; Jacimore Metals, Inc.; Valmac Industries, Inc.; and Tyson Foods, Inc.

and in designing the center gate so that the gate could not be released safely.

Thus, the complaint alleges strict liability and negligence. The complaint does not state how the injury occurred or how the trailer was defective and unreasonably dangerous. It does not allege that either Valmac or Tyson manufactured or supplied the trailer within the context of the Arkansas Product Liability Act and clearly does not state a cause of action based on strict liability. As to the negligence counts, the complaint simply throws a blanket over six defendants with no attempt to differentiate as to their involvement or accountability. In more conventional litigation these generalities might be forgiven, but when exclusivity under workers' compensation is at stake, it is critical for the plaintiff to state *facts* which give rise to common law liability in tort. In *Johnson* v. *Houston General Insurance Company*, 259 Ark. 724, 536 S.W.2d 121 (1976), for example, an employee filed suit at law against his employer's carrier, alleging retaliatory conduct brought on by his having filed a workers' compensation claim. The complaint was dismissed by the trial court for failure to state a cause of action and this court affirmed, pointing out that the complaint failed to state *specific facts* constituting elements of actionable damage. How these several defendants can respond to these all-inclusive allegations other than by simply denying them is not apparent, and that meets neither the letter nor the spirit of fact pleading. Ark. R. Civ. P. 8; *Wilson* v. *Overturff*, 157 Ark. 385, 248 S.W. 898 (1923) ("The complaint must contain a statement in ordinary and concise language, without repetition, of *facts* constituting the plaintiff's cause of action . . . directly and positively alleged. . . .")

Of even greater importance is the failure to allege essential facts which would give a court of law jurisdiction over Valmac and Tyson in this particular case. Tyson was Thomas's employer at the time of his injury, which was suffered in performance of his duties. Tyson has paid to date in excess of $350,000 in workers' compensation benefits (a fact the majority opinion fails to mention). The majority places considerable reliance on a decision of the Court of Appeals of New York, *Billy* v. *Consolidated Machine Tool Corporation*, 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S. 879 (1980), (to which two members of that court dissented). But essential factors on which the *Billy* court relied

are not present here, and that is a fatal defect in establishing both jurisdiction and a cause of action in this case. It is evident from the briefs that Thomas began working for Valmac in 1977 and later, at some undisclosed date, became the employee of Tyson. But the tort which the *Billy* court recognized was committed by a party which "*never had an employer-employee relationship* with the injured party." (My emphasis). Equally important, neither the complaint nor the briefs, so far as I can determine, state when the defect occurred. The significance of the latter date in establishing liability under the dual persona doctrine is stressed by Professor Larson in his analysis of the *Billy* case, because if it was while Thomas was *Valmac's* employee, then Tyson, as corporate successor to Valmac, also succeeded to Valmac's immunities under the business corporation act, on which the majority rely. *See* Ark. Code Ann. § 4-26-1005(b)(3).

Turning to the dual persona doctrine, I disagree that this court should adopt that theory as an exception to the rule of exclusivity under the workers' compensation law. The majority opinion ascribes greater support for the dual persona doctrine by Professor Larson than is borne out by the text itself. *See* 2A A. Larson, *The Law of Workmen's Compensation* § 72.81 (1990). The text does recite that whereas the disfavored dual capacity approach should be "jetisoned," the dual persona approach *may* have legitimate application "in exceptional cases." One of the exceptional cases examined by Larson is *Billy* v. *Consolidated Machine Tool Corporation, supra*, which the majority now incorporates into the law of Arkansas. Larson makes particular note of two pertinent factors which were present in *Billy* but which are absent from our case—Billy had never worked for the predecessor corporation (Valmac's counterpart) and the defective equipment was manufactured *before* the merger. Thus, of two facts critical to the applicability of the dual persona view, at least one is missing from this case and perhaps both. Had these factors been present, according to Larson, the successor corporation in *Billy* could claim the inherited immunity of the predecessor corporation. Larson at 14-232.

From another angle, the issue in this case is whether the exclusivity provision of the Workers' Compensation Act is paramount to the third party liability provision. Today's holding subordinates the exclusivity provision, which I believe is central

to the act, to the third party liability provision, the end result being that the same employer, although having paid thus far $353,000 in workers' compensation benefits, is liable anew for unlimited damages at common law. In an analogous situation, where the right of contribution by a tortfeasor was asserted against the employer, necessitating a similar balancing, this court unanimously subordinated the joint-tortfeasor act to the Workers' Compensation Act. In *Bashlin Co.* v. *Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982), an AP&L lineman sued Bashlin for injuries attributable to a defective lineman's belt. Bashlin filed a third party complaint against AP&L for contribution as a joint tortfeasor. The trial court dismissed AP&L by summary judgment and we affirmed:

> The Uniform Contribution Among Tortfeasors Act and the Workers' Compensation Act are both involved in this action. One of them must give because both cannot prevail in the matter before us. Therefore, we hold that it is in the interest of public policy and in keeping with the intent of the General Assembly to give the compensation act priority as an exclusive remedy. In matters involving workers' compensation benefits the employer shall be immune from third party tortfeasors' claims.

Finally, I would cite language in the case of *McAlister* v. *Methodist Hospital of Memphis*, 550 S.W.2d 240 (Tenn. 1977). Tennessee's Workers' Compensation Act, like ours, provides that remedies under the act are exclusive of all other remedies and has a third party liability provision, (Section 50-914, T.C.A.) similar to our own Ark. Code Ann. § 11-9-410 (1987). While *McAlister* is a dual capacity case, implicit in the opinion is a disdain for concepts which defeat the aegis of exclusivity by constructing an alter ego for the employer:

> Nothing in Sec. 50-914, T.C.A. may be construed to evince a legislative intent that an employer may ever be classified as a "third person," without doing violence to the plain language which permits common law suits against "some person other than the employer." The employer is the employer; not some person other than the employer. It is that simple. The injured workman is confined to the benefits provided by the Workmen's Compensation Act

and may not sue his employer in tort.

I respectfully dissent to the reversal in this case.

WAL-MART STORES, INC. *v.* Pam BAYSINGER

90-234 812 S.W.2d 463

Supreme Court of Arkansas
Opinion delivered July 1, 1991
[Rehearing denied September 16, 1991.*]

* Dudley and Corbin, JJ., not participating. Hays and Brown, JJ., and Epley, Sp. J., would grant rehearing.

Bassett Law Firm, by: *Curtis L. Nebben*, for appellant.

Jim Johnson, for appellee.

WILLIAM F. SHERMAN, Special Justice. Pam Baysinger, the appellee, filed an action against Wal-Mart, Appellee's former employer, alleging that Wal-Mart terminated her for prosecuting a claim for injuries under the Workers' Compensation Act, in violation of public policy and statute. The complaint also alleged that Wal-Mart was liable for the tort of outrage. The case came to trial before a jury in Benton County Circuit Court on February 15, 1990. The trial court instructed the jury on wrongful discharge, that is, wilful discrimination in the hiring or tenure of work of an individual on account of her claiming workers' compensation benefits. There was no instruction on the allegation of outrage. The jury returned a verdict for Pam Baysinger against Wal-Mart in the sum of $24,000.00 in compensatory damages. The amount or measure of damages is not an issue on appeal.

Ms. Baysinger began working for Wal-Mart at its Warehouse No. 2 in Bentonville, Arkansas on January 14, 1982. She remained there until her termination on October 1, 1986. She received evaluations each year, sometimes two, which were generally very good, and pay increases with each evaluation, except for June, 1986, from $4.95 per hour to her final pay of $6.30 per hour. An evaluation in January, 1984 stated she would work in any area where needed. She was employed in a number of different capacities, including janitor.

On August 28, 1986, Ms. Baysinger sustained a back injury while lifting a box. She suffered an acute lumbosacral strain, which caused back stiffness. She was examined and treated by Dr. Robert E. Holder, after referral by Wal-Mart. On September 2, 1986, Dr. Holder placed Appellee on restrictions to lift no more than ten pounds, then on September 8, 1986, no more than twenty pounds. She received physical therapy and wore a lumbosacral corset. She was allowed to work on September 11 under the lifting restrictions and with modified duty. On September 12, she was sent home. She returned to work on September 17. On September 26, 1986, Appellee suffered a recurrence of the back injury reported on August 28, 1986. The physician found that she had a

recurrent injury with "thoracic spine strain." She returned to work on September 29 and September 30, but was sent home both days because of her September 26 injury. She reported for work on October 1, 1986 and was told to see the personnel manager at Warehouse No. 2, Ernest Mika. Mr. Mika told her she was being terminated because she could not perform her job or any other job in Warehouse No. 2. On the exit interview form, Mr. Mika stated he had been advised by Dr. Holder that continued exposure to this type work could lead to more serious injury for Pam Baysinger. On another form, Mika wrote as the reason for termination that Ms. Baysinger was "unable to perform her job, limited medically," and that Wal-Mart did not expect to rehire Ms. Baysinger. On a notice of separation form it was stated she was not eligible for reemployment.

On the request for medical care form, Dr. Holder had noted the patient should consider another type work because of the recurrent nature of her injuries. He then noted she could return to her regular duties on September 29, 1986. Appellee came to Mika's attention when he saw the comments on the request for medical care form signed by Dr. Holder, which were not specific on her limitations. Mr. Mika's notes show that he discussed the case with a claims supervisor for the workers' compensation service company, who suggested they write Dr. Holder regarding the specific restrictions. Mr. Mika noted: "Depending on Dr. Holder's reply, we should consider placing her — if available in a lighter duty job and if none available termination." Mika directed Ms. Sheila Shepherd to find some work for Appellee at another location. Ms. Shepherd reported back that there was nothing available. On September 27, Mika wrote Dr. Holder requesting more specifics on the restrictions. Dr. Holder replied to Mika by letter dated October 1, received after the termination, observing that Appellee had a history of frequent injuries, "not always related to her low back," that she was a small girl and "obviously not physically built for heavy labor," and that it was difficult to know whether or not recurring injuries were due specifically to true accidents or were somewhat psychologic in nature. The doctor stated he understood that Wal-Mart had gone the "second mile in trying to find her a non-heavy duty source of employment." He observed that her 8th grade education placed "some limits on job options." The doctor recommended that

Appellee "not do any lifting over twenty pounds" and do a "minimal amount of bending, stooping, squatting and pulling type work." He said she could do those things as long as it was not a repetitive job, in other words, "continuous heavy lifting." He did not say how long such restrictions should last. Dr. Holder testified he did not advise Mr. Mika that "continued exposure to that type of work" could lead to more serious injury, that he could not recall that Mika told him he could not find light duty work for Appellee, and that he did not know on October 1 Appellee was being terminated.

On October 3, 1986, Dr. Holder signed an Arkansas Rehabilitation Services General Medical Examination Record in an attempt to obtain assistance from the State for Appellee. The purpose was rehabilitation, to assist her in obtaining training for work not involving common labor. Under "orthopedic," the doctor stated she had "stiff back," could not "touch toes, squat;" she had a cautious gait; and her major disabling condition was chronic low back strain and an 8th grade education.

Mr. Mika testified that if Dr. Holder had given no restrictions, Appellee would still be working at Wal-Mart, as she was a good worker. To Mr. Mika, there was nothing in the documentation to indicate the restrictions were other than permanent and Appellee had permanent limitations for lifting, bending and stooping. He stated this was why a leave of absence did not apply to her.

Pam Baysinger had had no back problems before her employment with Wal-Mart. She had sustained back injuries on October 28, 1982 and June 6, 1983, for which she received medical benefits under workers' compensation. After her August 28, 1986 injury, Wal-Mart paid medical benefits and temporary total disability benefits from August 29, 1986 to September 21, 1986. The last payment of weekly benefits was made after her termination.

Appellant's first argument is that the Benton Circuit Court lacked jurisdiction over the subject matter because the Workers' Compensation Act provides an exclusive remedy for employee claims against employers and that there is no cause of action for wrongful discharge. Appellant cites Ark. Code Ann. § 11-9-105 that the rights and remedies of an employee against his employer

under the Workers' Compensation Act are exclusive. Appellant cites two Arkansas cases. In *Cain* v. *Union National Life Ins. Co.*, 290 Ark. 240, 718 S.W.2d 444 (1986), this Court affirmed the dismissal of a complaint alleging an employee had suffered emotional distress, humiliation, and embarrassment from the respondent's bad faith in not settling a workers' compensation claim. Noting that there were statutory remedies for late payment, the Court held that the Workers' Compensation Act provides the exclusive remedy for such a claim. The Court followed its decision in *Johnson* v. *Houston General Ins. Co.*, 259 Ark. 724, 536 S.W.2d 121 (1976), the second case cited by Appellant, which also involved late payments and alleged purposeful delay in settling a valid claim. The Court stated that the rights and remedies provided in the Workers' Compensation Act were exclusive, and the lower court's dismissal of the complaint was affirmed. In *Johnson*, the employee contended the "retaliatory action on the part of employer-respondent for filing a workman's compensation claim is actionable in a court of law," but the Court declined to address the point. The Court is now prepared to reach this issue.

[redacted] It is the general rule that "when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship *at will* and *without cause*." *Griffin* v. *Erickson*, 277 Ark. 433, 436, 642 S.W.2d 308, 310 (1982). Generally, "employment is held only by mutual consent, and at common law the right of the employer to terminate the employment is *unconditional* and *absolute*." *Griffin* v. *Erickson*, *supra*, 227 Ark. at 436.

There are well-defined exceptions to this general rule. Four exceptions to the at-will doctrine under Arkansas law were identified by the United States District Court in *Scholtes* v. *Signal Delivery Service, Inc.*, 548 F.Supp. 487 (W.D. Ark. 1982). The Arkansas Supreme Court recognized the public policy exception to the general rule in *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), which involved the dismissal of Oxford, the employee, by Sterling Drug, Inc. Sterling Drug supervisors believed that Oxford had reported Sterling to the GSA for pricing violations, resulting in fines against Sterling in the sum of $1,075,000 in a 1984 settlement.

Oxford sued Sterling Drug for wrongful discharge and outrage. The Court cited its decision in *M.B.M. Co., Inc.* v. *Counce*, 268 Ark. 269, 273, 596 S.W.2d 681 (1980), in which the Court recognized certain exceptions to the at-will doctrine, including discharge for exercising a statutory right, for performing a duty required by law, or "that the reason for the discharge was in violation of another well established public policy." In *Sterling*, this court noted the development of a case law in other states accepting the public policy exception to the employment at-will doctrine. A public policy exception has been found in cases where employees were discharged for filing workers' compensation claims. *See, e.g.*, *Kelsay* v. *Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978); and *Frampton* v. *Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

In *Sterling Drug, Inc.* v. *Oxford, supra*, 294 Ark. at 249, this Court considered whether the public policy exception to the employment at-will doctrine should be founded upon contract or tort. The Court found a cause of action in contract to be more appropriate in such cases. There is an implied understanding that an employer will not wrongfully discharge an employee. The Court adopted the contract theory of liability, observing that "if an employer's conduct in breaking a contract of employment is sufficiently egregious or extreme, the employee can still claim tort damages on a cause of action for outrage." *Sterling Drug, Inc.*, *supra*, 294 Ark. at 249.

The public policy of a state is found in its constitution and statutes. *Sterling Drug, Inc.*, *supra*, 294 Ark. at 249. The Workers' Compensation Act provides a criminal penalty for "any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his claiming benefits" or "who in any manner obstructs or impedes the filing of claims for benefits." Ark. Code Ann. § 11-9-107 (1987). It is the clear purpose of workers' compensation laws to compensate workers who are injured on the job, and, in return for that guarantee, to give employers general assurance that claims made under the law will provide injured workers with an exclusive remedy. It is the policy of this State that valid claims will be paid. An employer violates this public policy when he discharges an employee for claiming workers' compensation benefits under the Act.

[redacted] Wal-Mart argues that Baysinger has no cause of action because the Arkansas General Assembly has not adopted a statute providing a civil cause of action for injured employees. Appellant's argument has no merit, for the public policy exception comprehends conduct by the employer which contravenes the statute, Ark. Code Ann. § 11-9-107, and the stated objectives of the Workers' Compensation Act. Conviction pursuant to a criminal statute requires the State to satisfy its burden of proof beyond a reasonable doubt. That is not the standard of proof required in a case alleging wrongful discharge. The criminal statute is a clear statement of a policy against discharging employees for pursuing workers' compensation benefits. The plaintiff, Pam Baysinger, had the ultimate burden to prove with a preponderance of the evidence that she was discharged in violation of a well-established public policy of this State, more specifically, that policy set forth in Ark. Code Ann. § 11-9-107 (1987).

[redacted] The burden of proof to establish a prima facie case of wrongful discharge is upon the employee. See Larson, *The Law of Workmen's Compensation*, Vol. 2A, § 68.36(c) (1990). A prima facie case is made by substantial evidence that the workers' compensation claim was a cause of the discharge. When an employee has made a prima facie case of retaliation, or wrongful discharge, the burden shifts to the employer to prove that there was a legitimate, non-retaliatory reason for the discharge. See Larson, *The Law of Workmen's Compensation*, Vol. 2A § 68.36(d) (1990). Such a reason might be the one offered by Wal-Mart in the present case, that Appellee did not have the physical ability to do her job, or any other job which might have been provided at that point in time. The court did not instruct the jury on the employer's burden to prove a legitimate reason for the discharge, and no such instruction was requested by either party. The evidence offered to support Appellant's reason for terminating Appellee was not convincing.

[redacted] There was substantial evidence to support the jury verdict for wrongful discharge. The verdict may be supported by direct or circumstantial evidence. As it is quite unlikely that an employer would announce that the employee was being discharged because of a workers' compensation claim, the injured employee must normally rely upon circumstantial evidence.

There is sufficient evidence in the record that Wal-Mart discharged Pam Baysinger because of the workers' compensation claim. After her August 28, 1986 injury, she received workers' compensation benefits. There was a recurrence of her injury on September 26. The personnel supervisor stated on the exit interview form he was told by the physician that continued exposure to this type of work could lead to more serious injury for the claimant, but the physician testified he had no recollection of saying such a thing. Otherwise, why would the physician release the claimant to return to work on September 29? There was too much unknown in Pam Baysinger's condition for the employer to conclude that she could no longer perform her work. A warehouse operations manager testified there were several types of light duty jobs which required little or no lifting, but Ms. Baysinger was not given an opportunity to fill one of them because she lacked the mathematical skills. She also was not given an opportunity to request medical leave in accordance with the Wal-Mart Associates' Handbook. The employer terminated Appellee, hurriedly, without adequate information of her medical condition or of the likelihood that she would heal.

Wal-Mart contends that no cause of action exists for retaliatory discharge until the employee files a claim with the Workers' Compensation Commission. The Court rejects this argument, which if allowed would permit the employer to discharge an injured employee before the employee would have had an opportunity to file a claim. Under the Arkansas Workers' Compensation Act, an injured employee may receive full benefits without ever filing an A-7 Form with the Workers' Compensation Commission. The record indicates that an A-7 Form was filed on November 19, 1986. There is a division in other jurisdictions which have addressed this issue, but we find the better rule to be that it is not required for the injured employee to file a formal claim to create the cause of action. It is sufficient that workers' compensation benefits are anticipated from the injury, whether or not a claim has been or will be filed. *See Wright* v. *Fiber Industries, Inc.*, 60 N.C.App. 486, 299 S.E.2d 284 (1983).

Appellant also argues that it is not responsible because a separate company, Corporate Service (CSI), actually processes workers' compensation claims on behalf of Wal-Mart. The record shows that injured workers are paid through funds from Wal-

Mart. The Wal-Mart personnel supervisor discussed Appellee's claims with a CSI representative on the day of her last injury. Wal-Mart is not insulated from liability through its employment of a separate service corporation to handle its workers' compensation claims.

Appellant presents two additional arguments, both alleging errors in the jury selection. Appellant contends first that the court erred in disqualifying any prospective juror who owned Wal-Mart stock, regardless of amount. Twenty-two prospective jurors who owned Wal-Mart stock were excused for cause. There is scant authority on this issue, but the few cases hold it is reversible error for a trial court to refuse to strike a juror who owns securities in a corporation which is party to the litigation. *See Chestnut* v. *Ford Motor Company*, 445 F.2d 967 (4th Cir. 1971); *Wallace* v. *Alabama Power Company*, 497 So.2d 450, 453-54 (Ala. 1986); *Southern Bell Telephone & Telegraph Company* v. *Shepard*, 204 S.E.2d 11, 12 (S.C. 1974).

[redacted] The issue of a juror's qualifications lies within the sound discretion of the trial court. *Montgomery* v. *State*, 277 Ark. 95, 97, 640 S.W.2d 108 (1982). The appellant, Wal-Mart Stores, Inc., occupies a predominant economic position in the Bentonville, Arkansas area. It was not an abuse of discretion for the trial court to excuse for cause all jurors who owned stock of the defendant corporation.

The appellant contends further that the lower court committed error in failing to strike a prospective juror who was a retired labor union official. Appellant's counsel asked him if he would be "rooting for Mrs. Baysinger." The prospective juror replied, "I fought for people like that." Appellant's counsel asked the prospective juror "do you feel that because of that you could give one hundred percent partiality to this case today?" The prospective juror replied, "I think so." Appellant's counsel asked that he be excused. The Court, inquiring as to the veniremen's qualifications, asked whether he could set aside any past experiences, could decide the case on the evidence presented, and could be fair to both parties; and the prospective juror responded affirmatively. It is apparent that the prospective juror did not understand the question concerning his "partiality," thinking the question asked for his "impartiality."

Nothing further was said by the Court or by counsel concerning the prospective juror's impartiality or his qualifications. He was called as a juror, and Appellant used a peremptory challenge to strike him. Three other veniremen identified themselves as former labor union members, and no objection was made. Appellant bears the burden of proving a prospective juror's disqualification. *Montgomery* v. *State*, *supra*, 277 Ark. at 97. There was no abuse of discretion by the trial judge in failing to strike the juror for cause.

Affirmed.

DUDLEY and CORBIN, JJ., not participating.

HAYS and BROWN, JJ., and Special Justice ALAN EPLEY dissent.

STEELE HAYS, Justice, dissenting. I have no quarrel with the view that the public policy of this state proscribes retaliatory discharge by an employer because an employee files a workers' compensation claim. Indeed, that policy is expressly embraced in the act: Ark. Code Ann. § 11-9-107 (1987) provides that an employer who willfully discriminates against any employee for claiming benefits is subject to fine and imprisonment. However, since the remedies provided by the legislature for the breach of that policy do not include a cause of action for damages, it is, for reasons I will attempt to demonstrate, beyond the power of this court to fashion that remedy on its own.

My disagreement with the majority is that I believe the judicial branch has no power to broaden the scope of the Workers' Compensation Act, nor any power to create a remedy not provided in the act. That power belongs to the legislature alone under the express provisions of Amendment No. 26. Given the unique status of the workers' compensation law in Arkansas, our function, I believe, is decidedly narrow, consisting only of such interpretative role as necessarily attends appellate review. In fact, this court has pointedly observed that its authority is so restricted in workers' compensation cases that if the legislature had not provided for court review, *then the courts could not have considered workers' compensation cases at all. J. L. Williams & Sons, Inc.* v. *Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943).

The Workers' Compensation Act was passed under the

authority of Amendment No. 26 to the state constitution, which was initiated by the people and adopted by them in 1938. By the amendment the people directed that the *General Assembly* shall have power to provide "the *means*, *methods*, and *forum* for adjudicating" workers' compensation claims (my emphasis). The legislature sent three bills to the governor. Two were vetoed. One was signed and then abated by referendum petitions until finally approved by the people in 1940. Thus, the people have been keenly involved in the adoption, drafting and approval of the legislation produced by the *General Assembly* at their direction.

The act itself is comprehensive and thorough and we have declared it "plain and unambiguous." *Odom* v. *Ark. Pipe & Scrap Material Co.*, 208 Ark. 678, 187 S.W.2d 320 (1945). It provides in minute detail for every eventuality arising from the employment relationship. For example, if the employer fails to secure payment of benefits, the employee has the option between the benefits due under the act or asserting a cause of action for damages at common law without the crippling defenses which were available to an employer at common law. Ark. Code Ann. § 11-9-105(b)(1) (1987). That same section, § 11-9-105, provides that the rights and remedies "shall be exclusive of all other rights and remedies of the employee" or anyone claiming under them.

Over the half century that the Workers' Compensation Act has existed in Arkansas, this court has withstood a battery of legal challenges to the act, including ingenious attempts to enlarge its scope, citing again and again § 11-9-105 and declaring that rights and remedies granted to an employee "shall be exclusive of all other rights and remedies." The act is a finely tuned trade-off of common law liabilities and defenses between industry and labor by which each class gave up certain rights in return for certain benefits. *Young* v. *G.L. Tarlton, Contractor, Inc.*, 204 Ark. 283, 162 S.W.2d 477 (1942) summarized the end result:

> The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the state, then the right of trial by jury is therefore no longer involved

> in such cases. The right of jury trial being incidental to the right of action, to destroy the latter is to leave the former nothing upon which to operate.

By analogy, divorce in Arkansas is purely statutory, and just as this court has no power to create a ground for divorce not expressly provided by the legislature, it has no power to enlarge, or lessen, the scope of the Workers' Compensation Act. In that vein, we said in *Barth* v. *Liberty Mutual Ins. Co.*, 212 Ark. 942, 208 S.W.2d 455 (1948):

> The cause of action of one claiming under the Workmen's Compensation Act is *purely statutory*, and that one claiming under its provisions 'has no claim or cause of action except the one given him' by the act.

In the *Odom* case, *supra*, speaking of the Workers' Compensation Act, we wrote:

> Its purpose and effect was to substitute, as to employment embraced within its terms, the liability created by it for *any and all* liability of the master arising from the death or injury of his servant. The remedies provided by [the workers' compensation law], are, unless the employer fails to secure the payment of compensation as required by the act, exclusive. [My emphasis.]

In *Huffstettler* v. *Lion Oil Co.*, 110 F. Supp. 222 (W.D. Ark. 1953), Judge Miller, in examining the exclusivity of Arkansas workers' compensation law, recognized the power of the *legislature* to create new causes of action under Amendment 26 and that the only cause of action by an employee against an employer now existing is where the employer fails to afford the benefits provided under the act.

In *Seawright* v. *U.S.F. & G. Co.*, 275 Ark. 96, 627 S.W.2d 557 (1982), referring to Ark. Code Ann. § 11-9-105, we said:

> The rights and remedies herein granted to an employee . . . on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next of kin, or any one otherwise entitled to recover damages from such employer. . . .

And in *Brothers* v. *Dierks Lumber & Coal Co.*, 217 Ark. 632, 232 S.W.2d 646 (1950), Justice Robert A. Lefler, in upholding the constitutionality of the act, referred to the right of the *legislature* to create new causes of action where none before existed.

A great many more cases could be cited. Suffice it to say that as recently as 1986, this court stated with firmness and unanimity that "any change concerning the exclusivity of the statutory remedies must come *legislatively*." [My emphasis.] *Cain* v. *National Union Life Ins. Co.*, 290 Ark. 240, 718 S.W.2d 44 (1986).

In sum, three provisions of the Workers' Compensation Act make it crystal clear that the legislature acted with purpose in *not* fashioning a cause of action at common law for retaliatory discharge by employers: one section provides that remedies *shall* be exclusive of all other remedies [§ 11-9-105(a)], one section provides that an employee *does* have a cause of action for damages at common law where the employer fails to secure benefits under the act [§ 11-9-105(b)(1)] and yet another section provides penalties for the employer who willfully discriminates against an employee for filing a claim for benefits. [§ 11-9-107]. Hence, the legislature recognized the likelihood of retaliatory actions by employers and provided the measures to penalize such actions. Those remedies do not include the action now before us and it is not within our power to create it.

The comments of Justice Robert C. Underwood of Illinois[1] in reference to judicial self-restraint are especially apt:

> It is only stating the obvious to say that it is fundamental in our system of government that the law-making function is vested in the legislative branch. The majority's intrusion into the legislative field in this case typifies the lack of judicial self-restraint which has been a source of concern and comment throughout our history. Mr. Chief Justice Marshall spoke to it as follows: "[The judicial] department has no will in any case.
> * * * Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose

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[1] *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172 384 N.E.2d 353 (Ill. 1978).

of giving effect to the will of the legislature; or in other words, to the will of the law." (*Osborn* v. *Bank of United States* (1824), 22 U.S. (9 Wheat.) 738, 866, 6 L.Ed. 204, 234.) It is essential to a preservation of the separation of powers that those of us who serve in the judicial branch subordinate our desires and preferences to the actions of the legislative and executive branches as long as those are expressed in constitutional terms.

Mr. Justice Harlan, dissenting in *Wesberry* v. *Sanders* (1964), 376 U.S. 1, 48, 84 S.Ct. 526, 551, 11 L.Ed. 481, 509, phrased it thus:

> The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

I would reverse and dismiss.

Special Justice Alan D. Epley joins in this dissent.

ROBERT L. BROWN, Justice, dissenting. Though I recognize an exception to the at-will doctrine for firings caused by filing a worker's compensation claim, the exception should not govern the facts of this case where a claim had not been filed at the time Pam Baysinger was fired. Baysinger was terminated because, regrettably, she could no longer do the work due to a back injury. The result was harsh and arguably unfair, but that was the reason for her firing. The majority engages in complete speculation when it holds that her firing was tied to an "anticipated" worker's compensation claim.

As in the case of *Mapco, Inc.* v. *Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991), there was no substantial evidence, circumstantial or otherwise, of motive or intent by Wal-Mart to violate the public policy of this state as set out in Ark. Code Ann. § 11-9-107 (1987). By this decision and *Mapco*, however, this court, as a practical matter, has embraced a theory of strict liability when it

comes to worker's compensation claims and employee terminations, regardless of the extenuating circumstances. To uphold the public policy of this state is one thing. To find a violation of that public policy simply premised on the juxtaposition of two events — the filing of the claim and termination — goes too far. Some evidence of intent or motive to violate the state's public policy must be shown.

But the facts in this case also differ in a major respect from those in *Mapco*. Here, Baysinger's firing *preceded* the filing of her claim. After she was terminated, Wal-Mart could in no way obstruct or impede her claim under Ark. Code Ann. § 11-9-107. She was completely free to pursue her claim or not. To hold that somehow the firing did obstruct her claim does not logically follow.

The majority cites as sole authority for its conclusion a North Carolina case that a firing before a claim was filed amounted to retaliation by the employer. *See Wright* v. *Fiber Industries, Inc.*, 299 S.E.2d 284 (N.C. App. 1983). Though I disagree with that holding for reasons already stated, I further note that the North Carolina statute setting out the state's public policy is decidedly different from our own. The North Carolina statute creates a civil remedy and specifically prevents discharges and demotions because an employee has instituted or caused to be instituted a claim. N.C. Gen. Stat. Sec. 97-6.1 (1985). Our statute, on the other hand, is a criminal statute and speaks only of obstructing and impeding the filing of claims.

To hold that Baysinger's firing was in retaliation for some future claim she might file constitutes a conjectural leap I cannot make. The public policy exception is not appropriate for the facts of this case.

I respectfully dissent.

HAYS, J., joins.

ALAN D. EPLEY, Special Justice, dissenting. I join in Justice Hays' dissent. It occurs to me that since the public policy of the state is set forth in its constitution and statutes, the appellee, Mrs. Baysinger, is also bound by the public policy set forth in Arkansas Code Annotated § 11-9-107 (1987). That public policy is (as Justice Hays states) that it is the policy of this state that all

actions for damages on account of injury between employer and employee are the exclusive province of worker's compensation, except where the employer fails to secure the payment of compensation. The majority opinion does not address this conflict in the public policy of the state.

However, I further dissent from the majority opinion finding substantial evidence to support the verdict of the jury.

It has been said that hard cases make bad law. I think this is a hard case. The majority opinion attempts to find evidence that the public policy of the State has been violated when an employer states on an exit interview form that he was told by the physician that continued exposure to this type of work could lead to more serious injury for the claimant. The physician (according to the majority) testified that he had no recollection of saying such a thing. Earlier in the opinion the majority interprets the testimony of Dr. Holder to be that he flatly did not advise Mr. Mika that continued exposure to this type of work could lead to more serious injury. Either way, how this fact has any logical bearing on this case has not been demonstrated by the majority. The only connection the appellee has been able to establish factually, in my opinion, is the contact between Mr. Mika and Mr. Scissors, the CSI representative. But a review of the testimony of both Mr. Mika and Mr. Scissors does not reveal any facts supporting the contention that the appellee's firing was in retaliation for filing a worker's compensation claim. The suggestion of Mr. Scissors was that if the employer could not find lighter work for the employee to do, then her employment should be terminated. The employer adopted this advice. But this does not provide evidence to substantially support the jury verdict. The evidence in this case and certainly the subsequent testimony of Doctor Holder indicates that it would be reasonable for anyone to conclude that if Mrs. Baysinger continued in her work of heavy lifting, that she would risk suffering a permanent and possibly debilitating injury. The evidence in this case which I feel is substantial is that the employer discharged Mrs. Baysinger before she suffered permanent injury. Even though she received worker's compensation payments, there is no substantial evidence that she was fired because of that fact. There is no public policy in this state that requires an employer to keep an employee whom the employer recognizes has become physically unsuited for a job. The distinc-

tion attempted here is that in a case such as this, the evidence of the plaintiff must prove that the discharge was in retaliation for a worker's compensation claim, and not to keep the employee from suffering further injury attempting to do the work. The majority suggests that the employer acted too quickly and without sufficient medical information about the appellee's condition and apparently cites these opinions as facts supporting the jury's verdict. There is nothing in the record, either expert testimonies or otherwise, that indicates that the speed with which the decision to terminate was made is substantial evidence supporting the jury's decision. In fact, the record reflects that the decision was not made until after a search for another job was made by the employer and after telephonic consultation by the employer with the treating physician. The record is clear that the physician advised that the appellee was no longer physically able to accomplish her former work. There is no substantial evidence in this record that Mrs. Baysinger's firing was related to her claiming worker's compensation benefits.

The evidence required of the employee in such a case as this must show, in the language of Arkansas Code Annotated § 11-9-107 (1987), that the employer has "willfully discriminate(d)" in regard to the tenure of work of the employee. It is my opinion that the record only demonstrates slight evidence of willful discrimination on the part of the employer against the employee and no evidence at all that the discharge was because of the past filing of worker's compensation claims. Therefore, in my opinion, the case should be reversed.

I agree with that portion of the majority opinion addressing the issues regarding jury selection raised by the appellant.

Robert Lee FELLOWS *v.* STATE of Arkansas

RC 91-32 810 S.W.2d 338

Supreme Court of Arkansas
Opinion delivered July 1, 1991

John R. Hollis, for appellant.

No response.

PER CURIAM. Petitioner, Robert Lee Fellows, by his attorney, John R. Hollis, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to his failure to timely file the record in this court. *See* Ark. R. App. P. 5(a).

We find that such failure, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our per curiam opinion *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979); *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. *In re: Belated Appeals in Criminal Cases, supra.*

James HARRIS, et al. *v.* Kenneth ROBERTSON, et al.

91-66 813 S.W.2d 252

Supreme Court of Arkansas
Opinion delivered July 8, 1991

Ian W. Vickery, for appellants.

Compton, Prewett, Thomas & Hickey, by: *William I. Prewett*, for appellees.

ROBERT H. DUDLEY, Justice. In this appeal of a boundary line dispute, we set aside a finding of fact by the chancellor and hold that the boundary line was established by acquiescence.

The facts, as viewed in the light most favorable to the appellees, are as follows. Gary and Brenda Stratton acquired eleven (11) acres of land about four (4) miles north of El Dorado in 1975. They lived in the house located on the eleven-acre tract for only a short time before they decided that they wanted a new house. In planning to build the new house they decided to divide the eleven-acre tract by selling three (3) acres, which included the existing house, and retaining the other eight (8) acres on which to

build their new house. They offered to sell the existing house and three acres through a realtor. In 1977, Kenneth and Virginia Robertson accepted the offer. At this time there was no legal description of the three-acre tract. Consequently, Gary Stratton and Kenneth Robertson walked over the land, agreed on the boundaries, and fixed all corners and turning points with iron pins. The Strattons next hired a surveyor, F.M Methuin, and requested that he determine the legal description of the three (3) acres according to the location of the iron pins. The surveyor completed his work in April of 1977 and gave the parties a legal description that was used in the warranty deed from the Strattons to the Robertsons. Unfortunately, the legal description was in error and did not describe the tracts according to the agreed line. It described the three-acre tract as extending about fifteen (15) feet into the eight-acre tract on the west side and as extending a few feet into the eight-acre tract on the north side. At the time, however, no one knew of the error in the deed.

In 1983, the Strattons sold their eight-acre tract to the Evanses. The boundaries were again represented as being the iron pins. The Stratton's deed to the Evanses described the eleven (11) acres but excepted the three (3) acres deeded to the Robertsons. Thus, the Evanses' deed contained the same error. In 1988, the Evanses conveyed the eight-acre tract to James and Sandra Harris. The Harrises used the same description but also thought the iron pins represented the boundaries. Soon thereafter, the Harrises decided to build a fence on the boundary line as marked by the iron pins. They set fence posts along the line between iron pins and began construction of the fence.

The Robertsons apparently thought that some of the fence posts extended past the iron pin line and onto their property. They employed a surveyor, Ted Pill, to shoot a line for the posts. Mr. Pill's measurements showed that some of the fence posts were a little out of line according to the iron pins, but that according to the legal description, the Harrises were fifteen (15) feet over onto the Robertson's land. The Harrises repositioned the fence posts to be on the iron pin line.

The Robertsons then employed another surveyor, Samuel Ball, to conduct a complete survey of their property and plot the results. He entered the bearings and distances in a computer

plotter and found the line as described in the deeds was in fact about fifteen (15) feet west of the line established by the pins. He testified that the first surveyor who set out the original metes and bounds description of the three-acre tract made an error in computing the angles and that caused the difference. In 1988, the Robertsons sued the Harrises and asked for the removal of the fence on the iron pin line. The chancellor held that the description in the deed prevailed over the iron pin line and ordered the fence removed.

[redacted] In *Seidenstricker* v. *Holtzendorf,* 214 Ark. 644, 217 S.W.2d 836 (1949), this court set out rather completely our law on boundaries by acquiescence. We wrote:

> Acquiescence, by owners of adjoining lands, in a boundary line, as shown by a division fence, for more than seven years will ordinarily confirm the boundary line as thus located, even though the fence may not be placed on the true line between the tracts.
>
> In the case of *Gregory* v. *Jones,* 212 Ark. 443, 206 S.W.2d 18, dealing with a question similar to the one involved here, we said: "In *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S.W. 706, Mr. Justice Riddick, in sustaining a long-existing boundary between adjacent owners, quoted the classic language of Hon. U.M. Rose, as found in *Cunningham* v. *Brumback*, 23 Ark. 336: ' . . . better that ancient wrongs should be unredressed than that ancient strife should be renewed.' *Robinson* v. *Gaylord*, 182 Ark. 849, 33 S.W.2d 710, is another case in which an old line was sustained, even against a new survey. Appellee argues that the original rail fence line was established by a mutual mistake and should be changed to the 1946 line, and cited *Randleman* v. *Taylor,* 94 Ark. 511, 127 S.W. 723, 140 Am. St. Rep. 141, as authority for such contention. Furthermore, appellee says that there was no *dispute* prior to the establishing of the rail fence line, so—appellee says—the rule stated by Chief Justice Hart in *Robinson* v. *Gaylord*, *supra,* and restated in *Peebles* v. *McDonald,* 208 Ark. 834, 188 S.W.2d 289, does not apply to this case. It is true that in this case the original rail fence line was

established without a prior dispute as to boundary; but the recognition of that line for the many intervening years (34 in this case) shows a quietude and acquiescence for so many years that the law will presume an agreement concerning the boundary. In *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S.W. 649, there had been no dispute prior to the establishment of the fence line which had been accepted as the common boundary for many years; and in that case Justice McCulloch, speaking for this court said: 'The proprietors of adjacent lands may by parol agreement establish an arbitrary division line, or an agreement may be inferred from long-continued acquiescence and occupation according to such line, and they will be bound thereby.' So in the case at bar the recognition of a common boundary for a long period of time is evidence of agreement and acquiescence, which may well exist without the necessity of a prior dispute. See 8 Am. Juris. 804. As stated in the annotation in 69 A.L.R. 1491: '. . . where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time, . . . they and their grantees are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although such line may not be in fact the true line according to the calls of their deeds.' "

The proof in this case established that the parties and their grantees acquiesced in the boundary set out by iron pins for longer than seven (7) years. Accordingly, we reverse the chancellor and remand this case for entry of a decree consistent with this opinion. That decree must locate the boundary by description. In *Rice* v. *Whiting,* 248 Ark. 592, 452 S.W.2d 842 (1970), we explained that where a boundary line is involved, the decree, the permanent record, should describe the line with sufficient specificity that it may be identified solely by reference to the order and without reference to a plat which may not be in existence in a few years.

As stated at the beginning of this opinion, we are setting aside a finding of fact by the chancellor. We only do so when such a finding is clearly erroneous. ARCP Rule 52 (a); *Kinghorn* v. *Hughes,* 297 Ark. 364, 761 S.W.2d 930 (1988). The chancellor in

this case based his ruling on the specific finding that:

> Defendants have not proven that when plaintiffs acquired the property from the Strattons that the grantors and grantee intended that the boundary lines of the property be fixed by the iron pins.

Because we give such deference to a Chancellor's finding of fact, we set out some of the testimony that causes us to reverse the finding. Gary Stratton, the grantor who divided the eleven (11) acres testified:

> Q: Okay. Now, if you would, tell the Court if you had the occasion to meet with the Robertsons or either of them on the property to discuss the terms of the sale?
>
> A: Yes, we did.
>
> Q: More than once?
>
> A: Pardon?
>
> Q: More than once?
>
> A: I recall one time—yes, more than once.
>
> Q: And I suppose at that time you had not already decided exactly where the three (3) acres would be. Is that right?
>
> A: Not exactly, no, sir.
>
> Q: And during the course of your negotiations did you determine where you wanted the corners of that property to be located?
>
> A: Yes. Mr. Robertson and myself discussed it.
>
> Q: And as a result of those discussions, did you actually decide where the corners were to be located?
>
> A: Yes.
>
> . . .
>
> Q: So the pin was to be set to the west so that he would retain the oak tree?
>
> A: That's correct.

Q: Then you walked back to where?

A: Well, to this pin here (indicating on survey).

Q: Okay, and then from there where?

A: Then marked this—this pin here (indicating on survey).

Q: Okay. And there were pins placed, as I understand it, on all these various corners?

A: Yes.

. . .

Q: Let me repeat the question then. Were your instructions to Mr. Methuin [first surveyor] with regard to this survey either to locate exactly where the stakes and pins were in the ground and create a description from those pins, or was he to survey to determine where the pins should go?

A: No. I directed the surveyor to the pins myself and I asked him to survey the property according to those pins.

. . .

Q: Okay. Do you recall whether or not, when the property was surveyed in 1977, whether a boundary line was flagged and a path was cleared, consistent with what Mrs. Robertson recalled?

A: When the surveyors surveyed it, they flagged the line, yes?

Q: Okay.

A: And had to cut the brush out to make the survey, yes, part of it.

Q: And at the end of this flagged and cleared path, was an iron pin located, to the best of your knowledge? Is there an iron pin at the end of the . . .

A: Yes.

. . .

Q: Now, Mr. Stratton, now that you were neighbors, I guess one of the good things that came out of that was that you didn't have quite as much to mow, but if you would, would you tell the Court, what were the practices of you and what were the practices that you observed Mr. Robertson with regard to mowing down that imaginary line between those two pins?

A: I took care of what was mine and he took care of what was his.

Q: And was it basically a line that was between the two pins that chain link fence sat onto, as well?

A: Yes.

Q: And this continued to be the conduct of both the Robertsons and your family from 1977 until 1983 when you sold it?

A: Yes, sir.

(Tr. p. 111-117)

Kenneth Robertson, a plaintiff and an appellee, and a grantee of the three-acre tract who is now claiming the erroneous description controls, testified:

Q: Okay. Now, Mr. Robertson, were you aware at the time that you purchased the property in 1977 that there were iron pins placed at various corners to your three (3) acres?

A: I was, yes, sir.

Q: Can you tell the Court whether any corner, to the best of your knowledge, did not have an iron pin?

A: At the time, they all—they was all there.

. . .

Q: Okay. Tell the Court what you and Mr. Stratton did. Now, this was before you acquired the land?

A: Okay, he walked me to each corner, pointed it out to me, where the boundary lines was . . .

Q: Mr. Stratton took you to this point, this point, (indicating on survey)?

A: Yeah.

Q: And were there points up here, too? Up in the front?

A: Yes, sir.

Q: And so you just . . .

A: Well, yeah, they was . . .

Q: So either you or Mr. Stratton, or both of you, at some point had to decide where those corners were?

A: Yeah, he—we went to each corner.

Q: Okay.

A: I don't remember going right to the one on the front on the right, but to the west, and south, and the east, we went to them.

Q: And you went to those corners, and—was this before you bought the land? Or after?

A: It was while I was in the process of buying it.

Q: Okay.

A: I don't remember . . .

Q: So, it was probably after you'd showed some initial interest, but before you actually closed the deal?

A: Yeah, probably. Yes, sir.

Q: And at that time Mr. Stratton had put those pins in and the two of you walked to them and made sure you knew where they were, and those pins—what was the purpose of those pins as you understood it?

A: Supposed to have been the boundary lines.

. . .

Q: Okay. Now you know, I want to ask you something, Mr. Robertson. I mean, what I hear you saying is that if the legal description in your deed gives you a little more land,

then what Mr. Ball [surveyor] says, is what you want. Is that right?

A: Well, what Mr. Ball—according to Mr. Ball here, this is what I should have.

Q: Okay. And even though it goes beyond the pins, that's what you should have because that's what it says in the deed?

A: I should have on—what my deed says is what I want, and Mr. Ball has got it marked here right, and that's what I want and that's all, that's it.

(Tr. p. 89-92.)

Virginia Robertson, the other grantee of the three-acre tract, and a plaintiff below, testified:

Q: Okay, And do I understand your testimony correctly that the boundaries of this three (3) acres when you purchased it in 1977 were set by the placing of various iron pins between the various lines?

A: Yes.

(Tr. p. 101.)

Sandra Harris, one of the subsequent grantees of the eight-acre tract and a defendant below, testified:

A: We walked with Gary Stratton over the entire property — well, he showed us the pins that were placed, and then we walked the entire property ourselves.

Q: Okay. And did you find pins at all the corners?

A: Yes.

Q: And what, if any, understanding did you have as to how those pins set relative to the boundaries of the property?

A: It was my understanding that that was the property we were buying.

(Tr. p. 128.)

Samuel Ball, the surveyor who used the computer plotter,

found the iron pins still in place in 1988. He testified:

> A: The corners that I had were corners that were in place.
>
> Q: All right, they were already in place?
>
> A: Yes, sir.
>
> Q: The corners that you had and that you looked at at that time?
>
> A: Yes, sir.
>
> Q: And would you describe how those corners were in place?
>
> A: They were iron pipes that were driven into the ground.
>
> . . .
>
> Q: All right. Now, let me ask you a few questions, then. Your survey, which has been introduced as Plaintiffs' Exhibit Number 3, reflects that you did find fencing on certain of the boundaries, found iron pins, I believe, at all corners.
>
> A: Yes, sir.
>
> Q: Is that correct?
>
> A: Yes, sir.
>
> Q: And the fact that you found iron pins at all the corners is reflected on your survey by the FIP?
>
> A: It is.

(Tr. p. 60-67.)

Finally, there was no testimony from either of the parties that he or she had ever occupied any land over or across his or her boundary as established by the iron pins. In fact, on those the parts of the property which were mowed, each mowed up to the line established by the iron pins. The rest of the property was in the woods. Accordingly, we set aside the chancellor's finding of fact and reverse and remand for entry of a decree consistent with this opinion.

Reversed and remanded.

IN THE MATTER OF THE ESTATE OF Glenn W. SHARP, deceased

91-2 810 S.W.2d 952

Supreme Court of Arkansas
Opinion delivered July 8, 1991

Malcolm R. Smith, P.A., by: *Malcolm R. Smith*, for appellant.

Wright, Lindsey & Jennings, by: *Alston Jennings*, for appellee.

ROBERT H. DUDLEY, Justice. This is a proof-of-will case in which only one disinterested witness testified that the testator signed the will. The probate court admitted the will to probate. We reverse and remand.

The instrument offered as a will purportedly contained the testator's signature, and, although it did not contain an attestation clause, two (2) people signed it as witnesses. At trial, three (3) witness testified about the testator's signature. The first witness testified that he signed as an attesting witness and that he recognized the signature on the will as the testator's. The second witness, also an attesting witness, did not recognize the testator's

purported signature, and testified that she had no recollection of the will or of the events surrounding it. The third witness, who was not an attesting witness and who stood to gain all of the decedent's property if the will was admitted, testified that the signature on the will was the testator's.

Ark Code Ann. § 28-40-117(a) (1987) provides:

Proof of will.

(a) An attested will *shall* be proved as follows:

(1) *By the testimony of at least two (2) attesting witnesses,* if living at known addresses within the continental United States and capable of testifying; or

(2) If only 1 or neither of the attesting witnesses is living at a known address within the continental United States and capable of testifying, or if, after the exercise of reasonable diligence, the proponent of the will is unable to procure the testimony of two (2) attesting witnesses, in either event the will may be established by the testimony of at least two (2) credible disinterested witnesses. The witnesses shall prove the handwriting of the testator and such other facts and circumstances, including the handwriting of the attesting witnesses whose testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence. [Emphasis added.]

[redacted] This statute means that at least two (2) attesting witnesses, if competent and available, are required to prove the signature of the testator. *Children's Mercy Hosp.* v. *Chick,* 262 Ark. 520, 559 S.W.2d 3 (1978).

[redacted] The probate judge was aware that the will was not proved by the two (2) attesting witnesses as required by the statute but found that there was a presumption of proper execution under our case of *Anthony* v. *College of the Ozarks,* 207 Ark. 212, 180 S.W.2d 321 (1944). While we appreciate the difficulty the probate judge had in understanding that case, we think she misinterpreted it. It was decided before the present Probate Code was adopted. At that time, the statute setting out

the mode or method of execution of a will, while not identical, was similar to today's statute. Compare section 14512 of Pope's Digest with Ark. Code Ann. § 28-25-103 (1987). However, the statutes providing for proof of a will were different. Compare sections 14535, 14536, and 14537 of Pope's Digest with Ark. Code Ann. § 28-40-117(a) (1987). With those differences in mind, the case can now only stand for the proposition that once the signing of a will is proven by the two (2) attesting witnesses, and there is no suggestion of fraud or undue influence, there is a presumption that the testator declared to the attesting witnesses that the instrument was his will; and that he either signed in front of them or acknowledged to them his signature on the instrument; and that the attesting witnesses signed at the request of and in the presence of the testator. See Ark. Code Ann. § 28-25-103 (1987).

Reversed and remanded.

Raymond J. BARRETT and Hallie B. Barrett *v.* POINSETT County, Arkansas

91-18 811 S.W.2d 324

Supreme Court of Arkansas
Opinion delivered July 8, 1991

Bill Bristow, P.A., for appellants.

L.D. Gibson, for appellee.

STEELE HAYS, Justice. This appeal is from a grant of a summary judgment motion for the government on a claim for inverse condemnation. We affirm the trial court.

Raymond and Hallie Barrett, appellants, own land in Poinsett County, Arkansas. They entered into a contract on November 17, 1986, with the governments of various cities in Craighead County aligned in an entity calling itself the "Northeast Arkansas Regional Solid Waste Disposal Authority." The Barretts were to sell the Poinsett County land to the Authority for use as a landfill for Craighead County. Under the agreement the Authority acquired an option to purchase the property for a price of $750,000. The option expired after March 31, 1987.

Appellants allege that Poinsett County was opposed to using land in its county as a solid waste disposal landfill, and so in response to the Barrett contract, Poinsett County passed a zoning ordinance in December of 1986, preventing any property in the township in which the Barrett land was located from being used for landfill purposes.

On January 15, 1987, the Barretts filed suit in Poinsett County contending that the ordinance in question was illegal and seeking a permanent injunction to prevent the effect of said ordinance. However, while suit was pending, and before closing of the sale pursuant to the terms of the Barrett contract, the Arkansas legislature passed legislation preventing one county from placing a landfill operation in an adjoining county without the consent of the receiving county.

In November 1987, appellants filed an amended petition for declaratory judgment, injunctive relief and damages, claiming there had been a temporary taking of the Barretts' land by Poinsett County. Appellants contend the Poinsett County action enacting the ordinance delayed the closing of their contract by an illegal spot zoning ordinance; that if it had not been for the

Poinsett County ordinance, appellant would have completed their transaction with the Authority prior to the legislative action.

On November 28, 1989, the trial court rendered its judgment. The court assumed for the purpose of the ruling that the zoning ordinance of Poinsett County was unconstitutional. However, the court found the facts did not give rise to inverse condemnation, and that the only other cause of action that might arise would be a tort action for interference with contractual relations which could not prevail because Poinsett County would be protected by governmental immunity.

■ From that order, appellants bring this appeal. They challenge only the trial court's finding that there was no inverse condemnation. While we do recognize a cause of action for inverse condemnation under appropriate circumstances, *see Robinson* v. *City of Ashdown,* 301 Ark. 226, 783 S.W.2d 53 (1990), we find the trial court correctly granted summary judgement for appellees in this case.

It is not clear from the trial court's order whether it found there was no cause of action because of the nature of the injury or simply because the injury was not extensive enough to constitute a taking. While it may be debatable that there is no cause of action for the type of injury suffered, *see* 4 J. Sackman, *Nichols on Eminent Domain* § 13.33 (1985), it is not necessary for us to decide that question, as it is clear that any injuries sustained were not sufficient to support an action for inverse condemnation.

■ The United States Supreme Court has held that when there was total diminution in value, a taking through police power regulations occurred. *Pennsylvania Coal Co.* v. *Mahon,* 239 U.S. 394 (1915). However, regulations affecting less than all of the use or all of the value of property, remain to be considered on the particular circumstances of each case. *Pennsylvania Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978). So in *Pennsylvania Central, supra,* the governmental regulation restricting the use of air space above the train terminal, where it simply prohibited the owners or others from occupying certain features of that space while allowing them to use gainfully the remainder of the parcel was not sufficient damage to constitute a taking. In similar cases, we have held that a much greater reduction in value or use of the property than is present here

would not constitute a regulatory taking. *See e.g. Winters* v. *State,* 301 Ark. 127, 782 S.W.2d 566 (1990); *J.W. Black Lumber Co.* v. *Ark Dept. of Pollution Control & Ecology,* 290 Ark. 170, 717 S.W.2d 807 (1986).

No reduction in the $350,000 valuation of appellants' land has been shown, or even alleged, only the lessening of one profitable use of the property. Appellants had been using the land for agricultural purposes, continued to use it in that manner during these legal proceedings, and still had available in the future all other possible uses. Given the facts and circumstances this case when set against the standards previously laid down on damages for inverse condemnation, we must agree with the trial court that any injury sustained here was not sufficient to support appellants' cause of action.

Affirmed.

GLAZE, J., concurs.

Jack BANKS *v.* STATE of Arkansas

91-84 813 S.W.2d 257

Supreme Court of Arkansas
Opinion delivered July 8, 1991
[Rehearing denied September 9, 1991.]

William R. Simpson, Jr., Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. In the Circuit Court the State charged the appellant, Jack Banks, a juvenile, with four offenses: (1) aggravated robbery, (2) attempted capital murder, (3) theft of property valued at less than $200, and (4) fleeing from arrest. Banks was 14 years old at the time the alleged offenses occurred and 15 when the proceedings which are the subject of this appeal occurred. Only one of the offenses charged, aggravated robbery, is listed in Ark. Code Ann. § 9-27-318(b)(1) (Repl.1991) as an offense with respect to which a prosecutor may charge a juvenile in a circuit court as opposed to a juvenile court.

On the basis that all of the offenses were alleged to have occurred in the same episode or course of conduct, the Circuit Court retained jurisdiction of all of the offenses charged but stated that verdict forms would not be given to the jury on the fleeing and theft charges. The Court reserved decision as to whether a verdict form would be submitted to the jury with respect to the attempted capital murder charge. The question presented by Banks' appeal is whether the offenses should all have

been transferred to the Juvenile Court and, if not, whether it was proper for the Circuit Court to retain jurisdiction of any charge not listed in § 9-27-318(b)(1).

We hold the Circuit Court should have dismissed the charges of offenses not listed in § 9-27-318(b)(1) for lack of jurisdiction. We remand the case for a second hearing on whether the aggravated robbery charge should have been transferred to the Juvenile Court.

The decision of the Circuit Court to retain jurisdiction of all the charges against Banks was made at the conclusion of a hearing on Banks's motion to transfer all the charges to the Juvenile Court. In response to the Court's inquiry the prosecutor stated the facts to be proved by the State.

Larry Ball and Eric Coffman were using the pay telephone at a shopping center parking area. They saw two young black men in this same parking lot standing outside a car. While Ball and Coffman were walking back to their car, they were approached by Banks and Andrew Harris. After some conversation, Harris pushed Coffman and ripped a gold chain from Coffman's neck and struck Coffman in the mouth with his fist. Harris and Banks ran back to their car. Banks pulled a shotgun from the car and brandished it toward Ball and Coffman.

Ball and Coffman drove their car to another parking lot where they found Officer King. They told King what had happened, and King turned on his blue lights and approached the car being driven by Banks in which Harris was a passenger. Banks and Harris sped away, and King gave chase. Harris repeatedly fired a shotgun at King's police vehicle. The chase ended when Banks lost control and King's vehicle collided with the car being driven by Banks. King had ducked down in the seat of his car to avoid the shotgun fire at the conclusion of the chase. Banks and Harris were caught by other officers who had arrived at the scene about the time of the crash.

1. Jurisdiction

The jurisdiction of the Juvenile Court is prescribed in Ark. Code Ann. § 9-27-306 (Repl. 1991). The parts of that law relevant to this case provide:

> (a) The juvenile court shall have exclusive original jurisdiction of and shall be the sole court for the following proceedings governed by this subchapter:
>
> (1) Proceedings in which a juvenile is alleged to be delinquent or dependent-neglected as defined in this subchapter; . . . .

"Juvenile" is defined in Ark. Code Ann. § 9-27-303 (Repl. 1991) as follows (relevant part only):

> "Juvenile" means an individual who:
>
> (A) Is under the age of eighteen (18) years, whether married or single;

"Delinquent juvenile" is defined in Ark. Code Ann. § 9-27-303(11) as:

> any juvenile ten (10) years or older who has committed an act other than a traffic offense or game and fish violation which, if such act had been committed by an adult, would subject such adult to prosecution for a felony, misdemeanor, or violation under the applicable criminal laws of this state.

The proceedings in this case were not ones in which a juvenile was "alleged to be delinquent." Therefore, we cannot say the Juvenile Court had exclusive jurisdiction of the charges solely on the basis of § 9-27-306. Looking further, however, we find Ark. Code Ann. § 9-27-318(b)(1) (Repl. 1991) which provides:

> When a case involves a juvenile age fourteen (14) years or fifteen (15) years at the time the alleged delinquent act occurred, the prosecuting attorney has the discretion to file charges in circuit court for an alleged act which constitutes capital murder, murder in the first degree, murder in the second degree, kidnapping in the first degree, aggravated robbery, or rape.

Although not yet codified, Act 903 of 1991 added first degree battery to the list.

[redacted] Reading §§ 9-27-306 and 9-27-318(b)(1) together, it becomes clear to us that the Juvenile Court has exclusive jurisdiction of all of the offenses charged against a juvenile with

the exception of those listed in § 9-27-318(b)(1). Thus, the only offense charged against Banks of which the Circuit Court could properly retain jurisdiction was aggravated robbery.

The authorities cited by the State include *Robidoux* v. *Coker,* 383 So.2d 719 (Fla App. 1980). There, the Florida Court of Appeals, considering a juvenile code similar to ours dismissed charges not listed among those for which a juvenile could be tried as an adult. The Florida law permitted trial as an adult of a juvenile charged with an offense punishable by death or life imprisonment. The juvenile was charged with armed robbery, attempted murder, and aggravated assault. Armed robbery was punishable by life imprisonment or death, but attempted murder and aggravated assault were not. In dismissing the latter two charges, the Florida Court of Appeals wrote:

> While it might be more convenient to dispose of all three counts involved herein in one judicial proceeding in the adult division, we do not believe the fact that the attempted murder and aggravated assault charges arose out of the same incident as the life felony charge of armed robbery is sufficient to allow adult jurisdiction.

The only other cases cited by the State on this point are from California and North Carolina. *Matter of Shanea J.,* 198 Cal. Rptr. 228 (Cal. App. 2d Dist. 1984); *Matter of Ford,* 272 S.E. 2d 157 (N.C. App. 1980). The State concedes they are not on point because the juvenile codes in those states are not like the Arkansas Juvenile Code. They provide for concurrent jurisdiction of juvenile and other courts.

In the course of discussing the ruling, the Trial Court referred to *Britt* v. *State,* 261 Ark. 488, 549 S.W.2d 84 (1977), as his basis for keeping jurisdiction of all the charges but permitting the jury to consider only one or two of them. The *Britt* case stands for the proposition that when the acts charged against a defendant do not constitute a continuing course of conduct they may be charged separately. The case has no application to these facts, as we have no doubt that aggravated robbery, fleeing, and attempted capital murder, as charged, were not part of a continuing offense like non-support and promoting prostitution, the examples given in the *Britt* case. We also have held that theft and aggravated robbery may both be charged because they are separate crimes,

having separate elements, even though they may have been committed at the same time. *Higgens* v. *State,* 270 Ark. 19, 603 S.W.2d 401 (1980). We are unaware of any decision of this Court which would require all of these offenses to be tried together, and even if there were such a decision, it would not alter our conclusion on the jurisdiction question.

As the Circuit Court lacks jurisdiction of all of the offenses charged other than aggravated robbery, they must be dismissed.

2. Transfer

Banks asks that his case be transferred to Juvenile Court. Given our conclusion that the attempted capital murder, fleeing, and theft charges must be dismissed, that leaves only the aggravated robbery charge as the subject of Banks's request. His argument for transfer is three-fold. First, he notes that the Circuit Court insisted that to sever the aggravated robbery from the other charges would leave each of the courts with an incomplete view of the incident. Trying all charges in Juvenile Court would cure that problem. Second, he contends that the Circuit Court had before it his counsel's "proffer" of evidence that he is an immature first offender who accompanied an older person, age 16, of low mental ability on the escapade, and the State presented no evidence other than the violent nature of the crime charged. Although Banks is alleged to have brandished a weapon, it is not alleged that he did any of the shooting. Third, he argues the trial court retained jurisdiction on the basis that the prosecutor had the right to bring charges in Circuit Court rather than on the basis of the criteria stated in Ark. Code Ann. § 9-27-318(e) (Repl. 1991) as follows:

> In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:
>
> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past

efforts to treat and rehabilitate the juvenile and the response to such efforts; and

(3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Subsection (f) provides: "Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect."

At the hearing on Banks's motion, Banks's counsel had assembled witnesses to testify with respect to the items addressed in § 9-27-318(e). The Court refused to hear the testimony.

MR. MARCZUK [defense counsel]: Your Honor, I was hoping not to only get counts two, three and four transferred because — He was involved obviously allegedly by the State's facts in this aggravated robbery. But I was hoping to put on these witnesses today to try to talk you into transferring the whole thing to Juvenile.

THE COURT: I understand what they're here for. They want me to transfer this to Juvenile because he's a pretty good kid and he's a pretty good bet and he hasn't been in trouble before and all that sort of thing. But that's not my function. My function is to decide whether or not the prosecutor has the right to try to prosecute them in Circuit Court and to punish them accordingly as adults. That is a discretionary thing and it's not—It's not an absolute thing that the Court can deny. And I'm inclined to permit that when the prosecutor feels it's appropriate in a case, absent some testimony to the contrary. And I will listen to what they have to say. But I'm going to be more inclined to grant it on the basis of lack of substantive proof rather than just what some friends and neighbors and teachers and counselors think would be in the best interest because I see that as just as bias on that part as it is a bias on the prosecutor's part. They want to punish them as adults and they think that there's an opportunity to salvage them.

But you've got some rather serious criminal conduct alleged here. And, if he is guilty, then I don't find anything wrong with him being punished as an adult. If he's not

guilty, then you've got another matter. If they find him not guilty, then what would be — Suppose I submit only the aggravated robbery to the jury and they find him not guilty of that. And there's a possibility of that under the facts of this case. Then would you want to transfer the other lesser included or underlying conduct to Juvenile and let him plead guilty to those out there? Of course not. You're going to say jeopardy's attached.

So what I see, Lou, is not what's necessarily good for you nor not what's necessarily good for the State. I see a responsibility on the part of the Court to take the facts as they may be developed here and see where there's wrong, if there is wrong, and to get all this young man's exposure into one ball of wax. If he beats the aggravated robbery, he may walk free. If he doesn't, he may get some punishment.

So, I don't want to — I'm not going to tell you you can't put these people on and have them testify. But I've considered everything that you've told me that they would testify in this to already.

MR. MARCZUK: Well, I would like to have — Well, if I can paraphrase, they are going to say he's of borderline mental capabilities.

THE COURT: Now, wait a minute. I'm not going to listen to that. If you want to tell me he's not guilty by reason of mental defect or disease, then fine. But, now, if you're — I'll have to enter an Act Three and we'll get him examined. On the other hand, if they're going to say he's borderline mentally retarded, that is not a defense. And I wouldn't listen to it on a motion to transfer because Mrs. LaRue should have the opportunity to come in and have an Act Three done and say, "Well, he's responsible." And I don't intend to demean that at all. But you know, Lou, that we've got people with I.Q.'s of fifty in the Department of Correction for life. And, you know, that's a sad and unfortunate fact. I don't know what his I.Q. is.

But the Court is not — The Court is not impressed with, "Don't send me to the penitentiary for killing this man because I've got an I.Q. that's dull." It is not

justification that you have a dull I.Q. in murder or rape or robbery or kidnapping or what have you. It's just not. Total incompetency is. But dullness in not.

I would not hear that without Mrs. LaRue having a chance to rebut it on a motion to transfer to Juvenile. Now, if you want me to hear it, I'll be glad to. And I'll be glad to have Dr. White test him or whatever you want to do.

MR. MARCZUK: Well, I understand the position you're in. But, just reading from the statute here — I know you know the statute and you've had a chance to refresh your memory — you're supposed to make your decision based on the prior history, the repetitive nature of it, the violence of the crime obviously. And, then, after you've heard this evidence, if it's clear and convincing that he should be tried as an adult, then you make your order. That's why I brought all these folks today.

THE COURT: And I have heard all that testimony. You have told me this is the only time he's been in trouble. Right?

Okay. I've heard that.

You've told me that all these counselors and all these people out here think he's a fine guy. He's a little bit slow, a little bit dull. But they think that he would be better served if it were transferred to Juvenile. Right?

MR. MARCZUK: Yes, sir.

THE COURT: Okay, I've heard that. I've denied it. I think that under the facts and the circumstances in this case, if they are as Mrs. LaRue says and if she can prove that, then she has a right and I'm going to permit her to try and convince a jury to send him to the Department of Correction. I don't know for how much. Maybe only aggravated robbery. But I am at this point willing to let her have the entire events and circumstances developed in order to show what happened out there.

While the Court's remarks were unclear, it is apparent the decision was made on the basis that the issue being considered was whether there was strong proof of aggravated robbery rather

than the statutory criteria for transferring the case to Juvenile Court about which the witnesses might have testified. Some of the Court's remarks indicate the conclusion that the prosecutor's discretion in charging the case in Circuit Court is absolute. If the latter was the basis of the Court's decision, it was erroneous. In *Pennington* v. *State,* 305 Ark. 312, 807 S.W.2d 660 (1991), we held that such deference to the discretion of the prosecutor "defeats the purpose of of the Arkansas Juvenile Code which recognizes the need for careful, case-by-case evaluation when juveniles are charged with criminal offenses."

In *Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502 (1991), this Court held that a circuit court could decline to transfer a charge of first degree murder to a juvenile court if, after considering the statutory criteria, the court, in its discretion, found clear and convincing evidence that the juvenile should be tried as an adult. The only evidence presented by the State was the charge which evinced the seriousness of the offense alleged and the violent nature of it. The difference between the *Walker* case and this one is that there the Trial Court listened to the evidence presented by Walker and made the decision on the basis of the statutory criteria. Here, although the court acknowledged the presence of the witnesses and said what he thought they would say, the evidence was not heard. Rather than hearing testimony on the statutory criteria for transfer, the Court made the references quoted above.

[redacted] We decline to order the case transferred to the Juvenile Court because, given the abuse of discretion standard this Court applied in the *Walker* case, we cannot say that case clearly should have been transferred. The trial court should, however, have made a decision whether to transfer only after hearing evidence relating to the statutory criteria. We, therefore, remand the case for another hearing.

Reversed and remanded.

Phillip QUALLS *v.* STATE of Arkansas

CR 91-52 812 S.W.2d 681

Supreme Court of Arkansas
Opinion delivered July 8, 1991

Paul J. Teufel, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. An undercover policewoman purchased crystal methamphetamine, a controlled substance, from Phillip Qualls at a residence occupied by Qualls. Officers who subsequently searched Qualls's room found him in possession of $580, drug paraphernalia, more crystal methamphetamine, and a photograph of Qualls, on a bed in his room where the drugs were found, surrounded by stacks of money with a caption written on the back, "It's mine, mine, all mine." Qualls was convicted as an habitual offender of delivery of a controlled substance, possession of a controlled substance with intent to deliver, possession of drug paraphernalia with intent to use, and manufacturing a controlled substance.

Qualls contends the photograph was erroneously admitted into evidence. We hold the Trial Court did not abuse its discretion in finding that it was relevant and that its probative value was not outweighed by its prejudicial effect. Qualls also makes alternative arguments that the trial court failed to rule on an issue as to his competency or failed to find his counsel ineffective at a hearing on his new trial motion conducted pursuant to Ark. R. Crim. P. 36.4 which has since been superseded by Rule 37.1. We hold there was no reason for the Trial Court to have ordered a competency examination and there is no evidence that Qualls's counsel were ineffective. The judgment is affirmed.

1. The photograph

Qualls moved in limine to exclude the photograph. The motion was denied. The State contends the issue is not preserved for appeal because Qualls's appendix does not contain a copy of the photograph. We find no need for a copy of the photograph because the testimony in the appendix adequately describes it. *See* Rules of the Arkansas Supreme Court and Court of Appeals 9(d).

While Qualls argues lack of a "foundation" for admission of

the photograph, and the State says he is really arguing lack of "authentication." Neither was specifically argued to the trial court. We consider the issues to be whether the photograph was relevant and whether the Trial Court erred in not finding that its prejudicial effect outweighed its probative value.

a. Relevancy

Qualls argued to the trial court that the photograph was irrelevant because it had nothing to do with the drug transaction with which he was charged. The State pointed out that Qualls was charged with possession of other quantities of the drug with intent to sell and that the picture was indicative that Qualls was selling it for money. Qualls countered that the money could have come from any source and not necessarily from drug sales.

[redacted] The Trial Court's ruling on relevancy is entitled to great deference and will be reversed only if the Court abused its discretion. *Walker* v. *State*, 301 Ark. 218, 783 S.W.2d 44 (1990); *White* v. *Clark Equipment Co.*, 262 Ark. 158, 553 S.W.2d 280 (1977). According to Ark. R. Evid. 401, relevant evidence 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. *Walker* v. *State, supra.*

[redacted] There was no abuse of discretion. Qualls did not object to testimony that he was found to have $580 on his person when he was arrested. A picture of him with stacks of money in the room where he conducted at least one drug transaction is indicative that he was selling drugs there and that he intended to sell the quantity of drugs found by the police in that room.

b. Probative value versus prejudice

[redacted] Arkansas Rule of Evidence 403 gives a court the authority to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Undoubtedly the photograph was prejudicial, but the question is whether it could have been so unfairly prejudicial as to outweigh its probative value. Again, the decision was within the broad discretion of the Trial Court, *Walker* v. *State, supra; Bennett* v. *State,* 297 Ark. 115, 759 S.W.2d 799 (1988), and we find no abuse.

We find nothing unfair about the possibility that a juror might conclude that a person pictured in a room on a bed in the midst of piles of cash might be conducting a business there generating large amounts of money as illicit businesses tend obviously to do because of the unwillingness of participants to be traced to the transactions through other means of financing them.

While the probative value of the photograph was not great, especially when compared with the other evidence against Qualls, we do find any unfair prejudice to overbalance it.

2. Competency

Neither Qualls nor his counsel raised an issue as to Qualls's competency until, at a pretrial hearing, Qualls's counsel announced to the Court that Qualls had complained about his representation, wanted a continuance, and "he would also like to address the Court and request a motion for a mental examination . . . ." The Court enquired of counsel whether there was any "reason or any justification or any indication" that a mental examination would be appropriate. Counsel replied in the negative.

Qualls then addressed the Court and spoke about how he and his counsel had argued about the need for a continuance and for getting his bond reduced. The matter of a mental examination was not mentioned further.

[redacted] Qualls cites *Robertson* v. *State,* 298 Ark. 131, 765 S.W.2d 936 (1989), in support of his contention that it was improper for the court to decline to give a ruling on his competency. There was no call for a ruling. No motion was made, and no defense with respect to competency was raised.

3. Ineffective assistance of counsel

That leaves only the argument that the Court erred in overruling the motion for a new trial pursuant to now superseded Rule 36.4. The contention is that Quall's counsel was ineffective due to his failure to move for a mental examination or to get a ruling if the colloquy in the pretrial hearing could have been considered a motion.

When the problem between Qualls and his counsel was revealed at the pretrial hearing, the Court appointed another

lawyer as co-counsel to assist in Quall's defense. Yet another lawyer was appointed to represent Qualls with respect to his motion for a new trial.

The motion for a new trial stated no facts showing or tending to show Qualls was entitled to a new trial. The motion was thus defective at the outset. *Whitmore* v. *State,* 299 Ark. 55, 771 S.W.2d 266 (1989). Nothing was mentioned about the failure to grant a mental examination. The subject came up at the post-trial hearing on the motion. Qualls testified he had told his original lawyer that if he were sent to prison he would kill himself "down there". That was the only evidence even remotely suggestive that Qualls might not have been competent to stand trial or incapable of following the law at the time the offenses were committed.

We find no basis for holding that the new trial motion should have been granted due to ineffective assistance of counsel. Even if we were to hold that counsel's performance was deficient in some way, we could find no basis for holding that Qualls was prejudiced. *See Strickland* v. *Washington,* 466 U.S. 668 (1984). Affirmed.

HAYES and BROWN, JJ., concur.

HOLT, C.J., dissents.

ROBERT L. BROWN, Justice, concurring. I am unwilling to reverse the conviction in this case based on a verbal description of the photograph at issue. Had the photograph been part of the record before us and had it depicted what is described by the appellant, I would doubt its relevancy. Not having the photograph before us, however, places us in the posture of speculating, at least to some extent, as to its content. I therefore, concur in the result.

HAYS, J., joins.

JACK HOLT, JR., Chief Justice, dissenting. I do not agree with the majority that the photograph of Qualls in a room on a bed in the midst of piles of cash was relevant under A.R.E. Rule 402. The money could have come from any number of other sources. In any event, the question of relevancy should not be resolved by imagination or guesswork. The picture is simply not relevant to the facts of this case.

In addition, acceptance of this picture into evidence violates A.R.E. Rule 403 for its probative value does not outweigh the danger of unfair prejudice.

The majority acknowledges that "undoubtedly the photograph was prejudicial"; however, they explain away the prejudice by stating they find nothing unfair about the fact that a juror might conclude, by examination of the picture, that Qualls was conducting an illicit business.

My concern is not with the guilt of Qualls, as there is overwhelming evidence of his guilt of the crime charged. I am troubled as to what effect the picture of Qualls surrounded by piles of money had on the jury in regard to the assessment of his punishment.

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 question of relevancy and probative value of the introduction of the picture into evidence, we must consider not only what effect the picture had upon the jury's finding of guilt or innocence, but what effect, if any, it may have had upon the assessment of a forty-year sentence as punishment. Since the prejudicial effects of admitting this picture into evidence could well have affected sentence, I would either reverse and remand or order his sentence reduced to the minimum authorized by law. *See White* v. *State,* 298 Ark. 163, 765 S.W.2d 949 (1989).

STEWART TITLE GUARANTY *v.* Kenton TREAT

91-134 810 S.W.2d 953

Supreme Court of Arkansas
Opinion delivered July 8, 1991

Marian M. McCullan and *Roy E. Danuser*, for appellant.

Kerry D. Chism and *Donald Joe Adams*, for appellee.

TOM GLAZE, Associate, Justice. This is a title insurance case involving an erroneous property description contained in the mortgagee's insurance policy written by appellant Stewart Title Guaranty Company (Stewart Title). The title insurance policy, in the amount of $316,200, was issued on June 28, 1983, to Twin Lakes Federal Credit Union (Twin Lakes), the mortgagee of 400 acres owned by Chris and Rosalee Wade. After a couple of interim transactions, the note and mortgage was purchased by appellee, Kenton Treat. The property description contained in the mortgage and the title insurance policy erroneously placed

32.5 acres in the wrong quarter section. Instead of SE 1/4, SW 1/4, the description read SW 1/4, SE 1/4. Because of this erroneous property description, 32.5 acres were included in the mortgage and title insurance policy that were not owned by the Wades.

On November 13, 1987, when the Wades became unable to make their payments, Treat sued on the note and mortgage and obtained a judgment in excess of $400,000. Treat received $100,000 from the sale of the property at a foreclosure sale on June 15, 1989. The Wades are now in bankruptcy. On February 22, 1990, Treat filed suit against Stewart Title seeking recovery under his title insurance policy. In this suit, Treat alleged that, on March 28, 1988, he had notified Stewart Title of the erroneous property description, but no action was taken to correct the problem. After two separate hearings, the trial judge ruled that Stewart Title was liable under the insurance policy and awarded a judgement of $21,125 plus costs. Stewart Title appeals this judgment arguing that there is insufficient evidence to support the court's ruling on liability and the amount of damages. We find no error, and therefore affirm.

A representative from Stewart Title and its attorneys began the first hearing by offering as a settlement, a quitclaim deed to the 32.5 acres erroneously left out of the title insurance policy. Stewart Title stated that by offering this quitclaim deed, the insurance company would be relieved of liability. Treat refused this offer for the following reasons: 1) Stewart Title could not reform the insurance contract now after knowing about the error for two and one-half years; and 2) the Wades were in bankruptcy, and Stewart Title could not obtain a quit-claim deed for the property without going through bankruptcy court. Because of the comments made by Stewart Title's attorneys, Treat asserted Stewart Title had stipulated to its liability. Thus, Treat offered nothing further to prove his case at the first hearing.[1] Stewart Title contends that it did not stipulate to liability and that Treat waived his right to present evidence on this issue.

From a review of the proceedings below, we call attention to the following comments made by Stewart Title's attorneys:

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[1] We note that Stewart Title is represented by different attorneys on appeal.

> (T)his all came about due to a scrivener's error . . . . It was the intent to pledge this property for that loan. It's the intent of the title policy to guarantee that if the loan is forfeited, you may acquire title by foreclosure.

After these comments, Treat stated Stewart Title had admitted liability and therefore the only issue remaining was whether or not Stewart Title had to pay money damages. The trial judge then allowed Treat to have one of his witnesses testify on the issue of damages. At the end of the hearing, the trial judge made the following statement:

> Gentlemen, just so it's clear on the record, there's no dispute here and the reason the plaintiff has not presented testimony is, there's no dispute that there was a real estate mortgage given to Mr. Wade to Twin Lakes Federal Credit Union. . . .There was an assignment of that mortgage to Mr. Treat. Subsequently, Mr. Treat had to foreclose that mortgage. That there was a scrivener's error in the real estate mortgage misdescribing a portion of the land sought to be covered by the real estate mortgage.

The record reflects that both parties agreed to the correctness of this statement.

We read the court's summation above as showing that the trial judge believed that the parties had stipulated to the issue of liability. And, after review of Stewart Title's comments below, we agree with Treat's and the court's conclusion that Stewart Title agreed to facts reflecting its liability in this case. We also note that Stewart Title took no action to counter Treat's and the court's belief. Thus, it would be grossly unjust for us to allow Stewart Title to prevail in its argument that Treat erred in failing to present further evidence on the liability issue.

We now address the damage issue. Both parties agree that in order to recover under his insurance policy, Treat was required to show a loss. The record shows that because of an erroneous property description that included 32.5 acres of someone else's property, the Wades retained ownership of their 32.5 acres free of encumbrances. In other words, when Treat foreclosed after the Wades defaulted on their note, Treat could not foreclose on 32.5 acres of the 400 acres covered by the title insurance because those

32.5 acres belonged to someone else, not the Wades. In proving his damages, Treat presented testimony which showed the value of the 32.5 acres erroneously included in the policy to be $27,000. Another witness testified that the 32.5 acres owned by Wade and the acreage erroneously included in the policy were worth approximately the same value—$500 per acre.

For the first time, Stewart Title argues on appeal that Treat did not prove the proper loss for a mortgage title insurance policy or the proper measure of damages. Stewart Title made no objection to the value testimony presented below. Instead, Stewart Title acknowledged Treat had sustained a loss but attempted to remedy Treat's loss by the Wades giving Treat a quitclaim deed to their 32.5 acres, which would be subject to the bankruptcy court's abandonment of that acreage. Treat rejected this idea, and Stewart Title offered no further argument regarding Treat's loss, nor did it question the measure of damages utilized or the damage evidence presented in the trial court below. As we have stated numerous times, this court will not consider arguments not presented to the trial court. *See, e.g., Crowder* v. *Crowder,* 303 Ark. 562, 798 S.W.2d 425 (1990).

Even if we could address Stewart Title's argument, from our reading of Treat's title insurance policy, it is clear that the policy covers, among other things, the loss or damage sustained or incurred by the insured by reason of "title to the estate or interest described in Schedule A being vested otherwise than as stated therein." Schedule A reflects that the estate or interest referred to at the date of the policy is vested in Chris and Rosalee Wade. As previously stated, the 32.5 acres described in the insurance policy were not vested in the Wades. Thus, under the terms of Stewart Title's own policy, Treat sustained a loss for which he is entitled to recovery.

For the reasons stated above, we affirm.

IN RE: William T. LEWIS, Jr.
Bar ID # 64024

91-144 810 S.W.2d 45

Supreme Court of Arkansas
Delivered July 8, 1991

James A. Neal, petitioner.

No response.

PER CURIAM. The Committee on Professional Conduct unanimously recommends the disbarment of William Theodore Lewis, Jr., Arkansas Bar ID No. 64024, 1238 West Governor, Springfield, Illinois 62704, pursuant to a judgment of the Supreme Court of Illinois, dated October 10, 1990, Docket No. 69542. A copy of the Petition has been forwarded to Mr. Lewis by the Clerk of the Court under cover letter of May 29, 1991. No response has been filed.

Having before us a certified copy of the judgment of the Supreme Court of Illinois ordering the disbarment of William Theodore Lewis, Jr., and cognizant of the recommendation of the Committee and of Rule 7F, DISBARMENT RECIPROCAL, of the Rules Regulating Professional Conduct of Attorneys at Law, providing that upon presentation of a certified order of a corresponding disciplinary authority of another jurisdiction evidencing disbarment, the Committee "by summary proceeding shall cause a like sanction," and having given notice of the filing of this petition, we find that William Theodore Lewis, Jr. should be, and he is hereby, disbarred from the practice of law in the State of Arkansas.

IT IS SO ORDERED.

Blair ARNOLD and Thomas E. Allen and Suzan A. Jernigan *v.* The Honorable John Dan KEMP, Circuit Judge of the Independence Circuit Court, Sixteenth Judicial District, State of Arkansas and Suzan A. Jernigan *v.* State of Arkansas

CR 91-60 813 S.W.2d 770

Supreme Court of Arkansas
Opinion delivered July 15, 1991

Tom Allen and *Blair Arnold*, for appellant Suzan Jernigan.

Tom Allen, *Blair Arnold*, *John Norman Harkey* and *H. David Blair*, for appellants Blair Arnold and Thomas E. Allen.

Jeff Rosenzweig and *Ralph G. Brodie*, for amicus curiae American Bar Association, American Criminal Defense Lawyers, and Arkansas Trial Lawyers Ass'n.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. This case involves the constitutionality of Ark. Code Ann. § 16-92-108 (1987), which relates to the legislative limitation of expenses and fees imposed upon court-appointed attorneys for indigent clients accused of crime. We find, under the circumstances of this case, the expense and fee "caps" contained in section 16-92-108 to be unconstitutional and that the contempt citation should be vacated. We remand to the trial court for proceedings consistent with this opinion.

On November 30, 1990, the appellant, Suzan Jernigan, was charged by information with the capital murder of her husband, J.B. Goff, and mother, Patricia L. Dunn. Jernigan was determined to be indigent, and the appellants, Blair Arnold and

Thomas Allen, were appointed as her attorneys by the court on December 11, 1990. Both Messrs. Arnold and Allen objected to their appointments; however, they represented Jernigan during her arraignment. Trial date was subsequently set for April 1, 1991.

On March 14, 1991, Messrs. Arnold and Allen advised the trial court that they were refusing to proceed because they could not provide Jernigan with effective assistance of counsel as they were reluctant to incur overhead expenses while representing her, particularly in light of the fact that the trial court had refused to reimburse them for their out-of-pocket expenses or provide attorney's fees and had refused to supply Jernigan with funds with which to hire the necessary expert and investigatory assistance. Counsel were found to be in contempt of court, fined $1,000.00, and ordered to appear before the court on March 29, 1991, for further proceedings.

The appellants filed a notice of appeal, as well as a petition for a temporary writ of prohibition and permanent writs of prohibition, mandamus, and certiorari.

[redacted] In *Ellis* v. *State*, 302 Ark. 597, 791 S.W.2d 370 (1990), we noted that appealability is controlled by Ark. R. App. P. 2(a), which requires a final judgment or decree or one that, in effect, determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. Jernigan's appeal is premature as there has been no final, appealable order for this court to review. Her petitions for other relief are also inappropriate at this juncture and will not be considered.

We do, however, address the following arguments promulgated by Messrs. Arnold and Allen as an appeal from their contempt charge predicated upon their refusal to proceed as Jernigan's court-appointed counsel: 1) the fee and expense limitations contained in section 16-92-108 violate their right to due process and just compensation, and 2) the present system of appointing attorneys in the State of Arkansas violates their right to equal protection.

Messrs. Arnold and Allen also assert 3) that the limitation of expenses and attorneys' fees creates an inherent conflict of interest between the indigent and the court-appointed attorney,

and 4) that the limitation of expenses and fees by the General Assembly inherently, and in its application, invades the judicial branch of state government. In light of our analysis of the first two arguments, we need not address the latter two points on appeal.

I. DUE PROCESS AND JUST COMPENSATION

Messrs. Arnold and Allen initially argue that section 16-92-108 violates their right to due process and just compensation.

We have held that there is a strong presumption of constitutionality attendant to every legislative enactment, and all doubt concerning it must be resolved in favor of constitutionality; if it is possible for the courts to so construe an act that it will meet the test of constitutionality, we not only may, but should and will do so. Further, the party challenging a statute has the burden of proving it unconstitutional. *Holland v. Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987).

We have previously addressed the constitutionality of Ark. Stat. Ann. § 43-2419 (Repl. 1977) (currently section 16-92-108) in *State* v. *Ruiz*, 269 Ark. 331, 602 S.W.2d 625 (1980), where the State appealed from a circuit court decision awarding reasonable attorneys' fees to attorneys representing indigent criminal defendants and holding the statute limiting such payments to be unconstitutional. In that case, we held that the statute limiting payments to attorneys representing criminal defendants to $100 for investigation expenses and $350 for attorneys' fees did not violate the provision in the Arkansas Constitution providing for the separation of powers, and the trial court was bound by the statute.

At that time, we based our decision on a quick and short reference to the historical practice of attorneys representing indigents for little or no fee and on the professional oath an attorney swears to upon admittance to the Arkansas Bar, which oath reads in pertinent part as follows:

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We also stated in *obiter dictum*:

> It has been argued in another case that requiring an

> attorney to furnish services for little or no fee is a taking of property in violation of the due process clause of the United States Constitution. This argument was rejected in the case of *United States* v. *Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). Finding no common law or statutory or constitutional authority establishing payment of attorneys fees, we are left only the sources provided by the legislature. The only other source is the services being furnished by the attorneys themselves. Lawyers clearly have an obligation to represent indigents upon court orders and to do so for existing statutory compensation or for no remuneration at all.

(Citation omitted.)

Subsequent to our decision in *State* v. *Ruiz*, *supra*, other states have addressed the constitutionality of comparable fee cap statutes and found them to be unconstitutional. *DeLisio* v. *Alaska Superior Court*, 740 P.2d 437 (Alaska 1987); *State ex rel. Stephan* v. *Smith*, 242 Kan. 336, 747 P.2d 816 (1987); and *Makemson* v. *Martin County*, 491 So.2d 1109 (Fla. 1986).

In *Coulter* v. *State*, 304 Ark. 527, 804 S.W.2d 348 (1991), we were presented with the issues that we now address but were unable to directly analyze at that time because the defendant in that case had neither shown nor argued that he had suffered any specific prejudice resulting from the fee cap statute. *See Goldsmith* v. *State*, 301 Ark. 107, 782 S.W.2d 361 (1990); *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). We noted, however, our concern and gave notice that we would reconsider our earlier decisions on the issue in an appropriate case and even outlined pertinent cases from other jurisdictions and their rationale that have dealt with the question. *Coulter* v. *State*, 304 at 542, 804 at 356; *see also Pickens* v. *State*, 301 Ark. 244, 783 S.W.2d 341 (1990). Rather than discuss these cases again, we single out and attach primary significance to *State ex rel. Stephan* v. *Smith*, *supra*, as the Supreme Court of Kansas commented at length upon the historical argument of legal representation for little or no fee:

> . . . the tradition of requiring pro bono work of attorneys originated in common-law England where attorneys who were expected to provide such representation also enjoyed

special rights and privileges. They were the sergeants-at-law, the elite among all English lawyers. They had special practice privileges, they commanded higher fees, and judges were selected exclusively from their ranks. They were actually public officers and were sometimes paid by the government. As officers of the court, English lawyers were exempt from suit, military service, and other compelled public service. Their modern American counterparts enjoy no such special privileges. The distinction and its consequences were recognized by the Indiana Supreme Court as early as 1854 [in *Webb* v. *Baird*, 6 Ind. 13, 17 (1854)]:

> The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class — clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens.

(Citations omitted.)

The court in *Webb* noted that an attorney is under no obligation, honorary or otherwise, to volunteer his services; it devolves as much on any other citizen of equal wealth to employ counsel in the defense as on the attorney to render services gratuitously.

The Kansas court concluded that:

> Attorneys generally have an *ethical* obligation to provide pro bono services for indigents. Such services may only be provided by attorneys. The individual attorney has a right to make a living. Indigent defendants, on the other hand, have the right to the effective assistance of counsel. The

> obligation to provide counsel for indigent defendants is that of the State, not of the individual attorney. The adjustment of these rights and obligations presents the primary difficulty of the present statutory system. The burden must be shared equally by those similarly situated. In the final analysis, it is a matter of reasonableness.

Following its historical analysis, the court analyzed the fifth amendment issue before them as follows:

> Whether a violation of due process has occurred depends upon whether "property" has been taken and upon what kind of "process" is due. . . . An attorney's advice and counsel is indeed his or her stock in trade. Moreover, when attorneys are required to donate funds out-of-pocket to subsidize a defense, they are deprived of property in the form of money. . . .
>
> > The term due process refers primarily to the methods by which the law is enforced; however the term has no fixed technical concept unrelated to time, place and circumstances. In *Hannah* v. *Larche*, 363 U.S. 420 (1960), this comment was made:
> >
> > " ' "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account.' " *Smith* v. *Miller*, 213 Kan. 1, 514 P.2d 377 (1973).

Pertinent provisions of our constitution are subject to the same analysis. Article 2, § 22 of the Arkansas Constitution provides that private property may not be appropriated for public use without just compensation. *Johnson* v. *Wylie*, 284 Ark. 76, 679 S.W.2d 198 (1984); *see also* U.S. Const. amend. V ("No person shall . . . be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation.")

Focusing further on the rulings of the Kansas Court, we cannot escape the clear logic underlying their finding that although their statute, on its face, did not violate due process yet, when applied to the facts before them, the fee and expense cap limits were unconstitutional. The Kansas fee and expense cap limitations are comparable to limitations we face in section 16-92-108. The Kansas Court aptly noted:

> Attorneys, like the members of any other profession, have for sale to the public an intangible — their time, advice, and counsel. Architects, engineers, physicians, and attorneys ordinarily purvey little or nothing which is tangible. It is their learned and reflective thought, their recommendations, suggestions, directions, plans, diagnoses, and advice that is of value to the persons they serve. It is not the price of the paper on which is written the plan for a building or a bridge, the prescription for medication, or the will, contract, or pleading which is of substantial value to the client; it is the professional knowledge which goes into the practice of the profession which is valuable.
>
> Attorneys are licensed by the state to practice their profession; but so are other professionals, such as architects, engineers, and physicians. One who practices his profession has a property interest in that pursuit which may not be taken from him or her at the whim of the government without due process. . . .
>
> Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation. When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money. *We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection.* [Emphasis added.]

> When the attorney is required to advance expense funds out-of-pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice, the system violates the Fifth Amendment.
>
> *State ex rel. Stephan* v. *Smith*, 242 Kan. at 369, 747 P.2d at 841.

[redacted] Like the question before the Kansas court, the core question before us is whether the services of an attorney are a species of property subject to Fifth Amendment protection. The answer is yes.

Unfortunately, we have perpetuated, throughout the years, a system of appointment without just compensation in many instances that is long past due for correction. The only proper and permissible course for us to follow is simply to give effect to the plain language of our constitution. *City of Hot Springs* v. *Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986). In doing so, we declare that even if the rationale in *State* v. *Ruiz*, *supra*, was correct when it was decided, and we have strong reservations in this regard, the practice of criminal law has changed, as have the times. Arkansas has delayed in confronting the realities of contemporary criminal defense practice, particularly in the area of capital litigation, even as the concept of what constitutes due process has changed. New scientific developments and an increased awareness in areas of social consciousness have served to drastically raise the complexity of criminal litigation. As a result, our trial courts must appoint highly trained and skilled counsel if indigents are to be afforded their constitutionally mandated effective assistance of counsel.

In *Family Div. Trial Lawyers* v. *Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), the court noted:

> As the scope of the constitutionally mandated right to counsel has expanded and the concomitant burden of providing *pro bono* representation imposed on attorneys has grown, several state courts have recognized that at some point the burden on particular attorneys could

> become so excessive that it might rise to the level of a "taking" of property. *See, e.g.*, *People ex rel. Conn.* v. *Randolph*, 35 Ill.2d 24, 219 N.E.2d 337 (1966); *Bias* v. *State*, 568 P.2d 1269 (Okla. 1977); *State ex rel. Partain* v. *Oakley*, 227 S.E.2d 314 (W.Va. 1976); . . .

In this case, the burden imposed on Messrs. Arnold and Allen is excessive to the extent that it constitutes a "taking" of their property and to limit them to a mere award of $1,000.00 for their work and skills is constitutionally unacceptable.

II. EQUAL PROTECTION

Messrs. Arnold and Allen also argue that the present system of appointing attorneys in this state violates their right to equal protection. We agree.

In determining whether a classification denies the equal protection of the laws, we, as an appellate court, must determine if it has a rational basis and is reasonably related to the purpose of the statute; a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. The factors we look at to determine whether a law is violative of equal protection are: 1) the character of the classification, 2) the individual interests asserted in support of the classification, and 3) the governmental interests asserted in support of the classification. *Holland* v. *Willis*, *supra.*

Messrs. Arnold and Allen contend that lawyers, as a class, are given less protection than other classes of professional citizens inasmuch as they are required to financially subsidize the State's responsibility of indigent representation.

Under our present system of indigent representation, we note that 26 counties have exercised their ability under legislative authority to initiate a public defender system, and 49 counties continue to utilize the traditional system of attorney appointment. Thus, an attorney's geographic location will initially determine whether his services will be commandeered for the public good or whether the public will fund the defense through its authorized legislative system. *See* Ark. Code Ann. §§ 16-87-

101 to -110 (1987). Additionally, in those counties that continue to appoint attorneys, an attorney's substantive area of practice and expertise will further define his eligibility for appointment. Consequently, our system of indigent representation is predicated upon an unequal distribution of the public's obligation to a subclass of attorneys based on where an attorney lives and on an attorney's ability to provide effective assistance of counsel.

The State responds by pointing out that only lawyers have the requisite license to practice law, and the legislature may take one step at a time when addressing complex problems. *See Bowen* v. *Owens*, 476 U.S. 340, 347 (1986) (quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

However, these arguments are not answers to the problem. Even though the legislature may take "one step at a time" in addressing complex problems, it does not have license to infringe upon the guaranteed constitutional rights of the citizens it represents. The untoward effects of the cap limitations fall unequally upon a select few lawyers, who serve under appointment, and result in a violation of lawyers' rights to equal protection.

Given these divergent positions and competing interests, we cannot say that the classifications have a rational basis or are reasonably related to the purpose of the statute. Again, we must find that section 16-92-108 does not pass constitutional muster as applied.

ATTORNEYS' FEES AND COSTS

Inasmuch as we have declared an attorney's services to be his property, the taking of which is subject to just compensation, it necessarily follows that we look to section 16-92-108 to determine whether or not the fees that are "capped" at $1,000.00 in this case will reasonably compensate them for services rendered or to be rendered. The answer is obvious. This limitation for such serious, complex criminal litigation is wholly inadequate. As a result, it becomes our duty to assess an appropriate measure of compensation for the taking of these attorneys' property.

In awarding fees to Messrs. Arnold and Allen for reasonably expended services, we do not mean that the trial court must simply award fees based on their customary hourly charges

or fixed fees for services in criminal cases of this nature. To the contrary, the trial court should determine fees that are considered "just." In *Chrisco* v. *Sun. Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), we recognized various factors to be considered by a trial court in making its decision, on an award of attorneys' fees, including the experience and ability of the attorney, the time and labor required to perform the legal service properly, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, the time limitations imposed upon the client's defense or by the circumstances, and the likelihood, if apparent to the court, that the acceptance of the particular employment will preclude other employment by the lawyer.

Ironically, the criterion we announced in *Chrisco* v. *Sun, supra*, is well grounded in express declarations of the Arkansas General Assembly as to appropriate payment for court-appointed counsel in criminal cases. In Act 125 of 1971, the Arkansas General Assembly expressed its concern about compensating counsel by enacting its second piece of legislation pertaining to indigents and court-appointed attorneys, in which it stated: ". . . *It is essential that counsel be furnished to him [the indigent] and that said counsel be compensated for his time, out of pocket expenses and services.*" Additionally, even though section 16-92-108 establishes a fee cap of $1,000.00 in the defense of a capital murder charge, the General Assembly declared that:

> (a) Whenever legal counsel is appointed by any court of this state to represent indigent persons accused of crimes, whether misdemeanors or felonies, the court shall determine the amount of the fee to be paid the attorney and *an amount for a reasonable and adequate investigation of the charges* made against the indigent and shall issue an order for the payment thereof.
>
> * * * *
>
> (b)(3) *The attorney's fees provided for by this section shall be based upon the experience of the attorney and the time and effort devoted by him in the preparation and trial of the indigent, commensurate with fees paid other attorneys in the community for similar services.*"

(Emphasis added.)

The factors as enumerated in *Chrisco* v. *Sun*, *supra*, and as expressed by our General Assembly, are instructive and should be conservatively applied here.

Further, the statutory limitation of expenses, in the sum of $100.00, does not provide the necessary funds for Jernigan's defense, and, here again, it would constitute a taking to force Messrs. Arnold and Allen to finance these expenses out of their own pockets in order to provide her effective assistance of counsel. We do not suggest that the trial court give carte blanche authority to counsel to incur expenses, but rather it should be within the province of the sound judgment of the trial court to approve such reasonable expenses as are plainly necessary for the defendant to have her day in court and to permit counsel to fairly and adequately present her case.

We reverse and remand to the trial court with directions to vacate its finding of contempt on the part of Messrs. Arnold and Allen and for further proceedings consistent with this opinion.

DUDLEY, HAYS, NEWBERN, and GLAZE, JJ., concur.

ROBERT H. DUDLEY, Justice, concurring. I agree with the majority opinion's holding that the statute setting a limit of $1,000.00 on attorney's fees and a limit of $100.00 on investigation expenses for the defense of a capital murder case is unconstitutional as applied in this case. I concur in holding that the statute, as applied, violates the Equal Protection Clause of the fourteenth amendment. Consequently, I agree that the judgment of criminal contempt entered against attorneys Arnold and Allen must be remanded. However, I am unable to agree that the attorneys' right to due process has been violated and that the attorneys are entitled to "just compensation" because their property has been unconstitutionally taken. The distinction is significant.

1. Due Process

In 1876, we held that attorneys may be required to represent indigent defendants without pay:

> Attorneys are a privileged class; they are only permitted to practice in the courts; and they are officers of the

> court. The law confers on them rights and privileges, and with them imposes duties and obligations to be reciprocally enjoyed and performed. The services required of them, in cases like the present, are such as charity and humanity demand in behalf of the destitute and defenseless; and the presumption cannot be admitted that they serve in expectation of fee or reward. The appellees but performed a duty, which their relation to the court and the public required of them.

Arkansas County v. *Freeman & Johnson*, 31 Ark. 266 (1876).

That concept has been followed through the years and, in *State* v. *Ruiz*, 269 Ark. 331, 602 S.W.2d 65 (1980), we wrote:

> It has been argued in another case that requiring an attorney to furnish services for little or no fee is a taking of property in violation of the due process clause of the United States Constitution. This argument was rejected in the case of *United States* v. *Dillon*, 246 F.2d 633 (9th Cir. 1965) *cert. denied*, 382 U.S. 978 (1966). Finding no common law or statutory or constitutional authority establishing payment of attorney's fees, we are left only with the sources provided by the legislature. The only other source is the services being furnished by the attorneys themselves. Lawyers clearly have an obligation to represent indigents upon court orders and to do so for existing statutory compensation or for no remuneration at all.

In *Shelton* v. *State*, 287 Ark. 322, 699 S.W.2d 728 (1985), we wrote:

> Appellant argues the court erred in denying three motions for funds. He first submits that Ark. Stat. Ann. § 43-2419, which authorizes and limits the amount of funds for payment of defense counsel and investigation services for indigent defendants, is so inadequate as to be unconstitutional. We considered this issue in *State* v. *Ruiz & Van Denton*, 269 Ark. 331, 602 S.W.2d 625 (1980), and upheld its constitutionality. Although we expressed concern that the statute does not allow for adequate compensation in some cases, we said the remedy must remain in the province of the legislature.

In sum, we have long required lawyers to perform this duty as a form of public service.

Compelling an individual to perform special types of public services does not constitute an imposition of involuntary service. *See Hurtado* v. *United States*, 410 U.S. 578 n. 11 (1973) (requirement that prisoners serve as witnesses in a trial without compensation constitutes public duty); *Bertelson* v. *Coney*, 213 F.2d 275, 277-8, *cert. denied*, 348 U.S. 856 (1954) (special draft of medical personnel); *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (military draft); *Butler* v. *Perry*, 240 U.S. 328, 333 (1916) (work on public roads). In order to meet some special needs, a government must have the ability to compel special forms of public service. The only real issue is whether the government must pay "just compensation" for those public services.

The vast majority of state and federal courts which have addressed the due process issue have decided that requiring counsel to serve without compensation is not an unconstitutional taking of property without just compensation. See *Williamson* v. *Vardeman*, 674 F.2d 1211 (8th Cir. 1982) for a listing of cases. A minority of courts have relaxed this obligation by reasoning that, although requiring an attorney to accept uncompensated cases as a condition of practicing law does not normally violate due process, the level of appointments may be so great that they constitute a "taking" when the attorney is no longer able to engage in remunerative practice. *State ex rel. Stephan* v. *Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *DeLisio* v. *Alaska Superior Court*, 740 P.2d 437 (Alaska 1987); and see *Family Div. Trial Lawyers* v. *Moultrie*, 725 F.2d 695 (1984) for a listing of other cases.

The source of the special duty is a lawyer's status as an officer of the court. As stated in *United States* v. *Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966):

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and

> assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services." Cf. *Kunhardt & Company, Inc.* v. *United States*, 266 U.S. 537, 45 S.Ct. 158, 69 L.Ed. 428 (1925).
>
> In *Powell* v. *State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), the Supreme Court held, in a capital case where the defendant was unable to employ counsel and was incapable of making his own defense adequately because of ignorance, etc., that it was the duty of the court to assign counsel for him, and stated at page 73, 53 S.Ct. page 65: "Attorneys are officers of the court, and are bound to render service when required by such an appointment."

In sum, I would follow our long tradition and our past cases and would agree with the vast majority of courts and hold that there has not been a taking of the attorneys' property.

However, the majority opinion holds that attorneys' services are property subject to fifth amendment protection, and that there has been an unconstitutional taking of that property. The fifth amendment, in the material part, provides, "nor shall private property be taken for public use, without *just compensation.*" (Emphasis added.) "Just compensation" means that the owner of the property appropriated is entitled to receive the fair value of the property taken, but, no more, because to award him less would be unjust to him, and to award him more would be unreasonable to the public. *Bauman* v. *Ross*, 167 U.S. 548 (1897). We have said "just compensation" means "full compensation." *Arkansas State Hwy. Comm'n* v. *Stupenti*, 222 Ark. 9, 257 S.W.2d 37 (1953). Thus, a lawyer who regularly earns $150.00 per hour from paying clients must be paid by the State at that same rate for representing an indigent defendant. The majority opinion states otherwise, and, as its basis, cites one of our cases and an Arkansas statute. The case does not deal with "just compensation" under the fifth amendment. The statute is the one overruled as applied in this case. More importantly, ultimately state law is not going to control the federal issue of just compensation under the fifth amendment to the Constitution of the United States. No state limit, even a reasonable one, can be placed on the amount of just compensation due under the fifth amendment. For all practical

purposes, the judiciary will have usurped the legislature's power over appropriations, and the courts will be authorized to order large sums of unappropriated money to be paid to attorneys. It is conceivable that county, and perhaps state, financial crises will result.

The legal precedent set by the majority opinion may possibly lead to a ruinous level of court costs and fees. If lawyers' time cannot be taken without just compensation in criminal cases, it cannot be taken in civil cases. Juvenile proceedings which require attorneys ad litem may be the next area contested. If lawyers' time cannot be taken without just compensation, witnesses' time cannot be taken without just compensation. Suppose the president of a large corporation earns $1,000.00 per hour and witnesses a minor car wreck. Could the parties to the car wreck afford to have their dispute decided in a court if one witness's fee amounts to $1,000.00 per hour? Perhaps this concept, which ignores the duty to perform certain public services, can be most clearly demonstrated by stating that, followed to its logical conclusion, it would mean if a person were making $100,000 per year and were drafted into the Army as a private, he would be entitled to receive $100,000 per year for his military service. In sum, I would join the vast majority of state and federal courts and hold that requiring counsel to serve poor people in criminal cases without compensation is not an unconstitutional taking of property. Therefore, counsel is not entitled to "just compensation."

2. Equal Protection

However, I concur in holding that the statutes placing unreasonable limits on fees and expenses violate the Equal Protection Clause of the fourteenth amendment. The practical, but significant, difference is that under an equal protection holding the State could place a reasonable limit on attorneys' fees.

As set out in the majority opinion a statute will be upheld if it bears a "*fair* and substantial relationship to a legitimate State end." *See Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464 (1981). The factors used to determine fairness are: (1) the character of the classification, (2) the individual interests asserted, and (3) the governmental interests asserted. *Holland* v. *Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987). In this case the

indigent defendant has the right, under federal and state law, to the effective assistance of counsel. The obligation to provide that counsel is the State's. Without question, a statute providing for fees to indigent defendants is related to a legitimate State end.

The State has adopted a statutory scheme by which it has delegated its obligation to the various counties. The counties may set up a public defender system or may pay individual attorneys to defend indigents, but when individual attorneys are appointed, the limit of the county's liability is $1,000.00. As the majority opinion points out, individual attorneys are appointed in forty-nine (49) of the seventy-five (75) counties in the State. In Independence County, where this case arose, one of the attorneys appointed has now been appointed to defend five murder cases, four of them capital murder cases, since 1978, his year of admission to the bar. He has been forced to expend 200 to 500 hours defending each case. His office overhead currently amounts to $23.92 per hour. He estimates this case will take 300 to 500 hours of his time. If he spends 300 hours on this case, his overhead costs will be over $7,000.00. After deducting the $1,000.00 fee, the result will be an out-of-pocket loss of over $6,000.00 on office overhead alone. This does not include his loss of time. He customarily bills at the rate of $90.00 to $100.00 per hour. Obviously, $90.00 times 300 hours would amount to $27,000.00. All together, he will likely suffer a financial loss well in excess of $25,000.00, and this is the fifth time in thirteen (13) years he has been appointed to defend a murder case.

Other attorneys testified that, if the accused in this case could pay a fee, they would charge fees of $50,000 to $80,000. There can be no real question but that the proof in this case shows that the attorneys appointed will suffer a substantial personal financial loss.

The State has a legitimate interest in supplying counsel to an indigent defendant who is charged with capital murder. The only issue is whether the State has met that obligation in a way which does not *unfairly* discriminate against these attorneys. As set out, the test of fairness has three (3) criteria. First, the character of classification. The statute passes this test. It has a rational basis. Lawyers may be singled out as a class to defend indigents at less than "just compensation." Second, and the only real issue, is

whether the class singled out is fairly treated. This necessitates a weighing of the lawyer's ethical duty to defend indigents against their ability to financially maintain themselves and their families. The ethical obligation will justify paying them a reduced fee for providing legal services to poor people, but the statute now before us pays far less than a "reduced fee." In fact, as applied in this case, it mandates a real and substantial financial loss to these attorneys. The statutory fee limitation, as applied in this case, is so low that it is patently unfair. It does not amount to a fair balancing of the attorneys' ethical duty with their financial interests. Thus, the statute, as applied in this case, denies these attorneys their right to equal protection.

3. Conclusion

I concur in holding that the statute as applied violates the Equal Protection Clause of the fourteenth amendment, but I do not agree with the majority that the attorneys' right to due process has been violated. The practical difference is that I would uphold a *reasonable* statutory limitation on fees, while the majority opinion authorizes "just compensation."

DAVID NEWBERN, Justice, concurring. Time changes everything. In the first of the "Scottsboro cases," *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Supreme Court held there were some circumstances in which the Due Process Clause of the Fourteenth Amendment entitled an indigent defendant to the right of counsel. In 1942, there were still "circumstances" in which an indigent defendant charged with rape and murder was said to have no right to counsel to assist in his defense. *Betts* v. *Brady*, 316 U.S. 455 (1942). The horn could be heard in the distance, however, and in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), it became loud and clear that the Fourteenth Amendment required the states to observe that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. 6.

It was about the time of *Gideon* v. *Wainwright* that Atticus Finch was defending Tom Robinson, without mention of a fee, perpetuating in the eyes of readers everywhere the noble image of the lawyer dedicated to justice with no thought of the "lucre" we mentioned in *State* v. *Ruiz*, 269 Ark. 331, 602 S.W.2d 65 (1980).

But things were changing still. Criminal defense work became more complicated due to the pervasiveness and growth of the sciences of detection and the salutary and growing recognition of the need for fair play in safeguarding the rights of accused persons.

Justice Dudley's thoughtful rejection of the due process rationale of the majority opinion, has given me pause. How can it be a "taking" of a lawyer's property to ask the lawyer to do that which the lawyer is already sworn to do? I believe the answer lies in the set of changes mentioned above affecting the trial of criminal cases and the concurrent changes in the legal profession which have resulted in a degree of specialization.

The law is an activity not only steeped in precedent but "bound" by it, or at least weighted by it in the process of social, and the slowly following legal, evolution. It is easy for those engaged in the profession to add nostalgia to precedent and hope we will not have to alter the way we do things. If the burden of representing indigent criminal defendants were shared by all lawyers, perhaps (although not to a true purist) it would be too little to amount to a taking. The truth is that serious criminal cases demand experienced criminal lawyers in order that justice be done. I do not deny that there are still lawyers who can "do it all," but more and more we see instances where good lawyers, for good reasons often having to do with protection of their would-be clients, do not wish to be put in the impossible position of having to deal with matters foreign to their experience. We see good criminal defense lawyers, relatively few in number, being called upon time and again to the point of exhaustion of themselves, to say nothing of exhaustion of the laudable sentiment and purpose of the lawyer's oath. I tend to agree there is an Equal Protection Clause problem in addition to the Due Process Clause prohibition against a taking without just compensation.

It seems inevitable that the concern Justice Dudley points up about the possible burden of expense this decision will place on the counties will be addressed by creation of a statewide public defender system. I hope it may also stimulate consideration of resurrecting the appellate public defender program we had in Arkansas in the late 1970s. Lawyers who wish to engage in private criminal law practice will still be able to do so, and good

criminal lawyers who are not public defenders may remain available to be appointed for criminal defense work without fee if they choose. Indigent defendants may in some, probably rare, instances have the assistance of counsel of their choice. At any rate they will be assured of counsel from an office devoted solely to the task of assisting them expertly. The resources available to the State for prosecution will be balanced by the resources available to the defense, and our system of justice will be fairer than it has been.

TOM GLAZE, Justice, concurring. I concur with the majority's decision to reverse the trial court's finding appellants in contempt. The majority relies heavily upon the case of *State ex rel. Stephan* v. *Smith*, 242 Kan. 336, 747 P.2d 816 (1987) in holding our law, Ark. Code Ann. § 16-92-108 (1987), unconstitutional. I believe it is important to discuss the rationale in *Stephan* in detail, particularly as it relates what measure of compensation must be paid an attorney so as to avoid the due process issue and "taking" existent in this case.

In *Stephan*, the court considered a number of constitutional arguments challenging the constitutionality of its law providing limits on attorneys' fees and costs, but, as just mentioned, our court primarily relies on the Kansas court's analysis of the due process argument. Our court correctly acknowledges that the *Stephan* decision holds that the Kansas "fee-cap' law was not unconstitutional *per se*. The majority court then, however, fails to discuss the full rationale employed by the *Stephan* court when deciding how the Kansas law could be (and was in that case) unconstitutionally applied. First, the Kansas Supreme Court stated the following:

> Requiring attorneys to donate a reasonable amount of time to indigent defense work bears a real and substantial relation to the legitimate government objective sought — protection of indigent defendants' Sixth Amendment right to counsel. Such a requirement may also be reasonable in light of the general ethical responsibility of lawyers to make legal services available. Clearly the Indigent Defense Services Act was adopted in the interest of the community. *Under such an analysis, the statute on its face does not violate due process.* (Emphasis added.)

Stephan, 242 Kan. at 363, 747 P.2d at 838.

After stating the above, the Kansas Court then proceeded into a lengthy discussion of how the Kansas Indigent Defense Services Act could be unconstitutional in its application. In doing so, the court discussed how the Fifth Amendment has been applied to limit the state's powers of eminent domain and, citing Kansas case law, defined a taking under the Fifth Amendment as "acquiring of possession and the right of possession and control of *tangible* property to the exclusion of the former owner." The court indicated the services of an attorney are not protected by the Fifth Amendment, but if the property taken is viewed as the attorney's money, it is protected as tangible property. The Kansas Court held that when the attorney is required to advance expense funds out-of-pocket for an indigent, without full reimbursement, the Kansas system violated the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is a substantial interference with his or her private practice, again, the Kansas system violated the Fifth Amendment. Before turning to our state law and its application, I should mention the majority opinion emphasizes a sentence from the *Stephan* case that states, "We conclude that the attorneys' services are property, and are thus subject to Fifth Amendment protection." Of course, such principle is true as the Kansas Supreme Court applied it in *Stephan*, but the Kansas Court made it abundantly clear that the services to which the court referred were as it had thoroughly described, *viz.*, services are not protected by the Fifth Amendment unless it is properly viewed as the attorneys' money or tangible property.

In applying the rationale of the *Stephan* case to the situation before us — as I understand is our majority court's intention — the appellants have certainly shown the fee and costs caps contained in § 16-92-108 are unconstitutional as applied to them. Appellants were appointed to defend Suzan A. Jernigan against capital murder charges, and under § 16-92-108, appellants are limited to a fee of $1,000.00 and costs in the sum of $100.00. Appellants have shown that, as of February 20, 1991, they have provided over $3,389.00 in overhead expenses.

Unquestionably, Arkansas' statutory limits on fees and costs, like Kansas's, will require modification by our General

Assembly. However, I would disagree with any suggestion that attorneys' fees in indigent criminal cases should be in line with fees paid other attorneys in the community for similar cases. In their due process argument, appellants suggest they should be entitled to just compensation and speak in terms of setting such fees at what they call "market value." The majority opinion merely provides the trial court should determine fees that are considered "just" and makes no reference to market value. I am not clear as to what the majority means by "just fees," but if it intends that term to mean the hourly rates that were testified to in this case, *viz.*, ranging from $75.00 to $125.00 per hour, I must disagree with such a holding. Such a result would obviously place Arkansas in a position that requires it to pay appointed counsel far more than what the federal government pays under its law.[1] More importantly, the majority's suggestions wholly ignore the *Stephan* decision on this point where the Kansas court stated the following:

> We agree fully that the bar of this state has an ethical obligation to provide legal services to the indigent accused. That ethical obligation may justify paying attorneys a reduced fee for legal services to the poor, less than the fee an attorney might charge a financially solvent client for the same service, but not less than the lawyers' average expenses statewide.

Id. at 375, 747 P.2d at 845.

Again, quoting the Kansas Court, it concluded, "The state also has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses." *Id.* at 383, 747 P.2d at 849.

In conclusion, I note my concern that the method and

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[1] *See* 18 USCA § 3006A (Supp. 1991) which, among other things, compensates appointed attorneys at a rate not exceeding $60.00 per hour for in-court services and $40.00 per hour for out-of-court services unless the Judicial Conference determines a higher rate not in excess of $75.00 per hour is justified. A maximum amount of $3,500.00 in felony cases and $1,000.00 in misdemeanors is established by the federal law which may be waived if the trial court or magistrate certifies a higher amount is necessary to provide a fair compensation. *See* 18 USCA § 3006A(d)(3) (Supp. 1991).

manner the majority adopts in establishing fees in appointed cases is somewhat vague since the term "just fees" has the connotation of "just compensation" and "just compensation" is generally measured in terms of market value. The use of market value in assessing fees departs from all cases I have read on this subject with the exception of the case of *Delisio* v. *Alaska Superior Court*, 740 P.2d 437 (Alaska 1987), where the Alaska Supreme Court held such fees should be fixed at "market value." In my view, this part of the *DeLisio* case is an aberration and should not be followed. Such a path is not required by our law and will surely pose an added financial burden for our state. For emphasis, I point out that out of the 22,253 criminal cases terminated in the state during 1990, 2,875 cases were known to be handled by appointed attorneys and 5,601 cases were known to be handled by public defenders. Also, I believe this court's adoption of "market value" fees, as suggested by appellants, would prove counterproductive to indigent defendants and private individual attorneys having considerable criminal defense experience, because the state may be forced to establish a public defender system that will cover all 75 counties in order to be able to know what its costs will be in providing necessary representation to indigents.

For the foregoing reasons, I concur in the majority's decision to reverse the order finding appellants in contempt. However, I disagree with any interpretation which might be given to the majority holding that "just fees" means fees assessed at market value or at the top rates testified to in this case.

Instead, like the court did in *Stephan*, I would limit this court's opinion to read that an appointed attorney may be fairly compensated for Fifth Amendment purposes at a rate which is not confiscatory, considering overhead and expenses. In doing so, the General Assembly would then have the flexibility to adopt a fee schedule in indigent cases similar to the one employed under federal law — an option I view as being constitutional but precluded by a "market value" requirement.

HAYS, J., joins this concurrence.

Paul REGISTER *v.* OAKLAWN JOCKEY CLUB, INC., and American Totalisator Co., Inc.

90-302 811 S.W.2d 315

Supreme Court of Arkansas
Opinion delivered July 15, 1991
[Supplemental Opinion on Rehearing December 23, 1991.]

Carl A. Crow, Jr., for appellant.

Friday, Eldredge & Clark, by: *James M. Simpson*, for appellee Oaklawn Jockey Club, Inc.

Daily, West, Core, Coffman & Canfield, by: *Michael C. Carter* and *Janice West Whitt*, for American Totalisator Co., Inc.

JACK HOLT, JR., Chief Justice. The issue in this case is whether the appellees, Oaklawn Jockey Club, Inc. (Oaklawn) and American Totalisator Co., Inc. (Amtote), owed any duty to the appellant, Paul Register, the breach of which would give rise to a tort action for negligent conduct on their part.

On February 10, 1989, Mr. Register attempted to place a Classix wager, where the bettor correctly selects the winning horse in six consecutive races, at Oaklawn Park in Hot Springs. When Mr. Register attempted to place his bet, the Amtote machine failed to issue a ticket conforming to his designated selections. Upon inquiry, Mr. Register was erroneously advised by Oaklawn's ticketing clerk that one of the horses he had selected had been withdrawn from its race. Mr. Register subsequently chose another horse and made his bet. At the conclusion of the six races, Mr. Register had correctly selected five winning horses. Apparently, though, the horse that Mr. Register had been told had been withdrawn had not been "scratched" and was in fact the winner of its race. Had Mr. Register's original wager been accepted, he would have been the holder of a winning ticket to a major share in the Classix.

The "Major Share" of the Classix pool (75% of the net amount in the pool) that day was $56,165.40, which was paid to the holder of one winning ticket issued for that wager. Mr. Register filed suit to recover one-half of that amount, $28,082.70. The trial court granted the appellees' motion for summary judgment, and Mr. Register appeals and alleges that the trial court erred in granting the summary judgment on the following bases: 1) Oaklawn and Amtote owed him a duty to use ordinary care, 2) Oaklawn and Amtote owed him a contractual duty on theories of implied contract, quasi-contract, and third party beneficiary, and 3) his cause of action is not barred by the Arkansas State Racing Commission Rules.

We find that the appellees owed a duty to Mr. Register, and it was error for the trial court to grant summary judgment in light of the alleged negligence of Oaklawn and Amtote by Mr. Register. Accordingly, the judgment is reversed and remanded.

In *Rickenbacker* v. *Wal-Mart Stores*, Inc., 302 Ark. 119, 788 S.W.2d 474 (1990), we noted that Ark. R. Civ. P. 56 provides that summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact. On appeal, in determining whether there is an issue of fact, the proof is viewed most favorably to the party resisting the motion, with all doubts and inferences resolved

against the moving party. The burden of proving that there is no genuine issue of material fact rests with the party moving for summary judgment.

In order to make a prima facie case of negligence, a plaintiff must show that he sustained damages, that the defendant was negligent, and that such negligence was the proximate cause of the damages. To prove negligence, a party must show that the defendant has failed to use the care that a reasonably careful person would use under circumstances similar to those shown by the evidence in the case. *Earnest* v. *Joe Works Chevrolet, Inc.*, 295 Ark. 90, 746 S.W.2d 554 (1988). Further, a party may establish negligence by direct or circumstantial evidence, but he cannot rely upon inferences based on conjecture or speculation. *Earnest* v. *Joe Works Chevrolet, Inc.*, *supra*, (citing *Glidewell Adm.* v. *Arkhola Sand and Gravel Co.*, 212 Ark. 838, 208 S.W.2d 4 (1948)).

Mr. Register contends in his first point of error that Oaklawn and Amtote owed him a duty to use ordinary care in responding to his specific requests for a wager. The existence of a duty depends upon whether a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other. W. Keeton, *Prosser and Keeton on Torts* 235 (5th ed. 1983). Under our well-established principles of common law duty and the facts before us, we find that a duty existed between the appellees and Mr. Register. Whether this duty was breached in this case is a genuine issue of material fact that would preclude the granting of summary judgment.

Oaklawn and Amtote's reliance on cases decided in other jurisdictions is misplaced in that those cases generally had statutes or rules and regulations limiting tort liability or dealt with the contractual theory of liability. *See Bourgeois* v. *Fairground Corp.*, 480 So. 2d 408 (La. App. 1985); *Seder* v. *Arlington Park Race Track Corp.*, 481 N.E.2d 9 (Ill. App. 1985); *Valois* v. *Gulf Stream Racing Ass'n*, 412 So.2d 959 (Fla. App. 1982); *Hochberg* v. *New York City Off-Track Betting Corp.*, 343 N.Y.S.2d 651 (1973), *aff'd* 352 N.Y.S.2d 423 (1974); *Holberg* v. *Westchester Racing Ass'n*, 53 N.Y.S.2d 490 (1945). In Arkansas, there is no statute, rule, or regulation that limits or restricts civil liability for negligence under these circumstances.

Cf. Ark. Code Ann. § 23-110-406 (1987) (contractual liability limitation.)

In addressing Mr. Register's second point of error, that Oaklawn and Amtote owed him a contractual duty on theories of implied contract, quasi-contract, and third party beneficiary, we note that horse racing in our state is authorized and regulated pursuant to the Arkansas Horse Racing Law (Law), codified at Ark. Code Ann. §§ 23-110-101 to -415 (1987 and Supp. 1989). The Law specifically provides that the only legislatively authorized way for a patron at a race track to recover money based upon the outcome of a horse race is through pari-mutuel or certificate system of wagering. Section 23-110-102. Any wagering contract on horse races outside of the scope of the Law is therefore invalid and illegal. Section 23-110-405(d)(2).

In fact, the Law prescribes that money in the betting pool "shall be paid over to bettors holding winning pari-mutuel tickets . . . ." Section 23-110-406(a). In *Holberg* v. *Westchester Racing Ass'n, supra*, the court reasoned that "[t]here can be no valid pari-mutuel bet or wager independent of a pari-mutuel ticket. The ticket not only is essential but is the contract itself." We find this rationale persuasive.

Consequently, as Mr. Register makes no claim to having a winning ticket representing entitlement to a major share in the Classix pool, there can be no recovery sounding in contract.

Finally, Mr. Register argues that his cause of action is not barred by the Arkansas State Racing Commission Rules. However, these rules have not been included in the abstract, and we are unable to address the issue. *Burgess* v. *Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985).

Reversed and remanded.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
DECEMBER 23, 1991

821 S.W.2d 475

Carl A. Crow, Jr., for appellant.

Janis Whitt and *James Simpson*, for appellee.

ROBERT H. DUDLEY, Justice. We grant rehearing in this case and affirm the ruling of the trial court. The facts were accurately set out in the original opinion, *Register* v. *Oaklawn Jockey Club, Inc.*, 306 Ark. 318, 319, 811 S.W.2d 315, 316 (1991) as follows:

On February 10, 1989, Mr. Register attempted to place a Classix wager, where the bettor correctly selects the winning horse in six consecutive races, at Oaklawn Park in Hot Springs. When Mr. Register attempted to place his bet, the Amtote machine failed to issue a ticket conforming to his designated selections. Upon inquiry, Mr. Register was erroneously advised by Oaklawn's ticketing clerk that one of the horses he had selected had been withdrawn from its race. Mr. Register subsequently chose another horse and made his bet. At the conclusion of the six races, Mr. Register had correctly selected five winning horses. Apparently, though, the horse that Mr. Register had been told had been withdrawn had not been "scratched" and was in fact the winner of its race. Had Mr. Register's original wager been accepted, he would have been the holder of a winning ticket to a major share in the Classix.

The "Major Share" of the Classix pool (75% of the net amount in the pool) that day was $56,165.40, which was paid to the holder of one winning ticket issued for that wager. Mr. Register filed suit to recover one-half of that amount, $28,082.70. The trial court granted the appellees' motion for summary judgment, and Mr. Register appeals and alleges that the trial court erred in granting the summary judgment on the following bases: 1) Oaklawn and Amtote owed him a duty to use ordinary care, 2) Oaklawn and Amtote owed him a contractual duty on theories of implied contract, quasi-contract, and third party beneficiary, and 3) his cause of action is not barred by the Arkansas State Racing Commission Rules.

We affirmed the trial court's granting of summary judgment on the counts of implied contract, quasi-contract, and third party beneficiary, but reversed the trial court's granting of summary judgment on the count alleging negligence. We held that Oaklawn and Amtote owed Mr. Register a duty to use ordinary care in taking his bet and, as a result, Mr. Register had stated a cause of action sounding in tort.

After reading the briefs submitted to us on the petition for rehearing, we have concluded that we erred in reversing the trial court on the negligence count. That error came about in the following way. The trial court held that statutes and regulations of the Arkansas State Racing Commission barred the negligence count. Mr. Register, in his original appellant's brief, argued that the regulations did not bar the negligence claim, but he failed to abstact the regulations. Both Oaklawn and Amtote cited the statutes and quoted the regulations in the argument part of their original appellees' briefs but, even so, we refused to consider them because appellant Register had not abstracted them. That was error on our part. We should have considered the regulations for either of two reasons. First, they were set out in the appellees' brief, and second, courts take judicial notice of regulations of state agencies which are duly published. *Webb* v. *Bishop*, 242 Ark. 320, 413 S.W.2d 862 (1967). Unfortunately, we held: "Finally, Mr. Register argues that his cause of action is not barred by the Arkansas State Racing Commission Rules. However, these rules have not been included in the abstract, and we are unable to address the issue." *Register* v. *Oaklawn Jockey Club, Inc.*, 306 Ark. at 321, 811 S.W.2d at 317-18 (citing *Burgess* v. *Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985)). Then, instead of affirming the trial court's holding that the statutes and regulations barred the negligence claim, we held that the trial court erred and that Mr. Register had stated a common law claim on that one count. Once the statutes and regulations on the negligence count are considered, it becomes apparent that the trial court ruled correctly, and we are the court that erred. Accordingly, we grant rehearing, modify the original opinion, and now affirm the trial court on the negligence count.

In earlier times all gaming contracts were against the public policy of this State. Our public policy was strong, so strong that since the Revised Statutes of 1838, we have had a statute that provides a losing bettor can maintain a suit to recover his losses, but a winning bettor may not do likewise because his contract is void. Ark. Code Ann. § 16-118-103(a) and (b)(1) (1987). In construing this statute we held that it meant that a winning wager on a horse race is illegal and void. *McLain* v. *Huffman*, 30 Ark.

428 (1875). Since a winning wager was illegal and void, there was no common law duty of care owed to a person making a wager.

Our law so continued until 1956, when the voters of Arkansas adopted the 46th Amendment to the Constitution of Arkansas which provides: "Horse racing and pari-mutuel wagering thereon shall be lawful in Hot Springs, Garland County, Arkansas, and *shall be regulated by the General Assembly.*" (Emphasis added.) The General Assembly has now regulated pari-mutuel wagering and has expressly provided for the disposition of wagering money as follows:

> Excepting only the moneys retained for the use and benefit of the franchise holder, the amounts paid to the commission for the use and benefit of the State of Arkansas, the amount paid to the commission for deposit in the Arkansas Racing Commission Purse and Awards Fund, and the amount paid to a city, town, or county as provided in this subchapter, *all moneys received by the franchise holder from wagers pursuant to this subchapter shall be paid over to bettors holding winning pari-mutuel tickets* in accordance with the provisions and at those times specified in the various race programs written by the franchise holder for the racing meet, as their respective interests may appear, *upon presentation of the tickets.* [Emphasis added.]

Ark. Code Ann. § 23-110-406(a) (1987). The meaning of the statute is clear. All wagering money received by Oaklawn shall be paid over to bettors holding winning tickets.

In addition, Ark. Code Ann. § 23-110-405(d)(2) (1987), in pertinent part provides, "There shall be no wagering on the results of any races except under the pari-mutuel or certificate method of wagering as provided for in this section . . . ." Again, it is clear that the General Assembly intends for all money received from wagers to be paid over to the bettors, subject to the other provisions of the statute.

Rule 2416 of the Arkansas State Racing Commission Rules and Regulations Governing Horse Racing in Arkansas (1989), provides:

> Any claim by a person that a wrong ticket has been delivered to him must be made before leaving the mutuel ticket window. No claims shall be considered thereafter and no claim shall be considered for tickets thrown away, lost, changed, destroyed or mutilated beyond identification. *Payment of wagers will be made only on presentation of appropriate pari-mutuel tickets.* [Emphasis added.]

Classix wagers are governed by Rule 2460(D) as follows:

> (1) The net amount in the Classix pari-mutuel pool will be divided into the Major Share (75%) and the Minor (Consolation) Share (25%).
>
> (a) The Major Share (75%) will be distributed among the *holders of Classix tickets which correctly designate the official winner in each of the six races comprising the Classix.*
>
> (b) The Minor Share (25%) will be distributed among the *holders of the Classix tickets which correctly designate the most official winners, but fewer than six, of the six races comprising the Classix.* [Emphasis added.]

In summary, pari-mutuel wagering is now authorized by the Constitution of the State of Arkansas and "shall be regulated by the General Assembly." The General Assembly has enacted statutes heavily regulating such wagering, has created the Arkansas State Racing Commission, and has authorized it to promulgate rules and regulations. That Commission has promulgated rules and regulations concerning Classix wagering. Under the statutes and regulations, a bettor must hold a pari-mutuel ticket that correctly designates the winner of all six races in order to receive any money from the Classix Major Share Pool.

All other jurisdictions that have considered similar statutes and regulations have concluded that common law negligence claims such as the one now before us are barred. *Bourgeois* v.

Fairground Corp., 480 So.2d 408 (La. App. 1985); *Seder* v. *Arlington Park Race Track Corp.*, 481 N.E.2d 9 (Ill. App. 1985); *Valois* v. *Gulfstream Park Racing Ass'n*, 412 So.2d 959 (Fla. App. 1982); *Hochberg* v. *New York City Off-Track Betting Corp.*, 343 N.Y.S.2d 651 (1973), *aff'd*, 352 N.Y.S.2d 423 (1974).

In holding no liability on a negligence claim in a case almost identical to the one at bar, the court, in *Seder* v. *Arlington Park Race Track Corp.*, 481 N.E.2d 9, 11-12 (Ill. App. 1985), relied on a comparable statute and wrote:

> [T]he only legislatively authorized way for a patron at a racetrack to recover money based upon the outcome of a horse race is through the pari-mutuel or certificate system. (Ill. Rev. Stat. 1983, ch. 8, pars. 37-26.) . . . The Act also establishes a board to supervise the pari-mutuel system and to prescribe rules, regulations and conditions governing the conduct of the races. *Under the rules and regulations adopted by the board, it is clear that in order to receive any funds from the sweep six wagering pool, a patron must hold a pari-mutuel ticket which correctly designates the winner of the six races.* See Illinois Racing Board Rules B5.14, B17.3.

In *Valois* v. *Gulfstream Park Racing Ass'n*, 412 So.2d 959, 960 (Fla. App. 1982), in affirming the dismissal of a complaint which included a negligence count, the court cited the applicable regulation that provided, "[p]ayment of winning pari-mutuel tickets shall be made only upon presentation and surrender of such tickets. No claims shall be allowed for lost or destroyed winning tickets." It additionally cited, but did not apply, a statute enacted after the occurrence of the alleged negligent act as expressing the public policy of the state that there should be no recovery for such a claim.

In *Hochberg* v. *New York Off-Track Betting Corp.* 343 N.Y.S.2d 651, 656 (1973), the court held, "Defendant, in this case, owes no duty to the plaintiff or any other OTB [New York

City Off-Track Betting Corporation] bettor with respect to the accuracy of the information and neither plaintiff nor any other bettor is entitled to rely on the information and hold defendant liable for any mistakes therein." In so holding the court relied on a statute which provided that "all sums deposited in any off-track pari-mutuel pools shall be distributed to the holders of winning tickets therein. . . ." *Id.* at 655.

In conclusion, we erred in not considering the statutes and regulations in our original opinion. Upon considering them we now hold, as have all other jurisdictions having similar statutes and regulations, that without the presentation of a winning Classix ticket, a bettor is precluded from asserting a claim sounding in either tort or contract. Accordingly, rehearing is granted, the original opinion of this court is modified, and the decision of the trial court is affirmed.

HOLT, C.J., GLAZE and CORBIN, JJ., dissenting.

JACK HOLT, JR., Chief Justice, dissenting. The petitioner, American Totalisator Co., Inc. (Amtote), submits its petition for rehearing on the basis that this court should reconsider its analysis of the decisions of courts in other jurisdictions. Amtote makes two assertions: 1) the other courts relied on statutes or rules and regulations virtually identical to those in effect in Arkansas, and 2) the plaintiff in every one of the five cited cases attempted to recover on a negligence theory, as well as a contract theory, and the negligence claim was rejected in each case.

Arkansas Sup. Ct. R. 20(g) states as follows:

> The petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain. Counsel are expected to argue the case fully in the original briefs, and the brief on rehearing is not intended to afford an opportunity for a mere repetition of the argument alrady considered by the court.

Amtote essentially requests that this court reassess its analysis of the decisions of courts in other jurisdictions. In its

opinion of July 15, 1991, this court stated, "The existence of a duty depends upon whether a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other. Under our well-established principles of common law duty and the facts before us, we find that a duty existed between the appellees and Mr. Register."

In addressing the parties' arguments on appeal, this court also noted that "Oaklawn and Amtote's reliance on cases decided in other jurisdictions is misplaced in that those cases *generally* had statutes or rules and regulations limiting tort liability or dealt with the contractual theory of liability." (Emphasis added.)

Given the court's phrasing in finding a duty owed by Amtote to Mr. Register, and analysis of the decisions of other jurisdictions, it is apparent to the dissent that this court addressed Amtote's extensive appellate arguments.

In our previous opinion, we declined to reach Mr. Register's final argument that his cause of action was not barred by the Arkansas State Racing Commission Rules inasmuch as he had failed to abstract them and noted that Amtote likewise had failed to properly supplement the abstract with the rules. Granted, we were partially wrong in this regard. Amtote, in its original brief, presented Rules 2416 and 2460(D) of the Arkansas State Racing Commission Rules and Regulations (ed. 1989), covering horse racing in this state, to support its argument that Mr. Register's cause of action is barred by the Racing Commission rules.

Rule 2416 provides as follows:

> Any claim by a person that a wrong ticket has been delivered to him must be made before leaving the mutuel ticket window. No claim shall be considered thereafter and no claim shall be considered for tickets thrown away, lost, changed, destroyed or mutilated beyond identification. Payment of wagers will be made only on presentation of appropriate pari-mutuel tickets.

Rule 2460(D) provides that the Classix pari-mutuel pool shall be handled as follows:

(1) The net amount in the Classix pari-mutuel pool will be divided into the Major Share (75%) and the Minor (Consolation) Share (25%).

(a) The Major Share (75%) will be distributed among holders of Classix tickets which correctly designate the official winner in each of the six races comprising the Classix.
(b) The Minor Share (25%) will be distributed among the holders of Classix tickets which correctly designate the most official winners, but fewer than six, of the six races comprising the Classix.

In its petition for rehearing, Amtote again provided us with Rules 2416 and 2460(D), noting that it had cited "these rules in its brief, and this court may take judicial notice of rules and regulations promulgated pursuant to statutory authorization and brought to the attention of this court."

Taking judicial notice of Rules 2416 and 2460(D), they may well limit contractual liability; however, they do not restrict tort liability. The fact still remains that under our well-established principles of common law duty and the facts before us, a duty existed between Amtote and Mr. Register. Accordingly, I disagree with the court's present finding that our statutes and regulations preclude a claim of tort liability of Oaklawn Jockey Club, Inc. and Amtote.

Consequently, Amtote impermissibly attempts to reargue the interpretation of cases decided in other jurisdictions and does not point out any specific errors of law or fact thought to be contained in this opinion.

I respectfully dissent to the granting of the petition for rehearing.

GLAZE and CORBIN, JJ., join in this dissent.

SUPPLEMENTAL OPINION ON DENIAL OF
SECOND REHEARING
FEBRUARY 3, 1992

822 S.W.2d 391

PER CURIAM. Petition for rehearing is denied.

ROBERT H. DUDLEY, Justice, concurring. The appellant, Paul Register, filed this case against appellees, Oaklawn Jockey Club, Inc., and American Totalisator Co., Inc. In his complaint he alleged that he attempted to place a winning Classix bet at the race track owned by Oaklawn Jockey Club, but, because of a malfunction by a betting machine installed by American Totalisator Co., his attempt to place the winning bet was not accepted. His complaint alleged counts of implied contract, quasi-contract, third party beneficiary, and negligence. On appeal, we unanimously affirmed the trial court's ruling on implied contract, quasi-contract, and third party beneficiary, but, again by a unanimous vote, reversed on the negligence count. *See Register* v. *Oaklawn Jockey Club, Inc.*, 306 Ark. 318, 811 S.W.2d 315 (1991). The appellees filed a petition for rehearing, and on a four-to-three vote, we granted rehearing on the negligence count. *See Register* v. *Oaklawn Jockey Club, Inc.*, 306 Ark. 318, 321, 821 S.W.2d 475 (1991). Thus, the appellant, for the first time, lost in this court on the negligence count. He has now filed a petition for a rehearing on that count, and at the same time suggested that this judge disqualify from the second rehearing because of an alleged appearance of impropriety. I decline the suggestion to disqualify.

The suggestion is based upon two (2) allegations. First, he alleges that there was an inappropriate telephone call to the Racing Commission by "someone identifying himself as a clerk at the supreme court." Second, he alleges there were "extra-judicial conversations with the attorney for the Arkansas State Racing Commission and with a former member of the Commission concerning this case" while they "may be in a special position to influence" this judge.

There was absolutely nothing wrong with the telephone call and, in addition, it did not in any way involve this judge. This judge read the suggestion for disqualification with bewilderment since he did not know who made the supposedly improper call. Later, at our conference on rehearing, another judge stated that he knew about the call. He stated that it came about in the following manner. The other judge, who incidently voted to deny the first rehearing, wanted to compare the regulations as set out by the appellees in their briefs with copies of the Racing Commission's original regulations. That judge asked one of his law clerks to go to the supreme court library and get a copy of the regulations for comparison. This was certainly a proper request since we were taking judicial notice of the regulations. The clerk went to the library but could not find the regulations. He asked an assistant librarian for assistance, and the assistant librarian ultimately telephoned the Racing Commission and asked for a copy of the regulations. That is the telephone call about which appellant complains. There was no impropriety whatsoever in it. The assistant librarian did nothing wrong in seeking a public document. In addition, it simply did not involve this judge. The appellant's suggestion that this judge disqualify because of the telephone call is balderdash.

The appellant additionally alleges that the attorney for the Racing Commission and a former member of the Commission may have tried to influence this judge on this second rehearing. Again, the suggestion is senseless. The facts are these. After the case had been handed down and after rehearing had been granted, this judge was in the presence of Byron Freeland and Dr. Malcolm Moore. Mr. Freeland is the attorney for the Racing Commission, and Dr. Moore is a Little Rock physician who grew up in Arkadelphia and, according to appellant's suggestion, was a member of the Racing Commission at some time in the past. Mr. Freeland either made some comment or asked some question about the phone call mentioned above. The essence of his statement or question was why would someone on this court want a copy of the Commission's regulations within an hour or so. This judge responded that he did not know about the phone call but assumed it involved a recent case about Classix betting and the Racing Commission's regulations. This judge commented that it had been an interesting case. Nothing more was said by either

person. The conversation was out in the open. It was not secretive in any manner. Mr. Freeland never made any suggestion whatsoever about the merits of the case. Upon reflection, it did not even appear that Mr. Freeland knew the name of the appellant, even though the case had received some media coverage. Dr. Moore, who was standing perhaps 10 yards away, said either that he knew, or that he knew of, the man who had tried to place the bet. He commented that the case involved a local football hero of many years past who had played for Henderson State College in Arkadelphia under the name of Cash Register and later played for the University of Arkansas under the name of Paul Register. He stated that Mr. Register was a nice man who later became an assistant coach at Texas A. & M. University. He asked if Mr. Register had won or lost his case, and this judge stated that he had lost. There was not even the slightest suggestion by Dr. Moore about how the case should be decided on rehearing. This judge rejects, without qualification, appellant's suggestion that the conversations were inappropriate in any manner. Neither Mr. Freeland nor Dr. Moore attempted to discuss the merits of the case or influence this judge. They would not attempt to do so, and this judge would not tolerate it if such were attempted. Further, the case came before us an an appeal from a summary judgment, so we must presume everything Mr. Register said is true.

Appellant's suggestion that this judge disqualify is declined, and I concur in the vote to deny the second rehearing.

Mary Alissa Harris KAY *v.* Thomas and Gladys KAY

91-118 812 S.W.2d 685

Supreme Court of Arkansas
Opinion delivered July 15, 1991

Smith Law Firm, Ltd., by: *Floyd A. Healy*, for appellant.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A. by: *Sam Laser* and *Brian Allen Brown*, for appellees.

DAVID NEWBERN, Justice. This is a negligence case in which we review a directed verdict granted to the defendants. Mary Alissa Harris worked as a housekeeper in the home of the appellees, Thomas and Gladys Kay. Subsequent to the incident which gave rise to her claim against the Kays, she married their son and is now Mary Alissa Harris Kay, the appellant. For ease of

identification, the appellees will be referred to as "the Kays," and Mary Alissa Harris Kay will be referred to as "Mary."

Mary was bitten by a brown recluse spider while working in the Kays' home, and she sustained a serious injury and substantial medical expenses as a result of the bite. Mary's complaint alleged the Kays knew of "the presence of spiders in their home and did nothing to make the premises safe" for her. At the conclusion of Mary's case-in-chief, the Trial Court granted the Kays' directed verdict motion. We affirm the judgment because Mary's evidence was insufficient to prove the Kays failed to honor the duty they owed to Mary as an invitee in their home.

Mary testified she had observed spider webs, cobwebs, and other signs of insects in the Kays' house. She discussed the matter with the Kays who advised her they would take care of the problem. She said they did not take care of it, and when she later returned to the house to clean she was bitten by the brown recluse spider while cleaning cabinets.

Mary's husband, Danny Kay, testified he usually sprayed the Kay's home for insects and had done so for several years, but he had not been asked to spray in March of 1990.

In the course of giving his oral ruling granting the Kays' motion for directed verdict, the Trial Court stated that Mary was an employee and not an invitee. While we have no case stating flatly that an employee working on her employer's premises is an invitee, we have no doubt that is the law. In *Coleman* v. *United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984), we held the plaintiff was a trespasser and contrasted an invitee as "one induced to come onto property for the business benefit of the possessor," citing W. Prosser, Law of Torts § 58 (4th ed. 1981). In *Daniel Const. Co.* v. *Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979), we held that an employee of a subcontractor lost his "business invitee" status when, for a personal purpose, he stepped off the portion of the premises where his job required him to be and was injured. The clear implication was that, had the employee remained on the premises controlled by the general contractor, his status would have been that of "invitee." We have no doubt that Mary was an invitee when she was working at the Kays' residence at their invitation.

The licensee-invitee distinction was, however, not the basis of the directed verdict. The Trial Court stated that even if Mary were an invitee and thus owed the duty of ordinary care to protect her from harm, there was no evidence that the Kays violated that duty. We agree with the Trial Court's conclusion.

Cases arising from insect bites to invitees are few. The only one cited by the Kays is *Brunnell* v. *Signore*, 263 Cal. Rptr. 415, 215 Cal. App.3d 122 (4th Dist. 1989). In that case a guest in a vacation home was bitten by a brown recluse spider and sued the owner of the premises alleging negligence in failure to maintain the property properly and failure to warn of a dangerous condition. Summary judgment was awarded to the defendant. The rationale of the Court of Appeals in affirming was as follows:

> [An] owner or occupier of a private residence does not have a duty to protect or prevent bites from harmful insects where: (1) it is not generally known that the specific insect is indigenous to the area; (2) the homeowner has no knowledge that a specific harmful insect is prevalent in the area where his residence is located; (3) the homeowner has on no occasion seen the specific type of harmful insect either outside or inside his home; and (4) neither the homeowner nor the injured guest has seen the specific insect that bit the guest either before or after the bite occurred. To impose a duty under these circumstances, where the owner or occupier of the premises had no reason to anticipate or guard against such an occurrence would be unfair and against public policy. Imposition of a duty even in those cases where the homeowner shared general knowledge with the public at large that a specific harmful insect was prevalent in the area but the homeowner had not seen the specific harmful insect either outside or inside his home would impose a duty on the owner or occupier of the premises that would also be unfair and against public policy. In either of these instances, the burden on the landowner would be enormous and would border on establishing an absolute liability. Further, the task of defining the duty and the measures required of the owner or occupier of private residences to meet that duty would be difficult in the extreme.

A few other cases are collected in Annot., Injuries to Patron Caused by Insect, 48 ALR3d 1257 (1973). Liability to a business invitee on the basis of failure to exercise ordinary care to make premises safe or give a warning has been upheld where the same or a similar insect or rodent, which has been seen previously on the premises,caused the injury. *CeBuzz, Inc.* v. *Sniderman*, 171 Colo. 246, 466 P.2d 457 (1970) (spider); *Williams* v. *Milner Hotels Co.*, 130 Conn. 507, 36 A.2d 20 (1944) (rat). In cases where there has been an injury from such an incident but there has been no showing of knowledge on the part of the owner or occupier of the premises of the existence of the specific danger and no showing of acts or omission amounting to negligence resulting in the injury, verdicts directed in favor of the defendants have been affirmed. *Cunningham* v. *Neil House Hotel Co.*, 33 N.E.2d 859 (Ohio App. 1940); *Hillwertz* v. *Parkes*, 298 F.2d 527 (6th Cir. 1962) (applying Ohio law).

In reviewing the directed verdict against her, we give Mary's evidence its strongest probative force. *See Harper* v. *Missouri Pacific R. Co.*, 229 Ark. 348, 314 S.W.2d 696 (1958). The fact that she had told the Kays of having seen evidence of insects, including spider webs, and the Kays' assurance that they would take care of the problem, do not, in our judgment, constitute the proof required in the *Brunelle* case or in the cases where liability to an invitee for an insect bite has been upheld. There was no showing that any kind of spider, much less a brown recluse, had been actually seen on the premises, nor was there evidence that such a harmful insect had ever been seen in the area in which the home was located. There was no evidence from which it could be determined how or, more importantly when, the spider came upon the premises. In these circumstances, we agree with the rationale of the California Court of Appeals that it would be unfair and a virtual declaration of absolute liability to hold the Kays responsible for Mary's injury.

Affirmed.

HAYS and BROWN, JJ., dissent.

GLAZE, J., not participating.

STEELE HAYS, Justice, dissenting. In affirming a directed verdict against the appellant, the majority relies almost entirely

on *Brunnell* v. *Signore*, 263 Cal. Rptr. 415, 215 Cal. App.3d 122 (4th Dist. 1989). But there are significant differences between this case and the *Brunnell* case. Arkansas applies the traditional common law with respect to trespassers, licensees and invitees and the duty owed them by owners and occupiers of land. *Baldwin* v. *Mosley*, 295 Ark. 285, 748 S.W.2d 146 (1988); *Davis* v. *Safeway Stores, Inc.*, 195 Ark. 23, 110 S.W.2d 695 (1937). California, on the other hand, abolished that theory of liability over twenty years ago and replaced it with a general duty of ordinary care. *Rowland* v. *Christian*, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). Thus, California has a distinctly different concept of liability than Arkansas. Under the law of this state, an owner owes an invitee an affirmative duty to see that the premises are reasonably safe. AMCI 1104. *Prosser* gives this explanation of the duty owed to an invitee:

> The leading English case of *Indermaur* v. *Dames* laid down the rule that as to those who enter premises upon business which concerns the occupier, and upon his invitation express or implied, the latter is under an affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover. The case was accepted in all common law jurisdictions, and the invitee, or as he is sometimes called the business visitor, is placed upon a higher footing than a licensee.
>
> * * *
>
> The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of hidden dangers known to the occupier, but he must also act reasonably to inspect the premises to which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property.

W. Keeton, *Prosser and Keeton on Torts* § 61 (5th ed. 1984).

Another material difference is that in the *Brunnell* case there was no evidence the owner had any reason to suspect that his premises presented any risk of spider bite. Whereas, the proof here is twofold: that the appellees had been told of the specific problem of spiders and had even given assurances that it would be addressed.

When the proof is given its highest probative weight, I cannot say that a directed verdict was properly granted.

BROWN, J., joins.

STATE of Arkansas *v.* Ronnie BURGE

CR 91-61 811 S.W.2d 318

Supreme Court of Arkansas
Opinion delivered July 15, 1991

Winston Bryant, Att'y Gen., by: *Clint Miller*, Sr. Asst. Att'y Gen., for appellee.

G. Keith Watkins, for appellee.

TOM GLAZE, Justice. The state charged appellee, a minor, with two counts of delivery of marijuana, a controlled substance, and, pursuant to Ark. R. Cr. P. 36.10(b) and (c), it appeals the trial court's dismissal of those charges.

At the commencement of trial, both the state and the appellee announced to the court, sitting non-jury, that they were willing to stipulate as to the results of the tests of the state chemist in order to avoid the necessity of his having to appear in court. Afterwards, however, the state did not introduce the controlled substance, so appellee moved to dismiss the charges against him. Appellee argued that, without the marijuana having been introduced into evidence, the state failed to show the substance that appellee gave the police officer, Roger Ahlf, was a controlled substance. He also argued that, without the marijuana, the state was unable to establish the chain of custody necessary to admit into evidence the chemist's test results. In sum, appellee argued below, and now on appeal, that because the marijuana itself was not introduced by the state, the state could not prove the charges against appellee.

We have consistently held that it is not essential to proof of charges of delivery or attempted delivery of a controlled substance that the substance itself, or the corpus delecti, be produced in court. *Marshall* v. *State*, 289 Ark. 462, 712 S.W.2d 894 (1986); *Williams* v. *State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Washington* v. *State*, 248 Ark. 318, 451 S.W.2d 449 (1970). We have cautioned, however, that in those instances where the substance is not produced in court, there must be accompanying testimony by one sufficiently experienced with the substance so as to testify that it was indeed the substance. *Id.*

Here, the state called Officer Ahlf as a witness who testified that on November 30, 1989, while acting as an undercover agent, he had spoken with the appellee about obtaining marijuana, and appellee advised that "up front money" in the amount of $110.00 would be required for an ounce of marijuana.[1]

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[1] Although the state had charged appellee with two counts of delivery arising from

Officer Ahlf testified that he later gave the appellee $110.00 for an ounce of marijuana and that appellee and another individual reciprocated by delivering a bag containing three-quarters of an ounce of marijuana and $20.00, since the amount was less than the requested ounce.

Officer Ahlf offered testimony showing that he was an expert who could identify marijuana. Based upon his experience, Ahlf opined without objection that the substance delivered to him by appellee and his companion was marijuana. The trial court did not rule Ahlf's testimony was insufficient to establish the material given him was marijuana. Instead, it ruled that, as a matter of law, appellee was entitled to have the state introduce the marijuana into evidence so he could show the state failed to establish that its chain of custody was sufficient to prove the offense against appellant. As we stated above, the case law reflects the trial court was wrong in this specific respect.

Accordingly, we hold that it was error of the trial court to have dismissed the state's charges.

Neal HALL *v.* STATE of Arkansas

CR 90-297 812 S.W.2d 688

Supreme Court of Arkansas
Opinion delivered July 15, 1991

separate episodes on November 30, 1989 and December 14, 1989, it was stipulated near conclusion of trial of the November 30, 1989 episode that the proof would be essentially the same as to both.

Gibbons Law Firm, P.A., by: *David L. Gibbons*, for appellant.

Winston Bryant, Att'y Gen., *Sandy Moll*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, Neal Hall, was tried and convicted by a Pope County jury for the rape and kidnapping of an eleven-year-old girl. He was sentenced to forty years imprisonment for the rape charge and five years for the kidnapping charge; the sentences were to run concurrently. Appellant appeals the denial of his motion for new trial. We affirm.

The evidence presented at trial reveals that at approximately 8:00 or 8:30 on the morning of October 18, 1989, appellant kidnapped his eleven-year-old victim as she was walking to school. He flashed a gun at her, represented himself to be an

undercover policeman, and told her to get in his car. He then took her into a wooded area, undressed her, blindfolded her, and raped her vaginally, anally and orally.

This evidence was presented through the testimony of the victim herself. The victim's testimony was in complete accord with numerous other witnesses. Dr. Kingsley Bost, the pediatrician who examined the victim, testified she had been vaginally, anally and orally raped. Mike Modika, a school bus driver, testified that on the morning of October 18, 1989, he saw a girl who looked a lot like the victim get into a white car. Modika identified a photograph of appellant's car as the car he saw the girl enter. Two other witnesses testified that on the morning of October 18, 1989, they saw a white car pulled off the road in an area near the rape scene. Both of these witnessed identified photographs of appellant's car as the car they saw. Still another witness testified that on October 18, 1989, he picked up the victim on the roadside; she was terrified and crying. Yet another witness, Gladys Franklin, testified that she was a passenger on the bus driven by Modika. Franklin stated she knew both appellant and the victim and that she saw the victim enter appellant's car on the morning of October 18, 1989. She also testified that she saw appellant's car leave after the victim entered it.

As the single point presented in this appeal, appellant asserts the trial court erred in denying his motion for a new trial based upon the prosecutor's failure to comply with the discovery request to notify appellant's counsel of the felony convictions of material witnesses. Specifically, appellant argues the prosecutor should have notified counsel of the May 30, 1990 arson conviction of Gladys Franklin. Appellant alleges the prosecutor's failure to disclose requested information precluded him from attacking Franklin's credibility.

Appellant's trial occurred on July 23 and 24, 1990. On February 5, 1990, appellant filed a "Request For Disclosure" specifically requesting "prior criminal convictions or charges or allegations of misconduct against persons whom the prosecuting attorney intends to call as witnesses . . . ." The state responded to the request on February 20, 1990, listing Franklin as a witness, but failing to list any charges or convictions. The state's response also stated that the response would be amended upon the finding

of other witnesses or information. Although there was further written communication between the prosecutor and appellant's counsel regarding discovery, no mention of Franklin's guilty plea and sentence of ten years probation entered May 30, 1990, was made.

After trial and upon discovery of Franklin's conviction, appellant moved for a new trial stating that the prosecutor's failure to disclose the information prejudiced him in that he was precluded from impeaching Franklin's testimony with the arson conviction. At a hearing on the motion, the trial court noted the state's failure to comply with the request was not intentional, but an oversight. Not convinced that evidence of Franklin's prior conviction would have made any difference in the trial, the trial court denied appellant's motion.

Ark. R. Crim. P. 17.1(a) states in pertinent part:

> (a) Subject to the provisions of rule 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> . . . .
>
> (vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

We have previously held that reversible error exists when a prosecutor in fact fails to comply with an appellant's timely request for discovery information which results in prejudice to the appellant. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

There can be no doubt as evidenced in the foregoing discussion, that appellant filed a timely request for the information in question and that the state in fact failed to provide the requested information due to an oversight. Although we have previously considered a prosecutor's intent in deciding whether there was a discovery violation, *Lasley* v. *State*, 274 Ark. 352, 625 S.W.2d 466 (1981), such intent or lack thereof is no longer

relevant. *See Yates* v. *State*, 303 Ark. 79, 794 S.W.2d 133 (1990).

The key issue then is whether appellant was prejudiced by the prosecutor's failure to disclose the requested information; absent a showing of prejudice, we will not reverse. *Caldwell* v. *State*, 295 Ark. 149, 747 S.W.2d 99 (1988). We hold appellant has not met his burden of showing prejudice. First, as noted by the trial court, given our lack of knowledge of whether the facts relating to Franklin's arson conviction concern her truthfulness, we can only speculate that appellant's counsel would have been allowed to impeach her credibility with this information. Second, the evidence of appellant's guilt is overwhelming even absent Franklin's testimony.

Excluding Franklin's testimony, the overwhelming evidence against appellant consists of the testimonies of the witnesses, which are related at the beginning of this opinion and the victim's testimony,which is corroborated by other evidence. When taken together, the testimonies of these other witnesses place both the victim and appellant's car near the rape scene at the same time the day the rape occurred. The victim gave an extremely detailed account about her rapist and the circumstances surrounding the crime. Both in a photographic line-up and at trial, she identified appellant as her rapist and kidnapper. The reliability of her identification of appellant is strengthened by the numerous facts to which she testified and which were corroborated by other evidence.

The facts to which the victim testified and the other evidence which corroborates her testimony follow. The victim testified that while she was walking to school, a man wearing a jean jacket, bluejeans, black boots, and blue hat pulled beside her in a car and showed her a gun. She later identified a B-B pistol taken from appellant's apartment as the gun she saw in the car. She testified that a hat taken from the dumpster in front of appellant's apartment looked familiar to her. She also identified a picture of the boots taken from appellant's apartment as the ones her rapist wore. The victim testified her assailant smoked Winston cigarettes; Winston cigarettes were found at appellant's apartment. She stated her attacker had shoulder-length hair that was dirty blond. Appellant admitted his hair was long, but that he cut it

when he learned he was a rape suspect. Hair clippings were found in appellant's bathroom. The victim testified the car she was kidnapped in was white with a blue interior and that she heard tools or cans rattling in the back of the car. She later identified photographs of appellant's car as the one in which she was kidnapped. The truck of appellant's car was filled with aluminum cans.

It is true that the record indicates the jury deliberated for quite some time before reaching a verdict. Appellant contends this indicates the jury had difficulty in reaching a verdict. This contention is purely speculation on his part and it does not mean the jury would have reached a different verdict had Franklin's testimony been impeached. It simply means the jury deliberated for a while; we can only speculate as to the reason. They could have had difficulty in recommending sentencing provisions.

In holding that appellant has not met his burden of showing he was prejudiced by the prosecutor's failure to disclose the requested information, we in no way intimate approval of the prosecutor's actions in this case. Whatever the reason, whether it be intentional or oversight, a prosecutor's failure to disclose discoverable information to a criminal defendant is an action which should be avoided. In this case, there was no prejudice resulting from the prosecutor's negligence; it is this absence of prejudice that forms the basis of our decision.

The decision to grant a new trial in a criminal case 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. *Allen* v. *State*, 297 Ark. 155, 760 S.W.2d 69 (1988); *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). As there was a plethora of evidence other than Franklin's testimony to support a determination of guilt, we cannot say there was an abuse of discretion and appellant has not demonstrated any prejudice. Thus, the denial of the motion for new trial is affirmed.

Affirmed.

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

DAVID NEWBERN, Justice, dissenting. So long as the evidence against an accused is "overwhelming," a prosecutor, acting in the name of the State of Arkansas, can do anything in the

course of obtaining a conviction! That is the essence of the majority opinion.

"Whatever the reason, whether it be intentional or oversight, a prosecutor's failure to disclose discoverable information to a criminal defendant is an action which *should be avoided.*" (Emphasis added.) Compare that language quoted from the majority opinion with this language from Ark. R. Crim. P. 17.1, to which I have also added emphasis:

> RULE 17.1. Prosecuting Attorney's Obligations.
>
> (a) Subject to the provision of Rules 17.5 and 19.4, the prosecuting attorney *shall disclose* to defense counsel, upon timely request the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> ***
>
> (vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

The majority opinion thus begins by altering the terms of the Rule from mandatory to discretionary. It then says we and the trial court may forget the Rule as long as the evidence of guilt is overwhelming.

On February 2, 1990, Hall's counsel filed a discovery request seeking "[a]ny record of prior criminal convictions or charges or allegations of misconduct against persons whom the prosecuting attorney intends to call as witnesses at the hearing or at trial. . . ." On February 20, the prosecutor responded, listing Gladys Franklin as a witness. In April, 1990, Gladys Franklin was charged with arson. On May 30,1990, Franklin pleaded guilty to arson, was fined $500 and put on probation with the prosecutor in attendance. On July 11, 1990, the prosecutor updated his response to the discovery request with the name of an additional witness and a number of physical items he intended to present at the trial. No mention was made of the fact that Ms. Franklin had been convicted of a crime.

Gladys Franklin was a key witness against Hall. If the jury

had had doubts about the testimony of the victim, Ms. Franklin's testimony would have been the only testimony directly identifying Hall as having been with the victim on the day the crime occurred.

As the majority opinion points out, the jury took considerable time in reaching its decision. The jurors might well have had some doubts. Experts testified that no latent fingerprints in Hall's car matched those of the victim, and pubic hairs found on the victim were not similar to Hall's! Of course, no one can say, in the words of the majority opinion, "the jury would have reached a different verdict had Franklin's testimony been impeached." If the accused has to prove that to get a reversal for violation of a rule, then the rule might as well not exist.

Had Hall's counsel been apprised of the fact that Franklin had been charged with arson in the same judicial district in which this trial was taking place, his cross-examination of her could have all but nullified her testimony in the eyes of the jurors who, obviously struggled with the evidence as it was. Was it "prejudicial" for Hall's counsel not to have had that information? Yes, without a doubt.

In *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), we opined that overwhelming evidence of guilt may be considered along with allegations of error, and we held that, "No longer is it presumed that simply because an error is committed it is prejudicial error." In *Johnson* v. *State*, 303 Ark. 313, 796 S.W.2d 342 (1990), we overlooked error largely on the basis of inconsistent positions taken by Johnson's brief with respect to that error. In *Mitchell* v. *State*, 295 Ark. 341, 750 S.W.2d 936 (1988), we wrote we would not "count" the error of failure of the prosecution to make a tape recording of Mitchell's confession available to him, noting the "overwhelming evidence of guilt," but we emphasized the "good faith" of the police officers who had erased the tape so that it could be reused. With respect to an error in selecting the jury in that case, we said we were able to overlook a "technical" default where the evidence of guilt was overwhelming, the error was harmless, and thus the accused was not prejudiced by the mistake. We could not find evidence that the jury treated Mitchell in any way that was prejudicial to him. In this case, to the contrary, it is unquestionable that there was

prejudice toward Hall, and the prejudice was unfair although the trial court concluded it was the result of an "oversight."

The facts of this case show that a heinous and revolting crime was committed. I cannot, however, condone the conclusion that we can overlook the serious violation of Hall's rights because of the nature of the crime or solely because the evidence against him was strong or even "overwhelming." Any defendant is entitled to fair treatment as it is spelled out in our Rules, regardless of the strength of the evidence against him or her.

If we begin to disregard our explicit Rules which we purport to establish to protect the rights of individuals, the erosion of personal liberties will escalate. We will no longer be able to claim with any degree of honesty to be a "government of laws." Hall should be given a new trial in which his rights are respected regardless of the nature of the crime with which he is charged and regardless of the strength of the evidence against him. That will be a small price to pay for the liberties we enjoy as a result of fairness in the courtroom.

I respectfully dissent.

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

RLI INSURANCE COMPANY *v.* Jackie Sue COE

90-331 813 S.W.2d 783

Supreme Court of Arkansas
Opinion delivered July 15, 1991
[Rehearing denied September 9, 1991.*]

* Brown, J., not participating.

Hubbard, Patton, Peek, Haltom & Roberts, by: *William G. Bullock* and *John B. Greer*, for appellant.

Nicholas H. Patton, for appellee.

DONALD L. CORBIN, Justice. Appellant, RLI Insurance Company, seeks to set aside an $8,002,178.15 judgment entered August 11, 1989, in the Circuit Court of LaFayette County in favor of appellee, Jackie Sue Coe. Appealing from the trial court's denial of its Motion for Relief from Judgment and its

Motion for New Trial, appellant makes four assignments of error. We find no merit in any of the arguments presented and affirm.

On December 12, 1987, Brad Beaty, appellee, and two other passengers were traveling from Taylor, Arkansas, to Lewisville, Arkansas, in Beaty's truck. It was an hour and a half before appellee's wedding was to take place and the four were on their way to the church where the ceremony was to be performed. Beaty was driving. The truck crossed the center line and hit a bridge, injuring the three passengers. On April 1, 1988, appellee and the two other passengers filed suit against Beaty in the Circuit Court of Lafayette County, alleging the wreck was caused by his negligent acts and omissions. Beaty and one of the passengers were Oklahoma residents. Appellee and the other passenger, her sister, were both Arkansas residents. Appellee alleged she suffered damages for past and future medical expenses, past and future pain, suffering and mental anguish, past and future loss of earnings, and disfigurement, in the amount of $725,000.00.

Brad Beaty was covered by a policy of liability insurance issued by Farmers Insurance Company, Inc., (hereinafter referred to as "Farmers") and having limits of $250,000.00 per person. He was also a named insured on a separate policy issued by appellant to William R. Beaty, his father, which provided "umbrella" coverage for up to an additional one million dollars.

Farmers, as primary carrier, employed G. William Lavender to defend the suit. Appellant was notified of the suit and made an agreement with Farmers that Lavender would forward to it copies of all pleadings and correspondence relating to the loss. On August 15, 1988, appellant forwarded a "reservation of rights" letter to William R. Beaty. On January 20,1989, appellant filed suit in Oklahoma against William R. Beaty, seeking a declaratory judgment that it was entitled to rescind the policy for material misreprentations made in the application.

Lavender forwarded all correspondence relevant to the case to appellant until he determined that no answer was going to be filed to the declaratory judgment action against William R. Beaty. He then notified Farmers that due to a conflict of interest he would no longer be able to communicate with appellant. The last correspondence forwarded by Lavender to appellant was

dated January 31, 1989.

On March 23, 1989, a trial was held at which evidence and testimony were received by the court. On April 20, 1989, a judgment was filed along with findings of fact and conclusions of law. Following an August 10, 1989 Motion for Entry of Final Judgment filed by appellee, the court, pursuant to Ark. R. Civ. P. 54, entered such a judgment. It was filed August 11, 1989.

On August 25, 1989, appellant filed a Motion to Intervene for the limited purpose of filing a Motion for Relief from Judgement and for New Trial; the same day it filed the Motion for Relief from Judgment and for New Trial. On November 3, 1989, appellant filed a Supplemental Motion to Intervene and a Supplemental Motion for Relief from Judgment. On November 6, 1989, following a hearing at which appellant presented testimony and evidence in support of its motions, the trial court entered an order allowing appellant to intervene, denying appellant's Motion for Relief from Judgment, and making various factual and legal findings in support of its rulings. It is from the adverse rulings included in the November 6, 1989 order this appeal comes.

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE THE PROCEEDINGS UPON WHICH JUDGMENT WERE HAD DENIED APPELLANT DUE PROCESS OF LAW.

Appellant cites the Fourteenth Amendment to the United States Constitution and *Davis* v. *University of Arkansas Medical Center and Collection Serv., Inc.*, 262 Ark. 587, 559 S.W.2d 159 (1977), in support of this argument. In *Davis* this court, when considering a due process issue, quoted the following language from *Goss* v. *Lopez*, 419 U.S. 565 (1975):

> There are certain bench marks to guide us, however, *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), a case often invoked by later opinions, said that '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they

> require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'

Davis, 262 Ark. at 589, 559 S.W.2d at 161.

Appellant asserts that from the *Mullane* language it can be seen that in the context of civil litigation in the state courts of Arkansas, due process of law requires prior notice of the adjudication and prior opportunity for hearing, both being appropriate to the nature of the case. Appellant contends that, in light of the nature of this case, neither the required notice nor the required hearing was afforded.

Appellant argues that at the time of the March 23, 1989 hearing, it was "the only party having an interest adverse to Jackie Sue Coe" and as it had no notice of the hearing, it was denied due process of law. Appellant relies on *Ideal Mutual Ins. Co.* v. *McMillian*, 275 Ark. 418, 631 S.W.2d 274 (1982), in making this argument. In that case, Ideal Mutual Insurance Company insured an airplane that crashed, killing the pilot and injuring McMillian, the passenger. After the pilot's estate was closed, a negligence action was filed by McMillian against the estate of the pilot. A statute of nonclaims barred any action except to the extent that liability insurance was available. The county sheriff was appointed special administrator. He attempted to give notice of the suit to Ideal Mutual Insurance Company by mailing letters to both the attorney for the owner of the plane and Ideal Mutuel's issuing agent. The attorney received the letter addressed to him. However, the letter addressed to the issuing agent was incorrectly addressed and the issuing agent denied ever receiving it. The trial court found the notice to the insurance company was sufficient and, as the complaint was never answered, entered a default judgment against the estate of the pilot. After learning of the default judgment, the insurance company filed a Motion to Intervene under Ark. R. Civ. P. 24(a). The motion was denied. It then filed a Motion to Set Aside the Default Judgment alleging insufficient notice of the proceeding. The trial court denied that motion also. On appeal, this court reversed and remanded finding that under the statute, although the estate was the named defendant, the insurance company was the only party financially interested in the outcome of the case

and pursuant to Ark. R. Civ. P. 24(a) could have intervened as a matter of right. We held that because the insurance company did not receive notice of the suit, the Motion to Set Aside the Default Judgment should be granted and the insurance company should be allowed to intervene.

In *Ideal Mutual*, the insurance company was not given notice the action had been filed. In the case at bar, appellant admittedly knew of the pending action; it complains of not receiving notice of the March 23, 1989 trial, what it refers to as "the adjudication." Although appellant had a financial interest in the outcome of the case, and may not have been given notice the case had been set for trial, it had notice of the proceedings in that it knew the lawsuit was pending. Like the insurance company in *Ideal Mutual*, it also could have intervened as a matter of right, Ark. R. Civ. P. 24(a). Had it so intervened, it could have been present to protect its own interests.

Appellant received correspondence from Mr. Lavender until and even after the time it filed the declaratory judgment action in Oklahoma, by which it placed itself in a position adverse to that of Brad Beaty. Among the correspondence forwarded to appellant regarding the pending suit was a letter from appellee's counsel to Mr. Lavender, mailed late in 1988. In the letter, appellee offered to settle the lawsuit for $1,250,000.00. Accompanying the letter was a copy of the videotape, "a day in the life of Jackie Sue Coe."

Notice that the lawsuit is pending is the notice required to satisfy the due process requirement. *See Ideal Mutual, supra.* Appellant had not only notice the lawsuit was pending, but also notice the primary coverage would probably be exhausted.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE THE RELIEF REQUESTED WAS NECESSARY TO PREVENT THE MISCARRIAGE OF JUSTICE.

Ark. R. Civ. P. 60, Relief from Judgment, Decree or Order, states in part:

(b) Ninety-Day Limitation. To correct any error

> or mistake or to prevent the miscarriage of justice, a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.

Appellant maintains that at the March 23, 1989 hearing there was no justiciable controversy between the parties before the court and, thus, the machinery of the court system was used as an instrumentality for later extortion against a non-party. It maintains that such extortion was the object of the trial is obvious from the following: the parties acquiesced in the entry of a judgment for more than ten times the damages pleaded; appellant was not notified of the entry of the judgment at the time it was entered; and almost exactly thirty days after entry of the judgment, appellee sued appellant for over eight million dollars on the basis of an assignment of rights she received from Brad Beaty. Appellant claims these events resulted in a miscarriage of justice which should have been prevented by the trial court's granting it relief pursuant to Rule 60.

[redacted] The only limitation on the exercise of the power to set aside the judgment pursuant to Rule 60 is addressed to the sound discretion of the court. *Massengale* v. *Johnson*, 269 Ark. 269, 599 S.W.2d 743 (1980).

Appellant maintains the trial court's finding that it failed to make a prima facie case showing any defense to the original cause of action as required by Rule 60(d) is inapplicable. Rule 60(d) provides as follows:

> (d) Valid Defense to Be Shown. No judgment against a defendant, unless it was rendered before the action stood for trial, shall be set aside under this rule unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense.

Appellant contends "the action" in this case includes what were at the time the judgment was entered, the pending claims of the other two passengers, and therefore, the hearing of March 23, 1989, comprised only a part of the action. Appellant maintains that as the requirement of establishing a meritorious defense is

inapplicable where the judgment from which relief is sought "was rendered before the action stood for trial" and the judgment in the case at bar was rendered before "the action stood for trial," the requirement of a prima facie showing of a valid cause of action is inapplicable.

Appellant fails, however, to support this contention with either convincing argument or authority. As we have said many times, assignments of error which are unsupported by convincing argument or authority, will not be considered on appeal unless it is apparent without further research that they are well taken. *Goodwin* v. *Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

Alternatively, appellant contends the requirement of the establishment of a prima facie case of a meritorious defense was met. It contends that in its Supplemental Motion for Relief from Judgment it pleaded that Brad Beaty had a valid defense to the claim of appellee in that she was a participant along with Beaty in a joint enterprise within the contemplation of such Arkansas cases as *Lewis* v. *Chitwood Motor Co.*, 196 Ark. 86, 115 S.W.2d 1072 (1938).

This court in *Tucker* v. *Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), defined "meritorious defense" as:

> [E]vidence (not allegations) sufficient to justify the refusal to grant a directed verdict against the party required to show the meritorious defense. In other words, it is not necessary to prove a defense, but merely present sufficient defense evidence to justify a determination of the issue by a trier of fact.

Tucker, 275 Ark. at 66, 628 S.W.2d at 283-84.

In *Neal* v. *J.B. Hunt Transp. Inc.*, 305 Ark. 97, 805 S.W.2d 643 (1991), this court considered whether the trial court's giving a jury instruction on joint enterprise was error. In *Neal*, both the driver of a car and the passenger brought a negligence action against a trucking company, alleging one of the company's trucks ran them off the road. The jury found in favor of the trucking company. On appeal, the driver and passenger argued it was error to give a joint venture instruction absent a showing of some business relationship or purpose common to

them both. We stated that a finding of a joint enterprise requires a showing of "an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking." *Neal*, 305 Ark. at 101, 805 S.W.2d at 645. We found a basis for the joint enterprise instruction in testimony of the driver. She said she would have turned the driving back over to the passenger if he had asked. We stated that assuming the evidence is sufficient to raise an issue of negligence on the part of the driver of the vehicle and it remains the same on the matter of right to control the vehicle, the giving of an instruction on joint enterprise was not error; the essential question is whether the parties can be found by implication to have agreed to an equal voice in the management of the vehicle, and in the normal and usual case is an issue of fact for the jury.

In the case at bar, appellant asserted the defense of joint enterprise in its November 3, 1989 Supplemental Motion for Relief from Judgment. However, the record is devoid of any evidence that appellee had an equal right to direct and govern the movements and conduct of Brad Beaty "in respect to the common object and purpose of the undertaking." Because there is no evidence to justify a determination of the issue, we cannot say the trial court abused its discretion by refusing to set aside the August 11, 1989 Final Judgment.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE UNCONSCIONABLE FRAUD WAS PRACTICED BY JACKIE SUE COE IN OBTAINING THE JUDGMENT.

Appellant argues that pursuant to Ark. R. Civ. P. 60(c)(4), the trial court should have set aside the judgment for fraud practiced by appellee, by and through her counsel. The relevant portion of Rule 60 provides as follows:

> (c) Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days. The court in which a judgment, other than a default judgment . . . has been rendered or order made shall have the power, after

> the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> . . . .
>
> (4) For fraud practiced by the successful party in obtaining the judgment.

Appellant relies on *Davis* v. *Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987), in which we construed Rule 60 and held that "fraud" sufficient to compel the setting aside of a judgment is:

> [A] breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declared fraudulent because of its tendency to deceive others . . . Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.

Davis, 291 Ark. at 476, 725 S.W.2d at 847, (quoting *Lane* v. *Rachel*, 239 Ark. 400, 389 S.W.2d at 621 (1965). We note that the cases involving fraud under Ark. R. Civ. P. 60 are cases of fraud upon the court. However, the language in the definition of fraud adopted by this court simply requires a "tendency to deceive others."

Appellant claims the breach of legal or equitable duty is patent, and the actions of appellee, by and through her counsel, evidence this breach of duty. The alleged actions of appellee upon which appellant bases its argument are: 1) hastily contriving a hearing on a case knowing appellant, the only party with an interest adverse to Coe, had not been given notice of the hearing and thus would not have opportunity to defend; 2) misrepresenting to the trial court at the commencement of the trial that there was no settlement agreement,when in fact the entire controversy between Coe, Brad Beaty, and Farmers was settled and Beaty had agreed to assign to Coe all rights he had against appellant; and 3) conspiring with Beaty to induce the trial court to enter an excessive judgment in reliance on reports and other material which were never introduced into evidence and therefore, were not a part of the record.

We cannot say any action of appellee, by and through her attorney, in any way deceived appellant. In light of the

circumstances at the time, the actions of appellee's attorney were taken in her best interest. Appellee had past medical expenses and would certainly incur substantial additional medical expenses. She was not able to pursue her career. Her interest in going forward with the lawsuit is apparent. Appellant had notice of the lawsuit and that the amount of damages sought exceeded the amount of primary coverage. We cannot say that appellee's actions in expediting the lawsuit deceived appellant.

As for the alleged misrepresentation to the court concerning any settlement agreement, at the November 3, 1989 hearing on appellant's motions, the court heard testimony from the attorneys involved in the March 23, 1989 trial. Appellee's attorney testified that on March 23, 1989, there was an oral agreement between the parties. He said it had not been reduced to writing and that, depending on the proceedings that day, was subject to being changed. Brad Beaty's attorney testified the parties had "an oral agreement to be consummated in writing and subject to the approval of this clients and my client." He continued by saying that "we had one in principle before, but, we had a binding agreement after the trial." Both attorneys testified that the trial court was aware of the tentative agreement. We cannot say that any party by these actions practiced a fraud upon the court.

Appellant's contention that appellee conspired with Beaty to induce the trial court to enter the judgment is without merit. Although not all the evidence was introduced into evidence to be made a part of the record, the evidence was before the court. In its Findings of Facts and Conclusions of Law, the court referred to the various items of evidence and the testimonies of the different witnesses. Under the circumstances, there was no need for appellee to establish a detailed record. We cannot say her failure to do so was part of a conspiracy to induce the court to enter an excessive judgment.

IV.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING APPELLANT'S MOTION FOR NEW TRIAL UNDER RULE 59(a)(1) and (a)(4) TO BE DEEMED DENIED.

On August 25, 1989, appellant filed a Motion for Relief from

Judgment and for New Trial. On October 24, 1989, appellant filed a Notice of Appeal and Designation of Record, by which it sought to appeal "from any effectual deemed denial by the trial court of its request for a new trial pursuant to Rule 59 of the Arkansas Rules of Civil Procedure."

The bases of appellant's Motion for New Trial are Ark. R. Civ. P. 59(a)(1) and (a)(4), which provide as follows:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; . . . (4) excessive damages appearing to have been given under the influence of passion or prejudice[.]

Appellant argues that "irregularities in the proceedings" occurred in the trial court which compelled the ordering of a new trial. The alleged irregularities include both the entry of a judgment in excess of ten times the amount of damages pleaded, where said judgment was based on the obvious collusion between appellee and Brad Beaty, the named defendant, and the inducement of the trial court to enter judgment based upon matters not introduced into evidence or made a part of the record.

Appellant also contends the $8,002,178.15 judgment was excessive and appears to have been given under the influence of passion or prejudice. Appellant contends the language used in the Findings of Facts and Conclusions of Law indicates the award of damages was affected by passion. The specific language appellant refers to is the use of the word "grotesque" by the court in describing the tissue grafting on appellee's ankle; the court's stating that it "certainly understands the plaintiff's testimony regarding the embarrassment theses scars and disfiguring areas cause her;" and the court's stating that it was "impressed with" the testimonies of appellee, her family, and her fiance.

On appellate review, the test of a denial of a motion for new trial is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable infer-

ences permissible under the proof. *Schuster's, Inc.* v. *Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987).

A review of the record reveals that the court received testimony and evidence at the March 23, 1989 trial. The parties stipulated to past medical expenses in the amount of $130,230.43. Also stipulated was a transcribed statement of appellee's attending physician, Dr. Shubert of Baylor University Medical Center in Dallas, Texas. The parties also agreed that a vocational assessment report, which was being prepared by Dr. Wayne Werner, would be submitted to the court. A videotape of "a day in the life of Jackie Sue Coe" was played, followed by testimony from appellee as well as her mother, father, sister, and fiance.

Appellee testified about her past work experience and the prospects for the future concerning her job. She also told the court about the activities she enjoyed prior to the accident such as softball, water skiing, and horseback riding. She said since the accident the only outdoor recreation in which she could participate was fishing. She talked about the pain and anxiety she experienced in undergoing some twenty-five surgical procedures on her ankles. She said several more surgeries would be necessary and, according to her doctor, the possibility still existed that she might lose one of her legs. The other witnesses related their observations concerning appellee's pain and suffering and the changes in her lifestyle since the accident.

In the Findings of Fact and Conclusions of Law filed August 11, 1989, the court sated that it "further is of the opinion that the proof in this cause of action far exceeds the amount plead for and the pleadings should be deemed amended to conform to the evidence offered in this case." Although the judgment was in excess of the amount of damages pleaded, there is substantial evidence to support the court's entering judgment as it did. We cannot say that the alleged irregularities were such that appellant was prevented from having a fair trial. Finally, the language used by the court in its Findings of Fact and Conclusions of Law is simply descriptive and, in light of the evidence and testimony before the court, is not inappropriate. We certainly cannot infer from that language that the entry of the judgment was based on passion. Therefore, we cannot say the trial court erred in allowing appellant's Motion for New Trial under Ark. R. Civ. P. 59(a) to

be deemed denied.

Affirmed.

HAYS and GLAZE, JJ., concur.

BROWN, J., not participating.

TOM GLAZE, Justice, concurring. I concur. For me, the difficult issue in this appeal is the due process question raised by RLI. As pointed out by the majority, RLI had notice of the pending lawsuit, but relied upon the insured's and the primary carrier's (Farmers Insurance's) attorney, G. William Lavender, to keep RLI apprised as to the progress of the case. The majority opinion correctly details the facts leading to Lavender's failure to inform RLI of the insured's and Farmer's settlement with the plaintiff, Jackie Coe. Nor did Lavender inform RLI of the March 23, 1989, trial that resulted in the eight million dollar judgment entered on April 20, 1989. Coe, Farmers and the insured were aware that RLI had the excess coverage in this case and therefore had a personal stake in its outcome. Nevertheless, as already noted, RLI was never notified of the March 23 trial by Coe, Farmers, Lavender or the insured, even though RLI's excess coverage was unquestionably in jeopardy. If these were the only events that had occurred, I would question whether adequate notice had been provided RLI.

The record is not clear as to when RLI became aware of the April 20, 1989 judgment, but it is clear RLI was aware of that judgment by June 7, 1989. On that date, RLI wrote the trial judge notifying him that RLI had been sued in federal court by Coe based upon certain rights she obtained under the April 20 judgment. RLI also asked the court not to take further action in the Coe lawsuit without notice being given RLI. By letter dated June 13, 1989, the judge advised RLI's counsel that he knew of nothing pending in Coe's portion of the lawsuit, but the other two plaintiffs' claims would be tried in the future. He further advised that, if RLI intended to defend against those claims, RLI should enter its appearance in the proceedings.

At this point in time, RLI was fully apprised that Coe's claim was one of three involved in the same lawsuit, that Coe's claim had been reduced to judgment and that two parties' claims were still pending. Coe's judgment, however, was not a final one, as can

be discerned by reading ARCP Rule 54(b), which provides as follows:

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

Here, the trial court made no express finding in its April 20 judgment that Coe's claim should be made final because there was no just reason for its delay. As a consequence, the trial court's decision was subject to revision at any time prior to the other parties' claims being adjudicated. In sum, if RLI had acted to intervene in Coe's and the other parties' lawsuit in June 1989, it could have timely raised the objections it later attempted to raise after August 11, 1989 — the date the trial court entered a judgment in Coe's behalf that complied with the requisites of Rule 54. In sum, Coe's judgment was not final until August 11th, not April 20th.

This court has emphasized that it is the duty of a litigant to keep himself informed of the progress of his case. *Midwest Timber Products Co., Inc.* v. *Self*, 230 Ark. 872, 327 S.W.2d 730 (1959); *Trumbell* v. *Harris*, 114 Ark. 493, 170 S.W. 222 (1914); *Meisch* v. *Brady*, 270 Ark. App. 652, 606 S.W.2d 112 (1980). In the present case, RLI had ample notice and opportunity to have raised and litigated the issues below that it now argues on appeal. While RLI's grievance with Farmers and its attorney may have some merit concerning the latters' failure to keep RLI informed

as agreed, Coe owed no such duty. RLI was, in my view, entitled to procedural due process, which included notice of the pending lawsuit and an opportunity to be heard. The record reflects RLI was afforded such due process. Therefore, I join in the majority's decision upholding Coe's judgment.

STATE of Arkansas *v.* Jesse C. MARTINEZ, Jr. and Nadine C. Martinez

CR 91-75 811 S.W.2d 319

Supreme Court of Arkansas
Opinion delivered July 15, 1991

Winston Bryant, Att'y Gen., by: *Jeff Vining*, Asst. Att'y Gen., for appellant.

Jeffrey E. Levin and *Ronald E. Bumpass*, for appellees.

DONALD L. CORBIN, Justice. The state brings this interlocutory appeal from an order of the Johnson Circuit Court granting appellees' pretrial motion to suppress evidence. Ark. R. Crim. P. 36.10. The sole issue presented in this appeal is whether the trial court erred in ruling the evidence seized be suppressed due to an invalid nighttime search warrant. We affirm.

In reviewing a trial court's decision to grant a defendant's motion to suppress evidence, we make an independent determination based on the totality of the circumstances and reverse the trial court's decision only if it is clearly against the preponderance of the evidence. *State* v. *Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991).

Our review of the evidence reveals that, on four different occasions during the month prior to the July 27, 1990 arrest of both appellees, Officer Hanes of the Fifth Judicial Drug Task Force purchased marijuana from appellee Jesse Martinez at the Martinez property, which consists of both the Martinez residence and a Martinez-owned business entitled Marty's Gun Shop. On July 26, 1990, Jesse Martinez contacted Officer Hanes regarding the purchase of a quarter pound of marijuana. At this point, Officer Hanes initiated steps to obtain a search warrant. He planned to execute the above-referenced purchase and then search the Martinez property. On July 27, 1990, Officer Hanes met with Chief Deputy Dorney of the Johnson County Sheriff's

Office and Judge Len Bradley to obtain the search warrant. Officer Hanes was sworn and signed the prepared affidavit. The search warrant was then issued at approximately 6:45 p.m. Because Ark. R. Crim. P. 13.1(b) requires the application for a search warrant be supported by one or more affidavits or recorded testimony, we do not consider any unrecorded oral testimony that may or may not have been given. Thus, we only consider the information contained in the affidavit.

The affidavit was dated July 27, 1990, and recited that arrangements had been made to purchase a controlled substance from Jesse Martinez on that day. The affidavit also stated that it was believed Martinez stored the controlled substance at his residence and that the proposed sale was expected to occur there.

The state argues the search warrant issued in this case contained the appropriate language that the warrant was to be executed "at any time of the day or night" and therefore, the trial court erred in granting the motion to suppress. With this argument we cannot agree.

It is well-settled that an affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *State* v. *Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980); *Harris* v. *State*, 262 Ark. 506, 558 S.W.2d 143 (1977). Ark. R. Crim. P. 13.2(c) provides that:

> (c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or

night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

The affidavit in this case does not set out facts showing reasonable cause for Judge Bradley to have found that any of the three circumstances quoted above existed. The affidavit merely provides that four previous sales of marijuana had been made by Jesse Martinez to Officer Hanes, that controlled substances were believed to be stored at the Martinez residence, and that another purchase was scheduled to occur at the residence that day. The affidavit is silent with respect to anything regarding reasonable cause to believe the marijuana would be destroyed or removed before the next morning. Thus, we hold it was error for the nighttime search warrant to have been issued.

Our holding is consistent with *Hall* v. *State*, 302 Ark. 341, 789 S.W.2d 456 (1990), and *State* v. *Broadway*, *supra*. Both *Hall* and *Broadway* have facts similar to the facts in the present case. In *Hall*, *supra*, we held that an affidavit reciting simply that illegal drugs were at appellant's residence and that a confidential informant had purchased marijuana there within the last seventy-two hours did not state facts sufficient to support the issuance of a nighttime search warrant. The *Hall* case is controlling of the present case in all respects.

Although we hold the issuance of this search warrant was in violation of Ark. R. Crim. P. 13.2(c), a motion to suppress will not be granted unless the violation is "substantial." Ark. R. Crim. P. 16.2(e). "The nighttime intrusion into a private home is the violation of an important interest, and from the record before us there is nothing to indicate that the evidence would not still have been there the next morning." *Hall*, 302 Ark. at 344, 789 S.W.2d at 458. Consistent with *Hall*, we hold the intrusion into appellees' home, which began at approximately 9:00 p.m. and continued through 4:00 p.m. the next day, was a substantial violation of our rules.

The state urges us to apply the good faith exception to the warrant requirements which was first enunciated in *United States* v. *Leon*, 468 U.S. 897 (1984). We have stated that we would apply this exception to violations of our state laws given the appropriate case. *Hall*, *supra*. However, as was also determined in *Hall*, this is not the appropriate case. *See Hall*, *supra*, 302 Ark.

at 344, 789 S.W.2d at 458-59. In the case at bar, Chief Deputy Dorney testified he was somewhat familiar with our rules of criminal procedure regarding nighttime searches. There can be no doubt then that he knew the search which began at approximately 9:00 p.m. was conducted in violation of our rules. The search violated our rules in that it was conducted, almost one hour after the 8:00 p.m. time constraint, pursuant to an affidavit that did not specify any of the three conditions for issuing a nighttime warrant. Because the executing officers did indeed have knowledge of our rules, we need not address the issue of whether the issuing judicial officer remained neutral and detached and refrained from acting as a rubberstamp for the law enforcement officers. *Id.* Thus, we decline to apply the good faith exception to this violation of our rules of criminal procedure.

In summary, it was error to issue the nighttime search warrant. The good faith exception is not applicable to this case. Based on our review of the evidence, we cannot say the trial judge's decision to grant the motion to suppress was against the preponderance of the evidence. *Hall*, *supra*, is a case with strikingly similar facts to this case and we are bound by that decision. Accordingly, the trial court's suppression order is affirmed.

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

STEELE HAYS, Justice, dissenting. It is, I believe, a mistake to decide this case from the standpoint of whether the search warrant meets the requirements of a nighttime search. The correct approach, I suggest, is to determine whether the manner and means by which the search warrant was executed constitutes a substantial violation of our rules governing search and seizure of evidence. Ark. R. Crim. P. 16.2. It is, after all, only *unreasonable* searches that are offensive to the Fourth Amendment. *Harris* v. *United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947). In determining whether the violation was substantial we are obliged to consider all the circumstances, including the extent of deviation from lawful conduct by the officers, the extent to which the violation was willful, the importance of the particular interest violated, the extent to which privacy was invaded. Rule 16.2. When the circumstances of this case are examined, there is no basis for a conclusion that the officers acted improperly in any

manner or that the search was in any sense unreasonable.

In the late morning of July 27, 1990, the day the warrant was issued, appellee Jesse Martinez called Officer Hanes, acting as an undercover agent, to say "I've got plenty of what you want" (referring to marijuana). Hanes asked if Martinez could handle a quarter pound and Martinez said "Yeah, that would be easy." Hanes began the steps to secure a search warrant, which was issued at 6:45 p.m., well within the 6:00 a.m. to 8:00 p.m. time frame of Ark. R. Crim. P. 13.2(c). It is evident the officers assumed the warrant would be executed during daytime hours, but when they called Martinez to arrange to come to his house, ostensibly to make the purchase, he put them off on the grounds that he had company. Martinez arranged to meet them near the Mulberry River Bridge on Highway 103, some distance from his home. By the time Martinez arrived it was 8:10 p.m. and so it was 8:48 before the officers could make the arrest and drive to Martinez's house to begin the search. It is clear the delay was attributable not to improper conduct by the officers, but to arrangements directed by the appellee and which the officers were powerless to counter-mand without arousing his suspicions.

Thus, the issue is simply whether under all the circumstances a delay of forty-eight minutes is a "substantial violation" of Rule 13.2(c). The majority rely on *Hall* v. *State*, 302 Ark. 341, 789 S.W.2d 456 (1990) and *State* v. *Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980). But the search in *Hall* was executed between 1:00 a.m. and 3:00 a.m., and *Broadway* was the product of a sharply divided court and the majority opinion does not tell us what time the warrant was executed, only that it was a nighttime search without the required grounds. But 8:48 on a July evening is hardly the equivalent of 1:00 a.m. It is still light, and there is no evidence these appellees had retired for the evening. In short, this case more nearly resembles *Brothers* v. *State*, 261 Ark. 64, 546 S.W.2d 715 (1977) and *James* v. *State*, 280 Ark. 359, 658 S.W.2d 382 (1983). In *Brothers* a search pursuant to a warrant began "about 8:00 p.m. and was completed as soon thereafter as possible." This court found that not to be a material violation of Rule 13.2(c):

> In this particular case the failure to strictly comply with Rule 13.2(c) was not willful, no additional invasion of

> privacy occurred, and appellant suffered no prejudice. Therefore, suppression was not warranted.

In *James* the search commenced at 7:10 p.m. but was interrupted so that the warrant could be amended, which was not reissued until 9:12 p.m. Similarly, in *United States* v. *Koller*, 559 F. Supp. 539 (E.D. of Ark. 1983), the federal district court, applying Arkansas law in the interpretation of Rule 13.2(c), denied a motion to suppress where the warrant was signed at 7:55 p.m. and arrived at approximately 8:10 p.m. at the defendant's home. Citing the language quoted from *Brothers*, *supra*, the district judge wrote:

> Any failure to strictly comply with Rule 13.2(c) did not violate the policy of prohibiting unexpected searches in the middle of the night, was only a matter of minutes, and did not cause a surprise intrusion into defendant's privacy. There was no substantial violation of Rule 13.2(c), of federal policy, or the Untied States Constitution.

Appellees have made no attempt to show prejudice [*Pridgeon* v. *State*, 262 Ark. 428, 559 S.W.2d 4 (1977)] or that the relatively short delay in executing this warrant created any added intrusion into their privacy, or that the delay was attributable to anything other than the instructions interposed by the appellee Jesse Martinez. It is exactly this sort of situation to which *United States* v. *Leon*, 468 U.S. 897 (1984) was intended to apply.

HOLT, C.J., joins.

Arthur L. GEORGE *v.* STATE of Arkansas

CR 91-100 813 S.W.2d 792

Supreme Court of Arkansas
Opinion delivered July 15, 1991
[Supplemental Opinion on Denial of Rehearing
November 11, 1991.*]

* Hays, Glaze, and Corbin, JJ., concur. Holt, C.J., Dudley and Newbern, JJ., would grant rehearing.

[redacted]

[redacted]

Carolyn Lee Whitefield, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal arises from the conviction of the appellant, Arthur L. George, for first degree sexual abuse where the jury assessed a sentence of ten years. The victim was a young girl who was 2 1/2 years old at the time of the offense and 3 1/2 years old at the time of the trial. When the events that are the subject of this appeal occurred, she was under the care of the appellant, who ran a private day care service with his wife in his home in the City of Texarkana. The appellant was age 68 at the time of the criminal charge. The primary issues on appeal relate to the confrontation rights of the appellant under the Sixth Amendment and the introduction into evidence of the appellant's prior conviction for a similar offense as part of the state's case-in-chief.

Paul and Ginger Oliver enrolled their daughter in day care with the appellant and his wife for approximately one year, from August or September 1988 to September 1989. The victim stayed with the Georges during work hours Monday through Friday. Because of the fact that there was only one other child at the Georges' in August 1989, the Olivers moved their daughter to a new day care facility in September named Tot's Landing where she could be with other children. The daughter, however, did return to the Georges' on occasion in September and October 1989 for visits, including a visit Halloween night on October 31. Mrs. Oliver testified that her daughter did not want to go to the Georges' on Halloween night but had wanted to go by for a visit two weeks earlier.

On the night of November 2, 1989, Mrs. Oliver was awakened by her daughter who was having a nightmare. She had had a series of nightmares recently, but on this occasion she complained of dinosaurs in her room which might bite her. The dinosaur fear apparently was inspired by a film that she had seen at Tot's Landing about dinosaurs entitled *The Land Before Time*. Mrs. Oliver tried to allay her daughter's fears, but the daughter

responded, according to Mrs. Oliver, "Yes, there's dinosaurs in there and they are going to bite me and they are going to bite me like Papaw George bites me." Mrs. Oliver pursued what her daughter meant, and her daughter said, according to Mrs. Oliver, "He bites me on my tee tee." She then pointed to her genital area.

Mrs. Oliver asked her daughter again about George and she replied, according to her mother, "Yes, he bites me like the dinosaurs are going to bite me." Mrs. Oliver went back to bed, but about fifteen minutes later her daughter awoke and again brought up George and the dinosaurs.

Mrs. Oliver relayed her conversation to her husband who was incredulous, but the next morning he asked his daughter about the appellant, and she repeated for him, according to his testimony, that she was afraid the dinosaurs were going to bite her "like Papaw George" did. The father asked where she had been bitten, and the daughter "bent over and pulled up her dress and leaned over and pointed at her behind," according to his testimony.

On November 3, 1989, Mrs. Oliver made an appointment with a social worker for the Arkansas Department of Human Services, Evonne Fellers, to interview her daughter. Ms. Fellers used an anatomically correct doll and had the victim identify parts of the body. The victim played with the vaginal area of the doll and, in response to the social worker's question about what the appellant had done, "stood up, pulled her pants down, bent over, raised her buttocks and pointed to her buttocks." At that point Mrs. Oliver, who was in the room interjected that her daughter usually said that "Papaw George bites her on the tee tee." During the interview the victim did not verbalize anything to the social worker.

The appellant was changed with first degree sexual abuse as a person over age eighteen who engaged in sexual contact with a person under age fourteen under Ark. Code Ann. § 5-14-108 (1987). Thereafter, the state filed a motion for a hearing to determine the trustworthiness of the victim's statements to her mother, father, and the social worker under Ark. R. Evid. 803(25), and that hearing was held on September 4, 1990. At the conclusion of the hearing, where the Olivers, the social worker and the victim testified, the court ruled that the victim's state-

ments to Mr. and Mrs. Oliver were trustworthy based on the evidence presented by the state taken as a whole. Also, since the victim had testified and been cross-examined, the trial court found that the appellant was not denied his right to confront a witness against him.

The jury trial commenced on September 10, 1990, and lasted until September 12, 1990. At the trial the victim testified and was cross-examined, but she was largely unresponsive to defense counsel, and her testimony was confused and at times contradictory. At the conclusion of her testimony, the trial court ruled that the victim was incompetent to testify and instructed the jury to disregard her testimony. The victim's hearsay testimony, as related by her parents, was deemed admissible. The trial court also permitted the state to introduce as part of its case the appellant's prior conviction for first degree sexual abuse dated July 26, 1990. The prior acts which constituted that offense occurred between September 1987 and September 1989, presumably at the Georges' home, although this is not clear from the record.

Confrontation Clause

For his first argument, the appellant contends that he was effectively denied his right to cross-examine the victim due to her confusing and contradictory responses and, at times, outright refusal to answer questions. This rendered the victim unavailable for cross-examination, according to the appellant. In addition, he argues that the victim's statements to her parents were unreliable. When the right to confront witnesses under the Sixth Amendment is denied, so the argument goes, it is error for the trial court to admit hearsay statements into evidence under Ark. R. Evid. 803(25).

The U.S. Supreme Court has held that the Confrontation Clause in the Sixth Amendment assures the defendant the twin rights of a face-to-face confrontation with his accuser and the right to cross-examination. *See Coy* v. *Iowa*, 487 U.S. 1012 (1988). At the same time the right to confrontation is not absolute, and the Confrontation Clause "does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." *Idaho* v.

Wright, ___ U.S. ___, 110 S. Ct. 3139, 3145 (1990).

In *Wright* the Court quoted from its prior holdings on the Confrontation Clause and concluded that the reliability of a hearsay statement could be met where the hearsay statement falls within a firmly rooted hearsay exception *or* where it is supported by particular guaranties of trustworthiness, which must be shown from the totality of the circumstances. *See also Lee* v. *Illinois*, 476 U.S. 530 (1986); *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Factors to examine in determining trustworthiness, according to the Court in *Wright* and based on state and federal court decisions, are a) spontaneity and consistent repetition, b) mental state of the declarant, c) use of terminology unexpected of a child of similar age, and d) lack of motive to fabricate. The *Wright* Court rejected other corroborative evidence of guilt, such as medical evidence of abuse, as having no bearing on the actual trustworthiness of the declarant's statement.

The facts in *Wright* were similar to the facts before us. There, the declarant involved was 2 1/2 years old at the time of the crimes charged, and the trial court found her unable to communicate to the jury, and thus unavailable. The trial court in the present case found the victim incompetent to testify, after her testimony to the jury which was contradictory, inconsistent, and at times non-responsive. Nevertheless, as the Court in *Wright* pointed out, a finding of inability to communicate did not render the victim's prior statement *per se* unreliable or even presumptively unreliable. The Court was only willing to say that this might have some relevancy in determining trustworthiness.

The victim's statements of child abuse in *Wright* had been made to a pediatrician. In determining the reliability of the victim's statements, the trial court had looked not only at the circumstances of the statements, but also at corroborative evidence of the abuse itself such as medical evidence, the opportunity of the defendant to commit the offense, and the sister's testimony that the abuse had transpired. Due to the trial court's consideration of factors, unrelated to the circumstances of the victim's statements, the Court excluded these statements as not firmly rooted in a hearsay exception and not possessing sufficient guaranties of trustworthiness under the Confrontation Clause.

In reviewing the factors set out in *Idaho* v. *Wright* for

trustworthiness and applying them to the case before us, we look first at spontaneity and consistent repetition. The victim in the present case certainly satisfied the spontaneity criterion by blurting out her statement to her mother following a nightmare about dinosaurs. Moreover, she has consistently maintained that the appellant bit her in her genital area. This is confirmed by the statements she made to her mother and father, her demonstration of where she was bitten to her father and the social worker, and her statements and demonstrations at the pre-trial hearing and trial — though admittedly her testimony at times was contradictory. For example, she once told defense counsel that her statement about being bitten was "wrong." Such contradictions, however, can easily be attributed to the impact of courtroom trauma on a 3 1/2 year old. The austerity of the judge, the presence of the appellant, the tension of her parents, and the subtle antagonism of defense counsel all contributed to a very unsettling environment for the child. By and large, however, she adhered to her story of being bitten in the genital area by the appellant.

Moreover, while she was excited at the time she told her mother the story, there is nothing to suggest that she was deranged or had any motive to fabricate the story against the appellant, which are other *Wright* factors. Her story to her parents was unique and plausible and would not have been within the experience of a girl of such tender years. Mrs. Oliver confirmed that her daughter was unfamiliar with any kind of sexual experience which is certainly understandable at her age. Her demonstrations of where she was bitten added additional credence to her statements.

We hold, therefore, that though the victim was in effect unavailable to testify at trial due to the judge's finding of lack of competency, sufficient guarantees of trustworthiness existed in this case under the *Wright* criteria to support the trial court's finding that the parents' testimony of the victim's statements did not violate the appellant's confrontation rights. We thus follow the *Wright* case in holding that the victim's inability to testify effectively at trial did not presumptively invalidate the reliability of her statements to her parents. We further hold that the victim's statements to her mother (but not her father), qualify as an excited utterance under Ark. R. Evid. 803(2), because they were made at an unusually late hour following a nightmare that

clearly terrified the victim.

Rule 803(25)

The holding in *Idaho* v. *Wright* does call Rule of Evidence 803(25), which was passed by the General Assembly in 1985, into question. The Court in *Wright* held that corroborative evidence unrelated to the circumstances of the victim's statements was irrelevant to a determination of the reliability of those statements. Yet, Rule 803(25) specifically contemplates the trial court's use of such corroborative evidence in deciding trustworthiness. Ark. R. Evid. 803(25)(1). Moreover, Rule 803(25) does not include the specific factors deemed important for trustworthiness in *Wright* and used in the case before us: a) spontaneity and consistent repetition; b) mental state of the declarant; c) use of terminology unexpected of a child of similar age; and d) lack of motive to fabricate.

The reasoning behind the admission of hearsay statements of an unavailable victim is that the statements are so trustworthy, cross-examination of the victim would be of little help to the defense. Hence, the Confrontation Clause rights of the defendant are not violated. In the present case we have held that the trial court appropriately found that the victim's statements to her parents were trustworthy, and we used the *Wright* factors to arrive at our conclusion. Though the trial judge clearly considered Rule 803(25), we do not find from our examination of the record that he used irrelevant corroborative evidence in reaching his decision. Nor was this specific point argued by the appellant at trial or on appeal, although the appellant did raise the issue of the constitutionality of Rule 803(25) generally. To the extent that the trial court did consider corroborative evidence (and, again, the record does not reflect that he did), we hold that it was harmless error.

Nevertheless, in light of the *Wright* case we no longer believe that Rule 803(25) passes constitutional muster. Under its terms a trial judge could rely heavily on corroborative evidence of the crime in admitting an unavailable victim's hearsay statements as trustworthy and, in doing so, run afoul of the Confrontation Clause. As the U.S. Supreme Court stated in *Wright*, the factors to be considered must relate to the circumstances of the

hearsay declaration itself and not to mere proof of the crime. Impermissible factors are, therefore, included in Rule 803(25) and relevant factors, as specified in *Wright*, are not. Rule 803(25) is constitutionally defective on its face, and we so hold.

Prior Conviction - Rule 404(b)

The appellant also contends that the introduction into evidence of his prior conviction for first degree sexual abuse was reversible error. The applicable rule reads in pertinent part:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

Ark. R. Evid. 404(b).

In a 1981 case where the crime charged was first degree sexual abuse, the defendant had tried unsuccessfully by pretrial motion to prevent the state from impeaching his credibility under Ark. R. Evid. 609(a) with a nolo contendere plea he had made to a rape involving a young boy. *See Jones* v. *State*, 274 Ark. 379, 625 S.W.2d 471 (1981). The trial court denied the motion, and the defendant did not take the stand. We held that the ruling was wrong on the basis that the prior conviction "would have been of scant probative value as compared to its significantly prejudicial effect on the jury." 274 Ark. at 381; 625 S.W.2d at 472. We noted that the potential for prejudice was especially great in the sexual abuse context.

In 1987, however, we focused on Rule 404(b) and affirmed the admissibility of different deviate sexual acts perpetrated on the victim. *See Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987). In so holding we said that "we will allow such testimony to show similar acts with the same child or other children in the same household when it is helpful in showing 'a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship.' " 293 Ark. at 71; 732 S.W.2d at 455; *quoting White* v. *State*, 290 Ark. 130, 717 S.W.2d

784 (1986). We further held in *Free* that such evidence of similar acts assists in proving the depraved sexual instinct of the accused.

While there is the potential for prejudice resulting from the admission of similar crimes of sexual abuse, Rule 404(b) clearly establishes that such evidence of "other crimes, wrongs or acts" may be admissible to prove, not the bad character of the defendant, but his motive, plan, or intent. Here, the trial court admitted a sexual abuse conviction into evidence which had occurred less than two months before the trial that is the subject of this appeal. Neither the state's exhibit of the conviction nor the testimony at trial provide more particulars relating to the earlier conviction. Yet the trial court found that the appellant's conviction for a similar act was some evidence of intent and was admissible on that basis under the Rule.

The trial court did not abuse its discretion in so ruling. The prior conviction for first degree sexual abuse occurred within two months of the trial in this case. The prior offense also occurred within the same time frame as the offense here. Under such circumstances the prior conviction is probative of intent, motive, or plan. This is so even though the prior sexual abuse involved another person. *See Baldridge* v. *State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990). (Prior sexual advances to a niece were probative of similar advances toward a nephew.)

We are, further, unable to draw a legitimate or reasonable distinction between introduction of a *similar act* to prove intent and introduction of a *conviction* for a similar act to prove intent. Rule 404(b), in referring to "crimes," does not make that distinction, and we question whether the distinction is meaningful when the real issue is the probative value of proof of an element of the offense weighed against its prejudicial impact.

We have held that a prior conviction is inadmissible to prove general intent to commit a crime, because the prejudice far exceeds the probative value. *See Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). We also have held that in special circumstances where specific intent is an element of the crime, evidence of that intent is admissible. *Id.* We concluded in *Alford* that "our cases very plainly support the common sense conclusion that proof of other offenses is competent when it actually sheds light on the defendant's intent; otherwise it must be excluded."

223 Ark. at 338; 266 S.W.2d at 808. In the case of child abuse such as we have here, a depraved sexual instinct was involved, and our prior cases have noted that similar unnatural sex acts may shed light on such an instinct. *See, e.g., Young* v. *State*, 296 Ark. 397, 757 S.W.2d 544 (1988).

We, therefore, affirm the admissibility of similar child abuse acts as probative of motive, plan or intent under Rule 404(b). The case of *Jones* v. *State*, as discussed above, is distinguishable on its facts. Nevertheless, to the extent *Jones* is inconsistent with our holding today, we overrule it.

Lastly, we note that the trial court gave a cautionary instruction relating to the prior conviction:

> The Court would further instruct you that you may consider the testimony relating to the prior conviction of the defendant only for the purpose of determining the intent the defendant may have had pertaining to the charge alleged.

We have previously held that proof of other criminal activity which is independently relevant to the main issue and tends to prove some material point rather than merely that the defendant is a criminal may be admissible with the proper cautionary instruction. *See Young* v. *State*, 296 Ark. 394, 757 S.W.2d 932 (1988). This concept has been applied to show other sexual acts between the victim and accused. *Id.* We see no reason why it should not apply in the case before us.

Directed Verdict

The appellant moved for a directed verdict on three grounds: 1) the criminal information was vague and erroneous in stating that the event occurred "on or about November 2, 1989"; 2) the appellant's age was not proven which was an essential element of the crime charged; and 3) the victim's incompetency at trial rendered her hearsay statements to her mother presumptively inadmissible.

We have held that in an information reciting that a sexual abuse act occurred "on or about April 27, 1985," the state need not specify a date beyond this unless the time was somehow material to the allegation. *See Johnson* v. *State*, 292 Ark. 632,

732 S.W.2d 817 (1987). We did not think that more specificity was required in that case, and that conclusion governs us in the case before us. The trial court was correct in denying a directed verdict on this point.

On the second point the state failed to prove before it rested that the appellant was above age eighteen as the first degree sexual abuse statute requires. The appellant was actually 69 years old at time of trial, and the trial court permitted the state to reopen its case to prove that the appellant was over 18, after the appellant's motion for directed verdict but before the appellant had put on his case. Such matters are discretionary with the trial court, and we will not reverse absent abuse of discretion. *See Curtis* v. *State*, 279 Ark. 64, 648 S.W.2d 487 (1983). (The recalling of a jury for additional evidence was discretionary with the trial court.) We find no prejudice on this point.

The third argument dealing with the competency of the victim to testify and the trustworthiness of her declarations has already been discussed. *See Idaho* v. *Wright*, 110 S. Ct. 3139 (1990).

Affirmed.

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

ROBERT H. DUDLEY, Justice, dissenting. The basic issue in this case is whether the appellant received a fair trial under the applicable laws. In my opinion there were two (2) significant errors which deprived him of a fair trial.

1. *Admissibility of hearsay evidence*

Before trial the prosecuting attorney recognized that he would have difficulty in proving the crime since the alleged victim was probably not competent to testify, and, in addition to proving a touching of the sex organ or the buttocks of the little child, he had to prove that the act of touching was for the purpose of gratifying the sexual desire of either the appellant or the alleged victim. As a result, he filed a motion pursuant to A.R.E. 803(25) for a hearing to determine the trustworthiness of the child's statement to her mother, father, and social worker. He stated that at trial he would offer evidence of those statements and offer evidence of a prior conviction of appellant for sexual abuse. The

trial court heard evidence on the 803(25) motion and ruled that the mother and father could testify about their conversations with the child, and, in addition, ruled that the prior conviction could be used to impeach the credibility of the accused.

At trial, over the appellant's objection, the court allowed the child to testify. Her testimony was confused and contradictory, and, in truth, she was not competent to testify. See *Chambers* v. *State*, 275 Ark. 177, 628 S.W.2d 306 (1982) for the criteria for determining competency. The trial court then allowed the mother, father, and a social worker to testify about statements the child had made to each of them. Later in the trial, the trial court realized that it had made an error in declaring the child competent and allowing her to testify, so it reversed its ruling, and ordered the child's testimony stricken. It further instructed the jury not to consider the child's testimony. Thus, the sole testimony used to convict the appellant was the hearsay testimony of the mother, father, and social worker. As previously set out, their testimony was admitted under A.R.E. Rule 803(25).

The majority opinion agrees with the appellant's argument that Rule 803(25) is unconstitutional and holds: "Rule 803(25) is constitutionally defective on its face, and we so hold." Yet, the majority opinion affirms the trial court's admittance of the hearsay statements of the mother, father, and social worker because the child's statements were "spontaneous," "consistent," "plausible," and "trustworthy." Such a holding is without a basis under our rules of evidence.

The Arkansas Rules of Evidence govern the proceedings of courts in this State. A.R.E. Rule 101; *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986). They are our sole rules of evidence. Rule 801 defines hearsay. Rule 802 provides: "Hearsay is not admissible except as provided by law or by these rules." Rule 803(1) through (24) provides that the hearsay rule does not apply to those twenty-four (24) specific exceptions. Not one of those exemptions is based upon "consistent" out-of-court statements, "plausible" out-of-court statements, or "trustworthy" out-of-court statements. One exception, 803(2), can be said to apply to "spontaneous" statements, but the majority opinion tacitly concedes that even that exception is not applicable to the testimony of the father and social worker. Thus, the admission of the hearsay

testimony of the father and social worker was unmistakably without a basis under our rules and was in error. As others have previously said, "I would reverse for the reasons set out in the majority opinion."

In addition, and although it is not of consequence to this dissent, the "spontaneous" exception may not be applicable to the mother's testimony since the alleged incident probably occurred at least two (2) days, and most likely two (2) weeks, before the child told her mother. (See appendix pp. A-18 to -21.) However, since that exception was not suggested or proven to be applicable by the prosecutor and was not relied upon by the trial court, the various dates were not fully developed. In addition, the general residual exception, Rule 803(24), would be insufficient in this case just as it was in the almost identical case of *Idaho* v. *Wright*, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

2. *Proof of prior conviction*

The appellant did not receive a fair trial for a second reason. The trial court allowed proof of a prior conviction into evidence during the State's case-in-chief. However, before discussing the specific error, it might be helpful to discuss generally the issue as embodied in the Arkansas Rules of Evidence.

The majority opinion interchangeably discusses Rules 404(b) and 609(a). They serve very different purposes, and should not be confused. Rule 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

Under this rule, evidence of other crimes is admissible in the State's case-in-chief when it furnishes part of the content of the crime. This case might well have been a good example of the application of the rule. Here, the accused worked with up to ten (10) young children, some as young as one year old, at a day care center. He probably changed diapers and changed wet under-

pants. In doing so, it was probably necessary for him to touch the children's buttocks, but without a culpable intent. That would not have been a crime. The additional fact that would make it a crime would be the touching of the buttocks for the purpose of gratifying the sexual desire of at least one of the participants. See Ark. Code Ann. §§ 5-14-108, 5-14-101(8), and original commentary thereto. If it could be shown that appellant had previously been convicted of gratifying his sexual desire by deviate sexual contact, it would tend to show his culpable mental state in this case. See Ark. Code Ann. §§ 5-2-202 to -204. Such proof necessarily requires proof of enough collateral details to show "a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship." See *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987) and cases quoted therein. The proof might have also been admissible to show the appellant had the opportunity at the day care center to molest these children. Of course, before testimony of another crime is admitted under Rule 404(b), the probative value of the evidence must be weighed against the danger of unfair prejudice. A.R.E. Rule 403.

On the other hand, Rule 609(a) does not come into play during the State's presentation of direct evidence in its case-in-chief. Rather, it comes into issue during cross-examination and is not designed to furnish part of the content of the crime, but instead, is designed to allow the cross-examiner to attack the credibility of the witness. Subsection (a) of the rule is as follows:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

Subsequent subsections of the rule provide that, unlike a Rule 404(b) prior conviction, a prior conviction admitted pursuant to Rule 609(a) for impeachment purposes may not include collateral details and circumstances surrounding the conviction.

Cotchett and Elkind, *Federal Courtroom Evidence* 53 (1986) (citing federal cases).

The case at bar involves proof of a similar crime which was introduced during direct examination of a State's witness in its case-in-chief. Accordingly, it involves proof under Rule 404(b). However, the State did not offer any of the collateral details of the prior crime to the jury. Apparently, the jury was given only the case number and the fact that the accused had committed a prior felony. (Appendix D-27.) Therefore, the proof did not tend to show the culpable mental state of the accused during the touching; instead, it only showed that he was a bad person. Thus, this case should be reversed on this point also.

Unfortunately, the majority opinion discusses a Rule 609(a) prior conviction and, in affirming this case, goes so far as to overrule *Jones* v. *State*, 274 Ark., 379, 625 S.W.2d 471 (1981), a case involving A.R.E. Rule 609(a). Such a holding violates fair play. If the majority opinion is correct, and if the *Jones* case is applicable and must be overruled, it cannot be overruled ex post facto. *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982). If the *Jones* holding is involved in this case, it is now the law of the case and can be overruled only prospectively. *Rhodes* v. *State*, *supra*.

For the two (2) stated reasons, it is my opinion that the appellant did not receive a fair trial.

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

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
NOVEMBER 11, 1991

818 S.W.2d 951

Carolyn Whitefield, for appellant.

Winston Bryant, Att'y Gen., by: *Sally Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. For his petition for rehearing, the appellant argues that the trial judge used Ark. R. Evid.

803(25) in his decision to admit hearsay evidence and that because we held Rule 803(25) to be unconstitutional in our original opinion, the trial judge's admission of the hearsay testimony constituted reversible error. The petition for rehearing is denied, and we reaffirm the conviction.

With respect to Rule 803(25), our original opinion is amended by plurality decision. The hearsay statements at issue on appeal are the child's separate statements to her mother and father about the molestation. The child made the statements to her mother immediately after waking from a nightmare late at night and to her father the following morning. Both parents testified to those statements at trial. We recognized in our original opinion that since the child's statements to her mother followed a nightmare that caused her to become extremely agitated, they were admissible under the excited utterance exception set forth in Ark. R. Evid. 803(2) as well as under the factors referenced in *Idaho* v. *Wright*, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990). The father's hearsay testimony the next morning, though largely cumulative to the mother's, was only admissible under the *Wright* criteria.

In *Wright*, the Court identified four criteria that had been used in various jurisdictions to determine the trustworthiness of hearsay statements: a) spontaneity and consistent repetition; b) the mental state of the declarant; c) the use of terminology unexpected of a child of similar age; and d) the lack of a motive to fabricate. The Court specifically held in *Wright* that consideration of evidence corroborating the commission of the crime was irrelevant to the hearsay inquiry and, thus, was constitutionally impermissible.

We noted in our original opinion that there was no evidence corroborating the commission of the crime (such as medical testimony of physical trauma) that was used by the trial court in making its decision to admit the hearsay testimony. Defense counsel confirmed this at the Rule 803(25) hearing preceding the trial when she said:

> Any other corroborative evidence of the act which is subject to the statement. Here we have the testimony of the parents and of [the social worker] that there was no medical indication of abuse. So, there is no outside corroborative evidence.

Without the existence of the impermissible corroborative evidence, the trial judge could not have considered it under Rule 803(25)(A)1.*l*, despite his having made the general statement that he had considered all of the Rule 803(25) criteria. We did not reverse the appellant's conviction in our original decision, though Rule 803(25) did contain the suspect corroborative evidence factor, because no corroborative evidence was introduced at trial or considered by the trial court.

We applied the *Wright* factors in our original opinion in affirming the admissibility of both the mother's testimony and the father's, although, again, the mother's testimony also qualified under the excited utterance exception. One question left unanswered is the precise vehicle to be used for our application of these factors. Our Rules of Evidence state that hearsay is not admissible except as provided "by law or by these rules." Ark. R. Evid. 802. The *Wright* factors have not been formally adopted by rule of this court. That raises the question of whether the factors as set out in *Idaho* v. *Wright* qualify as "law" under our Rule 802 and, further, whether our original opinion in this case is "law" for Rule 802 purposes. In 1990 we held that our rules of evidence are supreme in establishing hearsay exceptions. *See State* v. *Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990).

What cannot be overlooked in this case is the fact that the *Wright* factors were present and were benchmarks for the trustworthiness of the child's statements. To some extent they are embraced within the Rule 803(25) criteria, which the trial judge considered. They also are available for consideration by a trial judge under the Rule's catch-all subparagraph which renders applicable "any other factor which the court at the time and under the circumstances deems relevant and appropriate." Ark. R. Evid. 803(25)1.m. Spontaneity and consistent repetition figured in this case, as the prosecutor and social worker stated to the court at the Rule 803(25) hearing. No motive to fabricate was presented by the defense. At the age of 2½ when the statements were made, the child had no knowledge of child/adult sexual activity, according to the mother. The description of the sexual act by the child was void of explicit sexual terminology. These were all matters that the trial judge had to consider because they were present in this case.

[redacted] The Court in *Idaho* v. *Wright* held that corroborative evidence such as that contemplated in our Rule 803(25)(A)1.*l*

violates a defendant's Sixth Amendment rights. Our Rule 803(25)(A)1.*l* is, therefore, clearly constitutionally suspect. Our original opinion, accordingly, is revised to limit the invalidation of Rule 803(25) to the suspect subparagraph *l*. The balance of Rule 803(25) remains intact. By retaining the balance of Rule 803(25), this permits consideration of the *Wright* criteria as relevant factors at the trial court's discretion under Rule 803(25)(A)1.m

HAYS, GLAZE, and CORBIN, JJ., concur.

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

TOM GLAZE, Justice, concurring. While I join the majority court, I also register my disagreement with the majority court's decision in *Idaho* v. *Wright*, 110 S.Ct. 3139 (1990), that is the source of the residual hearsay issue with which our court is confronted in this issue.[1] In a sharply divided decision (5-4), the Court held Idaho's residual hearsay exception rule to be unconstitutional, because for confrontation purposes, the residual hearsay rule was not a firmly rooted hearsay exception. The majority stated that hearsay evidence used to convict an accused must possess indicia of reliability by virtue of its inherent trustworthiness and not by reference to corroborating evidence at trial.

The dissenting justices in *Wright* took the majority court to task, stating their views that no constitutional justification existed to support the majority's decision to remove corroborating evidence from consideration of the question whether a child's statements are reliable. The dissent pointed out the obvious — it is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. To illustrate, the dissenting justices alluded to the child abuse case as an example, stating that, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his abdomen, there is physical evidence or testimony to corroborate the child's statement. In other words, such physical evidence would show the child likely did not fabricate the abuse allegations, therefore making the child's story more worthy of belief. The dissenting opinion further sets out legal authority and commentary that, in

[1] Since the *Wright* decision, one member comprising the majority court has resigned and his vacancy has since been filled with a new appointment.

my view, destroys the rationale employed by the majority court in its decision to strike down the corroborating residual hearsay rule — a rule which is identical to Arkansas's rule at issue in this case.

Little else can be gained by a further discussion of the *Wright* decision and the dissenting justices' views except to say that I respectfully hope the Supreme Court quickly reexamines that holding and mercifully overrules it.

HAYS and CORBIN, JJ., join this concurrence.

ROBERT H. DUDLEY, Justice, dissenting. Before the trial on the merits, the State gave notice that, pursuant to A.R.E. Rule 803(25), it sought a hearing to determine the trustworthiness of the child's statements to her mother and father, as well as her statement to a social worker. The trial court held the hearing and, in its finding of fact, expressly stated that it considered each of the criteria of Rule 803(25) and found that the statements to the mother and father possessed a "reasonable likelihood of trustworthiness." The trial court did not rule on the competency of the child to testify, and did not rule that the social worker assigned to the case could give hearsay testiony under A.R.E. Rule 803(25).

At trial, the court ruled that the child was competent to testify; later reversed its ruling and ordered the child's testimony stricken. However, the court allowed the prosecutor to put the social worker's testimony in evidence as "not going to the truth of the matter asserted." The record of that ruling and testimony is as follows:

> MS. WHITEFIELD [Appellant's attorney]:
> Objection, Your Honor, to what she said.
>
> MR. HUDSON [Prosecuting attorney]:
> With the court's that is already in evidence. We don't offer it at this time for the truth of the matter. Only to show Ms. Howard was acting in response to that.
>
> THE COURT:
> It's admitted for the limited purpose.
>
> A. [Social worker]: I explained to Lindsey that I had some special dolls, and that I could bring them out if she could show me with these dolls what happened to her. So, I brought out these same dolls. What she did was she undressed, if I remember correctly, all of the figures except

> the young male. And after she got them undressed, she put her finger, fingers in the vaginal area of the female dole [sic], and she said to me, "Papaw George put his fingers in me."

The only testimony used to convict the appellant was the hearsay testimony of the mother, father, and social worker. That testimony was admitted under A.R.E. Rule 803(25). The appellant appealed and argued that A.R.E. Rule 803(25) was unconstitutional. The original majority opinion, *George* v. *State*, 306 Ark. 360, 813 S.W.2d 792 (1991), stated that the only incriminating evidence came in through A.R.E. Rule 803(25) and that rule was unconstitutional. Even so, the original majority opinion, with three (3) judges dissenting, affirmed the conviction. On rehearing, the supplemental opinion tacitly admits that the original opinion was in error, but rather than grant rehearing changes the basis of the original opinion. The supplemental opinion now holds that 803(25) is a severable legislative act and, since the trial judge did not apply the unconstitutional part of the act, 803(25)(A)(1)(*l*), the decision remains affirmed.

I.

The short answer to the supplemental opinion is that the trial court did consider each of the factors, including the admittedly unconstitutional provision 803(25)(A)(1)(*l*), in allowing the testimony of the father and mother. The trial court's finding of fact on this issue is as follows:

> The court is called on to make a determination, not of whether or not the victim is a competent witness here today, but whether or not the criteria set out in Arkansas Rules of Evidence 803 subparagraph 25 *enumerated specifically as a thru m*, the court has previously announced that it has concluded, it is, the court is required to consider *all of those criteria*, and the court, also, makes its decision today on the assumption that the legislature intended for those criteria to be used specifically, and in the test of the statement offered, as opposed to whether or not the victim is a competent witness. The court finds that the state has, by a preponderance of the evidence, met the criteria required under Arkansas Rule 803 subparagraph 25. Taken as a whole, the court finds there is a reasonable likelihood of trustworthiness of the statement of the

mother. That is the ruling of the Court.

Secondly, the trial court's ruling that the quoted hearsay testimony of the social worker was admitted for a "limited purpose" and "did not go to the truth of the matter asserted" was such a misapplication of the non-hearsay rule that it needs no comment.

II.

There are other fundamental reasons the supplemental opinion is in error. The first reason involves the validity of the legislative enactment of A.R.E. Rule 803(25).

A.

The Uniform Rules of Evidence were enacted by an invalid session of the General Assembly. *See Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986). This court declared their enactment invalid, but then, under our rule-making authority, adopted them as court rules. We adopted the Uniform Rules of Evidence "as they are set forth in Act 1143 of 1975 (Extended Session, 1976)." *In re Adoption of the Uniform Rules of Evidence*, 290 Ark. 616, 717 S.W.2d 491 (1986) (Per Curiam). A.R.E. Rule 803(25) is not set forth in Act 1143 of 1975 (Extended Session, 1976). It was not enacted until 1985. *See* 1985 Ark. Acts 405 § 1. Thus, this court has never adopted Rule 803(25).

In *St. Clair* v. *State*, 301 Ark. 223, 783 S.W.2d 835 (1990), we held that the separation of powers doctrine did not preclude the General Assembly from enacting Rule 803(25) as a rule of evidence, and we affirmed its use in a criminal prosecution.

However, in *State* v. *Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990), we reversed ourselves. We held that the legislature could not create an "exception to our rules of evidence." The plurality opinion in *Sypult* states that "we retreat from the positions we have taken in *Curtis* and *St. Clair, supra*," and that allowing the General Assembly to write the rules of evidence "could well open the door to total abrogation of the rules of evidence and procedure we deem vital to the interest and policies inherent in the judicial process." *Sypult*, 304 at 7, 800 S.W.2d at 404. Justice Newbern's concurring opinion expressed the view that rules of evidence are procedural in nature and that "it will be helpful for all to understand that the Arkansas Rules of Evidence are the primary,

general source of evidence law." *Id.* at 13, 800 S.W.2d at 407. Justice Turner's concurring opinion, in which Justice Price joined, expressed, among other things, the need for uniformity and clarity so that lawyers and judges would have one place to look for the rules of evidence. Only two justices dissented from the holding.

In sum, this court alone can adopt procedural rules of evidence. Rule 803(25) is such a rule of evidence and has never been adopted by this court. The supplemental opinion's dictum about severability of subsection (A)(1)(*l*) of the General Assembly's enactment of 803(25) is meaningless.

B.

In addition, the supplemental opinion implies that the Supreme Court of the United States created a new Arkansas rule of evidence in *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). In that case, the Supreme Court did not create a state rule of evidence. It did not attempt to do so; it could not do so. It only declared that the admission of a child's hearsay statement under Idaho's residual hearsay exception violated the accused's rights under the Confrontation Clause.

III.

Even if the *Sypult* doctrine is not considered, and, even if one looks to the legislature or the Supreme Court for this rule of evidence, the supplemental opinion is still in error.

A.

Arkansas Rule of Evidence 801(c) provides that, " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 provides, "Hearsay is not admissible except as provided by law or by these rules." Rule 803 then provides exceptions to Rule 802, which are phrased in the terms of *nonapplicability of the hearsay rule*, rather than in terms of positive admissibility, in order to repeal any implication that other grounds for exclusion are eliminated. The theory behind Rule 803 and its first twenty-four (24) exceptions, is that, under appropriate circumstances, a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify the nonproduction of the declarant even though he may be

able to testify. It provides: "The following *are not excluded* by the hearsay rule, *even though the declarant is available as a witness*." A.R.E. Rule 803 (Emphasis added). Twenty-four (24) exceptions follow in our Rules. Perhaps the best known is number (2). It is: "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." A.R.E. Rule 803(2).

The legislatively enacted number (25) is not phrased in terms of nonapplicability of the hearsay rule, but, instead, provides that a child's hearsay "is admissible." Apparently, it is admissible in spite of any other ground of inadmissibility. Under it, hearsay evidence is admissible if it only possesses a "reasonable likelihood of trustworthiness." The rule provides that the hearsay statement of a child ten years old, or younger, is to be admitted in evidence even though the child is available to testify. (Rule 804 deals with hearsay exceptions when the declarant is unavailable). In sum, Rule 803(25) defies the symmetry of Rule 803 and the first twenty-four (24) hearsay exceptions and provides that the hearsay statements of a young child are not hearsay upon proof of certain criteria. The Rule is as follows:

> A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, provided:
>
> 1. The Court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:
>
> a. the age of the child
> b. the maturity of the child
> c. the time of the statement
> d. the content of the statement
> e. the circumstances surrounding the giving of the statement
> f. the nature of the offense involved
> g. the duration of the offense involved
> h. the relationship of the child to the offender
> i. the reliability of the assertion
> j. the reliability-credibility of the child witness

before the Judge

k. the relationship or status of the child to the one offering the statement

l. any other corroborative evidence of the act which is the subject of the statement

m. any other factor which the Court at the time and under the circumstances deems relevant and appropriate.

2. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

3. If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

4. This Section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable Rule of Evidence.

A.R.E. Rule 803(25).

B.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, operates in two (2) ways to restrict the range of admissible hearsay evidence. First, the state must either produce the declarant for cross-examination or show a good reason for his unavailability. Here, the child was declared incompetent to testify. The Supreme Court has not yet decided whether incompetency constitutes this type of unavailability. *Idaho* v. *Wright*, 110 S. Ct. 3139, 3147 (1990). Certainly, a strong argument can be made that, if a declarant is not competent to testify in court, his statements made out of court to a third party are not somehow rendered competent so that they can be repeated in court. Even so, for the purposes of this dissent, it is assumed that the child who was not competent to testify at trial was "unavailable" as defined by our Rules of Evidence and *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Second, once a witness is shown to be unavailable, his statement is admissible only if it bears "*adequate indicia of*

reliability." If the evidence does not fall within a firmly rooted hearsay exception, such as the "excited utterance," it is *presumptively unreliable and inadmissible* for Confrontation Clause purposes. To fall within the admissible category, the evidence must show that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. . . ." *Idaho* v. *Wright*, 110 S. Ct. at 3146 and 3149. In explaining the evidence required to make the declarant's truthfulness so clear, the court used deeply rooted exceptions as examples. The opinion provides:

> The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. See, *e.g.*, 6 Wigmore, *supra*, §§ 1745-1764; 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01] (1988); Advisory Committee's Note on Fed. Rule Evid. 803(2), 28 U.S.C. App., p. 778. Likewise, the "dying declaration" and "medical treatment" exceptions to the hearsay rule are based on the belief that persons making such statements are highly unlikely to lie. See, *e.g.*, *Mattox*, 156 U.S., at 244, 15 S. Ct., at 340 ("[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath"); *Queen* v. *Osman*, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L. J.) ("[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips"); Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257 (1989). "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Huff* v. *White Motor Corp.*, 609 F.2d 286, 292 (CA7 1979).

Idaho v. *Wright*, 110 S. Ct. at 3149.

The supplemental opinion in the case at bar refers to Rule

803(25)'s "catch-all subparagraph." In *Wright*, in discussing the somewhat comparable residual exception rule, the Court wrote:

> We note at the outset that Idaho's residual hearsay exception, Idaho Rule Evid. 803(24), under which the challenged statements were admitted, App. 113-115, is not a firmly rooted hearsay exception for Confrontation Clause purposes. Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliabiltiy because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. See *Mattox*, 156 U.S., at 243, 15 S. Ct., at 339; *Roberts*, 448 U.S., at 66, 100 S. Ct., at 2539; *Bourjaily*, 483 U.S., at 183, 107 S. Ct., at 2782; see also *Lee*, 476 U.S., at 551-552, 106 S. Ct., at 2067-2068 (BLACKMUN, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted). The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial. See, *e.g.*, Senate Judiciary Committee's Note on Fed. Rule Evid. 803(24), 28 U.S.C. App., pp. 786-787; E. Cleary, McCormick on Evidence § 324.1, pp. 907-909 (3d ed. 1984). *Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissiblity of statements under a firmly rooted hearsay exception. Moreover, were we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.* See *Green*, 399 U.S., at 155-156, 90 S. Ct., at 1933-1934; Evans, 400 U.S., at 86-87, 91 S. Ct., at 218-219 (plurality opinion); *Inadi*, 475 U.S., at 393, n. 5, 106 S. Ct., at 1125, n. 5; see also *Evans*, *supra*, 400 U.S., at 94-95, 91 S. Ct., at 222-223 (Harlan, J., concurring in result).

Id. at 3147-3148 (Emphasis added).

Rule 803(25) is constitutionally infirm. It provides that the hearsay statement of a child ten years old, or younger, *is admissible* upon a showing only that it possesses a "*reasonable likelihood of trustworthiness.*" On its face, this is a lesser sltandard than is required by the Confrontation Clause which requires that the statement bear such an "*adequate indicia of reliability" that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.*" *Id.* at 3146 and 3149 (emphasis added).

The Supreme Court of the United States has interpreted the Confrontation Clause of the Sixth Amendment in *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). That case is precedent for the case at bar. Our form of federalism requires this court to follow the Supreme Court interpretation of matters relating to the Constitution of the United States.

IV.

In conclusion, this court alone can adopt the procedural rules of evidence. It has never adopted A.R.E. Rule 803(25). However, even ignoring the fact that we have never adopted the rule, precedent of the Supreme Court of the United States mandates that A.R.E. Rule 803(25) be held unconstitutional. Rehearing should be granted, and the appellant should be given a fair trial: After all the opinions in this case, the fact remains that the appellant stands convicted of a felony, but the only testimony against him is the hearsay testimony quoting a witness who was declared incompetent.

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

STATE of Arkansas *v.* Jerry HILL

CR 91-159 811 S.W.2d 323

Supreme Court of Arkansas
Opinion delivered July 15, 1991

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellant.

John Wesley Hall, Jr., for appellant.

PER CURIAM. The petitioner, State of Arkansas, requests a writ of certiorari on the basis that the trial court lacks the power to amend the charge of the Prosecuting Attorney of Faulkner County against the respondent, Jerry Hill, from theft of property (Ark. Code Ann. § 5-36-103 (1987) (a felony)) to theft of a trade secret (Ark. Code Ann. § 5-36-107 (1987) (a misdemeanor)).

The writ of certiorari is not one of right, but is to be granted or denied within the discretion of the court from which it is sought; certiorari may be granted where the court lacks the power to act as it has purported to do. *Gran* v. *Hale*, 294 Ark. 563, 745 S.W.2d 129 (1988).

In *State* v. *Brooks*, 301 Ark. 257, 783 S.W.2d 368 (1990), this court noted that the duty of charging an accused with a felony is reserved either to the grand jury or the prosecutor, Ark. Const. amend. 21, § 1; by amending the charge from a felony to a misdemeanor, in that case, over the State's objection, the trial court encroached upon the prosecutor's constitutional duties and breached the separation of powers doctrine. *See also United States* v. *Edmonson*, 792 F.2d 1492 (9th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *State* v. *Laury*, 397 So.2d 960 (Fla. App. 1981); *Petition of United States*, 306 F.2d 737 (9th Cir. 1962).

Consequently, the trial court's amendment, in this case, of a felony charge to that of a misdemeanor impermissibly usurped the prosecutor's constitutional duties.

The petition for writ of certiorari is granted.

Jack LAYMON *v.* STATE of Arkansas

CR 91-51 814 S.W.2d 901

Supreme Court of Arkansas
Opinion delivered September 9, 1991

Michael R. Davis, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. In the second trial of this case, the appellant, Jack Laymon, was convicted of rape and sentenced to forty years imprisonment. On appeal, Laymon raises four arguments for reversal: 1) the trial court erred in allowing the prosecutor to refer to a witness's prior inconsistent statements given at the first trial; 2) the trial court erred in refusing to allow the defense to call a rebuttal witness furnished to the defense the morning of trial; 3) it was error to permit the State's witness to testify concerning her prior sexual relations with the appellant; and 4) the weight and sufficiency of the evidence did not support the verdict. None of the arguments have merit and we affirm.

SUFFICIENCY OF THE EVIDENCE

Since Laymon's final allegation of error requires us to examine the evidence in this case, we consider it first. *See Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

The appellant was charged by information alleging that, over a period of several years, he engaged in sexual intercourse or deviate sexual activity with a person less than fourteen years of age. The victim, who was Laymon's stepdaughter, testified that she had been sexually molested by Laymon from the time she was ten years old. She testified that Laymon placed his penis between her legs and "move[d] it around" on an average of two to three times a week, from 1986 to 1989. In addition, the victim testified that Laymon had anal intercourse with her "three, maybe four times" and forced her to perform oral sex "two, maybe three times." She reported instances of digital penetration and attempted vaginal intercourse. The victim stated that the abuse usually occurred at home while her mother and brother were sent on various errands.

The victim stated that she was initially afraid to report the molestation because of Laymon's physical abuse of her family. Eventually, however, she reported the abuse to her mother and to a teacher at school, which prompted an investigation by social services.

Shortly thereafter, the family left Laymon and went to stay with the victim's sister in Iowa. The victim testified that her

mother later moved the family back to Arkansas and reconciled with Laymon. The victim recanted her story upon returning to Arkansas and testified that she did so because Laymon threatened to kill her and to have her placed in foster care.

Annette Sachoff, a supervisor with the Department of Human Services who first interviewed the victim, testified that the victim reported instances of anal, oral, and vaginal sexual abuse. Ms. Sachoff testified that the victim's later retraction of her allegations against Laymon was not surprising and that it was not unusual for children to change their stories. Ms. Sachoff found the victim's story to be credible.

Further testimony from the victim revealed that Laymon's molestations continued upon her return to Arkansas, and she again reported it to school authorities, who contacted SCAN (Suspected Child Abuse and Neglect). SCAN director, Betty Simmons, testified that the victim related incidents, or attempted incidents, of oral, anal, and vaginal intercourse and that she had threatened suicide because of the abuse. The victim never recanted anything she told Ms. Simmons.

Dr. Roger Bost examined the child after her molestation was first reported and found a scratch between her anus and vagina and a general tenderness of the rectum. Dr. Michael Hendren examined the victim following the second report of abuse and discovered a one-half-inch tear of the external genitalia. Both physicians testified that, although not conclusive, their medical findings were consistent with the sexual abuse described to them by the victim.

Lastly, the victim testified that on one occasion, Laymon forced her to engage in anal intercourse after the victim's mother walked in and discovered the girl with her pants down. Laymon told his wife that he had been "checking her for pinworms." The victim's mother testified that, while she did not believe Laymon had molested her daughter, Laymon had made the above statement to her under the circumstances described by the victim.

Laymon argues that the evidence is insufficient to support a conviction for rape because the only direct testimony of rape came from the victim herself. We have often said that a rape victim's testimony need not be corroborated to support a convic-

tion. *Cope* v. *State*, 292 Ark. 391, 730 S.W.2d 242 (1987); *Curtis* v. *State*, 301 Ark. 208, 783 S.W.2d 47 (1990). Although not necessary, at least one incident of anal intercourse was partially corroborated by the mother's testimony.

On review, it is only necessary to ascertain that evidence which is most favorable to the appellee, and if there is substantial evidence to support the verdict, the finding must be affirmed. *Gillie* v. *State*, 305 Ark. 296, 808 S.W.2d 320 (1991). Substantial evidence must be forceful enough to compel a conclusion, without suspicion or conjecture. *Id.* We find that the victim's testimony, together with that of the social workers and examining physicians, overwhelmingly supported the verdict.

ADMISSIBILITY OF THE WITNESS'S PRIOR INCONSISTENT STATEMENTS

We next address Laymon's argument that the trial court erred in allowing the State to refer to prior inconsistent statements given at the first trial.

The State called Laymon's niece, Connie Dew, who apparently contradicted her testimony given at the first trial. The State attempted to impeach Ms. Dew, pursuant to A.R.E. Rule 607, by asking the following questions:

> Q. All right. I've got another question for you. Do you remember testifying under oath previously that you saw Jack Laymon force her to have oral sex?

Defense counsel moved for a mistrial on the basis that the prosecutor had "referred to previous testimony in a previous case." The trial court ruled that reference to prior testimony was permissible as long as no mention was made of a previous trial. We agree. Prior inconsistent statements are properly admissible for impeachment purposes, and Laymon suffered no prejudice since no reference was made to the trial itself.

Laymon's further assertion that the prior statements were not relevant was not argued below, and we will not consider arguments made for the first time on appeal. *Matthews* v. *State*, 305 Ark. 207, 807 S.W.2d 29 (1991).

TRIAL COURT'S REFUSAL TO PERMIT TESTIMONY

Laymon next contends that the trial court erred in refusing to allow the defense to call a rebuttal witness whose name had been provided by Laymon the morning of trial.

[redacted] Presumably, testimony of the witness, Perry Bennett, would have rebutted the victim's testimony on direct examination by the State that she had been raped by Laymon on a camping trip. The State objected to the proposed testimony since the witness's name had not been previously disclosed. The following dialogue ensued:

> BY MR. DAVIS: Your Honor, Mr. Laymon supplied me the name of this witness this morning. I wasn't aware of it before this morning. It goes to the credibility of the witness . . .in regards to rebutting what she said about a camping trip. If I had had any previous notice of it, I would have provided him to the prosecution; but I didn't know it until I walked in the Courthouse this morning.
>
> BY MR. BYNUM: Well, that may be, Judge, but we are entitled to know the names of his witnesses.
>
> BY THE COURT: Well, I don't know that that's proper rebuttal.
>
> BY MR. DAVIS: She made a comment, Your Honor, in her direct, that she was on a camping trip where Jack got her drunk and she woke up with just her panties and tee-shirt on, which is a specific act that my client is accused of committing, and this witness will refute that by stating, that this is like it's a proffer, if the court grants his motion, that Jack did not get the children drunk; that she went to bed by herself and they stayed up by the fire most of the evening together, and that's what I was informed of this morning.

The trial court noted that the witness had been present outside the courtroom that morning, long before the victim had ever testified, and ruled that since the defense knew Bennett was a potential witness, his name should have been previously furnished to the State. We affirm the trial court's decision, but for different reasons. *See Gillie* v. *State*, *supra*.

The victim had testified that "during deer season one year," Laymon took her and her older brother camping and got both children drunk. When she awoke in the morning, she was dressed only in her tee-shirt and underwear and was bleeding near her rectum. In his proffer of Bennett's testimony, defense counsel offered nothing to indicate that the "camping trip" about which Bennett would testify was the same outing described by the victim. She testified that the incident simply occurred "during deer season one year" and that only she, Laymon, and her older brother were present. Under the facts before us, it is unclear whether the victim and the potential witness were referring to the same occasion and thus whether Bennett's testimony would have been relevant. *See Richmond* v. *State*, 302 Ark. 498, 791 S.W.2d 691 (1990); A.R.E. Rule 103(a)(2).

Moreover, even if we characterize the proposed witness's testimony as appropriate rebuttal evidence, Laymon has not demonstrated that he was prejudiced by the exclusion of Bennett's testimony since the incident in question was only one of several incidents indicating anal intercourse. In addition, the victim's testimony reflects incidents of oral and vaginal intercourse over a span of several years. Any one of these incidents would have supported a conviction for rape. We will not reverse an alleged error that is unaccompanied by a showing of prejudice. *Nard* v. *State*, 304 Ark. 159, 801 S.W.2d 634 (1990).

TESTIMONY RELATING TO PRIOR SEXUAL CONDUCT

Finally, Laymon contends that the trial court erred in permitting testimony concerning prior sexual conduct between him and Connie Dew, a witness on behalf of the state.

Laymon first argues that evidence of a defendant's prior sexual conduct with a person other than the prosecutrix is not admissible under the Rape Shield Law, Ark. Code Ann. § 16-42-101 (1987). Notwithstanding the fact that Laymon misinterprets the application of this law, this argument was never raised at trial and we will not consider it. *See Williams* v. *State*, 304 Ark. 279, 801 S.W.2d 296 (1990).

Laymon's objection at trial, when the State asked Ms. Dew whether she had previously given statements concerning

whether she and Laymon had ever engaged in sexual intercourse, was that his past sexual history with the witness was irrelevant. This objection was untimely. Examination of the record reflects that the State had been pursuing a line of questioning designed to impeach Ms. Dew's credibility with prior inconsistent statements and had already asked, and received answers to, questions regarding her sexual relations with Laymon. Ms. Dew had admitted to having given prior statements revealing that she and Laymon had engaged in oral intercourse and had previously been asked the exact question at issue, concerning sexual intercourse, without objection. Failure to object at the first opportunity waives any right to raise the point on appeal. *Ferrell* v. *State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Affirmed.

Russell MITCHELL *v.* STATE of Arkansas

CR 91-12 814 S.W.2d 904

Supreme Court of Arkansas
Opinion delivered September 9, 1991

Don B. Dodson, for appellant.

Winston Bryant, Att'y Gen., by: *Elizabeth A. Vines*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was arrested and charged by police citation with three (3) misdemeanors. At the time of appellant's arrest, the charging officer's personnel file did not contain a psychological evaluation, and as a result, the officer did not meet the minimum standards established by the Commission on Law Enforcement Standards and Training. The statute then in effect provided that any action taken by an officer who did not meet the minimum standards "shall be held as invalid." Ark. Code Ann. § 12-9-108(a) (1987). After appellant's arrest, but before his trial, the statute was amended to provide that "[a]ctions taken by law enforcement officers . . . shall not be held invalid merely because of the failure to meet the standards and qualifications." Act 44 of 1989; Ark. Code Ann. § 12-9-108(a) (1990-91 Advance Code Service). The amendment additionally provided that it was applicable to all pending cases.

Appellant filed a motion to dismiss the citation on the ground that it was invalidly issued since the officer did not meet the standards and, in addition, filed a motion to suppress all evidence gathered by the officer. The trial court applied Act 44 and denied both motions. Upon trial, appellant was convicted of the misdemeanors. He appeals and makes four (4) assignments of error. We have previously decided the four (4) arguments adversely to appellant's contentions.

Appellant first contends the police citation was invalid, and therefore, the trial court erred in refusing to quash it. The trial court did not err. *Harbour* v. *State*, 305 Ark. 316, 807

S.W.2d 663 (1991). He also argues that the trial court erred in refusing to suppress the evidence gathered by the officer. Again, the trial court did not err. *State* v. *Henry*, 304 Ark. 339, 802 S.W.2d 448 (1991) and *Moore* v. *State*, 303 Ark. 514, 798 S.W.2d 87 (1990).

He argues that the application of Act 44 to a pending case violated the prohibitions against ex post facto laws. The argument is without merit. *Ridenhour* v. *State*, 305 Ark. 90, 805 S.W.2d 639 (1991). His final argument is that he was deprived of procedural due process because the police citation was invalid. This argument is also without merit. *Harbour* v. *State*, 305 Ark. 316, 807 S.W.2d 663 (1991).

Affirmed.

Jimmy Dale PATTERSON *v.* STATE of Arkansas

CR 91-33 815 S.W.2d 377

Supreme Court of Arkansas
Opinion delivered September 9, 1991

Val P. Price, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Jimmy Dale Patterson, was tried by jury, convicted of murdering Stanley Dunham, and sentenced to life imprisonment. He has raised four points of appeal. He first contends the court should have directed a verdict of acquittal for three reasons: (1) the State failed to prove the killing occurred in the course of a robbery, and thus there was no proof of the underlying offense necessary for a conviction of capital felony murder pursuant to Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1989); (2) venue was improperly laid in Craighead County because the killing occurred in Greene County; and (3) the State's evidence proved the killing occurred in self defense. Patterson's second point is that the Trial Court

improperly admitted evidence of a statement made by Patterson despite a promise made during a pretrial hearing that the statement would not be used. His third contention is that two inculpatory statements he made while in custody were not voluntary and should not have been admitted into evidence. Finally, Patterson contends the "fee cap" statute limiting the amount to be paid to counsel appointed to represent indigent criminal defendants is unconstitutional.

We affirm the conviction. There was evidence from which the jury could have concluded the killing occurred in the course of a robbery. Some of the acts requisite to the murder occurred in Craighead County, thus venue was not improperly laid, and the jury was not required to believe evidence of self defense. Thus, we find no error in denial of the directed verdict motion. We find no prejudice resulted from admitting evidence of the statement the State may have agreed to exclude, and we find the totality of the circumstances indicates that the other statements were voluntarily made. Nor is there merit in the "fee cap" argument because Patterson has not demonstrated that his case was prejudiced as a result of the legislative limit on the fee to be paid his appointed counsel.

Stanley Dunham's body was found in his car in Craighead County. The body and car had been burned, and the body was beyond recognition. The remains were identified by scientific means. Patterson was arrested and questioned about the death on January 13, 1990. He denied knowing Dunham, and his statement was generally exculpatory. Patterson was held in the Craighead County jail that night, and officers found a piece of paper in Patterson's billfold with Dunham's name and address on it.

On January 14 Patterson made another statement. In it he admitted having killed Dunham. He said both he and Dunham had dated Judy Stone. He knew Dunham had come to Jonesboro from his Ohio home, and he called Dunham at Dunham's room at the Holiday Inn. Dunham came to Patterson's apartment house, and they got into an argument in the parking lot. Dunham threatened Patterson, and Patterson shot Dunham once in the upper body with a single shot .22 caliber gun, placed the body in Dunham's car, and drove the car to a place called "Hill Top"

where there was a telephone booth. Patterson said he called his son to bring gasoline to him. After telling his son to go "down the road," he splashed the gasoline around in the car and then set it afire. An explosion occurred, and Patterson suffered burns on his arms. Patterson had removed two pistols, a pocket knife, a wrist watch, and over $1000 cash from Dunham's body or from the car. Patterson said he then went to his hometown in Tennessee where he gave his father $600 in exchange for a check in that amount which he later deposited in a bank account.

Yet another statement was taken from Patterson on January 15. In it he discussed in great detail his relationship with Judy Stone and a woman named Peggy Brown. Stone worked for Dunham during the time she and Patterson had a relationship. She travelled to Ohio to help Dunham in his business from time to time. Dunham sent her money while she was in Arkansas. She told Patterson that Dunham made a lot of money but that his children kept him "drained" financially. She also told Patterson that Dunham was obsessed with her and would be dangerous to them if they married or continued their relationship. She assured Patterson that she and Dunham had had no sexual relationship, but Patterson was suspicious anyway, and he knew she had a relationship with yet another man in Indiana.

Patterson said that during the time Stone spent in Ohio he developed a relationship with Peggy Brown. When Stone returned to Arkansas from a five-week stay in Ohio, Patterson and Stone got back together, and Patterson asked Brown to stop seeing him. Brown persisted, however, and was with Patterson when he killed Dunham.

In the January 15 statement, Patterson gave substantially different details about the killing. He said when he called Dunham at the Holiday Inn, he mentioned Stone and said they needed to talk. Dunham agreed to meet him at a place on highway 69 in Greene County. Patterson waited on Dunham who drove to the appointed place. When their cars were stopped four or five feet apart facing opposite directions, Patterson said Dunham put his hand in his coat pocket as if to draw a gun. Patterson picked up his single-shot .22 from the floorboard of his car and shot Dunham. He then got out of his car and went to Dunham. He found no gun in Dunham's jacket but did find a .44 caliber pistol

on the seat of Dunham's car. He stuffed Dunham's body in the trunk of Dunham's car, and removed items from the car and from the body. The burning of the car with gasoline brought by Patterson's son, occurred much as he had said in his January 14 statement, with the additional detail that Peggy Brown drove Patterson's car back to Patterson's apartment.

Patterson told yet another version of the killing in his trial testimony. He said that he wanted to meet Dunham to talk him out of trying to marry Stone. He called Dunham at the Holiday Inn and asked him to meet at the highway 69 location, but when they met there, both got out of their cars and Dunham said "Young man, I am going to marry Judy Stone." Patterson replied that it would not happen, and that he had been going with Stone for two years. Dunham then went "into a rage," and came toward Patterson as if to "bear hug" him. Patterson said he struck Dunham and turned back toward his car when he heard Dunham say "I'll kill you." Patterson said he then jumped in his car and attempted to drive away but wound up at the dead end of a gravel road. Dunham approached in his car and stopped at an angle near Patterson's car, and that was when the shooting took place.

1. Directed verdict

a. Evidence of robbery

Patterson was charged with capital murder as defined in Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1989). The relevant portion of the statute makes a killing capital murder if it is committed in the course of or furtherance of robbery. The argument here is that a verdict should have been directed in favor of Patterson on capital murder because the State did not prove that the robbery was anything other than an afterthought occurring after Dunham was dead.

[redacted] Patterson is correct in stating that the State did not present any evidence directed to whether Patterson had formed an intent to rob Dunham prior to his having killed him. There was evidence that Patterson had been in financial straits as late as a month before the killing, and he had heard from Stone that Dunham made a lot of money but was relieved of most of it by his children. The circumstantial evidence consisting of the close proximity of time and place of the killing and the taking of the

decedent's property so as to make it all one transaction is sufficient to allow the jury to conclude the killing occurred in the course of a robbery. *Pomerleau* v. *State*, 303 Ark. 275, 795 S.W.2d 929 (1990); *Owens* v. *State*, 283 Ark. 327, 675 S.W.2d 834 (1984); *Grigsby* v. *State*, 260 Ark. 499, 542 S.W.2d 275 (1976).

b. Venue (jurisdiction)

Patterson contends that, as the killing occurred in Greene County, the Craighead County Circuit Court was without authority to try him for it. Arkansas Code Ann. § 16-88-105(b) (1987) provides, "[t]he local jurisdiction of circuit courts . . . shall be of offenses committed within the respective counties in which they are held." Section 16-88-108(c) provides, however, "[w]here the offense is committed partly in one county and partly in another, or the acts, or effects thereof, requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county."

In *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972), we reviewed these statutes and similar ones, as well as decisions under them, in other states. Although it was not the holding of the *Hill* case, we concluded for the purpose of guiding the trial court on retrial that these laws are remedial and to be construed liberally.

[redacted] In *Thrash* v. *State*, 291 Ark. 575, 726 S.W.2d 283 (1987), the evidence showed that Thrash hatched a plan in Desha County to steal a vehicle. The murder and robbery occurred in Lincoln County, but the body was returned by Thrash to Desha County. In *Pilcher* v. *State*, 303 Ark. 335, 796 S.W.2d 845 (1990), Pilcher met his victim in Saline County and invited him to Grant County where the robbery and homicide occurred. Pilcher then brought the body back to Saline County. We held Thrash and Pilcher were properly tried in Desha and Saline Counties respectively because in those counties "acts requisite to the consummation of the offense" had occurred. The cases are virtually indistinguishable from this one on this issue, and we conclude the Craighead County Circuit Court had jurisdiction of the alleged offense.

c. Self defense

Patterson argues, without citation of authority, that his defense of self defense was established as a matter of law because the only evidence the state put on with respect to how the killing took place consisted of Patterson's statements of January 14 and 15, in each of which he said he killed Dunham out of fear that Dunham was about to shoot him.

The Trial Court's instruction to the jury described self defense as an affirmative defense. Patterson made no objection to the instruction. *Cf.* AMCI 4105, the model instruction on use of force in defense of a person which contains no such description. At one point in the instruction given in this case, the Trial Court stated that Patterson had the burden of proving self defense by a preponderance of the evidence. At another point the instruction stated that his burden was only to raise a reasonable doubt as to his guilt.

In his argument, Patterson states that "the appellant has the burden of proof by a preponderance of the evidence the affirmative defense of justification self-defense and the use of deadly force." The State also argues that self defense is an affirmative defense, citing Ark. Code Ann. § 5-2-607(a) (1987) which states the conditions under which a person is justified in using deadly force, and § 5-1-111(d) (1987) which states that a defendant must prove an affirmative defense by a preponderance of the evidence. The State then cites *McCaslin* v. *State*, 298 Ark. 335, 767 S.W.2d 306 (1989), in which we made it clear that a jury is not required to believe a defendant's evidence on the affirmative defense of entrapment.

Neither of the statutes cited by the state defines justification or self defense as an affirmative defense. In *Peals* v. *State*, 266 Ark. 410, 584 S.W.2d 1 (1979), this Court, considering the propriety of an instruction on "choice of evils," stated, "We think the matter of justification was treated as an affirmative defense at the trial. However, justification is not an affirmative defense. . . . It becomes a defense when any evidence is offered tending to support its existence and such evidence may be introduced by either side. *Thomas* v. *State*, 266 Ark. 162, 583 S.W.2d 32 (1979)." AMCI 4105 provides a defendant is only required, in asserting the defense, to "raise a reasonable doubt" in

the jurors' minds. In *Doles* v. *State*, 275 Ark. 448, 631 S.W.2d 281 (1982), we held that an accused was entitled to an instruction on justification where there was some evidence of self defense. We wrote, "Justification is not an affirmative defense which must be pled, but becomes a defense when any evidence tending to support its existence is offered to support it," citing the *Peals* and *Thomas* cases.

Regardless of the Trial Court's mistake in describing justification or self defense as an affirmative defense and in giving two standards of proof, one of which was erroneous, there was no reversible error because no objection was made to the instruction. Indeed the error may have been induced by the fact that Patterson treated self defense as an affirmative defense from the outset of the litigation and filed a "Notice of Intent to Raise Affirmative Defense" reciting "Justification — Use of Deadly Physical Force in Defense of a Person a/k/a self defense."

Even in a capital murder case, a defendant must make a contemporaneous objection at trial to preserve a claim of error for review. *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986).

The *Thomas* case provides the answer to Patterson's argument that his unrebutted statements presented by the state prove self defense as a matter of law. We pointed out that we are not required to view the evidence most favorably to the defendant. The opposite is true. The jury is not required to believe all of the defendant's statements about what happened at the time of the homicide. It may accept or reject any part of the testimony of a witness. *Gilliam* v. *State*, 294 Ark. 117, 741 S.W.2d 631 (1987). In this case the evidence was certainly sufficient to show that Patterson killed Dunham, and there is nothing in the record to cause us to conclude that self defense or justification was, as a matter of law, proven by either party.

2. The January 13 statement

At the pretrial suppression hearing, the prosecution stated it would present only the voluntariness of the January 14 and January 15 statements for review because it had no intention of introducing the January 13 statement into evidence. Yet at the trial, the statement, which was exculpatory, was sought to be

introduced for impeachment purposes.

Patterson moved to exclude the statement, and the Trial Court held a hearing out of the presence of the jurors to determine its admissibility. It was shown that clearly there was no surprise to Patterson or his counsel who had known of the statement. The only argument seems to be that the State should not have broken its "promise." Patterson cites no authority on this point and makes no argument which convinces us that any unfair prejudice resulted from the introduction of the statement. This court does not reverse in the absence of a showing of unfair prejudice. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied, 470 U.S. 1085 (1985).

3. The January 14 and 15 statements

Patterson contends he asked for an attorney each time he spoke with the sheriff's deputies who took statements from him. The officers testified either that he made no such request or that they could not recall him making it. Patterson contends that at one point when he asked for an attorney to advise him, the officers interviewing him sent for a deputy prosecutor who did not speak to him directly but who answered questions he had about possible sentences by relaying the answers through a sheriff's deputy. The officers testified that a deputy prosecutor was at the jail where they questioned Patterson for up to 30 minutes, and they did ask him questions in connection with the case, but they did not recall that he was called there as a result of Patterson's request for the assistance of a lawyer.

Patterson also contends he was promised that, if he confessed, the death penalty would be waived and his son and Stone would not be sent to prison.

The issue of voluntariness of an inculpatory statement given by an accused in custody is one this Court determines after looking at the "totality of the circumstances" displayed by the record. *Weaver* v. *State*, 305 Ark. 180, 806 S.W.2d 615 (1991). The trial court must resolve conflicts in testimony, and we will not reverse unless the decision in that respect is clearly erroneous. *Fuller* v. *State*, 278 Ark. 450, 646 S.W.2d 700 (1983).

Patterson has given us nothing to suggest that the Trial Court in this case was clearly erroneous in choosing to believe the

officers rather than Patterson on these questions.

4. The "fee cap"

In *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), this Court held unconstitutional the statute limiting fees which can be paid to an indigent defendant's appointed counsel. We had previously held, however, that we would not reverse a conviction on the basis of the constitutional inadequacy of the law unless it were shown that the complaining defendant's trial was prejudiced by the inadequacy of the fee paid his counsel. *Coulter* v. *State*, 304 Ark. 527, 804 S.W.2d 348 (1991). Patterson has made no such showing.

5. Rule 11(f)

As this is a case in which there is a sentence to life imprisonment, the record has been reviewed for all objections decided adversely to Patterson, and we find no error.

Affirmed.

Michael Anthony BLACK *v.* STATE of Arkansas

CR 90-241 814 S.W.2d 905

Supreme Court of Arkansas
Opinion delivered September 9, 1991

Henry & Mooney, by: *Wayne Mooney*, for appellant.

Winston Bryant, Att'y Gen., *Jeff Vining*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant appeals from his conviction for first degree murder and sentence of life imprisonment. His sole argument on appeal is that there is insufficient evidence to support the jury's verdict. Appellant's argument is without merit; therefore, we affirm.

To meet its burden of proof for a conviction of murder in the first degree, the state must prove that a person with a purpose of causing the death of another person, causes the death of any person. Ark. Code Ann. § 5-10-102(a)(2) (Supp. 1989). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (1987).

In criminal cases, this court affirms where there is substantial evidence to support the verdict. *Lunon* v. *State*, 264 Ark. 188, 569 S.W.2d 663 (1978). Circumstantial evidence may be sufficient to sustain a conviction, *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988), and where circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. *Murry* v. *State*, 276

Ark. 372, 635 S.W.2d 237 (1982). Whether circumstantial evidence excludes every other reasonable hypothesis is usually a question for the jury. *Id.* On appeal, however, this court views the evidence only to determine whether there is substantial evidence to support the verdict. *Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633 (1988). Finally, in determining whether substantial evidence exists, the court reviews the evidence in the light most favorable to the appellee. *Pope* v. *State*, 262 Ark. 476, 557 S.W.2d 887 (1977).

On February 24, 1989, Earl Markway was found murdered in a field off Highway 63 in Trumann, Arkansas. He had been stabbed twenty-three times, and no money was found in his wallet. In reviewing the state's evidence introduced at trial, Markway, described as an older man dressed in western-style clothes, had been seen with the appellant at several bars on the night of the 23rd. Appellant, who is from Michigan, was in Trumann to marry his girlfriend, Missy Zech, and he had borrowed Missy's car, which was used to transport him and Markway that night. Appellant and Markway were first at a bar in Our Place from approximately 6:30 to 8:00 p.m., in West Main Tavern from about 8:30 to 9:30 p.m., and in Jim's Tavern between 9:00 and 10:00 p.m. Markway was buying beers for the appellant, and while at West Main Tavern, Markway complained because he was unable to obtain change for a $100.00 bill, so he paid with a $50.00 bill. After leaving Jim's Tavern, appellant and Markway were seen together at an Exxon station by a former girlfriend, Vicki Finney, and by Missy, who was out looking for her car. Appellant had just purchased a six-pack of Budweiser. He told Missy that he had to take Markway home and that he would return to his sister's (Anita Parker's) house where he was staying. Missy told appellant that she would follow him and Markway, but appellant lost them after leaving Exxon's premises.

Later that night, appellant showed up alone at another former girlfriend's (Carolyn Campbell's) house. Tammy, Carolyn's daughter, and two friends, Chris and Tony, were there and all agreed that appellant arrived at around 11:00 p.m. and went straight to the bathroom and ran water for a few minutes. Tammy and Chris both related they saw a knife in appellant's possession, and Tammy also said that she saw blood on appellant's hands when he came in. After a brief stay, appellant drove

to his sister's house, where he arrived at about 11:30 p.m. and was described as being in a bad mood. He had $180.00 in his pocket and also had a full bottle of crack. The amount of money was greater than what appellant told Missy he had when they left Michigan. After changing his jacket and T-shirt at his sister's, he then got a ride to a bar named Rudy Kazoo.

The State presented six witnesses who testified that the appellant told them that he had killed the old man. First, a bouncer at Rudy Kazoo's bar stated that he broke up a fight involving the appellant and another, and appellant said, "You don't want to f____ with me, I done killed one m_____ f_____." Vicki Finney stated that, on the night of the 23rd, she also saw appellant at Rudy Kazoo, and he told her that he had stabbed an old man. That same night, appellant asked Vicki for a ride to Michigan and gave her $100.00 for the trip. On the journey to Michigan, Vicki saw appellant take a knife wrapped in tissue out of the glove box and throw it in a ditch. She stated she saw something dark red on the knife and the blade was so bent, it would not fully close. In Michigan, Vicki said she overheard appellant tell his brother that he had stabbed the old man.

Another ex-girlfriend, Samantha Hilderbran, who resided in Michigan, related that she knew nothing about the homicide in Arkansas until appellant told her that he had killed an old man. Appellant told Samantha that he just intended to rob the old man, but the man drew a knife, and appellant then stabbed him. Appellant told Samantha that after the stabbing, he went to a girl's house, put his hands under his shirt and went to the bathroom to wash. After telling Samantha what happened, he threatened her against testifying against him by saying, "You think that man has been stabbed twenty-three times, yours would be uncountable."

Finally, appellant's sister, Anita Parker, and brother, Mark, testified that appellant told them he had stabbed the old man. These declarations arose after appellant returned to Arkansas from Michigan, and he got into an argument with Mark in front of Anita and her boyfriend, Gene Dees. Appellant was concerned that Mark had told the police that appellant had stabbed Markway, and in a fight with Mark, appellant repeatedly asked Mark how it felt to be a walking dead man and also said, "I'm

going to stab you long, deep and repeatedly like I did that old man." He told Anita and Gene that they would be next.

The testimony of the foregoing witnesses strongly supports appellant's murder conviction. Appellant did little to discredit these witnesses' accounts except to say that they lied because they were angry with him for beating them up. He also pointed out that the witnesses never gave a full account of what he purportedly said about the victim until they were asked on a second or later time. Such inconsistencies in testimony are matters for the jury. *Ronning*, 295 Ark. 228, 748 S.W.2d 633. On appeal, this court does not weigh evidence on one side against the other, we simply determine whether the evidence in support of the verdict is substantial. *Id.*

Other evidence was also advanced by the state which either matched or was consistent with the testimony set out above. Without going into detail, the state showed traces of human blood were found on the jacket worn by appellant on the night of February 23 and on the steering wheel cover of the car he drove that night. Also, the code number on a crushed Budweiser beer can found near the victim's body matched the code numbers of four full beer cans found in the car driven by appellant. And finally, a partial footprint found in the area of the victim's body was made by a tennis shoe like the ones worn by the appellant.

Because the state's evidence so clearly reflects that the appellant committed the first degree murder crime with which he was charged, we affirm. Further, under Sup. Ct. R. 11(f), an examination has been made of all other rulings adverse to appellant, and none of them constitute prejudicial error.

James Wesley JOHNSON *v.* STATE of Arkansas

CR 91-41 814 S.W.2d 908

Supreme Court of Arkansas
Opinion delivered September 9, 1991

James P. Massie, for appellant.

Winston Bryant, Att'y Gen., by: *Jeff Vining*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, James Wesley Johnson, was tried and convicted by a Pulaski County jury for possession of a controlled substance with intent to deliver. He was sentenced as an habitual offender to serve sixty years imprisonment in the Arkansas Department of Correction. Johnson appeals contending that the evidence adduced at trial was insufficient to support the possession conviction. We affirm.

In considering appellant's sufficiency of the evidence argument, we consider only the evidence that is favorable to the state and supports the appellant's conviction. *Crossley* v. *State*,

304 Ark. 378, 802 S.W.2d 459 (1991). On December 29, 1989, the police went to the area of Thirteenth and Wolfe Streets in Little Rock to investigate an informant's tip about possible narcotic activity in the area. During the investigation, the police learned that a brown van parked in the alley behind Wolfe Street was a source of drug activity.

After locating the van, the police shined flashlights into the van's window, and observed a male and a female trying to hide themselves under a pile of clothes on the van's rear bench seat. Appellant was lying across the floorboard behind the van's front seats. The police observed the appellant pull a pistol out of his belt, wave it, and stick it under a seat cushion. After removing the van's occupants, the police recovered a folded piece of paper from the floorboard behind the front seats. The paper contained 2.562 grams of cocaine.

Two officers testified regarding appellant's position in relation to the spot where they found the paper. One officer testified that appellant was sitting on the paper. Another officer testified that appellant was lying across the paper. The officers also recovered two guns, "crack" pipes, and a pill bottle of Valium. Upon searching the appellant, the officers found a loaded gun clip in appellant's back pocket. The search did not reveal any drugs on the appellant's person.

At the close of the state's evidence appellant moved for a directed verdict of acquittal, claiming that the state's circumstantial evidence was not sufficient for the jury to conclude that he had committed the crime of possession. The motion was denied.

In determining whether there is sufficient evidence to support a jury verdict, we will affirm if there is substantial evidence to support the conviction. *Lewis* v. *State*, 295 Ark. 499, 749 S.W.2d 672 (1988). Substantial evidence, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). It must force or induce the mind beyond suspicion or conjecture, and a verdict should only have been directed where there was no evidence from which the jury could have found the defendant guilty without resorting to surmise and conjecture. *Id.* In order for circumstantial evidence to be sufficient to support a

finding of guilty in a criminal case, it must exclude every other *reasonable* hypothesis consistent with innocence. *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988). However, whether the evidence excludes every other reasonable hypothesis is for the finder of fact to determine. *Id.*

In the instant case, appellant argues that the state failed to prove possession because there was no direct evidence that the contraband belonged to appellant. He relies on the undisputed fact that the police did not find any drugs on his person at the time of his arrest.

Possession means "to exercise actual dominion, control, or management over a tangible object." *Turner* v. *State*, 24 Ark. App. 102, 103, 749 S.W.2d 339, 340 (1988). At appellant's trial, two officers testified that appellant was covering the contraband with his body immediately prior to his arrest. Viewing the evidence in the light most favorable to the state, the officers' testimonies are sufficient to establish that appellant exercised dominion or control over the contraband.

Accordingly, we hold that there is substantial evidence to support appellant's conviction.

Affirmed.

Jimmy Lane WICOFF *v.* STATE of Arkansas

RC 91-44 814 S.W.2d 267

Supreme Court of Arkansas
Opinion delivered September 9, 1991

Christopher O'Hara Carter, for appellant.

No response.

PER CURIAM. Appellant, Jimmy Lane Wicoff, by his attorney, Christopher Carter has filed a motion for rule on the clerk. His attorney admits that the record was tendered late because the ninety-day limit for filing the record in this Court, *see* Ark. R. App. P. 5(a), was not extended by a new trial motion with respect to which no record was made. *See* Ark. R. App. P. 4(c).

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.

STATE of Arkansas *v.* Ranger Thomas THORNTON

CR 91-58 815 S.W.2d 386

Supreme Court of Arkansas
Opinion delivered September 16, 1991

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellant.

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

ROBERT H. DUDLEY, Justice. On May 2, 1990, the appellee, Ranger Thomas Thornton, was involved in a car wreck which killed one person. That same day, he was charged by police citation in municipal court with the misdemeanors of speeding, reckless driving, drinking on the highway, running a red light, destruction of public and private property, and the class C felony of manslaughter. On May 16, 1990, he pleaded guilty to speeding, reckless driving, and drinking on the highway and pleaded not guilty to running a red light and destruction of public and private property. He was found guilty of those two additional misdemeanors. The State dismissed the felony manslaughter count filed in municipal court.

On November 20, 1990, about six (6) months after the municipal court proceedings, the State, by information filed in

circuit court, charged the accused with the felony manslaughter. The information is cryptic; the charging part alleges only that the accused "on May 2, 1990, in Chicot County did unlawfully, recklessly cause the death of another person, to wit: Cheryl Kniss." A bill of particulars was not provided. On December 10, 1990, twenty (20) days after the manslaughter charge was filed, the appellee, Thornton, moved to dismiss the charge under the Double Jeopardy Clause of the Fifth Amendment. Two days later, on December 12, 1990, the trial court, without having a response from the State and without holding an evidentiary hearing, dismissed the charge. The State appeals pursuant to A.R.Cr.P. Rule 36.10. We reverse and remand.

I.

[redacted] The accused seeks to bar the State from appealing on two (2) procedural grounds. First, he argues that the State did not object to the entry of the dismissal order, and, accordingly, we should not consider the dismissal. The requirement for a contemporaneous objection has long been our general rule, and remains so, but we also have long recognized that an exception to the rule exists when a litigant did not have the opportunity to object. *Harrell* v. *City of Conway*, 296 Ark. 247, 753 S.W.2d 542 (1988); *Goodwin* v. *State*, 263 Ark. 856, 568 S.W.2d 3 (1978). Here, the State did not have the opportunity to object and, as a result, the contemporaneous objection rule does not bar appeal of the dismissal.

[redacted] Secondly, the accused contends that the State is asking for the reversal of a factual determination and cites us to our case law which provides that we will not accept an appeal from the State after a final dismissal for the purpose of determination of a question of fact. *See State* v. *Dixon,* 209 Ark. 155, 189 S.W.2d 787, (1945); *State* v. *Harvest*, 26 Ark. App. 241, 762 S.W.2d 806 (1989). We have not changed our position; we still will not accept a State appeal of a final order solely to determine a question of fact. However, that rule is not applicable to this appeal. As can be seen from the remainder of this opinion, this appeal involves the uniform and correct administration of the criminal law, and we have traditionally accepted such appeals. See A.R.Cr.P. Rule 36.10 and citations thereunder.

II.

The case of *Grady* v. *Corbin*, ___ U.S. ___, 110 S. Ct. 2084 (1990) governs the case before us. There, Thomas Corbin was involved in a car wreck which killed one person. After the wreck he was given uniform traffic tickets for driving while intoxicated and for failure to keep right of the median. Both tickets directed him to appear at a Town Justice Court. He appeared as directed and pleaded guilty. The presiding judge was informed neither of the fatality nor of a pending homicide investigation. The judge subsequently assessed the penalty. About two (2) months later, the grand jury indicted Corbin, charging him in county court with, among other things, negligent homicide, criminally negligent homicide, and reckless assault. The prosecution filed a bill of particulars stating that in order to prove the homicide and assault charges it would prove that the defendant (1) was operating his vehicle in an intoxicated condition, (2) failed to keep to the right of the median, and (3) was driving 45 to 50 miles per hour, which was too fast for the prevailing conditions. Corbin moved to dismiss because of double jeopardy. Ultimately, the case reached the Supreme Court of the United States which held the homicide and assault charges were barred by the Double Jeopardy Clause.

[redacted] The Court formulated a two (2) part inquiry to determine whether double jeopardy bars a prosecution. First, the *Blockburger* test should be applied. If it reveals that the offenses have identical statutory elements or that one offense is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. *Id.* at 2090. If the subsequent prosecution is not barred under the first inquiry, it should be subjected to the second inquiry, the "proof of the same conduct" analysis. The holding of the case concisely sets out this second inquiry as follows: "We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2087.

III.

The key to the second inquiry is determining on what conduct the State will rely to prove the subsequent prosecution. In

Grady the State had filed a bill of particulars which set out its anticipated proof. Because of that bill of particulars, the Court wrote:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution, and the New York Court ofAppeals properly granted respondent's petition for a writ of prohibition. This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).

Id. at 2094. In the case before us there is no bill of particulars; instead, there is only the cryptic information which does not fully disclose the conduct on which the State will rely. The issue becomes: which party has the burden of proving the prior conduct the State will use?

In *Grady,* the majority answered the burden of proof issue for federal courts in footnote fourteen (14) of the opinion. There the Court provided a procedural mechanism for implementation of the test by relying on the procedure followed in previous double jeopardy cases and quoting a passage summarizing that procedure as follows: " '[W]hen a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses.' " *Id.* at 2094, n.14 (quoting *United States* v. *Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988)). The court in *Ragins* stated that this was the approach taken by all of the federal circuits. See also Note, *The Burden of Proof in Double Jeopardy Claims,* 82 Mich. L. Rev. 365 (1983).

The State argues in its brief that the burden should be on the defendant to demonstrate that the State will rely on conduct for which the defendant has already been convicted in proving the

pending charge. The State cites one case so holding. See *Commonwealth* v. *LaBelle,* 397 Pa. Super. 179, 579 A.2d 1315 (1990). Other states have followed the Supreme Court's direction and placed the burden on the state. See *Scalf* v. *State*, 573 So. 2d 202 (Fla. Dist. Ct. App. 1991).

It seems to us that the better procedure is to place the burden on the State since the State is in a better position, than is the defendant, to know what it is trying to prove and how it plans to do so. Accordingly, we adopt the standard recommended by the Supreme Court on the burden of proof.

[redacted] The Supreme Court did not state that there must be a hearing on a pretrial double jeopardy issue. However, the very existence of the burden shifting procedure mandates that some response is necessary to a defendant's motion to dismiss based on double jeopardy. No opportunity was given for such a response in this case. The trial court apparently assumed that the State would not be able to prove the elements of the crime of manslaughter without relying on the accused's conduct for which he had previously been convicted—speeding, reckless driving, drinking on the highway, and running a red light. As a practical matter the trial court's action ultimately may well prove to be the correct result, but the State should have been given an opportunity to demonstrate otherwise before the case was dismissed.

IV.

[redacted] The error in prematurely dismissing the charge occurred before jeopardy attached. There never has been a determination that the State failed to prove the elements of the crime. Thus, the case may be remanded rather than dismissed. *See Tibbs* v. *Florida,* 457 U.S. 31 (1982).

Reversed and remanded for proceedings consistent with this opinion.

Stanley PRESTON *v.* STATE of Arkansas

CR 90-92 815 S.W.2d 389

Supreme Court of Arkansas
Opinion delivered September 16, 1991
[Rehearing denied October 21, 1991.]

Burbank, Dodson & McDonald, for appellant.

Winston Bryant, Att'y Gen., *Catherine Templeton*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Stanley Preston, was tried by jury and convicted of burglary on July 18, 1989. In a bifurcated habitual felon proceeding the jury returned a sentence of 21 years. Preston filed a timely *pro se* motion pursuant to Ark. R. Crim. P. 36.4 raising approximately 13 allegations of ineffective assistance of counsel. Preston's trial counsel moved to withdraw, and the motion was granted without a hearing. No new counsel was appointed, and no order denying a new trial was entered, although in the order permitting trial counsel to withdraw the Court stated that he did not find trial counsel to have been ineffective. Preston appealed this order. We remanded, *Preston* v. *State*, 303 Ark. 106, 792 S.W. 2d 599 (1990), due to the lack of a final order, and we wrote:

> [A] new lawyer should be appointed to represent the appellant. If the trial court finds the petition does not assert sufficient facts to raise an effectiveness issue, it may so rule. If the trial court finds the petition does state sufficient facts to raise such an issue, a hearing should be held. The hearing at that stage need not necessarily be a formal one, because if the pleadings, files and records of the case conclusively show that the petitioner is not entitled to relief, the court may so rule. If, however, the pleadings and records do not so show, a formal hearing must be held.

The trial court set a hearing and appointed new counsel on the morning of that hearing. The newly appointed attorney only had time to read the *pro se* petition and had no opportunity to review the record. He had not been at the trial or spoken with trial counsel prior to the hearing. At the hearing Preston was given an opportunity to read and expand on his ineffectiveness allegations and former counsel was given an opportunity to refute them. At the conclusion of the recitation the Trial Court stated he would review the transcript and files and determine whether the allegations merited a formal hearing. Following this review he decided the allegations did not warrant a hearing and issued an order with specific fact findings on each of the assertions denying the motion for a new trial.

Preston raises one point of appeal. He contends that the Court erred in denying the motion because his new counsel was not afforded a meaningful opportunity to obtain review of his

ineffectiveness claims or amend the petition to assert additional claims because of his appointment on the morning of his informal hearing.

In his final order the Trial Court did precisely as we directed on remand, he reviewed the petition and found that it did not assert sufficient facts to raise an effectiveness issue. As we made clear in *Whitmore* v. *State*, 299 Ark. 55, 771 S.W.2d 266 (1989), there is no requirement that the court grant an evidentiary hearing on an allegation other than one of specific facts from which it can be concluded that the petitioner suffered some actual prejudice. Furthermore, the supporting facts must appear in the petition, and the petitioner cannot rely on the possibility that facts will be elicited from witnesses if a hearing is held. Preston's petition consisted of conclusory allegations, which were not borne out by the record, or bald assertions about the failure to call witnesses. Preston offered no details that a particular witness or witnesses could have testified to particular facts which would in reasonable probability have affected the outcome of the trial.

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the petitioner has the burden of overcoming that presumption. *Strickland* v. *Washington,* 466 U.S. 668 (1984). The strong presumption in favor of counsel's effectiveness cannot be overcome by the mere claim that a petitioner has some witnesses who might have had some evidence to present. Neither Preston's petition nor his testimony at the informal hearing presented facts which demonstrated that his trial counsel erred or that any error existed which had a prejudicial effect on the actual outcome of the proceedings. We cannot say the Trial Court was wrong in concluding that the petition did not warrant relief.

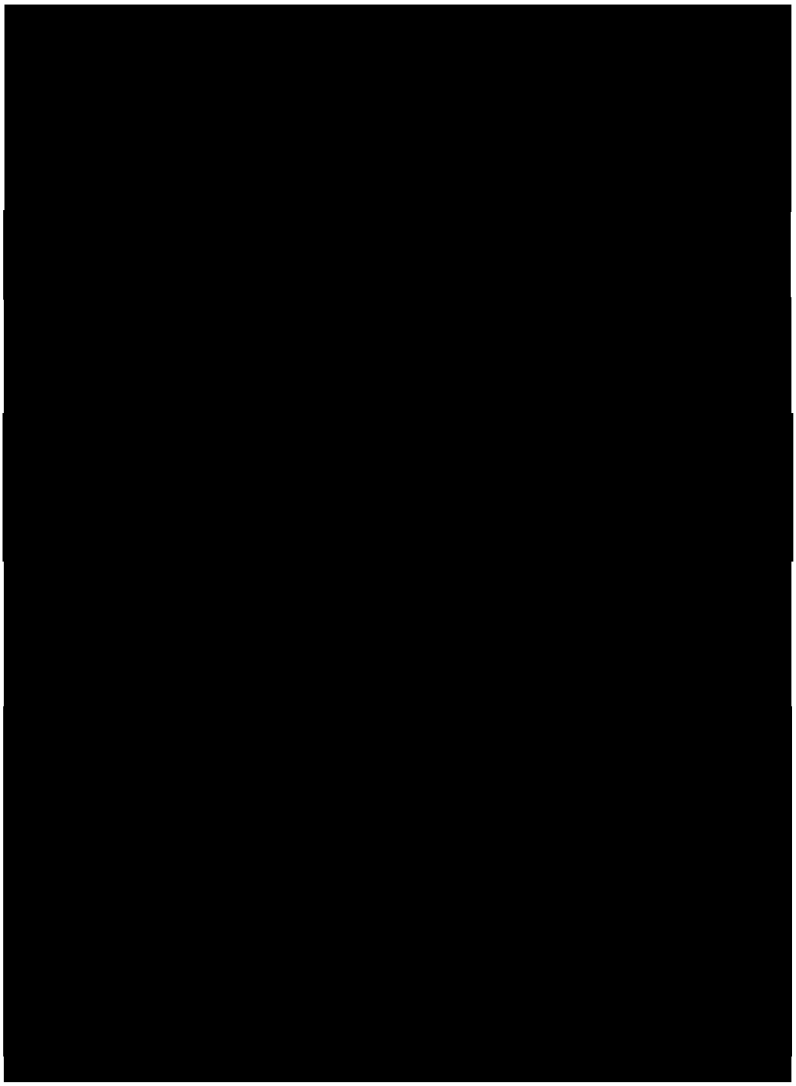
It was proper for the Trial Court to have appointed new counsel; however, given the Court's subsequently reached conclusion that the allegations were unworthy of a formal hearing, there was nothing the new counsel could have done to further Preston's motion. Thus, Preston's allegation that his new counsel was given no opportunity to help him is not persuasive.

Affirmed.

Nancy CROW *v.* STATE of Arkansas

CR 91-3 814 S.W.2d 909

Supreme Court of Arkansas
Opinion delivered September 16, 1991



Craig Lambert, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant was convicted for the capital murder of her mother, Gladys Crow, and sentenced to life imprisonment without parole. On appeal, she raises four points for reversal.

As background information leading to appellant's arguments, we first relate some of the pertinent evidence introduced at trial that supports appellant's conviction. Appellant's accomplice, Donald Bates, told the police about the murder, and testified against appellant in exchange for a reduction of the charge to first degree murder and sentence of life imprisonment. The state's evidence showed Ms. Crow was murdered the morning of October 3, 1989, and on October 31, 1989, her body was found partially submerged in a pond located on property owned by Sollie Sutliff. On November 1, Bates confessed to the police, and implicated the appellant as the one who actually killed Ms. Crow. Bates lived on property which he with another person purchased from Ms. Crow and her husband. They were in arrears on the property which was located adjacent to appellant's. He said that appellant expressed concern that she believed her mother planned to disinherit her; therefore, she asked Bates to assist in a plan to murder her mother.

Ms. Crow was expected to arrive at appellant's home on the

morning of October 3, and appellant and Bates designed a plan so the appellant could use a crossbow to shoot an arrow through the window of her mobile home as her mother walked towards the home through a small gate. While various means had been discussed to achieve this objective, Bates testified that he was actually present that morning at appellant's premises and, when Ms. Crow arrived and departed from her car, he suggested she walk through the small gate entrance. As Ms. Crow walked through the gate, the appellant shot her, but her wound was not fatal. Ms. Crow managed to return to her car and attempted to get away. However, by this time, appellant had run to the scene, and with Bates's assistance, they were able to stop Ms. Crow's car. Ms. Crow then passed out, and after Bates and appellant dragged her out of her car, appellant proceeded to shoot Ms. Crow with the crossbow two additional times at close range. Bates related how he and appellant disposed of Ms. Crow's body, clothing, car and the arrows. Prior to Bates's confession, the police had already found Ms. Crow's car, which Bates had burned soon after the murder in order to get rid of the blood stains. After confessing, Bates took the police to where he and appellant had disposed of clothing and also the arrows used to shoot Ms. Crow. The officers were able to retrieve the clothing and two arrows from a creek.

Based upon Bates's confession, the police obtained an arrest warrant for the appellant. As a result of two searches of appellant's home, the officers found two diary sheets. These sheets of paper contained references to the murder and further implicated appellant. At the time of appellant's arrest, she was a patient in a Texas hospital. With this background, we now turn to appellant's first argument on appeal.

Upon the request of Johnson County Sheriff Eddie King, local Texas law enforcement officers effected appellant's arrest at the Texas hospital. Appellant was on oxygen and attached to an I.V. The officers did a search incident to appellant's arrest looking for possible weapons and removed a kitchen knife. While an officer remained in appellant's room, another called Sheriff King who asked if a diary had been found during the search. Upon returning to appellant's room, the Texas officer saw the diary, a brown three-ring notebook covered in foil, situated on a tray table about five to six feet from her bed. The officer seized the diary.

Appellant argued at trial, and now on appeal, that the officers had unlawfully seized the diary, and the trial court erred in failing to suppress its introduction into evidence. We disagree.

[redacted] Even though the officers did not have a search warrant to search appellant's room, the law permits a search of the area within the immediate control of the person arrested. A.R.Cr.P. Rule 12.2. In *State* v. *Risinger,* 297 Ark. 405, 762 S.W.2d 787 (1989), we set out the following relevant Supreme Court's discussion in *Chimel* v. *California,* 395 U.S. 752 (1969), of the "search incident to arrest" principle as follows:

> [W]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. *There is ample justification, therefore, for search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.* (Emphasis added.)

In the present case, the record reflects that appellant's diary was only five or six feet from her bed, and although she was on oxygen and attached to an I.V., she was able, on her own, to leave her bed and to walk. Thus, appellant undoubtedly had the capability to destroy the diary. The accessibility issue aside, the *Chimel* rule defines the area which may be searched, and is not constrained because the arrestee is unlikely at the time of the arrest to actually reach into that area. *United States* v. *Palumbo,* 735 F.2d 1095 (8th Cir. 1984).

[redacted] Gruesome photographs are the subject of appellant's second issue on appeal. In all, eight photographs of the victim's

body were introduced into evidence. The victim's body was partially decomposed, because the body had been submerged in the pond for almost a month. At the trial below, the appellant's attorney only objected to two photographs, exhibits nine and ten. While on appeal, the appellant's argument includes all the photographs, we can only address her arguments on exhibits nine and ten, since she did not properly object to the other photographs. As we have stated countless times, we will not consider arguments raised for the first time on appeal. See, *e.g., Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

We have held that admissibility of photographs rests within the sound discretion of the trial court, and its decision will not be reversed without a showing of clear abuse of discretion. *Morris* v. *State,* 302 Ark. 532, 792 S.W.2d 288 (1990). Even inflammatory photographs are admissible if they tend to shed light on an issue, if they are useful to enable a witness to better describe the objects portrayed, or if they better enable the jury to understand the testimony. *Id.* In *Berry* v. *State,* 290 Ark. 223, 718 S.W.2d 447 (1986), this court warned trial judges against the "carte blanche" acceptance of gruesome photographs. In *Berry,* the court found that six, mostly repetitious, gory, color photographs of the victim's face were of little probative value and could do nothing but inflame the jury. This court has also held that a defendant cannot admit the facts portrayed and thereby prevent the state from putting on its proof. *Cotton* v. *State,* 276 Ark. 282, 634 S.W.2d 127 (1982).

Applying this law to the present case, exhibits nine and ten were three by five color photographs of the victim's body after it had been removed from the pond. The body is partially enclosed in a yellow body bag. The pictures show the rope tied around the victim's body which was used with the concrete blocks pictured in exhibit eight to weigh the body down in the pond. These are the only pictures that show the rope still tied around the body.

This court has upheld the admittance into evidence of photographs of a body removed from a pond. See *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979). Here, the state had to corroborate Bates's account of the murder and hiding of the victim's body, and, in order to do so, it was necessary for the state to show the ropes attached to her body. Not only are these

photographs mild compared to the others not objected to, there is nothing to suggest that the trial judge accepted the state's photographs "carte blanche." In sum, the challenged photographs were necessary for the state to prove its case, and the trial court was correct in admitting them into evidence.

Appellant next argues that the trial court erred in allowing Officer Jerry Dorney to read and explain an entry the appellant had made in her diary. In sum, appellant contends Dorney's testimony was not admissible under Ark. R. Evid. 701 as lay opinion testimony, nor was he qualified to testify as an expert on the subject.

First, we mention the appellant's argument on appeal touches on fourteen entries in appellant's diary, but she only interposed an objection to the first diary entry read by Donrey. The diary entries related to topics other than the mere mention of crossbows and arrows. Only the objections raised at trial level are deemed properly before this court; all others are considered waived. *Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990).

The entry as read by Donrey, and to which appellant objected, is as follows:

> [T]he first entry is on Thursday, February 9th, 1989. It's some notations at the bottom of the page. It has Fox Fire, Sport Fire and Spit Fire listed and by the side of each of those is the number, the dollar amount, two hundred sixty-two. There's a notation that says, most energy effect. Thirty, thirty-five, forty, sixty yards deadly; a hundred fifty pound pull; forty dollars for cocking device. Arrows, four dollars each . . . .

After overruling appellant's objection, the prosecutor asked Dorney to tell the jury what, in view of his investigation, was the above entry referring to, and Dorney answered as follows:

> Okay. It shows that she was comparing cross bows, their pound pull, distance in which they are effective, price of the arrows. She was looking for the best buy on a cross bow.

Dorney's response was based at least in part from his investigation and acquired knowledge of crossbows and their brand names. Obviously, a juror without experience or knowledge of crossbows

would not know what Fox Fire, Sport Fire and Spit Fire referred to. Under Ark. R. Evid. 701, when a witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and are helpful to a clear understanding of his or her testimony or the determination of a fact in issue. We have stated that Rule 701 is not a rule against opinions, but is a rule that conditionally favors them. *Carton* v. *Missouri Pac. R.R.,* 303 Ark. 568, 798 S.W.2d 674 (1990). On these facts, we cannot say the trial court abused its discretion in allowing Dorney's testimony. *See Ferrell* v. *State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

We cannot address the appellant's fourth argument challenging the sufficiency of the evidence corroborating Bates's testimony, because appellant failed to renew her motion for directed verdict at the close of the case as is required by A.R.Cr.P. Rule 36.21(b). See *Ferrell*, 305 Ark. 511, 810 S.W.2d 29; *Andrews* v. *State*, 305 Ark. 262, 807 S.W.2d 917 (1991). This rule is applicable in life cases, as well. *Sanders* v. *State,* 305 Ark. 112, 805 S.W.2d 953 (1991).

Under Rule 11(f) of the Rules of the Supreme Court and Court of Appeals, an examination has been made of all other rulings adverse to appellant, and none of them constitute prejudicial error. For the reasons stated above, we affirm.

Marvin NICHOLS *v.* STATE of Arkansas

CR 91-56 815 S.W.2d 382

Supreme Court of Arkansas
Opinion delivered September 16, 1991
[Rehearing denied October 21, 1991.]

John L. Kearney, for appellant.

Winston Bryant, Att'y Gen., by: *Elizabeth A. Vines*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant, Marvin Nichols, was convicted of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver and was sentenced as an habitual offender to sixty years on the cocaine count and twenty years on the marijuana count, with the two sentences to run consecutively. He raises numerous issues on appeal.

The facts, though somewhat in dispute, are these. On March 3, 1990, several police officers of the City of Pine Bluff executed a search warrant and made a surprise visit to the appellant's residence. The time was described as sometime after 8:30 in the evening. According to a policeman involved in the search, Officer Alexander, the search warrant had been obtained as a result of a

confidential informant's purchase of a controlled substance from the appellant three days earlier. Officer Alexander testified that he entered the kitchen of the appellant's residence and found the appellant and three more people sitting around a table where contraband — crack cocaine in a salt shaker, a large cocaine rock in a plastic container, and marijuana in plastic bags — was in plain view. Witnesses for the appellant disputed this testimony at trial. Other people were standing around the kitchen area, and one person was smoking a crack pipe. No cocaine or marijuana was found on the appellant's person. He was arrested and charged with possession with intent to deliver the controlled substances that were on the table.

I.

SUFFICIENCY OF THE EVIDENCE

We first review the appellant's challenge to the sufficiency of the evidence relating to his possession of controlled substances. Motions for a directed verdict on grounds of insufficient evidence were appropriately made by the appellant at the end of the state's case and at the close of all the evidence. Thus, in conducting this review we must look to whether substantial evidence exists to support the verdict. *Cerda* v. *State,* 303 Ark. 241, 795 S.W.2d 358 (1990). Evidence is substantial if it is of sufficient force to compel reasonable minds to reach a conclusion and pass beyond mere suspicion and conjecture. *Hodge* v. *State*, 303 Ark. 375, 797 S.W.2d 432 (1990); *Cerda* v. *State.* When there is *no* evidence from which a jury could find the defendant guilty without resorting to speculation and conjecture, the judge should grant a directed verdict. *Scherrer* v. *State,* 294 Ark. 227, 742 S.W.2d 877 (1988). In considering the appellant's argument, this court may only consider the evidence that is favorable to the state and supports the appellant's convictions. *Summers* v. *State*, 300 Ark. 525, 780 S.W.2d 541 (1989).

The proven facts in this case are more than enough to qualify as substantial evidence. The premises involved here were described by the police officers as the appellant's residence. According to Officer Alexander, the appellant was seated at the kitchen table at the time of the raid with the contraband in plain view on the table in front of him. Though this testimony was disputed by defense witnesses, the jury clearly chose to believe

Officer Alexander. Since others joined the appellant around the table, we cannot conclude that the contraband was exclusively within his possession. But we have held that constructive possession exists where joint occupancy of the premises occurs and where there are additional factors linking the accused to the contraband. *See Embry* v. *State,* 302 Ark. 608, 792 S.W.2d 318 (1990). Those additional factors include a) whether the accused exercised care, control, and management over the contraband, and b) whether the accused knew the material was contraband. *Id; see also Crossley* v. *State,* 304 Ark. 378, 802 S.W.2d 459 (1991). This control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *See Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988). We have little hesitancy in holding that substantial evidence of constructive possession exists where the abundant contraband lay in front of the appellant in plain view on the table in his house.

II.

MOTION TO STRIKE

The appellant next contends that it was highly prejudicial for the prosecutor to bring out in the testimony of Officer Alexander that the appellant had sold controlled substances three days before the raid on his house, when no charges had been brought against the appellant in connection with that sale. More specifically, the appellant argues that the trial judge erred in failing to strike this testimony and admonish the jury to disregard it. In resolving this issue the chronology of the appellant's motion to strike is important. The motion was first made by counsel after Alexander described the drug sale. Yet, after initially moving to strike the drug-sale testimony, counsel told the judge that he would "wait" on his objection.

At the conclusion of officer Alexander's direct testimony, counsel for the appellant approached the bench, and this colloquy ensued:

> Defense Counsel: We would, at this time, move to strike testimony as being unduly inflammatory, and I can do that, and not relevant, and not raise the objection or

whatever to the search warrant. I can do that at another time.

The Court: Okay.

Defense Counsel: I assume that the Court is going to deny —

The Court: I can't until I hear the motion. Do you want to do it now, or I can reserve you the right to do it?

Defense Counsel: I'll wait.

The Court: Okay.

It was not, however, until both the prosecutor and the defense had rested that counsel moved the trial judge to strike the drug sale testimony as prejudicial and to admonish the jury to disregard it. The prosecutor opposed the motion on grounds of waiver due to the delay in making it and, further, on the basis that the drug sale formed the underlying basis for the search warrant. The trial judge agreed that a waiver had occurred and denied the motion.

With this chronology before us, it is not necessary to reach the issue of any, prejudice that may have resulted from the drug sale testimony. Defense counsel simply waited too long to raise the issue. Our case law is clear that in order to preserve an issue for appeal, an objection to evidence must be made at the first opportunity to do so. *See Ferrell* v. *State,* 305 Ark. 511, 810 S.W.2d 29 (1991); *Munnerlyn* v. *State,* 293 Ark. 209, 736 S.W.2d 282 (1987); *Hill* v. *State,* 285 Ark. 77, 685 S.W.2d 495 (1985). Even if the objection and motion were deemed to have been made during Alexander's testimony, they were clearly withdrawn. An objection and motion pertaining to the testimony of the state's first witness are not timely made when they are renewed after numerous state and defense witnesses have testified and after both sides have rested. This issue was not preserved for appeal.

III.

SEARCH WARRANT

The appellant's third issue relates to the second. He contends that the prosecutor brandished the search warrant

around the courtroom, used it in testimony, and referred to the circumstances leading up to its issuance. The appellant further argues that the search warrant itself was not introduced into evidence, and its validity was not proven, all of which prejudiced the defense. The appellant, however, failed to make any objection concerning the search warrant's validity at trial, and we have been consistent in holding that such a lapse forecloses our review of the matter on appeal. *See Ferrell* v. *State, supra; Gregory* v. *Gordon,* 243 Ark. 635, 420 S.W.2d 825 (1967).

IV.

INSTRUCTION ON CONSTRUCTIVE POSSESSION

The appellant also argues that the instruction given to the jury on constructive possession did not correctly state the law. The record, however, does not reflect that the defense counsel objected to the instruction in controversy offered by the prosecutor. Failure to raise an objection to a specific instruction is fatal to an appellant's right to have the issue reviewed on appeal. See *Garrison* v. *State,* 13 Ark. App. 245, 682 S.W.2d 772 (1985). Because no objection was made, this argument must fail.

V.

MODIFICATION OF SENTENCE

The appellant was sentenced as an habitual offender to sixty years for possession with intent to deliver cocaine. This crime is an unclassified felony, and the appellant contends, with the concurrence of the Attorney General, that the appropriate term of years for sentencing is not more than fifty years. *See* Ark. Code Ann. § 5-4-501(a)(7) (1987). We have authority to modify sentences in excess of statutory limits. *See* Ark. Code Ann. § 16-91-113(c)(3); *see also Ellis* v. *State*, 270 Ark. 243, 603 S.W.2d 891 (1980). We, therefore, reduce the sentence for possession with intent to deliver cocaine from a term of sixty years to fifty years, the maximum term of years under § 5-4-501(a)(7). In all other respects the sentence shall remain the same.

Along these same lines the appellant argues that because this is a circumstantial case, his sentence was excessive. The argument is without merit. As modified, the sentence is within the statutory limits. We do not review the severity of a

sentence which is within the lawful maximum, except in capital cases. *See Andrews* v. *State*, 283 Ark. 297, 675 S.W.2d 636 (1984). The convictions and sentences are affirmed as modified.

Bobby JOHNSON *v.* STATE of Arkansas

RC 91-51 814 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered September 16, 1991

James P. Massie, for appellant.

No response.

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

His attorney, James P. Massie, admits that the record was tendered late due to a mistake on his part.

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

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

Ernest Dewayne LEMONS *v.* STATE of Arkansas

CR 91-108 814 S.W.2d 559

Supreme Court of Arkansas

Opinion delivered September 16, 1991

Daniel D. Becker, for appellant.

Winston Bryant, Att'y Gen., by: *Pamela Rumpz*, Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant, who was already on probation, was charged with the murder of Mr. Stephens. Appellant's probation was revoked, and appellant appealed. The parties have submitted their briefs, and the case awaits submission.

After appellant's probation was revoked, he was tried on the murder charge, and at the close of the state's case, the state moved for dismissal, which was granted. The state's request for dismissal was prompted by its witness's (Dr. Fahmy Malak's) testimony that Stephens had died from a gun shot close to the head. Other state witnesses presented conflicting testimony to the effect that Stephens had been shot from a distance.

After dismissal of the murder charges, appellant seeks to supplement the record in his revocation appeal with Dr. Fahmy Malak's trial testimony even though such testimony was given nearly six months after the revocation hearing. The state objects to such supplementation, but alternatively requests that it, too,

should be allowed to supplement the record with pathology expert reports that conflict with Malak's testimony.

Because this court's role is not one of factfinding, we are in no position to determine what effect any of the proffered testimony might have had on the trial court when it revoked appellant's probation. The trial court did not have benefit of what has transpired since its revocation decision and because we have not, as yet, decided this matter on the original record, we remand this cause to the trial court for a rehearing or reexamination and re-evaluation of all relevant evidence. *See Johnson v. State*, 248 Ark. 184, 450 S.W.2d 564 (1970); *Mitchell* v. *Bishop,* 245 Ark. 899, 435 S.W.2d 91 (1968); *see also,* 24B C.J.S. *Criminal Law* § 1943 (1962).

ARKANSAS-OKLAHOMA GAS CORP. *v.* LUKIS STEWART PRICE FORBES & CO. LTD., Ebasco Risk Management Consultants Inc.; et al.

90-344 816 S.W.2d 571

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Wilson, Engstrom, Corum & Dudley, by: *Timothy O. Dudley*, for appellant.

Warner & Smith, by: *Joel D. Johnson*, for appellee Instituto Nacional de Seguros.

J. Michael Shaw and *P.H. Hardin*, for appellees-insurers.

ROBERT H. DUDLEY, Justice. A group of insurance companies, the appellees, provided surplus lines of liability insurance to appellant Arkansas Oklahoma Gas Corporation. A gas explosion resulted in judgments of $8,000,000 against AOG and it, in turn, looked to the insurers for coverage. By that time, five (5) of the surplus lines insurers had become insolvent. The solvent ones paid

their proportionate, or several, shares of the loss, but refused to pay the insolvent insurers' shares. Eventually, AOG filed suit and alleged that each insurer was jointly liable for the whole loss. In a summary judgment proceeding, the trial court held that the appellee insurance carriers were severally liable only. AOG appeals. We affirm.

For many years AOG had purchased its liability insurance thorough Rebsamen Insurance, Inc. of Little Rock. Charles Campbell, the Executive Vice President of Rebsamen Insurance and a licensed surplus lines insurance broker in Arkansas, handled the AOG account. In 1976, both Campbell and AOG knew that AOG's liability insurance would expire in 1977. Before the policies expired, Campbell sought to obtain new ones. He obtained $500,000 in primary liability insurance coverage from the USF&G companies. He obtained $1,000,000 in excess liability coverage from Gas, Ltd., later known as AEGIS. Finally, he sought to obtain $9,000,000 in excess liability coverage. At that time, it would have been extremely difficult, if not impossible, to obtain that much excess liability coverage from companies authorized to do business in Arkansas, and it was no easy task to obtain that much excess liability coverage, even looking to alien and foreign unauthorized companies.

Campbell contacted Ebasco Risk Management Consultants in New York. He knew that Ebasco had provided risk management insurance services for utilities for over forty (40) years. A sketch of its program is as follows: Various utilities would contact Ebasco about excess liability insurance. Ebasco would contact Lukis Stewart Price Forbes & Co., a Toronto, Canada broker. Lukis Stewart would then contact its parent company in London, England, "The Sedgwick Group." The Sedgwick Group would put together an excess liability insurance program by procuring insurance from various syndicates and underwriters at Lloyd's and from other insurance companies located in London and from still others around the world. The policy would be in the form of a master policy for the Ebasco group excess liability program and would be known as the "Ebasco slip." Lloyd's syndicate insurers and other insurers would provide in the master policies that each insurer's liability was several. The master policies would be delivered to Lukis Stewart and then to Ebasco. The master policy would authorize Lukis Stewart to issue a memorandum of excess

liability insurance to Ebasco, and Ebasco would then send the memorandum to the local agent for each utility. Each utility was separately rated for the purpose of computing premiums. In summary, Ebasco held the master policy for each of the separately rated utilities in the group of insured utilities.

At the time relevant to this case, Lloyd's syndicates were on the "Ebasco slip" for a total of 25.75 percent of the excess liability insurance and other combined companies were on the slip for a total of 74.25 percent. The two master policies provided that the insurers are severally liable only. The master policy by the underwriters at Lloyd's provides:

> Now know Ye that We the Underwriters, Members of the Syndicates whose definitive numbers in this after-mentioned List of Underwriting Members of Lloyd's are set out in the attached Table, hereby bind ourselves each for his own part and not one for another, our Heirs, Executors and Administrators and in respect of his due proportion only, to pay or make good to the Assured or to the Assured's Executors or Administrators or to indemnify him or them against all such loss, damage or liability as herein provided, after such loss, damage or liability is proved and the due proportion for which each of Us, the Underwriters, is liable shall be ascertained by reference to his share, as shown in the said List, of the Amount, Percentage or Proportion of the total sum insured hereunder which is in the Table set opposite the definitive number of the Syndicate of which such Underwriter is a Member AND FURTHER THAT the List of Underwriting members of Lloyd's referred to above shows their respective Syndicates and Shares therein, is deemed to be incorporated in and to form part of this Policy, bears the number specified in the attached Table and is available for inspection at Lloyd's Policy Signing Office by the Assured or his or their representatives and a true copy of the material parts of the said List certified by the General Manager of Lloyd's Policy Signing Office will be furnished to the Assured on application.

The combined companies' master policy provides:

> Now know ye that we the Assurers do hereby bind

> ourselves, each COMPANY for itself only and not one for another and in respect only of the due proportion of each Company, to pay to the Assured or the Assured's Executors or Administrators, all such loss, damage or liability as herein provided that the Assured may sustain during the stated period, not exceeding in all the sum insured, as properly apportioned to the sums, or to the percentages or proportions of the sum insured, subscribed against our names respectively.

The policies further provide "that Lukis Stewart Price Forbes & Co. Ltd. may issue evidence of coverage to each Assured." Lukis Stewart issued two "memoranda of excess liability insurance," one representing the group of Lloyd's syndicates participating in 25.75 percent of the risk and the other representing the combined companies' 74.25 percent of the risk. Neither memorandum provided whether liability was joint or several. The memoranda were sent to Ebasco in New York and then forwarded to Charles Campbell of Rebsamen Insurance in Little Rock and finally to AOG.

On June 21, 1978, while the policies were in force, a natural gas explosion caused personal injuries that resulted in judgments against AOG totaling $8,000,000.

The primary carrier, USF&G, paid the $500,000 limit of its policy. AEGIS paid the $1,000,000 limit of its excess liability coverage. All of the Lloyd's underwriters paid their several amounts in full. This amounted to 25.75 percent of the loss. Most of the "other companies" paid their percent of the loss, but five of the "other companies," representing $543,514.49 of the loss, were insolvent and did not pay.

AOG demanded indemnity from the solvent insurers. They refused to pay more than their several shares. AOG then filed suit against Rebsamen Insurance, Ebasco, Lukis Stewart, and the excess liability insurers. In its complaint, it pleaded that Rebsamen, Ebasco, and Lukis Stewart were its agents and, as such, were negligent in their selection of the insurance companies. That part of AOG's suit has not been decided and is not before us in this appeal. AOG additionally pleaded that the Lloyd's syndicates and the other companies are jointly liable under three theories: (1) operation of law, (2) breach of contract, and (3) negligence.

AOG and the insurance companies both filed motions for summary judgment. Four volumes of record, consisting of interrogatories, requests for admissions, answers to interrogatories and admissions, affidavits, exhibits, and depositions were filed along with the motions. After reviewing them, the trial court ruled in favor of the insurance companies and issued an ARCP Rule 54(b) certification that allows us to accept the appeal of the partial summary judgment.

As a preliminary matter, all parties agree that Arkansas law is applicable to this case, and it is appropriate to cite today's Arkansas Code Annotated, rather than 1977's Arkansas Statutes Annotated, since none of the statutes involved have been amended.

AOG first argues that the insurance companies are jointly and severally liable as a matter of law. Its argument is based on Ark. Code Ann. § 23-79-117(b) (1987) which provides:

> (b) Two (2) or more insurers may, with the approval of the commissioner, issue a combination policy which shall contain provisions substantially as follows:
>
> (1) That the insurers executing the policy shall be severally liable for the full amount of any loss or damage according to the terms of the policy, or for specified percentages or amounts thereof aggregating the full amount of insurance under the policy; and
>
> (2) That service of process or of any notice or proof of loss required by the policy upon any of the insurers executing the policy shall constitute service upon all the insurers.

AOG argues that the statute plainly means that in order to limit liability under a policy to several liability, the insurers must have obtained the approval of the Arkansas Insurance Commissioner. The appellee insurance companies did not have the approval of the Commissioner to issue these policies, and, for that reason, AOG contends they are jointly liable as a matter of law. AOG's argument would have merit if the cited statue were the controlling statute.

The cited statute, Ark. Code Ann. § 23-79-117(b), is

part of the general insurance code. Another section of the insurance code deals with "surplus lines insurance," the particular kind of insurance at issue in this case.

Ark. Code Ann. § 23-60-105 (1987) provides:

> Provisions of this code relative to a particular kind of insurance or a particular type of insurer or to a particular matter shall prevail over provisions relating to insurance in general or insurers in general or to such matters in general.

Consequently, the specific provisions of the Arkansas Surplus Lines Insurance Law control over the general statute cited by AOG.

Our statutory scheme for surplus lines insurance is based upon the premise that Arkansas insurance brokers at times will be required to look to foreign or alien unauthorized insurers for surplus lines insurance. Accordingly, it regulates Arkansas insurance brokers, not the unauthorized companies with whom they are conditionally authorized to do business. *See* Ark. Code Ann. §§ 23-65-302 and 303 (1987) concerning placing of surplus lines insurance with unauthorized or non-admitted insurers.

In addition, Ark. Code Ann. § 23-65-305 (1987) provides:

> If certain insurance coverages cannot be procured from authorized insurers, coverages, hereinafter designated "surplus lines" may be procured from unauthorized insurers subject to the following conditions:
>
> (1) The insurance must be procured through a licensed surplus lines broker;
>
> (2) The full amount of insurance required must not be procurable, after diligent effort has been made to do so, from among authorized insurers who are actually marketing that kind or class of insurance in this state, and the amount of insurance placed in an unauthorized insurer is only the balance over the amount procurable from authorized insurers.

Ark. Code Ann. § 23-65-310 (1987) provides that a broker may place surplus lines insurance with unauthorized foreign and alien insurers that are approved by the Commissioner. The first

few lines of the statute, which are representative of its full content, provide:

> (a) A surplus lines broker shall place surplus lines insurance only with insurers which have been approved by the commissioner. The commissioner may maintain a list of approved foreign and alien surplus lines insurers in addition to those alien insurers maintaining status on the current National Association of Insurance Commissioners' nonadmitted insurers' quarterly listing. The approved list shall not contain:
>
> (1) Any insurer which is not licensed in at least one (1) state of the United States for the kind of insurance involved;
>
> (2) Any stock insurer having capital and surplus amounting to less than three million dollars ($3,000,000);

Ark. Code Ann. § 23-65-311 (1987), places the duty upon the broker to issue and deliver evidence of the insurance to the insured. Of equal importance, it expressly provides that insurers may assume only a proportion of the policy, or several liability. It provides:

> (a) Upon placing a surplus lines coverage, the broker shall promptly issue and deliver to the insured evidence of the insurance, consisting either of the policy as issued by the insurer or, if the policy is not then available, the surplus lines broker's certificate. The certificate shall be executed by the broker and show the subject, coverage, conditions, and terms of the insurance, the premium charged and taxes collected from the insured, and the name and address of the insurer. *If the direct risk is assumed by more than one (1) insurer, the certificate shall state the name and address and proportion of the entire direct risk assumed by each such insurer.*
>
> (b) If, after the issuance and delivery of the certificate, there is any change as to the identity of the insurers, *or the proportion of the direct risk assumed by the insurers* as stated in the broker's original certificate, or in any other material respect as to the insurance coverage evidenced by the certificate, the broker shall promptly

issue and deliver to the insured a substitute certificate accurately showing the current status of the coverages and the insurers responsible thereunder.

(c) If a policy issued by the insurer is not available upon placement of the insurance and the broker has issued and delivered his certificate as provided in subsection (a) of this section, upon request therefor by the insured, the broker shall, as soon as reasonably possible, procure from the insurer its policy evidencing such insurance and deliver such policy to the insured in replacement of the broker's certificate theretofore issued.

(d) Any surplus lines broker who knowingly or negligently issues a false certificate of insurance, or who fails promptly to notify the insured of any material change with respect to the insurance by delivery to the insured of a substitute certificate as provided in subsection (b) of this section, upon conviction, shall be subject to the penalties provided by § 23-60-108 of this code or to any greater applicable penalty otherwise provided by law. [Emphasis added.]

From the foregoing, it is manifest that the statutory scheme for surplus lines insurance is designed to regulate the registered broker and to authorize the broker, by his certificate, to advise the insured of the names, addresses, and proportion of the risk assumed by each insurer. It provides for several liability of the insurers and does not specify that the surplus lines insurer must comply with the general insurance code provisions.

The Seventh Circuit Court of Appeals addressed a comparable case in *Corday's Dept. Store, Inc.* v. *New York F. & M. Under., Inc.*, 442. F.2d 100 (7th Cir. 1971). The issue in that case was whether a surplus lines insurer could provide exclusions in its policy which deviated from the statutory required standard form of fire insurance. In Illinois, as in Arkansas, surplus lines insurance is exempt from the statutory requirement of a certificate of authority. The Court of Appeals, in reviewing the object and purposes of surplus lines insurance, stated:

The District Court, recognizing that the object and purpose of surplus line insurance provisions, as elucidated

> by the Illinois courts, is to make it possible to secure protection against a risk when authorized companies will not provide that protection, concluded that the regulatory scheme embodied in the Illinois Insurance Code is used to achieve that objective which embraces, as well, the implicit common sense judgment that it is better that a citizen of Illinois be able to insure a risk at less than standard coverage, than that he not be able to secure any protection at all.

Id. at 104. The court held that the Illinois statutes setting out the forms of policies were applicable only to authorized companies transacting business in the state but were not applicable to a policy issued by a surplus lines insurer. Likewise, we hold that the statute cited by AOG is a part of the general insurance code and does not govern surplus lines insurance.

[redacted] Secondly, AOG argues that the trial court erred in granting summary judgment against it on its breach of contract claim. The basis for the alleged breach of contract is the language in the memoranda issued by Lukis Stewart that provides the insurers will indemnify AOG for "any and all sums which they shall be legally obligated to pay . . . to any person or persons as damages for personal injuries sustained. . . ." AOG argues that the insurers have failed to pay all such sums, and therefore, have breached their contract. Lukis Stewart issued the memoranda of insurance to its insured, AOG, as brokers are authorized to do. *See* Ark. Code Ann. § 23-65-311. AOG expressly pleaded in its complaint that Lukis Stewart was its agent and, in its brief to the trial court, admitted that the appellee insurance companies were not liable for the acts of its brokers. (AOG still has its claims pending against Lukis Stewart for its alleged wrongful acts as AOG's agent.) In short, under the pleadings and argument of AOG, the memoranda were not contracts with the appellee insurance companies, but instead, are memoranda issued by its own broker. Since it is undisputed that the appellee insurance companies have each severally paid their proportionate amount due under the master policies there was no genuine issue as to any material fact involved in the breach of contract count, and the trial court correctly granted summary judgment on this claim.

[redacted] In the oral argument of this case, AOG argued that

Lukis Stewart was the agent of AOG in some of the matters and was the agent of the insurance companies in others, depending on which party requested it to do the particular act, and this set of facts raised a jury question. *See* 3 G.J. Couch, *Couch Cyclopedia of Insurance Law* § 25:94 (R.A. Anderson, ed., 2d rev. ed. 1983). However, we do not consider this dual agency as it was not raised below.

In its final point, AOG argues that the trial court erred in dismissing its negligence claim. In this claim, AOG asserted that its brokers and the appellee insurers negligently led AOG to believe that all of its coverage was placed with underwriters at Lloyd's. However, there is no affidavit or other response which indicates that the appellee insurers made any such representation, and the ruling of the trial court correctly dismissed them from this part of the suit.

One of the appellee insurance companies, Instituto Nacional de Seguros, attempts to cross-appeal. This insurance company first asks us to affirm the trial court's ruling that it is not jointly liable and that it has paid all that it severally owed, and that it was correctly dismissed from the lawsuit. It then asks, on cross-appeal, for this court to hold that "the trial court erred in not granting this appellee's motion for summary judgment on the grounds that this appellee was not a participant in the subject insurance policy." Instituto's designation of its procedure as a cross-appeal is in error. A cross-appeal is required only when the appellee seeks some affirmative relief which he failed to obtain in the trial court. A cross-appeal is not necessary when the appellee won the case below and merely asks that the judgment be affirmed on a different basis. *Bowen* v. *Danna*, 276 Ark. 528, 637 S.W.2d 560 (1982). However, when we affirm on direct appeal, as we have done in this case, we need not decide if there are additional reasons to affirm the case. *Id.* at 535-6, 637 S.W.2d at 565. Accordingly, we decline to decide if there are additional grounds on which to affirm the judgment in favor of Instituto.

Affirmed.

Dennis RUSSELL v. STATE of Arkansas

CR 91-79 815 S.W.2d 929

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Randy Rainwater, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant, Dennis Russell, tried to kill his daughter and mother and, as a result, was charged with two (2) counts of attempted first degree murder. The counts were tried together. He was convicted of attempted first degree murder for the attack on his daughter and attempted second degree murder for the attack on his mother. He appeals from both convictions in this one appeal. We affirm both convictions.

The evidence, when viewed most favorably to the appellee State, is as follows. On the evening of the attack, the appellant was driving his mother's car from Benton to Mena. His mother, Mary Nelson, was in the front passenger's seat. Two (2) children were in the rear seats; his eight-year-old niece, Kelly Russell, was in the right rear seat, and his two-year-old daughter, Christi Russell, was in the left rear seat. He drove slowly and made frequent stops to smoke cigarettes. His mother became agitated and asked him to speed up. He stopped the car, hit his mother in the face, and choked her. He then began stabbing her with a screwdriver. He started the car and began to drive. He steered with his left hand and continued to stab his mother with the screwdriver in his right hand. His mother finally grabbed the steering wheel and turned the car. He had to stop. She jumped out and fell down into a culvert. When she was found later, she had twenty-two (22) stab wounds, some of them being deep.

A state trooper saw her and stopped. She told him what had happened. He radioed for emergency medical help for the mother, left her with a motorist who had stopped, and started looking for appellant. He found him about half a mile away, near the mother's parked car. Inside the parked car were the two (2) girls. His two year old daughter, Christi, had numerous stab wounds, one stab being so vicious that it had broken a bone in her chest.

Shortly thereafter, an ambulance driven by Scott Brakefield, arrived. Brakefield and the other emergency medical technician placed the mother, Mary Nelson, and the two-year-old, Christi, in the back of the ambulance and put the eight-year-old niece, Kelly, in the front passenger's seat. Brakefield started driving the ambulance to the nearest hospital which was in Hot Springs.

At trial, Brakefield testified that Kelly was talking nervously and told him that she was scared. She was rambling and said, "He was stabbing her." Brakefield asked, "Who was stabbing?" and Kelly replied, "Dennis." Brakefield also stated that Kelly told him, "Dennis told Mary he was going to kill her." Brakefield was at the scene for a total of twelve (12) minutes and the ambulance ride took forty-two (42) minutes.

Appellant objected to this testimony on the ground of hearsay and, more specifically, that the excited utterance exception did not apply because too much time had elapsed between the startling event and the girl's statements. On appeal, Russell argues; (1) that the girl's statements did not come within the excited utterance exception and (2) that there was no evidence that the girl possessed sufficient intelligence to render her statements reliable.

As for his first argument, A.R.E. Rule 803(2) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The following are requirements for admissibility of hearsay under the excited utterance exception:

> (a) *Nature of the occasion.* There must be some *occurrence, startling enough* to produce this nervous excitement and render the utterance spontaneous and unreflecting. . . . [I]n practically all of the instances —

> involving statements after corporal injury by violence — such conditions are in fact present, and this requirement is fulfilled. . . .
>
> (b) *Time of the utterance.* The utterance must have been *before there has been time to contrive and misrepresent*, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings.
>
> It is to be observed that the statements *need not be strictly contemporaneous* with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. . . .
>
> Furthermore, there can be *no definite and fixed limit* of time. Each case must depend upon its own circumstances: . . .
>
> (c) *Subject of the utterance.* The utterance must *relate to the circumstances of the occurrence preceding it.* . . . (Emphasis in the original.)

6 J. H. Wigmore, *Evidence* § 1750 (Chadbourn rev. 1976)

> Upon the ordinary principal applicable to all testimonial evidence, and therefore to hearsay statements offered under these exceptions, the declarant must appear to have had *an opportunity to observe personally* the matter of which he speaks. . . . (Emphasis in the original. Citations omitted.)

Id. at § 1751.

[redacted] Here, the declarant was an eight-year-old girl who witnessed her uncle commit a violent attack upon her grandmother and two-year-old cousin. By the very nature of the occurrence, it was a startling event for her. Less than one hour elapsed between the event and Kelly's statements to the ambulance driver. Her statements were made under the influence of the excitement of the startling event. She made them while riding in the ambulance with her profusely bleeding and seriously injured grandmother and cousin. Her speech was rambling, and she said

she was still scared.The statements were obviously related to the preceding startling event. Thus, the trial court properly admitted Kelly's statements under the hearsay exception for excited utterances.

In the second part of his argument on the excited utterance, appellant contends that the trial court erred in admitting the statement without a showing that Kelly was competent to testify. No such showing was necessary, as we explained in *Bryan* v. *State*, 288 Ark. 125, 702 S.W.2d 785 (1986). The reason is that, although the hearsay statement lacks the safeguard of being made under oath, the probability of truth in an excited utterance supplies a reliable safeguard.

Appellant next argues that the trial court erred in admitting the opinion testimony of a second emergency medical technician, Reith Stanley, concerning the instrument which caused Mary Nelson's wounds. Stanley attended Nelson in the ambulance. During the State's direct examination of him, he stated that he had previously observed wounds made by screwdrivers. He testified that Nelson's wounds were square-shaped. He stated that it was his opinion that her wounds were caused by a square-headed or a Phillips head screwdriver. Appellant argues that Stanley should not have been allowed to testify concerning the cause of the wounds because this is a matter which requires specialized training and expertise.

A.R.E. Rule 701 states:

> Opinion testimony by lay witnesses. If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (1) Rationally based on the perception of the witness; and
>
> (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Lay witnesses are permitted to give their opinion as to the cause of death or other physical condition if the witness is qualified by experience and observation with regard to the subject matter. *McAway* v. *Holland*, 266 Ark. 878, 599 S.W.2d 387

(Ark. App. 1979).

We have written that the requirements of Rule 701 are as follows:

> [I]n order to satisfy the first requirement of Rule 701, the testimony must initially pass the personal knowledge test of A.R.E. Rule 602. But, even if the witness does have the requisite personal knowledge, any inferences or opinions he expresses must thereafter pass the rational connection and "helpful" tests of Rule 701. "The rational connections test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts. He may express the opinion or inference rather than the underlying observations if the expression would be 'helpful to a clear understanding of his testimony or the determination of a fact in issue.' " *Id.* at 701-11. If however, an opinion without the underlying facts would be misleading, then an objection may be properly sustained. *Id.* at 701-12, -13.

Carton v. *Missouri Pac. R.R.*, 303 Ark. 568, 571-2, 798 S.W.2d 674, 675 (1990) (quoting 3 *Weinstein's Evidence* ¶ 701[02], at 701-11, -12, -13 (1987)).

Here, Stanley's testimony concerning the instrument with which Mrs. Nelson's injuries were inflicted was based on his personal knowledge and the observation of her wounds. The opinion was one which a normal person who had previously seen puncture wounds made by screwdrivers would form. Finally, his opinion was helpful to the determination of a fact in issue, the cause of Mrs. Nelson's wounds. The trial court did not abuse its discretion in admitting the testimony.

Russell's final argument is that the trial court erred in not granting his motion for a mistrial based upon Nelson's testimony that she had to assist appellant with visitation of his daughter "[b]ecause he'd made so many threats against his ex-wife—." Nelson gave this testimony during the State's rebuttal. Appellant objected and asked for a cautionary instruction to the jury. The trial court sustained his objection and instructed the jury to disregard the testimony. Russell later moved for a mistrial after the direct rebuttal examination was completed. The court denied

this motion.

The testimony to which appellant objected followed his own direct testimony in which he testified:

> And, then we proceeded to go to Mena to pick up my baby, my little girl. And, she let me off at McDonald's because they don't want me to know where my ex-wife lives or nothing, you know, and they've got all kinds of judgments and things saying I can't go see her or nothing so she can stay hid out from me.

Russell further testified that he could see his daughter only when he was accompanied by his mother. With this testimony, Russell "opened the door" to questions concerning why he was unable to see his ex-wife and, therefore, needed assistance with visitation of his daughter. "One who opens up a line of questioning or is responsible for error should not be heard to complain of that for which he was responsible." *Berry* v. *State*, 278 Ark. 578, 583, 647 S.W.2d 453, 457 (1983).

More importantly, it is a settled rule of law that a mistrial is an extreme and drastic remedy which should be resorted to only when there has been an error so prejudicial that justice could not be served by continuing the trial. *Brewer* v. *State*, 269 Ark. 185, 599 S.W.2d 141 (1980). The granting or denial of a motion for mistrial lies within the sound discretion of the trial judge and the exercise of that discretion should not be disturbed on appeal unless an abuse of the discretion is shown. *Chaviers* v. *State*, 267 Ark. 6, 588 S.W.2d 434 (1979).

Considering all the evidence in this case, Nelson's statement was not so prejudicial as to warrant a mistrial. The court acted properly in admonishing the jury to disregard her statement and continuing the trial.

Affirmed.

Michael Montez PORCHIA *v.* STATE of Arkansas

CR 91-63 815 S.W.2d 926

Supreme Court of Arkansas
Opinion delivered September 23, 1991
[Rehearing denied October 28, 1991.]

Thomas J. O'Hern, for appellant.

Winston Bryant, Att'y Gen., *Catherine Templeton*, Ass't Att'y Gen., for appellee.

STEELE HAYS, Justice. On the evening of April 26, 1990, Art's Liquor Store on Asher Avenue, Little Rock, was robbed. Two clerks were murdered. Appellant, Michael Porchia, was one of five persons charged with capital murder and aggravated robbery. Appellant moved to sever his trial from the co-defendants and the motion was granted. Appellant also moved to suppress a custodial statement. Following an omnibus hearing the motion to suppress was denied and the state waived the death penalty.

Appellant was tried by a jury on December 4, 1990, and convicted of aggravated robbery, theft of property and two counts of second degree murder. The court found appellant to be a habitual offender and the jury then sentenced appellant to twenty-five years on each count of second degree murder, forty-five years for the aggravated robbery and seventeen years for the theft of property.

Appellant now brings this appeal, making two arguments for reversal: first, that the trial court erred in denying his motion to suppress the custodial statement in which he implicated himself and his co-defendants, and, second, in refusing to instruct on a lesser included offense.

I

At the suppression hearing, appellant testified he did not make the statement to police, that he could not have given any statement voluntarily or knowingly due to heavy drinking prior to the time he spoke with the police, nor did he waive his *Miranda* rights. On appeal appellant argues that under the facts in his case, the trial court erred in denying suppression. There is no merit to appellant's contention.

Custodial statements are presumed to be involuntary and the state has the burden of proving otherwise. This court makes an independent review of the totality of the circumstances and will reverse only if the trial court's finding is clearly against the preponderance of the evidence. *Shaw* v. *State*, 299 Ark. 474, 733 S.W.2d 827 (1989). The credibility of the witnesses who testify to the circumstances surrounding the defendant's custodial statement is for the trial court to determine. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

The factors to consider for both the voluntariness of the waiver and the statement are essentially the same. They include: age, education and intelligence of the accused, length of detention, repeated or prolonged questioning, the use of mental or physical punishment and the advice or lack of advice of constitutional rights. *Shaw* v. *State, supra.*

This case resembles *McDougald* v. *State*, 295 Ark. 276, 748 S.W.2d 340 (1988), where the appellant had also claimed he did not voluntarily or knowingly waive his rights as he was under the influence of drugs and alcohol at the time. We cited previous cases where we have stated that the fact that a defendant may have been under the influence of drugs or alcohol at the time of his statement will not of itself invalidate his confession, but will only go to the weight accorded it. And, whether an accused had sufficient capacity to waive his constitutional rights or was too incapacitated due to drugs or alcohol to make an intelligent waiver has remained a question of fact to be resolved by the trial court. *See McDougald* v. *State, supra.*

The essence of appellant's proof, which included the testimony of a girlfriend and uncle of the appellant, was that appellant had consumed large quantities of alcohol and had smoked marijuana on the day he surrendered to police. Appellant's witnesses testified to his drinking that day and further stated that his speech was affected, he smelled of alcohol and needed help to stand up. Appellant testified he was intoxicated at the time he surrendered himself to police, that he was threatened with the death penalty by officers and that he never gave a statement to the police. He also denied being told he had a right to have an attorney present and denied the initials on the rights waiver form were his.

The state presented evidence from Detective Vince Mayer and Sergeant Carl Beadle. Both testified that appellant was advised of his Miranda rights, that he waived them and made a statement incriminating himself. Both stated that appellant did not smell of alcohol or otherwise exhibit signs of intoxication. Mayer testified that neither he nor Sergeant Beadle offered any promises or inducements to obtain a statement, nor did they coerce or threaten appellant in any way. He further stated that appellant signed the statement three times in his presence, and that in his opinion appellant made the statement voluntarily. Beadle testified that in his opinion, appellant understood his rights.

Appellant told the officers he was seventeen years old, had attended school through the eleventh grade, and had a G.E.D. The officers testified that they did not see any sign that appellant had been drinking when he was advised of his rights and chose to give his statement.

The basic points of any contention in this case are matters of credibility which are left to the trial court. We cannot say under the totality of the circumstances that the findings were against the preponderance of the evidence.

II

As his second point for reversal appellant argues the trial court erred in refusing to instruct the jury on a lesser included offense. Appellant contends the jury was instructed on capital felony murder, first degree felony murder and second degree murder as well as aggravated robbery, theft of property and accomplice liability. Appellant also requested two instructions on manslaughter based on Ark. Code Ann. §§ 5-10-104(a)(3) and (4) (1987), but the court refused and appellant maintains this was error.

We decline to reach this question on the basis of Ark. Sup. Ct. R. 9. While appellant did abstract the two instructions he requested, none of the other instructions given were abstracted, and we have no way of knowing from the abstract what instructions were actually given. Obviously, when addressing a lesser included offense argument by appellant we must have the other instructions before us in order to make a proper review of

the trial court's action.

It is fundamental that the record on appeal is confined to that which is abstracted. *Harris* v. *State*, 303 Ark. 233, 795 S.W.2d 55 (1990). A failure to abstract a critical document precludes the court from considering issues concerning it. *Hudson* v. *State*, 303 Ark. 637, 799 S.W.2d 529 (1991). Nor can the record be contradicted or supplemented by statements made in the briefs. *Bice* v. *Hartford Acc. & Indem. Co.*, 300 Ark. 122, 777 S.W.2d 213 (1989); *Bridger* v. *State*, 264 Ark. 789, 575 S.W.2d 155 (1979).

Affirmed.

Keith COBBINS *v.* STATE of Arkansas

CR 91-66 816 S.W.2d 161

Supreme Court of Arkansas
Opinion delivered September 23, 1991

John H. Bradley, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. This is an interlocutory appeal of a decision not to transfer two charges of rape and aggravated robbery from Circuit Court to Juvenile Court. The appellant, Keith Cobbins, was charged with burglary, aggravated robbery, rape, and aggravated assault. At the time of the incident, Cobbins was fifteen years old. The burglary and aggravated assault charges were transferred to Juvenile Court pursuant to Ark. Code Ann. § 9-27-318 (Repl. 1991). The Circuit Court retained the rape and aggravated robbery charges.

Cobbins raises two issues. He contends the trial judge should have transferred the rape and aggravated robbery charges to Juvenile Court because it had not been shown by clear and convincing evidence, required by § 9-27-318(f), that he should be tried in Circuit Court as an adult on these charges. He also asserts the Circuit Court lost jurisdiction because of failure to hold the hearing on the transfer within ninety days after the charges were filed as required by § 9-27-318(b)(2).

The Trial Court was correct in finding clear and convincing evidence that Cobbins should be tried as an adult on the aggravated robbery and rape charges. This finding is based on the violence involved in the commission of the offenses, the prior offenses committed by Cobbins, and the unsuccessfulness of past rehabilitation efforts. Nor can we find convincing authority leading us to conclude that the ninety-day hearing requirement is

jurisdictional. The decision of the Trial Court will be affirmed.

During the motion to transfer hearing, the victim, Dorothy Brown, testified that upon returning home from work on October 5, 1989, she found her door open. She stated that after she entered her home, Cobbins hit her in the head with a claw hammer three times and then raped her. Brown testified that Cobbins told her if she did not submit to him, he would kill her and her son James. Brown stated that after the rape Cobbins took two hundred dollars from her. Brown was later treated at Osceola Hospital.

Keith Cobbins was arrested based on information received by investigating officers from a friend of Dorothy Brown's son. Beginning October 5, 1989, Cobbins was held in custody in the Mississippi County Detention Center, as he was unable to post bond. A hearing on transferring the case from Circuit Court to Juvenile Court was demanded on August 9, 1990, well beyond the ninety-day period.

Keith Cobbins was no stranger to the juvenile justice system. Evidence presented at the transfer hearing indicated that Cobbins had previously been sentenced to the Youth Services Facility four times for various offenses. On July 31, 1986, he was sent to the Facility for committing two counts of burglary and one count of criminal mischief. He was again sent to the Facility on June 24, 1987, for theft of property and unauthorized use of a vehicle. The third offense, for which he was sentenced on June 16, 1988, was theft of property. The last incident occurred on February 2, 1989, when Cobbins violated his probation and committed harassment and assault.

Ray Rigsby, a Mississippi County juvenile officer, testified that to his knowledge there had been no success in rehabilitating Cobbins at the Facility and that he had not noticed any changes in Cobbins' behavior. On every occasion Cobbins had gotten into trouble after leaving the Facility. The State also presented evidence from the Child Study Center at the University of Arkansas for Medical Sciences indicating that Cobbins' behavior pattern was aggressive, dangerous, and disruptive. He had not been controllable in either the home or the youth services environment. A report by a staff psychologist at the Arkansas Department of Human Services indicated that Cobbins required placement in an institutional environment which would provide

protection for himself and others. The report added that Cobbins was prone to recidivism. A report from the Youth Services Center did state that Cobbins' behavior had improved since the incident, but he continued to be assaultive and an absent without leave risk.

1. Clear and convincing evidence

Section 9-27-318(e) sets out the guidelines for determining when an offense should be transfered from Circuit to Juvenile Court. It provides that:

> in making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors: (1) the seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense; (2) whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and (3) the prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Subsection (f) requires a "finding by clear and convincing evidence that a juvenile should be tried as an adult."

In the supplemental opinion on denial of rehearing in *Walker* v. *State*, 304 Ark. 402A, 805 S.W.2d 80 (1991), we held that the standard of review in juvenile transfer cases is whether the trial judge's finding is clearly against the preponderance of the evidence. Findings of fact by a Trial Court will not be set aside unless clearly erroneous. Ark. R. Civ. P. 52(a) (1990). The Trial Court is not required to give every factor mentioned in the statute equal weight, and proof on every factor need not be introduced in order to warrant keeping a case in Circuit Court. *Pennington* v. *State*, 305 Ark. 312, 807 S.W.2d 660 (1991); *Walker* v. *State, supra.*

"Clear and convincing evidence" has been defined by this Court as "that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established." *Kelly* v. *Kelly*, 264Ark. 865, 870, 575 S.W.2d 672, 676 (1979). In the case now before us, the Trial Court found clear

and convincing evidence on many of the factors enumerated in the statute. We cannot say the Circuit Court's finding was clearly against the preponderance of the evidence.

2. The ninety-day requirement

The hearing on the motion to transfer was not held until almost fourteen months after the charges were filed. For nine months Cobbins was held in the Mississippi County Detention Center, unable to post bonds.

Section 9-27-318(b)(2) states that "the circuit court shall hold a hearing within ninety days of the filing of charges to determine whether to retain jurisdiction of the juvenile in Circuit Court." Cobbins would have us hold that the Circuit Court loses jurisdiction of the charges upon failing to hold the transfer hearing within the ninety-day period.

Although the language of the statute is mandatory, it is silent on the effect of noncompliance. In making the decision on this issue, the Trial Court analogized to parole revocation hearings. A statute requires that a hearing be conducted on parole revocation within a reasonable time, not to exceed sixty days after the defendant's arrest. Ark. Code Ann. § 5-4-301(b)(2) (1987). In *Haskins* v. *State*, 264 Ark. 454, 572 S.W.2d 411 (1978), we held that this requirement was not intended by the General Assembly to be jurisdictional. The sixty-day limitation represented the period beyond which the hearing could not be delayed if the defendant objected. Failure to demand a hearing within the sixty-day period waived the right to insist on a timely hearing.

[redacted] Here, the Trial Court relied on the *Haskins* case and determined that the ninety-day hearing requirement was not intended to be jurisdictional. We consider the analogy to be apt. Although the statute makes the ninety-day requirement mandatory, nothing in the statute indicates it is jurisdictional. Another factor to be considered is that Cobbins was represented by counsel during the ninety-day period. Motions were filed by counsel only twenty-four days after Cobbins was charged; however, no motion to transfer was made during the ninety-day period. Further analogy to the *Haskins* case leads us to the conclusion that counsel's failure to demand a transfer hearing

until well beyond the ninety-day period waived the right to insist on a timely hearing.

Affirmed.

Curtis Ray EASTER *v.* STATE of Arkansas

CR 91-88 815 S.W.2d 924

Supreme Court of Arkansas
Opinion delivered September 23, 1991

J.G. Molleston, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant was convicted of burglary, battery, and attempted rape and sentenced to twenty years, thirty years, and forty years imprisonment respectively. The judge ordered that the burglary and battery sentences run consecutively to each other and an outstanding sentence, leaving the appellant with a total of fifty years imprisonment. On appeal, the appellant challenges only his attempted rape conviction. In his appeal, the appellant raises the following two points of error: 1) the trial court erred in allowing the prosecutor's redirect examination of the victim; and 2) there is insufficient evidence to support the appellant's conviction for attempted rape. We find no merit in these arguments, and therefore affirm.

We address sufficiency of the evidence issues first on appeal. To preserve the issue of sufficiency of the evidence for appeal at a trial, the defendant must move for a directed verdict at the conclusion of the prosecution's evidence and again at the close of the case. A.R.Cr.P. Rule 36.21(b). This court has strictly followed the requirements of Rule 36.21(b) and has refused to address sufficiency of the evidence questions unless both directed verdict motions were made. *See Andrews* v. *State*, 305 Ark. 262, 807 S.W.2d 917 (1991); *Weaver* v. *State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Sanders* v. *State*, 305 Ark. 112, 805 S.W.2d 953 (1991).

In this case, the appellant made a motion for a directed verdict on the attempted rape charge at the close of the state's evidence, but failed to do so at the close of the case. But, two days after his conviction, the appellant filed a motion for a directed verdict or a judgment *non-obstante verdicto* on the attempted rape conviction. Since the appellant's motion was made two days after the jury verdict, it was in fact a motion for a new trial. In *Weaver*, 305 Ark. 180, 806 S.W.2d 615, we refused to recognize

the appellant's motion for a new trial as meeting the requirement under Rule 36.21(b) for a second directed verdict motion at the end of the case. Thus, we must decline to address the appellant's sufficiency of the evidence issue.

Appellant's second issue concerns the state's redirect examination of the eighty-eight-year-old victim. During the direct examination at the trial, the victim was very reluctant to describe the details of the attempted rape in court. However, the victim did recount that, after the appellant pushed his way into her house and threatened her with a pair of scissors, he threw her on the floor in the living room and tried to rape her. The victim stated that she kept her legs so tightly crossed that the appellant could not get them apart. Further, she testified that the appellant had his pants unbuttoned in the front and that he unbuttoned her blouse and fondled her breasts. Additional testimony showed that the appellant then forced the victim into the bedroom where he beat her with a plastic box lid and vacuum attachment. The victim passed out and when she came to she was naked and underneath the bed. The prosecutor asked the victim if the appellant did anything else to her clothing before she was forced into the bedroom, and the victim replied that she could not remember.

On cross-examination, appellant's attorney did not ask any questions about the victim's clothing or details of the attack. Instead, he had the victim admit that the appellant was in control of the situation, and if he wanted to do something, he probably could have done it. On redirect, the prosecutor again started asking the victim about what happened to her clothing before she was taken into the bedroom, and the appellant's attorney objected, saying that the state was just rehashing testimony on direct and that the questions were completely outside the scope of his cross-examination. The prosecutor replied that there was a point that needed clarifying. The trial judge, expressly taking into account the age of the victim, allowed the prosecutor to quickly see if he could clarify the point. On redirect, the victim added that the appellant pulled down her pants in the living room.

This court has recognized that the scope and extent of redirect examination lie within the sound judicial discretion of the trial judge. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *see also* A.R.E. Rule 611. In this matter, this court has

recognized that the court's discretion is very liberal. *Allen* v. *State*, 260 Ark. 466, 541 S.W.2d 675 (1976). The basic function of redirect examination is to enable the witness to explain and clarify any relevant matters in his or her testimony which have been weakened, confused or obscured by cross-examination and to rebut the discrediting effect of any damaging statements or admissions or to correct any wrong impression that may have been created. *See Id., Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980). In addition, a judge under his discretionary power may permit the party to bring out on redirect examination some matter which is relevant to his case or defense and which through oversight he has failed to elicit on direct. E. Cleary, *McCormick on Evidence* § 32, (3d ed. 1984).

It is clear from the record that the eighty-eight-year-old victim was understandably reluctant to discuss the details of the attempted rape on direct examination, and the prosecutor struggled to get the evidence of the attempted rape before the jury. After the cross-examination of the victim by appellant's attorney, the impression was left with the jury that if the appellant had been intending to rape the elderly victim as charged, he could have easily done so. Such an impression necessitated that the victim give more details of the impermissible and unlawful actions appellant imposed upon her. In addition, there was some confusion created by the victim's statements as to how the appellant could have attempted to rape the victim when her pants were still on. In sum, the trial judge did not abuse his discretion in allowing the prosecutor's redirect.

For the reasons stated above, we affirm.

Hilliard L. NELSON *v.* STATE of Arkansas

CR 91-70 816 S.W.2d 159

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Timothy "Blind Hog" Bunch, Public Defender, by: *Thomas*

E. Brown, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant, along with Charles Colbert and Ricky Dillard, was charged with the capital felony murder of Cheryl Franklin. Dillard agreed to be a state's witness, and appellant's case was severed from his co-defendants'. Appellant was convicted of the lesser included offense of first degree murder and sentenced to life imprisonment without parole.

On appeal, appellant argues that the trial court should have found Dillard an accomplice as a matter of law and erroneously failed to instruct the jury accordingly under AMCI 402. He also argued that the trial court erred in denying his objections to certain statements made by the prosecutor during closing argument.

First, we agree with the trial court that Dillard was not an accomplice as a matter of law and that the court was correct in instructing the jury under AMCI 403 because Dillard's accomplice status was disputed. A brief reference to the pertinent facts is necessary. The state's proof showed that on the evening of January 20, 1990, the appellant, Colbert and Dillard were frequenting various drinking establishments. After a brief conversation in the parking lot of one of the clubs, Dillard gave Ms. Franklin some money in exchange for sex. Apparently, she wanted money so she could buy a "hit of crack." When the men left the establishment, Franklin and another woman got in the car. They took the other woman home, and then picked up another individual named Rita Lane. Lane, however, was subsequently let out when appellant and Lane got into an argument. The men and Franklin then drove to a secluded area where they could smoke some crack.

Dillard testified that he departed the car and laid upon its front hood. He said that appellant got in the back seat and had oral sex with Franklin. Dillard stated that, during this period when appellant was in the car's back seat with Franklin, Dillard thought he heard appellant say that if Franklin would not have sex, they would leave her stranded. Dillard heard appellant and Franklin argue, and minutes later, Dillard heard three thumps on

the back end of the car. Dillard looked through the back window of the car and saw Colbert with something in his hand making a wiping motion on the car's trunk. When Dillard walked to the rear of the car, he viewed appellant standing over Franklin with a piece of concrete in his hand, coming down towards her head. Appellant and Colbert drug Franklin's body into some bushes, and told Dillard if he said anything, the same thing would happen to him. Franklin's body was found the next day and all three men were arrested.

[redacted] Under settled law, appellant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated. *Pilcher* v. *State*, 303 Ark. 335, 796 S.W.2d 845 (1990); *Scherrer* v. *State*, 294 Ark. 227, 742 S.W.2d 877 (1988). An accomplice of another person in the commission of a crime is statutorily defined as a person, who with the purpose of promoting or facilitating the crime, solicits, advises, encourages, or coerces the other person to commit the crime or aids, agrees to aid, or attempts to aid the other person in planning or committing it. Ark. Code Ann. § 5-2-403 (1987). Mere presence, acquiescence, silence, or knowledge that a crime is being committed, in the absence of a legal duty to act, is not sufficient to make a person an accomplice. *Scherrer*, 294 Ark. 227, 742 S.W.2d 877.

Appellant argues a number of factors he believes show Dillard was an accomplice as a matter of law. For example, he asserts the state originally had filed the same murder charge against Dillard as it did against appellant and Colbert, Dillard was at least guilty of the crime of hindering apprehension and the prosecutor had granted Dillard "extreme leniency." Clearly, none of these facts in any way make Dillard an accomplice to Franklin's murder. And while appellant argues the state obtained from Dillard's wife a shirt, which may or may not have had blood on it, implicating Dillard in the crime, there was other testimony indicating the shirt was Colbert's. Such evidence surely does not conclusively establish Dillard as an accomplice to murder. *See also Pilcher*, 303 Ark. 335, 796 S.W.2d 845 (where this court concluded that the fact the witness helped load a victim's body into a truck did not establish the witness as an accomplice).

Finally, appellant argues that Colbert's confession, which apparently related Dillard's involvement in the crime, clearly

revealed appellant as an accomplice. The short answer to this claim is that Colbert's confession was never introduced into evidence. Thus, the trial court or jury never had Colbert's confession before it when confronted with the accomplice issue.

In sum, contrary to appellant's argument, the evidence is disputed as to Dillard's accomplice status. Dillard's presence at the crime scene and knowledge of the crime was shown, but, as stated above, such is insufficient to make him an accomplice. Thus, the trial court did not err in refusing appellant's request for the AMCI 402 instruction.

Before leaving the accomplice issue, we consider appellant's suggestion that the trial court erred in denying his directed verdict motion that insufficient evidence was shown to corroborate Dillard's testimony. The state presented evidence that a Henry Bennett, Thelma Williams (Canaday) and Rita Lane saw Franklin with appellant, Dillard and Colbert on the night of Franklin's murder, and a Wardell Henderson, a bicycler, found Franklin's body in the area where Dillard said the four of them had gone that night. An investigator found several items of evidence at that same location, which included Colbert's black lighter and a concrete block with blood on it. The medical examiner testified that Franklin's death was caused by a blunt object to her head, such as a concrete block. And finally, a state police officer located Colbert's car, which had a dented trunk lid with what appeared to be blood on it. The foregoing evidence clearly sufficiently corroborates Dillard's testimony and tends to connect appellant with Franklin's murder.

Appellant's second point concerns the prosecutor's closing argument. Basically, he says the prosecutor argued beyond the scope of the evidence and prejudiced the jury by doing so. During his closing, the prosecutor said the following:

> Even [defense counsel] challenged [Dillard] and said, "Why aren't you telling us everything you told the police?" And you know what it had to be? It had to be more things that convicted [appellant]. We didn't hear them, though. If they had been in favor of [appellant], we would have heard them. They would have had the policeman up here telling you all these things that . . . appellant didn't do it, and someone else did.

> Or [defense counsel], as he insinuated, "Why don't you tell them what you told me?" Well, if it had been good for the [appellant], don't you know [defense counsel] would have been up there telling you about it?

At this point, appellant's counsel objected, saying the prosecutor knew defense counsel could not testify and still try a case. He called the prosecutor's remarks improper and said such remarks were not evidence.

In reviewing the record, particularly defense counsel's cross-examination of Dillard, counsel attacked Dillard's various statements as being inconsistent. In doing so, counsel elicited from Dillard that, in a prior statement, Dillard said that he, Colbert and Franklin did not discuss sex the night of the crime and then posed a question suggesting Dillard had told defense counsel and the authorities a different story later. While the prosecutor objected and defense counsel rephrased his question, counsel, continuing his impeachment of Dillard's differing statements, asked later, "What I want to know now is (sic) what you told the authorities that they wrote down correct *or is what you told me correct* or what you are telling the jury correct?" In closing argument, defense counsel further alluded to the fact that the state failed to produce certain testimony or evidence at trial.

In reviewing the above testimony and appellant's closing argument, we conclude the appellant opened the door to a response by the state. *Allen* v. *State*, 281 Ark. 1, 660 S.W.2d 922 (1983); *Robinson* v. *State*, 275 Ark. 473, 631 S.W.2d 294 (1982). Accordingly, we hold the trial court did not abuse its discretion in overruling the appellant's objection to the prosecutor's remarks.

We have examined the record pursuant to Ark. Sup. Ct. R. 11(f) and find no points preserved for appellate review which constitute prejudicial error. For the reasons stated above, we affirm.

Andrew ELLIS *v.* STATE of Arkansas

CR 91-90 816 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered September 23, 1991

G. Randolph Satterfield, for appellant.

Winston Bryant, Att'y Gen., by: *Jeff Vining*, Asst. Att'y Gen., for appellee.

DONALD CORBIN, Justice. Appellant, Andrew Ellis, was

convicted by a Jefferson County Circuit Court jury of three counts of delivery of cocaine and one count of misdemeanor possession of marijuana. He received a cumulative sentence of thirty-five years in the Arkansas Department of Correction. On appeal he challenges evidence used against him at trial because the officers were not properly certified law enforcement officers. He also challenges the trial court's refusal to instruct the jury on accomplice liability arising out of an undercover police officer's purchase of cocaine from appellant. We affirm.

On the night of February 11, 1989, Officer Danna Powell of the Pine Bluff Police Department stopped appellant for a misdemeanor traffic offense. After noticing a bulge in appellant's pocket, Officer Joseph Dorman conducted a pat-down search of appellant. During the pat-down search, appellant fled and Officer Dorman observed appellant tossing a white pill bottle into a small garden. Following his arrest by Officer Dorman and Sergeant Larry McGee, the bottle was recovered and determined to have contained cocaine.

While appellant was incarcerated, the state filed two informations against him, the first concerning the above-referenced incident and charging him with possession of cocaine, and the second charging him with three separate counts of delivery of cocaine. The second set of charges was the result of a pending investigation by State Police Investigator Bobby Nicks. Appellant was later charged with misdemeanor possession of marijuana resulting from an unrelated traffic stop for DWI.

The state and appellant made an agreement whereby the state would not charge appellant as an habitual criminal if appellant would waive his right to severance of the charges. Appellant was tried by a jury and found not guilty of the possession of cocaine charge arising out of the February 11, 1989 traffic violation. However, he was convicted of the three counts of delivery of cocaine and the misdemeanor possession of marijuana.

As his first assignment of error, appellant alleges the trial court erred in failing to grant his motion to dismiss the criminal charges and suppress evidence. Appellant's motion to dismiss was premised on the fact that, at the time of his arrest for the February 11, 1989 traffic offense, none of the police officers who

arrested him met the minimum employment standards established by the Commission on Law Enforcement Standards and Training. Although appellant was found not guilty on the possession of cocaine charge resulting from the February 11, 1989 incident, he argues that having to defend this charge increased his evidentiary burden and that any evidence resulting from this arrest should have been suppressed.

We find this argument to be meritless. On appeal, appellant must demonstrate prejudice, not just allege it. *Johnson* v. *State*, 303 Ark. 313, 796 S.W.2d 342 (1990). Appellant was found not guilty on the single charge of possession of cocaine. He has not demonstrated any prejudice resulting from the not guilty verdict.

Appellant's contention that the retroactive application of 1989 Ark. Acts 44 is prohibited by the *ex post facto* clauses of our federal and state constitutions has already been addressed. We call attention to a case dealing with this precise issue, *Harbour* v. *State*, 305 Ark. 316, 807 S.W.2d 663 (1991). This recent ruling stands for the proposition that in cases tried after November 8, 1989, the effective date of 1989 Ark. Acts 44, the amended version of Ark. Code Ann. § 12-9-108(a) (Supp. 1989) applies such that actions taken by non-certified officers are not held invalid merely because of a failure to meet the standards of the Arkansas Law Enforcement Commission. *See Harbour*, 305 Ark. at 317, 807 S.W.2d at 663. Although appellant was arrested on February 11, 1989, and his motion to dismiss was denied on August 17, 1989, the trial was held on October 16, 1990, and judgment was entered on October 22, 1990. The case was thus pending when 1989 Ark. Acts 44 was enacted and the trial court's application of the Act was not an application of an *ex post facto* law. *Barnes* v. *State*, 305 Ark. 428, 810 S.W.2d 909 (1991); *Harbour, supra; Smith* v. *City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991); *Ridenhour* v. *State*, 305 Ark. 90, 805 S.W.2d 639 (1991).

As for the suppression component of appellant's argument, we call attention to *Kittler* v. *State*, 304 Ark. 344, 802 S.W.2d 925 (1991), *State* v. *Henry*, 304 Ark. 339, 802 S.W.2d 448 (1991), and *Moore* v. *State*, 303 Ark. 514, 798 S.W.2d 87 (1990), where we held the exclusionary rule inapplicable to cases

involving uncertified law enforcement officers because an officer's failure to meet minimum employment qualifications is not the police misconduct the Fourth Amendment was intended to prohibit.

As his second assignment of error, appellant contends the trial court erred in refusing to instruct the jury on accomplice liability. Appellant proffered a complicity instruction based primarily on the theory that Investigator Nicks was appellant's accomplice because he purchased cocaine from appellant on three different occasions. He contends these purchases made Investigator Nicks an accomplice of appellant, and thus required corroboration of appellant's guilt by other evidence independent of Investigator Nicks' testimony.

We have consistently held that a buyer of illicit drugs is not an accomplice of the seller. *Williams* v. *State*, 290 Ark. 449, 720 S.W.2d 305 (1986); *Hoback* v. *State*, 286 Ark. 153, 689 S.W.2d 569 (1985); *Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971). Accordingly, we find no error in the trial court's refusal to instruct the jury that Officer Nicks was appellant's accomplice.

Affirmed.

Nathaniel MITCHELL *v.* STATE of Arkansas

CR 91-44 816 S.W.2d 566

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Green and Henry, by: *J.W. Green, Jr.*, and *Dennis R. Molock* for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. A Jefferson County jury tried and convicted appellant, Nathaniel Mitchell, of two counts of first-degree murder and one count of attempted capital felony murder. The jury sentenced appellant to forty years imprisonment for each of the murder convictions, and thirty years imprisonment for the attempted capital felony murder count. Appellant asserts four grounds for reversal of his conviction. We affirm on each of the four grounds.

I.

CUSTODIAL STATEMENT

Appellant's primary allegation of error is that the trial court erred in denying his pre-trial motion to suppress his custodial confession. He presents two theories in support of his suppression argument; First, he argues that the failure of the Jefferson County Sheriff's Department to inform appellant that he had legal representation or to follow counsel's instructions regarding appellant's interrogation invalidated appellant's confession. Second, appellant argues that the trial court erred in disregarding his testimony at the suppression hearing that the police denied his

request to use a telephone to arrange for legal representation. We disagree with both of appellant's arguments.

On August 25, 1989, police discovered the bodies of two gunshot victims, Charles Goodloe and Henry Harris, at the Altheimer Recreation Club in Jefferson County. Later that morning, police received information that appellant had killed Goodloe and Harris, and wounded another victim, E.L. Surratt, during a shooting incident the previous evening. Based on this information, the police arrested appellant at his residence in Stuttgart shortly after 4:00 a.m.

The police informed appellant of his *Miranda* rights at the time of his arrest. At approximately 7:00 a.m., the police again informed appellant of his *Miranda* rights. Following the second recitation of the *Miranda* rights, the police conducted a four hour interrogation session with appellant. At the conclusion of the interrogation, appellant gave police a signed confession admitting his involvement in the shootings.

While appellant was in custody, his family had retained counsel for appellant. During appellant's interrogation, counsel repeatedly telephoned the sheriff's department attempting to gain information about appellant's case. The police never told appellant of counsel's efforts. When counsel failed to contact appellant, counsel instructed the police to cease questioning of appellant. The police ignored counsel's instructions, and appellant did not speak to counsel until after appellant confessed to the crime. Appellant argues that the conduct of the police during the interrogation process violated his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), by denying him access to an attorney. We disagree.

A suspect's waiver of his Fifth Amendment rights is valid only if it is made "voluntarily, knowingly and intelligently." *Miranda, supra*, 384 U.S. at 444. The inquiry into the validity of a waiver has two distinct dimensions. *Burin* v. *State*, 298 Ark. 611, 770 S.W.2d 125 (1989) citing *Colorado* v. *Spring*, 479 U.S. 564 (1987) and *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986). First, the waiver must be "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; *Burin*, 298 Ark. at 613, 770 S.W.2d at 126. 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." *Moran*, 475 U.S. at 421; *Burin*, 298 Ark. at 613, 770 S.W.2d at 126.

Appellant does not explicitly challenge either prong of the waiver inquiry. Instead, he argues that the trial court should have suppressed his confession because the conduct of the police denied counsel access to appellant. We disagree based on the Supreme Court's decision in *Moran*, *supra*.

[redacted] In *Moran*, the Supreme Court held that the failure of the police to follow counsel's instructions or to inform the suspect of counsel's efforts to reach him does not affect the validity of an otherwise proper waiver. Events occurring without a suspect's knowledge do not implicate the validity of a waiver because such events "can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422.

We have followed *Moran's* interpretation of the waiver requirements. *See Burin, supra*, In the instant case, appellant did not know of counsel's efforts on his behalf. Consequently, we find that the police treatment of counsel is irrelevant to the validity of appellant's waiver.

Appellant attempts to distinguish the instant case from *Moran* by alleging that the Jefferson County police conspired to deny him access to counsel. We also find this distinction irrelevant to the validity of appellant's waiver. We agree with the Supreme Court's assessment of police culpability in *Moran*:

> [W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident.

Moran, supra, 475 U.S. at 423.

[redacted] At the suppression hearing, the trial court found that appellant understood his rights and voluntarily waived them. Only if the " '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." *Burin*, 298 Ark. at 613-14, 770 S.W.2d at 126 quoting *Moran*, 475 U.S. at 421. We independently examine the totality of the circumstances to determine whether the trial court's ruling was clearly erroneous. *Branscomb* v. *State*, 299 Ark. 482, 774 S.W.2d 426 (1989); *Burin, supra.*

Appellant argues that the trial court should have suppressed his confession on the basis of his testimony at the suppression hearing. At the suppression hearing, appellant testified that the police denied his request to use a telephone to arrange for legal representation. He further testified that the police ignored his request to cease questioning. However, the testimonies of several police officers contradicted appellant's assertions. They testified that appellant never asked them to cease the interrogation or indicated that he wished to consult an attorney. The police also testified that appellant indicated he understood his rights and waived them.

The credibility of witnesses who testify at a suppression hearing concerning the circumstances surrounding the defendant's in-custodial statement is for the trial judge to determine. *Branscomb, supra*, 299 Ark. at 489, 774 S.W.2d at 429. Based on our independent review of the totality of the circumstances we cannot say that the determination is clearly erroneous.

Accordingly, we affirm the trial court's decision allowing the state to introduce appellant's confession into evidence.

II.

AMENDED INFORMATION

For his second allegation of error, appellant argues that the trial court erred in allowing the state to amend its information three days prior to trial. On August 28, 1989, the state charged appellant with one count of premeditated and deliberated capital murder and one count of attempted capital murder. On August 17, 1990, three days prior to trial, the state amended the information to assert an additional count of capital murder. Appellant argues that the additional count violates the statutory prohibition of amendments changing the nature or degree of the

crime charged. Ark. Code Ann. § 16-85-407 (1987). We disagree.

The legislature's 1989 revision of the homicide statutes authorized the state's assertion of the additional murder count. The premeditated and deliberated capital murder statute, Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1989), now provides:

> (a) A person commits capital murder if:
>
> . . . .
>
> With the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person[.]

Prior to 1989, each premeditated and deliberated capital murder count required two victims. Ark. Code Ann. § 5-10-101 (1987).

[redacted] Appellant does not dispute the fact that the new statute was in effect on the date of the alleged murders. We have held that the state may amend an information to conform to the proof so long as the amendment does not change the nature or degree of the offense charged. *Jones* v. *State*, 275 Ark. 12, 627 S.W.2d 6 (1982). The mere fact that an amendment authorizes a more severe penalty does not change the nature or degree of the offense. *Wilson* v. *State*, 286 Ark. 430, 692 S.W.2d 620 (1985). As the state points out, the only effect of the amendment was to split the original single count of capital murder into two counts of capital murder under the new statutory definition of that offense. We consider this amendment to be a matter of form that does not change the nature of the offense charged.

[redacted] Furthermore, appellant failed to request a continuance when he was put on notice that the state planned to amend the information. We have previously held that we will not presume prejudice when an appellant fails to move for a continuance after he is put on notice that the state plans to amend an information. *Harrison* v. *State*, 287 Ark. 102, 696 S.W.2d 501 (1985); *Wilson, supra; Jones, supra.* In this case, appellant knew of the state's plan to amend three days prior to trial. Since he did not move for a continuance, we find no prejudice in the trial court's allowance of the amendment.

III.

CHARACTER WITNESSES

Appellant's third allegation of error asserts that the trial court erred in excluding the testimony of six character witnesses for the defense. The trial court granted the state's motion to exclude the testimony because the defense failed to comply with the state's discovery request for the names and addresses of the defense witnesses that would testify at trial. We affirm.

Ark. R. Crim. P. 18.3 provides the applicable discovery rule in criminal cases:

> Subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

The state filed its discovery request on August 30, 1989. On October 10, 1989, the trial court entered an order directing appellant to respond to the state's request within ten days prior to trial. Appellant failed to comply. He argues that the trial court erred in sanctioning him for his noncompliance because the substance of the witnesses' testimony would be limited to statements concerning appellant's truthfulness and veracity.

Rule 18.3 could not be clearer. We have held that the rule applies with equal force to testimony offered in support of a general denial defense and testimony offered to support an affirmative defense. *Weaver* v. *State*, 290 Ark. 556, 720 S.W.2d 905 (1986). Discovery in criminal cases, within constitutional limitations, must be a two way street. *Id.* at 558, 720 S.W.2d at 906. This interpretation promotes fairness by allowing both sides the opportunity to full pretrial preparation, preventing surprise at trial, and avoiding unnecessary delays during the trial. *Id.* In the instant case, the trial court found that appellant's failure to comply with the discovery order prejudiced the state. Without the names and addresses of appellant's witnesses, the state could not exercise its right to obtain information questioning the witnesses' credibility. We find that the trial court's exclusion of appellant's character witnesses was a proper sanction for appellant's blatant

disregard of the discovery rule.

We reject appellant's attempt to characterize his witnesses as rebuttal witnesses. He attempts this characterization in an effort to bring his witnesses within the narrow exception to Rule 18.3 that we recognized in *Weaver, supra.* We noted that genuine rebuttal witnesses need not be disclosed before trial because neither the defense nor the state necessarily knows in advance of the need for such rebuttal testimony. *Id.* In this case, appellant planned to use the witnesses in his case-in-chief. Since he knew in advance of the need for the witnesses' testimony, the trial court did not err in refusing to give appellant the benefit of the rebuttal witness exception to the discovery rule.

IV.

JURY INSTRUCTIONS

For his final allegation of error, appellant argues that the trial court erred in instructing the jury on the capital murder charge. The trial judge gave the jury the following instruction on the capital murder charge:

> In count one, that with a premeditated and deliberate purpose of causing the death of Charles Goodloe; . . . Nathaniel Mitchell caused the death of Henry Harris.

The judge gave an identical instruction on the elements of capital murder with respect to the killing of Henry Harris.

Appellant argues that in order to satisfy the elements of capital murder, the state must show that the defendant acted with "an intent to cause the death of A and in so acting, caused the death of B." We disagree based on the common sense construction of the applicable statute, section 5-10-101(a)(4). The statutory phrase "another person" means a person other than the defendant himself. We find no error in the trial court's instruction on capital murder.

Appellant also asserts that the trial court erred in instructing the jury on the definition of attempted premeditated and deliberated capital murder. Specifically, appellant argues that there was no evidence to support an attempt conviction. Appellant's argument is without merit. The victim of the attempted murder testified that appellant deliberately shot him

through a car window. This testimony provided a basis in the evidence for the trial court's instruction on attempted capital murder. Accordingly, we affirm.

GLAZE and BROWN, JJ., concur.

ROBERT L. BROWN, Justice, concurring. I concur with the majority opinion and find no violation of the appellant's constitutional rights under these facts. This case, nevertheless, raises a concern about the access of counsel to an accused in custody.

Statements by an accused must, first, be knowingly and intelligently made and, second, be made voluntarily. The appellant signed a document in this case evidencing that he knew what he was doing in making the statement and was doing so voluntarily. No doubt, in many cases the accused will make a statement to the police because it is obvious the authorities have a strong case against him or he wants to rid himself of the burden of the crime or he desires to curry favor with investigating officers and, incidentally, to receive some consideration for his efforts at sentencing. Equally obvious is the fact that an accused who learns that an attorney has been retained and is trying to see him may well cease further disclosures to police detectives.

As the majority underscores, the emphasis must be placed on the accused and his voluntary and intelligent waiver. However, there is something vaguely chilling about an allegation that an accused was kept incommunicado from counsel for a period of time. Here, I hasten to add, the time was not extensive, since counsel did not make his first telephone call until 10:26 a.m., and the statement was signed minutes later at 10:51 a.m. Further, the facts are inconclusive about whether the department was purposefully delaying counsel contact.

Police officers are well within their rights in limiting access to the accused during certain times such as a sensitive point in interrogations and a line-up when counsel has been waived. Surely, law enforcement does not have to "drop everything" when newly retained counsel calls. At some point, however, counsel must be given access, even though a waiver of counsel has been signed by the accused. That precise time limit is difficult to determine precisely, and the facts of each case must govern accessibility. Any hint, though, that detectives are rushing to

finalize a statement while keeping counsel at bay should be avoided. Here, the limit on attorney access was not egregious enough to warrant an exclusion of the statement from evidence. As the U.S. Supreme Court warns, at some point it could be. *See Moran* v. *Burbine*, 475 U.S. 412, 432 (1986).

GLAZE, J., joins.

Jerry Glen SEYLLER and Alma Katherine Seyller *v.* PIERCE AND COMPANY, INC.

90-327 816 S.W.2d 577

Supreme Court of Arkansas
Opinion delivered September 23, 1991
[Rehearing denied October 28, 1991.]

Friday, Eldredge & Clark, by: *James C. Clark, Jr.* and *Tonia P. Jones*, for appellant.

Green & Henry, for appellee.

DONALD L. CORBIN, Justice. Appellants, Jerry Glen Seyller and Alma Katherine Seyller, appeal a judgment of the Arkansas County Chancery Court imposing a materialman's lien on their property in favor of appellee, Pierce and Company, Inc. We find no error in the trial court's judgment and affirm.

The facts giving rise to the lien in question began when appellant Jerry Seyller consulted his long-time friend Tom Hollman regarding the construction of a metal building for appellants' wholesale electric business, Seyller Electric, Inc. On June 26, 1989, appellant Jerry Seyller signed a contract for the commercial construction project he discussed with Mr. Hollman. Appellant Alma Seyller did not sign the contract. The contract was written on the letterhead of Ray & Ray Metal Buildings, Inc. (RRMB) and signed by Mr. Hollman as authorized agent of RRMB. RRMB is a corporation holding a valid contractor's license. Although RRMB was appellants' general contractor, it did not perform the actual construction for the Seyller Electric project; rather, another corporation, Steel Building Manufacturers, Inc. (SBM) performed the construction. SBM was not a licensed contractor.

Mickey Pierce, president of appellee Pierce and Company, contacted Mr. Hollman seeking to supply ready-mix concrete for the Seyller Electric project. In August and September of 1989, appellee executed two written agreements concerning the concrete for appellants' building. These agreements were addressed to Mr. Hollman at Ray & Ray Construction Company, Inc. (RRCC) and signed by Mr. Hollman as agent of RRCC. Mr. Hollman was employed as a salesman by both RRMB and RRCC. RRCC was not a licensed contractor.

The testimony of Larry Holleman, an accountant and former Secretary/Treasurer of SBM and RRMB, revealed that RRMB was a shell corporation formed for the purpose of obtaining a valid contractor's license. Mr. Holleman explained that RRCC, along with several other corporations, was merged into a separate corporation, SBM, in January 1985. SBM continued to do business as RRCC. When SBM was unable to obtain a contractor's license, RRMB was formed and incorporated on June 9, 1986. RRMB obtained a contractor's license and, as Mr. Holleman testified was the standard operating procedure of the companies, served only as a general contractor to enter contracts with property owners. SBM would then perform the actual construction and arrange any necessary subcontracting. When RRMB received payment for the construction, it would in turn make payment to SBM. Mr. Holleman testified that the foregoing standard procedure was followed on the Seyller Electric project.

Appellee had not received payment for the concrete it supplied to SBM d/b/a RRCC when construction on the Seyller Electric project was halted before completion. Appellee thus filed suit to establish a lien on appellants' property pursuant to Ark. Code Ann. § 18-44-101 (1987). The trial court ruled in appellee's favor establishing a lien on appellants' property for $29,858.30, the amount of the concrete supplied to SBM d/b/a RRCC for appellants' construction project. The judgment ordered a sale of appellants' property with proceeds applied to the $29,858.30 owed appellee. Appellants appeal claiming appellee did not strictly comply with the requirements of our materialmen's lien statute. Alternatively, appellants claim the lien is unenforceable against appellant Alma Seyller's interest in the property. We find no merit to appellants' claims.

As their first argument on appeal, appellants assert the trial court erred in finding the necessary contract required by our materialmen's lien statute, section 18-44-101. The statute reads in pertinent part:

> (a) Every mechanic, builder, artisan, workman, laborer, or other person who shall . . . furnish any material, . . . for any building, . . . upon land, . . . under or by virtue of any contract with the owner or proprietor thereof or his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this subchapter, shall have, for his . . . materials, . . . furnished, a lien upon the building, . . . and upon the land belonging to the owner . . . .

Pursuant to this statute, the trial court found there was an enforceable contract between appellee and RRMB, appellants' general contractor, sufficient to support a materialmans' lien. Appellants claim that section 18-44-101 requires appellee, as a potential lien claimant, to have a contract with either themselves, as property owners, or with another party who has a contract with them. Appellants argue appellee did not meet this requirement because appellee's contract was with SBM d/b/a RRCC; appellants did not have a contract with SBM d/b/a RRCC as their contract was with the separate entity, RRMB.

Appellants are correct in stating the statute requires appellee to have either a contract with them or with someone with whom they have contracted. Appellants are incorrect, however, in asserting that no such contract exists.

[redacted] The requirement of the statute has been met and the trial court was correct in so holding, for the statute clearly provides that "a lien can be created if a contract is shown to exist between a materialman and a contractor representing the owner. The necessary contract can be by express agreement or implied from the circumstances or conduct of the parties." *Gillison Discount Bldg. Materials, Inc.* v. *Talbot*, 253 Ark. 696, 698, 488 S.W.2d 317, 319 (1972).

[redacted] The necessary contract between appellee and appellants' contractor, RRMB is found through the principles of agency and an implied agreement. Larry Holleman's testimony,

as related at the beginning of this opinion, revealed that the common practice of RRMB was to assign all its contracting authority to SBM. SBM would then perform the construction contracts and arrange any necessary subcontracts. Mr. Holleman testified this was the standard procedure of the two companies and that it was followed in the Seyller Electric project. From these facts, we conclude SBM d/b/a RRCC was an agent of RRMB. *See Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985). Thus, as section 18-44-101 requires, and in the language of *Gillison*, *supra*, a contract "exist[s] between a materialman [appellee] and a contractor representing the owner [SBM d/b/a RRCC]." *Gillison*, 253 Ark. at 698, 488 S.W.2d at 319.

Appellants claim the trial court, in effect, "pierced the corporate veil" to find the necessary contract existed, and that to do so was error in this particular case. We cannot agree with this contention. The trial court's judgment is silent with respect to piercing any corporation's veil and it is not necessary to do so to find a contract between appellee and RRMB. Appellee had a contract with SBM d/b/a RRCC, who was an agent of appellants' contractor, RRMB.

As their second claim on appeal, appellants argue appellee did not comply with the notice provisions of the materialmen's lien statute. Specifically, appellants claim they should have received pre-construction notice of any potential liens as required by Ark. Code Ann. § 18-44-115 (1987). It is undisputed that appellants did not receive the requisite notice. Appellee responds with the argument that appellants were not entitled to the pre-construction notice because the construction involved was "commercial construction" which is excepted from the notice requirement by section 18-44-115(f). Because we have recently held the commercial construction exception to the notice requirement unconstitutional on equal protection and due process grounds, *Urrey Ceramic Tile Co.* v. *Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991), we must make a threshold choice of law determination regarding which law applies to the current case. In other words, we must first decide whether to apply *Urrey* retroactively to this case which was pending before us when *Urrey* was decided.

We have stated that once a statute is declared unconstitutional, it is treated as if it had never been passed. *Bob Hankins*

Distrib. Co. v. *May*, 305 Ark. 56, 805 S.W.2d 625 (1991); *Huffman* v. *Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981). However, in this particular case, to treat the statute as if it had never been passed would require us to ignore the well-settled rule that even constitutional arguments are waived on appeal unless raised below. *Smith* v. *City of Little Rock*, 305 Ark. 505, 806 S.W.2d 371 (1991). Thus, before addressing the merits of appellants' second argument, we must make a choice of law. In other words, we must decide if *Urrey* is applicable to the present case such that section 18-44-115(f) is considered never to have existed; or, if because appellants failed to preserve the constitutional argument for appellate review, is *Urrey* not applicable to the present case such that sections 18-44-115(f) is considered to exist in this case.

In reaching our determination of the applicability of *Urrey* we consider the recent decision, *James B. Beam Distilling Co.* v. *Georgia*, ___ U.S. ___, 111 S. Ct. 2439 (1991), where a plurality of the United States Supreme Court stated its position on the retroactive application of a decision to claims arising on facts antedating the decision. That position, as stated by Justice Souter who announced the judgment of the Court, is that once the Court has applied a rule of law to the litigants in one case, it must apply the same rule of law to all other litigants not barred by procedural requirements or *res judicata*. Thus, having no procedural bars, James B. Beam Distilling Company, as petitioner, received the benefit of a prior decision of the Court, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), although it did not begin to litigate its case until after the *Bacchus* decision was rendered.

It is important to note that petitioner James B. Beam Distilling Company was not barred by *res judicata*, a statute of limitations, or other procedural requirements from litigating its case. In that respect, the factual situation in *James Beam* differs from the factual situation in the current appeal. Here, appellants are barred by the procedural requirement of preserving an issue in the trial court for our review. It is true that in their answer appellants asserted the materialmen's lien statute violated the Fourteenth Amendment of the United States Constitution and Ark. Const. art. 2, § 3; however, something more than a mere assertion of an argument in the pleadings is required to preserve an issue for appellate review. In *Bond* v. *Dudley & Moore*, 244

Ark. 568, 426 S.W.2d 780 (1968), we held that a party's conduct at trial can have the effect of abandoning an issue raised in the pleadings so that it cannot be relied upon in this court. We have also held that we will not address a constitutional argument that was not called to the trial court's attention for a ruling on the constitutionality during trial or at some point prior to the entry of final judgment. *May* v. *Barg*, 276 Ark. 199, 633 S.W.2d 376 (1982); *Wilson* v. *Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980). In the current case, although appellants raised the constitutional question in the pleadings, and although they raised a question of insufficient notice in their proposed findings of fact and conclusions of law, they did not request or receive a ruling on the constitutional issue from the trial court, nor did they argue the issue before to the trial court. Thus, in accordance with *May*, *supra*, *Wilson*, *supra*, and *Bond*, *supra*, we find appellants did not properly raise the constitutional argument to the trial court and the argument is not subject to appellate review. Accordingly, we hold the *Urrey* decision is not applicable to this case.

Now we address the merits of appellants' second claim. The thrust of appellants' argument is that appellee, who is a licensed contractor, was not entitled to receive the benefit of the commercial construction exception because the actual construction was not "performed by" a licensed contractor. The commercial construction exception, section 18-44-115(f), reads as follows:

> The provisions of this section shall not be applicable to commercial and industrial construction performed by contractors licensed under § 17-22-101 et seq.

As was previously stated, it was SBM d/b/a RRCC that performed the construction of appellants' building. At all times relevant to this appeal, SBM was not a licensed contractor. Thus, argue appellants, since a licensed contractor did not perform the construction, this exception should not apply and appellee's lien should be held unenforceable for failure to give the requisite notice.

[redacted] We have already determined that SBM d/b/a RRCC was RRMB's agent. RRMB, a licensed contractor, was appellants' general contractor which performed the construction by arranging the work and any necessary subcontracts. As the construction was performed by RRMB, a licensed contractor, the

commercial construction exception applies. Appellee's lien is therefore enforceable and does not fail for lack of notice to appellants.

Appellants' third argument on appeal is that appellee's lien should not attach to appellant Alma Seyller's interest in the property because she did not sign the contract with RRMB. Appellants own the property in question as tenants by the entirety. It is true that appellant Alma Seyller did not sign the contract, however, her actions during the construction indicate she was indeed a party to the contract, at least by implication. *Steed* v. *Busby*, 268 Ark. 1, 593 S.W.2d 34 (1980). She had knowledge of the contract and approved it by writing and signing three personal checks, which were drawn on appellants' joint account made payable to RRMB, for the progress payments. We reiterate the previously cited holding of *Gillison Discount Bldg. Materials* v. *Talbot*, 253 Ark. 696, 488 S.W.2d 317 (1972), that the contract giving rise to a materialman's lien can be either express or implied.

Affirmed.

HOLT, C.J., and BROWN, J., dissent.

ROBERT L. BROWN, Justice, dissenting. I would reverse.

By its decision today the majority disregards the law of corporations and the concept of distinct legal entities. The salient facts are undisputed:

1. The owner contracted with a corporation, Ray & Ray Metal Buildings, Inc. to do the work. The contract was signed on behalf of Ray & Ray Metal buildings by Tom Hollman as authorized agent. This corporation was duly licensed as a contractor in Arkansas.

2. A separate corporation, Steel Building Manufacturers, Inc., contracted with the supplier, Pierce and Company, for the materials in dispute. Tom Hollman signed on behalf of SBM as agent. SBM actually did the contracting work for the owner — not Ray & Ray Metal Buildings. SBM was *not* a licensed general contractor in Arkansas.

3. The owner was not notified by SBM that he would be liable for materialman's liens as required by Ark. Code Ann. § 18-44-

115 (1987). That notice would have identified a different corporation, SBM, as the actual contractor. As an unlicensed contractor, SBM was required to give the notice.

4. The owner paid Ray & Ray Metal Buildings one time for the materials. Based on the chancellor's decision, he will have to pay the supplier again.

In the face of these facts, the chancellor found:

> 5. Plaintiff, as subcontractor, contracted with Ray & Ray Metal Buildings, Inc. to deliver materials in the form of concrete for the construction of the building on the Seyller property.

In making this finding, the chancellor erred. A separate corporation, SBM, contracted with the subcontractor which was Pierce and Company — not Ray & Ray Metal Buildings. The majority engages in contorted reasoning when it holds that a common agent for the two corporations somehow causes a contract made by one corporation to bind the other. That simply is not the law, absent some intent and action by the second corporation to be so bound.

We take a radical step today when we say a common agent by one action binds two corporations, without any corporate suggestion that this was intended and when the owner was not so advised. The clear purpose of the notice statute is to let an owner know of liability for materials when unlicensed commercial contractors are doing the work. Also, an owner might well refuse to deal with a new contractor revealed in the notice which is different from the contractor retained to do the job. The statutory notice requirement should have been followed in this case, and it was not. I would relieve the owner of further liability.

HOLT, C.J., joins.

William Paul SMITH *v.* STATE of Arkansas

CR 91-71 815 S.W.2d 922

Supreme Court of Arkansas
Opinion delivered September 23, 1991

William R. Simpson, Jr. Public Defender, *Thomas B. Devine III*, Deputy Public Defender, by: *Andy O. Shaw*, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, William Paul Smith, urges reversal of a Pulaski County jury verdict convicting him of capital murder under Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1989). The jury sentenced appellant to serve life without possibility of parole in the Arkansas Department of Correction. We affirm.

Appellant presents three arguments for reversal of his conviction. His third argument challenges the sufficiency of the evidence. We will address that argument first in accordance with our custom of addressing sufficiency of the evidence arguments prior to our consideration of other alleged trial court errors. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

Appellant argues that the trial court erred in denying his motion for a directed verdict because the state did not present sufficient evidence of the premeditation and deliberation elements of capital murder. We must affirm if we find substantial evidence to support appellant's conviction. *Lewis* v. *State*, 295 Ark. 499, 749 S.W.2d 672 (1988). In determining whether there is substantial evidence, we consider only the evidence that is favorable to the state and supports appellant's conviction. *Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459 (1991).

The state's evidence showed that appellant drove to the Eastgate housing project in North Little Rock on the night of October 14, 1989. Two eyewitnesses testified that appellant parked his car, got out, and approached the victim, Michael Cooksey, from the side. The witnesses testified that Cooksey did not see appellant until appellant said, "Mike, I told you." As appellant spoke, he raised a sawed-off shotgun and fired a single fatal shot into the left side of Cooksey's face. Expert medical testimony established that the shot was fired approximately six feet from the victim. After shooting Cooksey, appellant jumped in his car and drove away.

Section 5-10-101(a)(4) defines premeditated and deliberated capital murder:

> (a) A person commits capital murder if:
>
> . . . .
>
> (4) With the premeditated and deliberated purpose of

> causing the death of another person, he causes the death of any person[.]

In the instant case, we believe the state produced substantial evidence that appellant killed Cooksey with the requisite premeditated and deliberated purpose. We have recognized that premeditation and deliberation are criminal elements that are hard to prove with concrete, demonstrative evidence. *Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3 (1982). Rather, the jury may infer a defendant's intent from the circumstances of the case. *Hamilton* v. *State*, 262 Ark. 366, 556 S.W.2d 884 (1977). Relevant circumstances include "the character of the weapon used and the manner in which it was used, the nature of the wounds inflicted, the conduct of the accused and the like." *Id.* at 372, 556 S.W.2d at 888.

In the instant case, the state's evidence included eyewitness testimony and medical expert testimony. In summary, this evidence established that appellant armed himself with a sawed-off shotgun, drove to the housing projects, walked to within six feet of the victim at an angle from which the victim couldn't see, spoke the victim's name, and shot the victim in the side of the head. We believe these circumstances provide more than substantial evidence for the jury to infer appellant's premeditation and deliberation. Accordingly, we affirm the trial court's denial of appellant's motion for a directed verdict.

Appellant's second allegation of error is that the trial court abused its discretion in failing to declare a mistrial when a juror informed the court that he may have known the victim, Michael Cooksey. The juror, Mr. James Treat, came forward after the jury had been sworn and the other veniremen had been excused to tell the court that a man resembling Mr. Cooksey had inquired periodically about a job at Mr. Treat's place of employment. (The record is unclear as to how Mr. Treat knew what the victim looked like.) Mr. Treat informed the court that he did not remember the man's name, and that he could not be sure that the man was Cooksey. The court then questioned Mr. Treat about his ability to serve as an impartial juror:

> THE COURT: Would that relationship with the deceased, if in fact it is the same person, have any effect on your sitting as a juror?

JURY MEMBER: No, it wouldn't affect me, Judge. I just wanted to report it.

THE COURT: I appreciate that, but do you think you couldn't serve as a fair and impartial juror, even though this is the one that approached you at your job?

JURY MEMBER: No.

The court denied appellant's motion for a mistrial.

We addressed an analogous situation in *Clay* v. *State*, 290 Ark. 54, 716 S.W.2d 751 (1986). In that case, a juror came forward after the trial began to inform the court that he remembered meeting the prosecuting rape victim several years earlier at her place of employment. We found no abuse of discretion in the trial court's refusal to declare a mistrial after the juror stated that his previous acquaintance with the rape victim would not affect his ability to be a fair and impartial juror. We recognized that situations involving an innocent failure to recognize the victim initially are clearly distinguishable from those cases where a juror intentionally gave false information during *voir dire*. *Id.*

In the instant case, we find no evidence that Mr. Treat intentionally withheld information during *voir dire*. Furthermore, assuming that the victim was the man Mr. Treat had seen at his place of employment, the information concerning the prior relationship was so tangential that we will not presume prejudice. Mr. Treat's acquaintance with the man he had seen at the work was so limited that he could not even recall the man's name. In cases such as this one, where a juror's withheld information is neither material nor intentionally withheld, we will not find that the trial court abused its discretion in refusing to declare a mistrial. *See Decker* v. *State*, 717 S.W.2d 703 (Tex. Crim. App. 1986) (opinion on reh'g).

Finally, appellant asserts two challenges to the constitutionality of the capital murder statute. He first argues that the statute's death penalty provision constitutes cruel and unusual punishment because of its arbitrary application. Since appellant did not receive the death penalty, he lacks standing to challenge the penalty's alleged risk of arbitrary application. *Hogan* v. *State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *Sumlin* v. *State*, 266 Ark.

709, 587 S.W.2d 571 (1979).

Appellant also argues that we should declare the capital murder statute unconstitutionally vague because the elements of the offense overlap the first degree murder statute. We have previously rejected the vagueness argument regarding the overlap of capital felony murder and first degree murder. *Sellers* v. *State*, 300 Ark. 280, 778 S.W.2d 603 (1989); *White* v. *State*, 298 Ark. 55, 764 S.W.2d 613 (1989). In those cases, we held that the overlapping was constitutionally valid because there was no impermissible uncertainty in the definition of each offense. *White*, *supra*. We apply the same rationale to section 5-10-101(a)(4) and hold that the offense of premeditated and deliberated capital murder does not violate the constitutional prohibition of vagueness.

In accordance with Ark. Sup. Ct. R. 11(f), we have examined the record and have determined that there were no rulings adverse to appellant which constituted prejudicial error. Accordingly, we affirm the conviction.

Paul CRAVEY *v.* STATE of Arkansas

CR 91-49 815 S.W.2d 933

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Burbank, Dodson & McDonald, for appellant.

Winston Bryant, Att'y Gen., by: *Catherine Templeton*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. On August 8, 1990, appellant Paul Cravey was found guilty of two counts of sexual intercourse or deviate sexual activity involving his niece, age 7, and his nephew, age 10, following waiver of a jury trial and trial before the court. He was sentenced to two terms of twenty years to run consecutively. Immediately following the sentencing, the trial court advised the appellant of his right to appeal on grounds of ineffectiveness of counsel under Ark. R. Crim. P. 36.4, as it was then in effect.[1]

On August 13, 1990, the appellant's counsel moved for leave to withdraw because the appellant had decided to seek post-conviction relief due to ineffective counsel at trial. On August 28, 1990, the appellant filed a pro se motion for a new trial under Rule 36.4, containing fourteen allegations of counsel ineffectiveness. The allegations included failure of defense counsel to bring out inconsistencies in the victims' testimonies, failure to call certain witnesses like the victims' parents and the social workers to testify, failure to produce photographs of the crime scene, and

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[1] Ark. R. Crim. P. 36.4 was amended by Per Curiam order, effective July 1, 1989, to provide for a motion for a new trial due to counsel ineffectiveness. *In re Abolishment of Ark. R. Crim. P. 37 and the Revision of Ark. R. Crim. P. 36*, 299 Ark. 573, 770 S.W.2d 148 (1989) (per curiam). That same date Ark. R. Crim. P. 37 was abolished. *Id.* By a second per curiam order effective January 1, 1991, Rule 36.4 was amended to delete the new trial procedure for ineffectiveness of counsel, and Rule 37 was reinstated. *In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure, as Revised and the Amendment of Rule 26.1 and Rule 36.4 of the Arkansas Rules of Criminal Procedure*, 303 Ark. 746, 797 S.W.2d 458 (1990).

failure to highlight certain salient points. (Among such salient points was the testimony of the state's medical witness concerning the healing of vaginal scars as applied to the facts of this case.) The prosecuting attorney responded to each allegation and argued that the appellant failed to add supporting facts to illustrate how these alleged failures prejudiced him at trial.

On October 10, 1990, the trial court signed an order granting the motion of appellant's trial counsel to withdraw and stated that this was done "so that the [appellant] could file a motion for a new trial on the basis of ineffectiveness of counsel." In another order the trial court appointed new counsel to represent the appellant. Also on October 10, 1990, the trial court denied the appellant's motion for a new trial, finding "that the allegations in the motion are conclusory, that they fail to state the defendant was prejudiced, that the allegations are without factual support and clearly do not assert facts sufficient to raise an issue of ineffectiveness of counsel." The trial court concluded that since the appellant's motion "contains nothing but mere conclusions and unsubstantiated allegations," it did not justify an evidentiary hearing.

The appellant now appeals the denial of his motion on two grounds: a) the trial court failed to appoint counsel to represent him prior to dismissal of his petition for post-conviction relief, and b) he was entitled to a hearing on his motion. We affirm the trial court on both points.

We begin by recognizing that our post-conviction procedures relating to ineffectiveness of counsel have been in flux over the past two years, and the appellant proceeded under a Rule 36.4 procedure which is no longer in effect. The operable part of Rule 36.4 establishing that former procedure read:

> The judge must further advise the defendant that, if a motion for a new trial is filed asserting facts sufficient to raise an issue whether his or her counsel was ineffective, a hearing will be held, and the time for filing a notice [of] appeal will not expire until thirty (30) days after the disposition of the motion, as provided in Rule 36.22.

Under this procedure an appellant could pursue an ineffective-counsel motion before the trial court and would be entitled to a

hearing if sufficient facts were raised. Otherwise, an appellant could appeal a denial of the motion to the appropriate appellate court within thirty days.

We agree with the trial court that the appellant's allegations were not buttressed by sufficient facts to raise an issue of ineffectiveness of counsel. To prevail on a claim of ineffective counsel a movant must show that the errors were so serious that the defendant was deprived of a fair trial and of Sixth Amendment guarantees. *See Mullins* v. *State*, 303 Ark. 695, 799 S.W.2d 550 (1990) (per curiam); *Robinson* v. *State*, 295 Ark. 693, 751 S.W.2d 335 (1988) (per curiam). Yet in each instance in the case before us the allegations made were either vague due to lack of factual underpinnings or else lacked the seriousness necessary to raise a viable issue of counsel ineffectiveness. The allegations simply did not rise to that level of gravity required to overcome the strong presumption that trial counsel did a competent job. *See Mullins* v. *State*.

We next address the appellant's assertion that he was entitled to the appointment of new counsel prior to the trial court's dismissal of his motion. This equates to an argument that counsel was required to assist the appellant in perfecting his motion before the trial court under the Sixth Amendment. We have recognized repeatedly, however, that post-conviction proceedings under Rule 37 (the same rationale would apply to former Rule 36.4) are civil in nature and that there is no constitutional right to counsel to assist the defendant in preparing a motion for a new trial. *See*, *e.g.*, *Mullins* v. *State*, *supra*; *Fretwell* v. *State*, 290 Ark. 221, 718 S.W.2d 109 (1986). We reaffirm those holdings today.

But where a hearing is required due to a trial court's finding of sufficient facts alleged, counsel is necessary, and we have so held. *See Preston* v. *State*, 303 Ark. 106, 792 S.W.2d 599 (1990). In *Preston*, the post-conviction motion for ineffectiveness of counsel was made under Rule 36.4 established by our 1989 per curiam. We held that the trial court had granted trial counsel's motion to withdraw but had not clearly ruled on the appellant's motion for a new trial on grounds of ineffective counsel. We

remanded the case for a ruling on that issue and added, "Even if we should construe the order to be an order denying a motion for new trial, as the appellant argues, we would still remand for a full finding of fact and written ruling." 303 Ark. at 108; 792 S.W.2d at 600. We then directed that upon remand, new counsel should be appointed to represent the appellant, and the trial court should either a) find that the petition and records do not raise sufficient facts to support an ineffectiveness issue, or b) assuming that sufficient facts were alleged, conduct a hearing to determine if the appellant is entitled to relief.

In the case before us, the trial court has already found that the appellant's motion is factually deficient and that a hearing is not justified. In *Preston* it had not done so. It would be futile, therefore, in light of what has already occurred for us to remand this case for further action before the trial court when that court has found that there is no basis for it.

In 1990 we remanded two Rule 36.4 matters and directed that a new attorney be appointed forthwith to prosecute an ineffective-counsel motion in the trial court. *See Mobbs* v. *State*, 303 Ark. 98, 792 S.W.2d 601, (1990); *Cox* v. *State*, 305 Ark. 488, 807 S.W.2d 665 (1991) (per curiam). Neither case guarantees the right to counsel to assist in preparing a post-conviction motion or the right to a formal hearing. Accordingly, they are not dispositive of the issues before us.

In this case the trial court found that the appellant's allegations were conclusory and that he had not raised sufficient facts to support an issue of ineffective counsel. We note that the trial court was intimately familiar with the facts of this case. The matter had been tried before the court without a jury, and thus the court had acted as the finder of fact. With this knowledge as background, the court reviewed the appellant's motion and the prosecutor's response and reached its decision.

Under such circumstances and in light of the trial court's findings, appointment of new counsel to prosecute the appellant's motion further in that forum is not required. To hold otherwise would require new appointments and hearings in every post-conviction case, irrespective of a trial court's previous findings.

We decline to take such a dramatic step.

Affirmed.

Vincent HOPES *v.* STATE of Arkansas

CR 91-92 816 S.W.2d 167

Supreme Court of Arkansas
Opinion delivered September 23, 1991

William R. Simpson, Jr., Public Defender, *William M. Brown*, Deputy Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant Vincent Hopes

was convicted of burglary and theft of property and sentenced as an habitual offender to thirty years for burglary and twenty years for theft of property, with the two sentences to run consecutively. He raises two points on appeal. First, he argues that the trial court erred in refusing to give an accomplice instruction relating to the principal witness against him. Secondly, he contends that the whereabouts of that same witness at the time of the offenses was proven by inadmissible hearsay testimony. Neither argument has merit, and we affirm the judgment of the trial court.

The facts are these. On the night of February 21, 1990, a Little Rock business named Yam's was broken into, and a Little Rock patrolman responded to the alarm at about 10:10 p.m. The patrolman approached the store through a back alley, and, though it was raining, he spied a figure standing by the open trunk of his car. When that person saw the approaching police car, he fled on foot. The patrolman next saw a figure on the roof of the business. No one, however, was arrested at the scene. On entering the business, backup officers found a television set on the walkway.

The patrolman requested a license check on the car, and, upon searching the vehicle, he found a black bag that contained three flashlights, among other items. It developed that the car was owned by Edna Russ. Russ at the time was employed at Parkway Health Center and apparently was working the 3:00 p.m.-to-11:00 p.m. shift the night of the Yam's break-in. She had loaned her car to the appellant earlier that day. At 10:30 that night she reported to the police that her car was stolen. She made a second report at 1:15 a.m. early the next morning.

Later that day Russ was taken to the police station as a suspect in connection with the Yam's burglary and theft and was read her *Miranda* rights. She admitted at that time that the appellant had called her at about 10:15 or 10:30 and told her to tell the police that her car was missing. It was following that conversation that she called the police. She further admitted that she had lied to the police about her car and that she had known there was a "problem" when the appellant called the night before. She denied knowing anything about the Yam's break-in. She admitted that two of the flashlights found in the car were hers.

The police released Russ, and later that day the appellant

took her to get her car, which had been impounded. On the way, the appellant confessed to her that he had committed the burglary and theft with another man. That afternoon, at her urging, he turned himself into the police.

I. *ACCOMPLICE*

At the trial on September 24, 1990, the appellant moved for a directed verdict on the basis that Russ was an accomplice, and there was no corroborating evidence to support her testimony. The trial court denied the motion. The appellant then requested two instructions: one, that Russ was an accomplice as a matter of law, and two, that the issue of whether Russ was an accomplice was for the jury to decide. The trial court refused to give either instruction. It is the failure to give the second instruction that the appellant contends was error.

The accomplice statute provides that a person is an accomplice if "with the purpose of promoting or facilitating an offense" that person encourages and aids in planning or committing the offense. Ark. Code Ann. § 5-2-403 (1987). The appellant argues that this issue should have been submitted to the jury for determination. He points to the fact that the prosecutor referred in his opening statement to the question of whether Russ was an accomplice; to the use of her car and flashlights in perpetrating the crimes; to the fact that a second unidentified person who may have been Russ was at the crime scene; and to her statement that she would do anything to keep from getting in trouble.

[redacted] The defendant in a criminal case bears the burden of proving that a witness is an accomplice. *Lear* v. *State*, 278 Ark. 70, 643 S.W.2d 550 (1982). A witness's status as an accomplice is a mixed question of law and fact and must be submitted to the jury if there is any evidence to support a jury's finding that the witness was an accomplice. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). Where the evidence does not support an accomplice instruction, it should be refused. *Powell* v. *State*, 231 Ark. 737, 332 S.W.2d 483 (1960). In the *Earl* case the witness alleged to be an accomplice had been jointly charged with the crime, and the charge against that witness was pending at the time of trial. There was also evidence tending to connect the witness with the commission of the crime. We held that, under those facts, it was error not to instruct the jury on the law of accomplice status and

the need for corroborating evidence, should the jury find the witness was an accomplice.

Here, Russ testified that she was at work during the time of the break-in, and there was no testimony contradicting this. She also emphatically denied that she knew anything about the burglary and theft before the fact. Though she lied to the police initially, she later admitted this, and the trial court found her testimony to be credible. Under present law, a person who was formerly an accessory after the fact is now guilty of a separate crime — hindering apprehension and prosecution. *Tyler* v. *State*, 265 Ark. 822, 581 S.W.2d 328 (1979). The misinformation she conveyed to the police falls more readily into the category of hindering an investigation than evidence that she committed the crimes herself. Whether to give an accomplice instruction lies within the discretion of the trial court. We hold that there was no abuse of discretion under these facts.

II. *HEARSAY*

The appellant raises as his second point the admissibility of hearsay testimony into evidence to prove that Russ was at work at the time of the Yam's break-in. The relevant colloquy took place during the prosecutor's direct examination of the investigating detective:

> Detective: And that she was reporting it at 10:30. I also told her that I had checked with her employer.
>
> Defense: Objection, your honor. Hearsay.
>
> The Court: Sustained.
>
> Prosecutor: Okay.
>
> Prosecutor: You told her that you were suspicious, you weren't buying her story?
>
> Detective: Correct.
>
> Prosecutor: Okay. As part of your investigation, were you able to confirm whether or not she was at work?
>
> Detective: Yes, she was.
>
> Prosecutor: Okay. Were you able to confirm what time she got to work?

Defense: Your Honor, I'm going to object to that as hearsay again.

Prosecutor: I'm asking whether or not his investigation confirmed, not who said, how said or what.

The Court: How's he going to get the information?

Prosecutor: It's just part of his investigation.

The Court: Well, it's probably objectionable but let's go ahead. Everybody knows she was out there. Go ahead.

Prosecutor: Okay.

Prosecutor: Were you able to confirm that she was at work?

Detective: Yes.

Prosecutor: Okay. And what shift did she work?

Detective: The three to eleven shift.

Defense: Your Honor, I'm going to continue my objection to this.

The Court: If you won't ask any questions about it, I'll sustain it. But, if you're going to get up and ask questions about it like you already have, well, then what difference does it make? Go on.

We do not agree with the Attorney General that the appellant failed to raise his objection at the first opportunity to do so. Rather, the trial court erred in admitting this testimony into evidence. Nonetheless, the fact that Russ was at work during the time of the offenses was already before the jury through the testimony of Russ herself. There was nothing presented by the appellant to contest this. We have held that where the same evidence was introduced by another witness without objection, it was properly before the jury for consideration, and subsequent hearsay testimony by the police constituted harmless error. *Orr* v. *State*, 288 Ark. 118, 703 S.W.2d 438 (1986). That is what occurred in the case before us. We hold that the detective's testimony was harmless error.

Affirmed.

Charles JOHNSON, County Judge *v.* SUNRAY SERVICES, INC.

90-329 816 S.W.2d 582

Supreme Court of Arkansas
Opinion delivered September 23, 1991

George E. Butler, Jr., Washington County Attorney, for appellant Washington County.

James G. Lingle, P.A., by: *George D. Oleson*, for appellants.

Robert B Leflar, amicus curiae, for Ozark Headwaters Group of the Sierra Club.

The Niblock Law Firm, by: *Walter R. Niblock*, amicus curiae, for Beaver Water District.

Davis Cox, & Wright by: *Wm. Jackson Butt, II* and *Tim E. Howell*, for appellees.

ROBERT L. BROWN, Justice. This appeal comes to us from a decree by the chancery judge voiding a Washington County quorum court ordinance to regulate solid waste disposal facilities ("landfills") on constitutional grounds. The appellants are Washington County, members of the quorum court and other Washington County officials. The appellee is Sunray Services, Inc. ("Sunray"), a corporation that provides solid waste disposal services and that had applied to the quorum court for site approval to provide such landfill services at Durham in Washington County. The effect of voiding the quorum court ordinance was to allow Sunray to proceed with plans to construct the landfill.

The appellants raise several issues on appeal, but we reverse on the issue of whether the ordinance was rationally related to a legitimate government purpose. We hold that it was. We further

decline to affirm on the basis of the various issues raised by Sunray as additional arguments in support of the chancellor's decree.

The facts in this case are largely without dispute, although the findings and conclusions that can be gleaned from them are the subject of intense controversy. On June 30, 1989, Miller Matthews, chairman of the board and sole shareholder of Sunray, acquired 1,850 acres in the Durham area and immediately granted Sunray an option to purchase that land. On July 14, 1989, Sunray requested site approval for a landfill in a letter to the quorum court. The quorum court referred the request to its Environmental Affairs Committee ("EAC"). Under the rules of the Arkansas Department of Pollution Control and Ecology ("Pollution Control") the request had to be acted on within sixty days, or the request would be deemed approved.

Over the next sixty days the EAC had two meetings in which Sunray's request was discussed — July 25, 1989, and August 21, 1989. At the first meeting EAC heard comments from citizens opposed generally to landfills and from a geologist opposed to the specific site. Sunray consultants also discussed the proposed Durham site before the committee. At the close of the meeting, the committee recommended a moratorium on any new landfills in the county until a regional study could be completed.

The quorum court considered landfill limits in general and the Durham site in particular at its August 10, 1989 meeting. Public comment was received regarding buffer zones from main water supplies and a landfill moratorium. Sunray's counsel spoke in favor of the Durham proposal. The meeting ended with the quorum court's sending the moratorium issue back to EAC for additional consideration.

On August 21, 1989, EAC considered and heard comments on the Durham proposal, Sunray's past record, buffer zones for landfills in general, and pending Environmental Protection Agency regulations. Sunray's attorney also answered questions about the project and spoke in favor of it. The committee concluded the meeting by recommending that the quorum court adopt more restrictive landfill standards than Pollution Control had done.

The quorum court met again on September 14, 1989. At a prolonged meeting a general restriction ordinance was discussed as well as Sunray's site proposal. Citizen comments were received both in favor of a restrictive ordinance and opposed. Richard Starr, the Beaver Water District director, and Dr. Richard Meyer, a limnologist, spoke in favor of some buffer zone between landfills and main water sources. Sunray's counsel made a presentation in favor of the site proposal. By a vote of 11 to 2 the quorum court passed Ordinance No. 89-23, which established a two-mile buffer zone between landfills and main water sources. That ordinance reads in pertinent part:

> ARTICLE 1. No hazardous or other solid waste disposal facility as defined by Arkansas law shall be located within two (2) miles of the main water sources within Washington County, specifically Beaver Lake, Illinois River, Middle, Main and West Forks of the White River, Lee Creek, Prairie Grove Lake, Lincoln Lake, Clear Creek, Spring Creek, Fall Creek, Richland Creek, Barron Fork, Fly Creek, Wedington Creek, Cove Creek, Muddy Fork, Ballard Creek, Evansville Creek and Cincinnati Creek, and any other main water source so designated by the Quorum Court.

The ordinance included civil remedies for violations and an emergency clause making it effective immediately. The quorum court then heard from two Sunray consultants on the issue of the landfill request at Durham. The Sunray consultants did not discuss the effectiveness of a buffer zone to protect main water sources. Armed with the ordinance, the quorum court promptly denied Sunray's Durham site request on the basis that the site fell within two miles of the Middle Fork of the White River — a main water source listed in the ordinance and a Beaver Lake tributary.

Sunray appealed the quorum court's decision to Pollution Control on October 6, 1989, by filing a preapplication for a landfill with that department and requesting the Director of Pollution Control to review the quorum court's actions. The director did conduct a review, and on December 27, 1989, he overruled the quorum court's denial and authorized Sunray to continue with the preapplication process for site approval. Before Pollution Control could make its site evaluation, the state

Attorney General issued an opinion on February 27, 1990, which caused the director of Pollution Control to halt all further activity relative to the Durham site until the issue of the ordinance's validity and the denial of Sunray's request by the quorum court could be finally decided.

Sunray filed suit on March 2, 1990, to have the ordinance declared unconstitutional and invalid, and Washington County counterclaimed to enjoin Sunray from violating the ordinance. Trial was held before the chancellor on May 29-30, 1990. Sunray's testimony consisted of evidentiary depositions of quorum court members and live testimony of a Pollution Control hydrogeologist (Mark Witherspoon), an engineer employed by SCS Engineers of Covington, Kentucky (Jim Walsh), a second hydrogeologist (Dr. William White, a professor at Pennsylvania State University), and its owner (Miller Matthews). Washington County offered the testimony of quorum court member and EAC Chair Lois Imhoff, and that of Beaver Water District director Richard Starr.

The decree of the chancery judge was entered on August 3, 1990. It struck down the ordinance as unconstitutional on due process and equal protection grounds and it further dismissed Washington County's counterclaim. In the decree the chancellor made findings of fact, including the following:

> (16) That the overwhelming testimony of the experts reflects that proximity to a water source is not a reliable basis for predicting whether a landfill may pollute nearby streams or rivers.
>
> (17) That the experts convincingly established that rational and objective factors to consider in siting a landfill include geology of the land, degree of slope, directional flow of ground water, and the texture of the soil.
>
> (18) That Washington County Ordinance No. 89-23 as adopted was not based upon rational and objective factors but rather upon negative attitudes and fears, community opposition and adverse public sentiment.
>
> (19) That while genuinely wanting to protect water sources in Washington County, members of the Quorum Court arbitrarily and irrationally adopted Ordinance No.

89-23 to deny Sunray's request for specific geographic site approval and to halt its effort to site a landfill at the Durham Site.

(20) That by enacting Ordinance No. 89-23 the Quorum Court has effectively blocked Sunray's application process without specifically naming any factors which inherently threaten the public health, welfare, safety and environment regardless of proper design and operation of the landfill.

(21) That by enacting Ordinance No. 89-23, the Quorum Court has effectively denied all potential landfill operators and potential users of land for landfill purposes the right to pursue an application process without naming factors which inherently threaten the public health, welfare, safety and environment regardless of proper siting, design and operation of the landfill.

The decree also contained these conclusions of law:

(4) That Washington County Ordinance No. 89-23 bears no rational relation to any legitimate governmental purpose and is therefore unconstitutional, illegal, invalid and unenforceable as a violation of due process of law. U.S. Const. Amend. XIV, Section 1; Ark. Const. Art. 2. (Citing case authority.)

(5) That Washington County Ordinance No. 89-23 creates an unlawful classification against landfill operators and users of land for landfill purposes which bears no rational relation to any legitimate governmental purpose and is therefore unconstitutional, illegal, invalid and unenforceable as a violation of equal protection of law. U.S. Const. Amend. XIV, Section 1. (Citing case authority.)

In deciding this case we first consider the pollution threat involved. With landfills the threat of pollution of water sources is directly related to underground water flow. This is so because the potential exists for landfill refuse to mix with rain, seep underground, travel along the underground water course for some distance, and eventually pollute surface water sources. There was considerable expert testimony offered by Sunray at trial that surface conditions and distance bear little or no relationship to the

direction of underground water flow. Indeed, virtually all of the scientific testimony presented at trial supported Sunray's contentions. Mr. Witherspoon of Pollution Control testified that distance is not a valid criterion for a landfill site's suitability and that he could find no rational basis for imposing a two-mile buffer zone. Prohibiting landfills within two miles of surface water without proper study and adopted criteria and without empirical justification for doing so was arbitrary and irrational in his opinion. He admitted that distance might be a factor where geologic studies have been done and where "you have a good definition of the geologic structure."

Dr. White testified that a two-mile buffer zone provides no protection at all against landfill pollution of water sources. Underground geology controls, he testified; not distance from surface waters. He further stated that Northwest Arkansas does have a subsurface geology that could cause underground water to flow in any direction, including the opposite direction from where surface water is located. He knew of no rationale for requiring a minimum distance between landfills and surface water. Dr. White admitted that he had not done extensive field investigations in Northwest Arkansas.

A third expert called by Sunray was Jim Walsh, an engineer retained to work on the landfill site. He also testified that there was no rational explanation for prohibiting a landfill as far away as two miles from surface water. Any monitoring or control of contamination from the landfill should occur within 300 feet of the site, he stated. Otherwise, the contamination plume spreads out as it covers a greater distance and is impossible to contain. Walsh stated that there was no justification for a setback requirement beyond 300 feet. He was, however, aware of three states that had distance requirements of up to 1,000 feet.

The appellants countered this testimony with the live testimony of quorum court member and EAC chair, Lois Imhoff, and Beaver Water District engineer and director, Richard Starr. Lois Imhoff testified that two miles was a compromise and that some quorum court members had argued for five miles. She said that Richard Starr spoke in favor of the ordinance to protect the drinking water and recreation uses of Beaver Lake as did Dr. Richard Meyer, a University of Arkansas limnologist, who

studies lake qualities. She admitted that no analysis had been done on the effect the rivers named in the ordinance had on drinking water or recreation. Her testimony was followed by that of Richard Starr, who stated that he opposed all landfill sitings within the Beaver Lake watershed because of the impact on water quality. He testified that the ordinance did have a rational basis since distance offers some protection against pollution and provides an area to work in in the event of a leaking problem. He disagreed with the conclusion that controlling contamination could only effectively occur within 300 feet of the landfill.

In the evidentiary depositions of quorum court members and other appellants submitted by Sunray, some quorum court members alluded to public sentiment and common sense as justifications for the ordinance. Some members also admitted the direct correlation between adopting the ordinance and denying Sunray's request for site approval.

I.

ARBITRARINESS

The first question confronting this court is whether the ordinance is so lacking in any rational relationship to a government purpose so as to be arbitrary and constitute a due process violation. We think not. We have long subscribed to a lenient rational basis test in Arkansas. This test is best set forth in a 1983 tax case. *See Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). There, we noted that the legislature is better equipped than the courts to investigate the arbitrariness of a certain tax exemption aimed at out-of-state retirees. We then said:

> Before it is said that such hypothesizing is far afield, we re-emphasize that our role is not to discover the *actual basis* for the legislation. Our task is merely to consider if *any* rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose. Since we can reasonably conceive of lawful purposes for the state's classification scheme, it may not be held to have been arbitrarily enacted.

280 Ark. at 215, 655 S.W.2d at 464. Hence, any rationale that is a

lawful purpose will void a constitutional challenge for arbitrariness.

[redacted] The Washington County quorum court was empowered to adopt landfill standards more restrictive than those of Pollution Control. *See* Ark. Code Ann. § 8-6-209 (Repl. 1991). By enacting a local zoning ordinance, the quorum court was exercising a legislative function, and the ordinance is subject to judicial scrutiny only to determine whether it is arbitrary, capricious, and unreasonable. *See Wenderoth* v. *City of Ft. Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971). Absent arbitrariness or unreasonableness, the local ordinance should stand because the judiciary does not review the wisdom or rightness of legislation. *Id.*; *see also West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

We believe a rational basis was embraced by the quorum court and supports this ordinance. Admittedly, no studies or analyses of the sub-surface geology had been made of the area in question by either party. And Sunray's case was replete with testimony that a) underground waterways may well not correspond to surface waterways due to sub-surface geology, and b) distance could work to impede the control of pollution emanating from the landfill. On the other hand Lois Imhoff testified that Dr. Richard Meyer and Richard Starr had told the quorum court that a buffer zone could provide protection and a safety area to correct leaking problems. Richard Starr confirmed that point of view to the chancellor in live testimony.

The goal of the quorum court was to protect water sources from landfill pollution — certainly a legitimate objective. It adopted an ordinance which endorsed a two-mile buffer zone as a means of doing this. We will not dismiss distance as a totally arbitrary reason for the ordinance when the record contains support for this position from the testimony of Richard Starr as well as other public comment, and when the quorum court members say they looked to common sense for additional support for their position. We are especially reluctant to give total credence to Sunray's experts when their testimony was premised to some extent on sub-surface geology, and no tests or analyses have been performed to ascertain the geology between Durham and the Middle Fork of the White River.

We also note that other jurisdictions have looked to distance

as a meaningful criterion for limiting landfill sitings. *See* Fla. Stat. Ann. § 403.707(5) (West Supp. 1990) (3,000 feet as the limiting distance); R.I. Gen. Laws § 23-18.9-9.1() (Reen. 1989) (total prohibition in watersheds for drinking water); RSA 483:4 (XVIII) (Supp. 1990) (1,320 feet from normal high water mark of designated natural rivers).

The chancery judge appears to some extent to have weighed the efficacy of competing methods for combating landfill pollution. In doing so, he looked to the fact that "overwhelming testimony" negated proximity to water as a reliable basis for predicting landfill pollution. The appropriate inquiry, however, was to ask whether a two-mile distance could have *any* bearing on landfill containment. For the ordinance to be arbitrary there must be a finding that it could have absolutely no bearing on the objective, and the testimony before the chancellor was conflicting on that point.

We, therefore, hold that the findings of the chancery judge pertaining to the arbitrariness of the ordinance and the absence of a legitimate rationale to sustain it to be clearly erroneous. We further hold that the chancellor erred as a matter of law in concluding that there was no rational relationship between the ordinance and pollution containment, since the quorum court members could have determined from the information before them that distance was a legitimate rationale for the ordinance.

II.

EQUAL PROTECTION

The chancery judge concludes in his Decree that the ordinance creates an unlawful classification against landfill owners and operators, but he does not define the favored class. Nor does Sunray in its complaint. The classification alleged could be between landfill owners within the buffer zone and other businesses in Washington County; or between landfill owners in the zone and landfill owners outside of the zone; or between landfill owners in the zone and other businesses in the zone. Our review is hampered by not knowing precisely what is the classification in question.

[redacted] Clearly, Sunray and other similarly situated landfill owners in the buffer zone are singled out. Nevertheless, though a classification may exist in state law, any rational basis which demonstrates the possibility of a deliberate nexus with legitimate state objectives will save the ordinance. *Arkansas Hosp. Ass'n* v. *Arkansas State Board of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989); *see also Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985). We have already held in this case that such a rational basis exists, and the U.S. Supreme Court has further held that the judiciary should not sit as a superlegislature to judge the wisdom or desirability of legislative policy in equal protection cases which do not affect fundamental rights and where regulation of local economic matters is involved. *See City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976) (per curiam). We, accordingly, reverse the chancellor's conclusion that the ordinance establishes an arbitrary classification and violates the Equal Protection Clause.

III.

PREEMPTION

The chancellor acknowledged in his decree that the quorum court was authorized by state law to adopt more restrictive landfill standards than Pollution Control under Ark. Code Ann. § 8-6-209 (Repl. 1991). He went on to state that these standards must not conflict with any state law, but he did not find or conclude that such a conflict existed. In his memorandum opinion handed down the same date as his decree, he specifically says that if the ordinance had had a rational basis, it would not have been inconsistent with state or federal law.

The Solid Waste Management Act was passed by the Arkansas General Assembly in 1971. *See* Ark. Code Ann. § 8-6-201, *et seq.* (1987). During its last two regular sessions the General Assembly passed two comprehensive amendments to the Act. Act 870 of 1989 and Act 752 of 1991, now codified at Ark. Code Ann. § 8-6-201, *et seq.* (Repl. 1991 and Supp. 1991). The stated purpose in both Acts was to remedy disparities among the counties in their capacity to dispose of solid waste and in their ability to implement environmentally responsible operations. Both acts establish regional districts and create regional boards to adopt solid waste plans and to issue landfill permits.

Neither Act 870 nor Act 752 expressly repealed the counties' authority to adopt more stringent landfill standards under Ark. Code Ann. § 8-6-209 (Repl. 1991). And like the chancellor we do not find a repeal of § 8-6-209 due to a direct conflict with inconsistent provisions in the two new acts. On this point we have been resolute in holding that repeals of statutes by implication are not favored. *See City of Ft. Smith* v. *Driggers*, 294 Ark. 311, 742 S.W.2d 921 (1988); *Davis* v. *Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980). Moreover, § 8-6-209 can be harmonized with the existing Solid Waste Management Act in that while regional boards are authorized to issue landfill permits under the Act, this does not preclude local governments from adopting additional landfill standards. In this same vein our County Government Code provides generally that it is consistent for the counties to promulgate more exacting standards of conduct than the state has adopted. *See* Ark. Code Ann. § 14-14-809(c) (1987).

Sunray also advances the argument that the state and federal governments have preempted the area of solid waste management, including the issuance of permits, and further argues that when Pollution Control authorized Sunray to commence the preapplication process, the quorum court could not impede this action by passing an ordinance and refusing to approve the Durham site. Sunray adduces much case authority from other jurisdictions in support of its preemption argument. But the authority cited does not embrace a situation, such as we have here, where a state statute specifically authorizes the counties to adopt more stringent landfill standards than the state. In sum, the power of the quorum court to act as it did in this case in passing the ordinance is expressly recognized under state law in § 8-6-209, and that section has not been repealed. We hold that neither the Arkansas Solid Waste Management Act nor the Resource Conservation and Recovery Act have preempted the authority of local governments to adopt additional landfill standards as provided for in this statute. *See* 42 U.S.C. § 6901, *et seq.* (1988); Ark. Code Ann. § 8-6-201, *et seq.* (Repl. 1991 and Supp. 1991).

IV.

DE NOVO REVIEW

[redacted] We agree with Sunray that in an appeal from a chancery court decision all issues raised before the chancellor are before this court for review. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). However, we do not find merit in Sunray's *de novo* arguments.

[redacted] a. *Vagueness*. Sunray contends that the ordinance is vague and overbroad in that it does not specify the factors that will determine "any other main water source," it does not define "civil penalties," and it does not state whether the two-mile buffer zone begins at the centerline of the river or the shoreline. The ordinance lists the primary water sources which vitiates this argument, while providing flexibility for the quorum court to expand on the list. There is also a legitimate flexibility in the civil penalties to be sought. Lastly, if it is the entire water source that is meant to be protected, common sense requires that the shoreline be the boundary of the buffer zone. Cf. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

[redacted] b. *Separation of powers*. Sunray attacks the ordinance on grounds that the quorum court retains the power to approve civil litigation brought by the EAC officer, in conjunction with the county judge. This shared authority with the county executive does not constitute a usurpation of executive power such as occurred in *Chaffin* v. *Arkansas Game and Fish Commission*, 296 Ark. 431, 757 S.W.2d 950 (1988).

[redacted] c. *Retrospective application*. The ordinance was not applied retrospectively, as Sunray argues, but used prospectively to deny the application. Undeniably, the ordinance's adoption and denial of the landfill application were closely related in the minds of some, if not all, quorum court members. But the ordinance was passed first and subsequently used as a means for dismissing the application.

[redacted] d. *Impairment of contract*. No contract with Sunray was impaired by the adoption of the ordinance. The landfill site was purchased with full knowledge that it would not be operational without government approvals. Adoption of the ordinance was a facet of that approval process.

e. *Planning Board referral.* The Planning Board does have authority to prepare a zoning ordinance for the county. *See* Ark. Code Ann. § 14-17-209(a) (1987). But that is not exclusive authority which divests the quorum court of its power to adopt standards for the location of landfill sites. *See* Ark. Code Ann. § 8-6-209 (Repl. 1991).

f. *Exclusionary zoning.* Though Sunray contends that landfills, as a practical matter, are almost totally excluded throughout the county, this fact is disputed by the appellants. The chancellor made no finding on this point. Without a clear factual basis to sustain a holding of exclusionary zoning, we decline to so hold.

g. *Bill of attainder.* Sunray finally argues that the ordinance was a punishment directed specifically at its business and its landfill application in violation of the federal constitution and state law. *See* Ark. Code Ann. § 14-14-805(8) (1987). We disagree. While the Sunray application may have been the immediate catalyst for quorum court action, landfill standards were a source of on-going debate before the quorum court. The ordinance does not provide a specific penalty for Sunray or landfill owners in general. Followed to its logical end, Sunray's argument suggests that all regulations, zoning or otherwise, which affect landowners are acts of attainder. That is not the law.

Reversed.

Mark Anthony McKILLION *v.* STATE of Arkansas

CR 91-73 815 S.W.2d 936

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Keith N. Wood, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Sr. Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant, Mark Anthony McKillion, was charged with breaking and entering and theft, with penalties to be assessed under the habitual offender statute. He was convicted of both offenses in the guilt phase of the bifurcated trial, and during the sentencing phase the trial court found that he was an habitual offender with four or more prior convictions and so instructed the jury. The court further instructed the jury that the sentence to be considered for the breaking and entering offense which is a Class D felony was eight to fifteen years under the habitual offender statute. *See* Ark. Code Ann. § 5-4-501 (1987). For burglary the jury was instructed that the punishment was ten to thirty years under the same act. *Id.* The jury sentenced the appellant to the maximum term in each case — fifteen years for breaking and entering and thirty years for burglary, with the two sentences to run concurrently.

At the time of the instruction on sentencing during the penalty phase, the appellant requested that the trial court also instruct the jury on sentencing for breaking and entering, which had a penalty of not more than six years, and under the burglary statute, which had a term of years of three to ten years. *See* Ark. Code Ann. §§ 5-4-401(a)(4), 5-4-501(a)(5) (1987). The trial court refused to instruct the jury on penalties for the individual offenses, and that is the sole basis for the appellant's appeal. We agree with the trial court's decision.

The trial court was correct in instructing the jury under the habitual offender statute. We decided this identical issue as recently as last year. *See Hart* v. *State*, 301 Ark. 200, 783 S.W.2d 40 (1990); *see also Woodson* v. *State*, 302 Ark. 10, 786 S.W.2d

120 (1990). In *Hart*, the appellant also argued that an instruction on the penalties for the offenses charged should be given and that the language for penalties under the habitual offender statute was permissive since it used the term "may," and, therefore, permitted an instruction of penalties under the non-habitual offender statute. We rejected the argument and held that the sensible meaning of the statute was to give the jury discretion to sentence only within the parameters set out in the habitual offender statute. We see no reason to reverse our position on this issue, and because the *Hart* case effectively disposes of the matter, we affirm.

James E. BUSH *v.* Sherrell BUSH

RC 91-50 816 S.W.2d 590

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Thomas R. Newman, for appellant.

Carolyn Whitefield, for appellee.

PER CURIAM. Appellant, James E. Bush, through his attorney, has tendered the record in this case, but the clerk has notified his attorney that the record on its face appears to be without the time allotted for docketing. Appellant insists the clerk is in error in refusing to file the record and has filed a motion for a rule on the clerk. *See* Rule 5 of the Rules of the Supreme Court and Court of Appeals. The rule is denied.

On January 30, 1991, the final decree was entered. On that same day the appellant filed a motion for a new trial. On February 8, 1991, he filed a notice of appeal. On February 27, 1991, the Chancellor took his motion under advisement and, on June 24, 1991, denied it. Appellant filed his second notice of appeal on July 15, 1991.

[redacted] In 1988, we significantly amended Rule 4(c) and (d) in an effort to simplify Arkansas appellate practice.

Rule 4(c) of the Rules of Appellate Procedure now provides:

> (c) *Disposition of Posttrial Motion.* If a timely motion listed in section (b) of this rule is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion. *Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice of appeal filed before the expiration of the 30-day period shall have no effect.* A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period. No additonal [additional] fees shall be required for such filing. (Emphasis added.)

A part of the Reporter's notes to the foregoing rule provides:

> Thus, the 1988 amendment follows the more simplified procedure established in the federal rule, but adds a 30-day "window" for judicial action on postrial motions to prevent problems with excessive delay. Under Rule 4(c), a motion is deemed denied if the trial court neither grants nor denies the motion with 30 days of its filing, and, under Rule 4(d), the time for filing the notice of appeal begins to run at the end of that 30-day period. If, however, an order granting or denying the motion is acted upon within the 30-day period, the time for filing the notice of appeal begins to run upon entry of the order.

Appellant cites a number cases construing an older version of the rule. Under the older version of the rule, the 30-day period for filing a notice of appeal ran from the expiration of 30 days

after the motion for a new trial was filed *unless the motion was set for a hearing or was taken under advisement within 30 days after it was filed. See, e.g., Watts* v. *Reynolds*, 286 Ark. 425, 692 S.W.2d 247 (1985). Rule 4(c) no longer contains the italicized language, and the cases interpreting the older version of Rule 4(c) are to be distinguished.

Rule denied.

IN THE MATTER OF THE ESTATE OF Janet Louise McLAUGHLIN

91-225 815 S.W.2d 937

Supreme Court of Arkansas
Opinion delivered September 23, 1991

Gary Eubanks & Associates by: *James Gerard Schulze*, for appellee.

George D. Ellis and *Steven W. Quattlebaum*, for appellee.

PER CURIAM. Janet Louise McLaughlin died intestate on September 26, 1990, in an automobile accident. Her son, Justin Cardin, was injured in the same accident. She was survived by her husband, Greg McLaughlin; her injured son, Justin Cardin; her parents, Billy and Charlene Williams; and her brother and sisters.

On October 8, 1990, Billy and Charlene Williams filed a petition to be appointed guardians of the person and estate of their injured grandson, Justin Cardin. They were subsequently

appointed guardians.

On October 11, 1990, in a separate probate proceeding, Greg McLaughlin was appointed administrator of the Estate of Janet Louise McLaughlin.

On May 28, 1991, Billy and Charlene Williams filed a pleading in the probate proceeding in which Greg McLaughlin had been appointed administrator of the Estate of Janet Louise McLaughlin. They labeled the pleading a "Petition for Right of Intervention to Protect Interest of Justin Cardin." In it, they sought to be appointed special administrators of the Estate of Janet Louise McLaughlin. Underlying these pleadings is a dispute over whether Greg McLaughlin's attorneys or Billy and Charlene Williams' attorneys will represent Justin in his case against the third party tortfeasor. The trial court denied the petition for appointment of a special administrator. Billy and Charlene Williams seek to appeal. We dismiss the appeal.

Ark. Code Ann. § 28-1-116(b) (1987) provides:

> (b) Orders Which Are Not Appealable. There shall be no appeal from an order removing a fiduciary for failure to give a new bond or to render an account as required by the court, nor from an order appointing a special administer.

Ark. Code Ann. § 28-48-103(f) (1987) provides:

> (f) The order appointing a special administrator shall not be appealable.

The Williamses contend that the cited statutes prohibit the appeal of the appointment of a special administrator but do not prohibit the appeal of an order denying the same. We do not think the legislature intended the statutes to be so interpreted.

Our statutory interpretation is guided, in part, by decisions from other states which have similar statutory language.

[redacted] In *Graham* v. *Gipson*, (In re Gibson's Estate), 64 Ariz. 181, 167 P.2d 383 (1946), the Arizona Supreme Court, in interpreting a statute almost identical to those cited above, held:

> The order [refusing to appoint a special administrator], is not an appealable order under our statutes. There is no provision in [the Arizona Probate Code] providing for

> an appeal, either from the appointment or the refusal to appoint a special administrator. In fact, no appeal may be taken from an order appointing a special administrator. *We hold that the converse of this statutory rule is also the law, and that there is no appeal from an order refusing to appoint a special administrator.* (Emphasis added.)

167 P.2d at 384.

The Montana Supreme Court reached the same conclusion in *McCabe* v. *District Court*, 106 Mon. 272, 76 P.2d 634 (1938). In that case, the court, citing a state statute which provided that no appeal must be allowed from the appointment of a special administrator, held that there was no appeal from an order refusing to appoint a special administrator. *Id.* at 638.

Accordingly, we dismiss the appeal.

Douglas Wayne EASTER *v.* STATE of Arkansas

RC 89-66 815 S.W.2d 391

Supreme Court of Arkansas
Opinion delivered September 25, 1991

Maxie G. Kizer, for appellant.

Winston Bryant, Att'y Gen., by: *Olan W. Reeves*, Senior Asst. Att'y Gen., for appellee.

PER CURIAM. The motion for belated appeal is granted.

DUDLEY, GLAZE, and CORBIN, JJ., dissent.

TOM GLAZE, Justice, dissenting. In a per curiam dated February 8, 1988, this court outlined the pertinent facts of what occurred in this case after Douglas Easter was found guilty of aggravated robbery and sentenced to twenty years imprisonment. Easter perfected no appeal, but later filed a motion with this court to allow him a belated appeal because his retained attorney, Charles L. Honey, had failed to perfect an appeal even though

Easter had requested Honey to do so. In response to Easter's motion, Honey filed his response and affidavit stating he had advised both Easter and his family of his right to appeal. In our per curiam, we summarized Honey's version of his communication with Easter and his family as follows:

> After he informed Easter that the appeal would cost $2,500 plus the cost of the transcript, Easter elected not to proceed with an appeal. Honey also states in his affidavit that he informed Easter that if he was unable to afford an appeal, he would ask to be relieved as counsel so that Easter could ask the trial court to appoint an attorney to represent him on appeal at public expense. Honey contends that Easter held fast to his decision not to appeal even after being informed that he could apply to the trial court for indigent status.

Because a conflict arose in Easter's and Honey's versions about whether Easter had waived his right to appeal, we remanded the factual issue to the trial court. This court recognizes that it is the trial court's task to assess the credibility of witnesses and resolve conflicts of fact. *See Allen* v. *State*, 277 Ark. 380, 641 S.W.2d 710 (1982). The trial court resolved the issue, finding Easter had knowingly, intelligently and voluntarily waived his right to appeal. Based on that factual resolution, this court denied Easter's motion for a belated appeal.

Easter later filed a *habeas corpus* petition in the United States District Court, Eastern District, Pine Bluff, and alleged ineffective assistance of counsel. The federal magistrate judge agreed with the state trial court and found that the state court's finding of fact after an evidentiary hearing was presumed to be correct. *See* 28 USC § 2254(d). The magistrate recommended dismissal of Easter's petition. The federal district court rejected the magistrate's recommendation and disagreed that the state court's findings should be presumed correct because the record did not show the trial court informed Easter of his right to appeal. The federal district court is wrong on this point.

At the evidentiary hearing before the state court, Honey testified that the trial judge told Easter he had thirty days to perfect an appeal and Easter agreed, saying, "I think [the judge] said something like that." Easter was asked also whether the

judge was on the bench when the judge told him he had thirty days to appeal and Easter responded, "Yes, sir, he could have."[1]

Regardless of whether the trial judge informed or did not inform Easter of his right to appeal, the record is replete with evidence that he was fully aware of his appeal rights. He admitted this knowledge in his handwritten motion seeking a belated appeal, and conceded that he discussed his desire to appeal on the day he was sentenced. Nonetheless, after Honey told Easter that he would handle his appeal for a fee of $2,500, Easter never discussed the appeal again with Honey. It is settled law that an attorney is not required to perfect an appeal when the petitioner who is aware of his appeal rights stands silent. *Davis* v. *State*, 293 Ark. 203, 736 S.W.2d 281 (1987); *Munn* v. *State*, 278 Ark. 283, 644 S.W.2d 945 (1983).

In my view, the state trial court's findings and decision were amply supported by the record, and the federal district court is clearly wrong in ignoring those findings. Easter knew he had thirty days to lodge an appeal. He also knew he could petition for appointed counsel if he could not pay his retained attorney's proposed fee. Yet, neither Easter nor his family did anything. Our case law clearly reflects Easter, by standing silent, waived his right of appeal. In my view, the federal district court is wrong in making its own findings in this case and ruling Easter should be freed if his belated appeal is not granted.

DUDLEY and CORBIN, JJ., join this dissent.

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[1] Apparently, the federal district court found this testimony in conflict with the sentencing transcript which did not include the trial judge's admonition that Easter had thirty days to appeal. If so, I can find nothing in the record where the court attempted to settle the record to determine why this conflict exists.

Dale Freemond DAY *v.* STATE of Arkansas

CR 91-94 816 S.W.2d 852

Supreme Court of Arkansas
Opinion delivered September 30, 1991

[redacted]

Denny Hyslip, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Dale Freemond Day, the appellant, was convicted of battery in the first degree and murder in the first degree, and sentenced to ten and forty years imprisonment, respectively. The sentences are to run concurrently.

Day now seeks reversal of his convictions, alleging that the trial court erred; 1) in admitting two photographs of the murder victim into evidence; 2) in refusing to sever the battery and murder offenses; 3) in refusing to grant funds for a private psychiatric evaluation; and 4) in allowing the admission of Day's statements into evidence. We disagree with all four arguments and affirm.

The facts at trial were presented primarily through the testimony of the battery victim, the investigating officers, and Day, himself.

On the evening of March 3, 1990, Day, who had been residing in Minnesota, arrived at the home of his estranged wife, Victoria Day, in West Fork, Arkansas. Finding no one there, Day entered one of the bedrooms and eventually fell asleep. He awoke to the sound of the television and realized that Victoria and her uncle, James Woodring, with whom she had been having an affair, were in the living room watching a T.V. program. Victoria shortly thereafter entered the bedroom, whereupon Day struck her repeatedly with the butt of a shotgun, breaking both of her hands. Day then went into the living room and hit Mr. Woodring with the shotgun. Mr. Woodring had been asleep on the couch

and when he attempted to rise, Day shot him. Day shot Mr. Woodring twice more as Mr. Woodring attempted to leave the house through the front door. The victim got as far as the driveway before he collapsed and died. Day asked Victoria for her car keys and drove Victoria's car to a nearby convenience store where he had parked his own car earlier. Day exchanged cars, drove to the sheriff's department, and turned himself in at approximately 2:45 a.m. on March 4.

I. *ADMISSION OF PHOTOGRAPHS*

Day first contends the trial court erred in admitting into evidence two photographs, State's exhibits 3 and 4, depicting James Woodring's body after the shooting. Day asserts the pictures were overly gruesome and inflamatory and that the probative value of the pictures was outweighed by their prejudicial effect. We do not agree.

Testimony at trial established that Mr. Woodring had been asleep prior to Day's assault and that he ran out of the house, barefoot, to escape from Day. State's Exhibit 3 showed that Mr. Woodring was shoeless, and Exhibit 4 showed where Mr. Woodring had fallen in proximity to the house. They were the only photographs of the crime scene admitted into evidence.

Even inflamatory photographs can be admitted if they shed light on any issue or are helpful to the jury. *Strawhacker* v. *State*, 304 Ark. 726, 804 S.W.2d 720 (1991). The admission of such evidence lies within the discretion of the trial court, and we will not reverse, absent an abuse of that discretion. *Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990). We find no such abuse here.

II. *SEVERANCE OF OFFENSES*

Day next argues that the trial court erred in denying his pretrial motion to sever the first degree battery charge and the first degree murder charge.

In addition to the battery and murder offenses, Day was charged with felon in possession of a firearm. The trial court severed this offense, but held that the battery and murder charges should be tried together as they were "part of the res gestae."

Ark. R. Crim. P. 21.1 provides:

> Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

A trial court's decision to deny a motion for severance is discretionary, and two or more criminal offenses are based "on a series of acts connected together" when the offenses occurred close together in time and place. *Gillie* v. *State*, 305 Ark. 296, 808 S.W.2d 320 (1991) (citing *Brown* v. *State*, 304 Ark. 98, 800 S.W.2d 424 (1990)).

Here, Day's assault on Victoria Day occurred only minutes before Day shot and killed James Woodring, who was present in the next room. Furthermore, Day's distress and jealousy over his wife's affair with Mr. Woodring can fairly be characterized as the "single scheme or plan" which prompted him to commit the offenses. The court was correct in not severing the charges.

III. *PSYCHIATRIC EVALUATION*

Citing *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), Day next claims the trial court erred in refusing to grant his request for a private psychiatric evaluation in order to determine his competency to stand trial. *Ake* provides in pertinent part:

> . . .[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

470 U.S. at 83. Day's claim is without merit. In the first place, an examination of the record reflects that Day did not demonstrate

to the trial judge that his present competence or his sanity at the time of the offenses would be a significant factor at trial. The trial court, as a cautionary measure, ordered psychiatric evaluation of Day by Dr. Travis Jenkins of the Ozark Guidance Center. Dr. Jenkins reported that Day was competent to stand trial and that there was "no evidence to suggest that he was psychotic at the time of the alleged offenses. . .", or during Dr. Jenkins' interview with him.

As a result of Dr. Jenkins' report, Day filed a motion to appoint a private psychiatrist, claiming that since he had some difficulty with anxiety, depression, and behavioral problems, he was entitled to the opinion of a "private employed expert." In denying Day's motion, the trial court noted that Dr. Jenkins' report reflected that "any evidence of anxiety, depression or behavioral problems were not pertinent to [Day's] psychiatric assessment around the time of the alleged offenses," and that "he had been afforded an evaluation at [the] Ozark Guidance Center by a duly licensed and qualified psychiatrist. . ."

We have repeatedly held that a defendant's right to examination under *Ake* is protected by an examination by the state hospital. *Wainwright* v. *State*, 302 Ark. 371, 790 S.W.2d 420 (1990); *Branscomb* v. *State*, 299 Ark. 482, 774 S.W.2d 426 (1989). So, even if Day was entitled to an examination, his evaluation at the Ozark Guidance Center is equivalent to examination by the State Hospital. We find no fault in the trial court's rulings.

IV. *ADMISSION OF STATEMENTS*

Lastly, Day argues that the trial court erred in allowing into evidence the oral and written statements he made to the police.

Day filed a pretrial motion to suppress all oral and written statements, alleging they were obtained in violation of his privilege against self-incrimination and right to counsel. A suppression hearing was held in which the State called the two officers present when the statements were made. Officer Seigle Bell, an investigator with the Washington County Sheriff's Department, was on duty at the Sheriff's office when Day turned himself in in the early morning hours of March 4. Officer Bell testified that Day came into the dispatch room with Corporal

Leroy Johnson, who pointed to Day and stated, "I think this is the man you're looking for." (Officer Bell testified that he had previously received a report of a possible homicide which named the appellant as a suspect.) Day stated his name, and Officer Bell asked him to place his hands against the wall while he proceeded to pat Day down for weapons. At that point, Day remarked: "The gun is in my car. It's parked outside." Officer Bell immediately escorted Day to the waiting room and advised him of his *Miranda* rights.

Day challenges the admission of this initial statement on the grounds that his entrance to the Sheriff's office placed him in a custodial situation and that he should have been "mirandized" before he uttered the incriminating information. We agree with the trial court, however, that the statement was admissible as a spontaneous utterance.

In determining whether statements are admissible, we evaluate the totality of the circumstances and reverse only if the trial court's finding is clearly against the preponderance of the evidence. *Walker* v. *State*, 303 Ark. 401, 797 S.W.2d 447 (1990). The statement was made within minutes of Day's arrival at the station, and there is no evidence that Day was coerced or induced into speaking. Officer Bell's decision to frisk Day first for weapons was appropriate under the circumstances and did not constitute the type of "custodial interrogation" for which the *Miranda* warnings were designed. We have held many times that a suspect's spontaneous statements, although made in police custody and prior to *Miranda* warnings, are admissible against him. *See Futch* v. *State*, 288 Ark. 323, 705 S.W.2d 11 (1986); *Ward* v. *State*, 272 Ark. 99, 612 S.W.2d 115 (1981).

The other admitted statements to which Day objects occurred after he was twice issued the *Miranda* warnings. In the first instance, Officer Bell testified that he read each sentence from the standard form used in the department and wrote down Day's response. Day then reviewed and initialed the form, indicating that he understood his rights.

Following this procedure, Officer Bell and Day entered Officer Bell's office and sat down with a cup of coffee, at which point Day began talking about the incident, implicating himself in both the battery and murder offenses. Officer Bell testified that

he advised Day to wait until Captain O'Kelly arrived, before talking, but Day insisted on continuing.

When Day completed his story, Officer Bell told him that he was going to write out a statement from his notes and have Day sign it. Day then stated, "Well, before I sign anything, I probably better talk to a lawyer."

Captain O'Kelly testified that when he arrived, Officer Bell briefed him concerning Day's statement and informed him that Day wished to speak with an attorney before proceeding further. In the presence of Officer Bell, Captain O'Kelly again advised Day of his *Miranda* rights, and Day executed a second statement of rights form. Captain O'Kelly then informed Day that he knew of Day's request for counsel and asked Day whether he wanted him to contact a lawyer, to which Day responded that Officer Bell had been mistaken about his request and that he only wanted a lawyer prior to going to court. Captain O'Kelly testified that Day "wanted to tell him what happened." Day allowed Captain O'Kelly to make written notes of his statement, at the end of which he added his signature.

As to Day's oral statement to Officer Bell, Day merely argues that this statement is inadmissible since it was "tainted" by the first oral statement. This argument is meritless as the first statement was a spontaneous utterance.

Furthermore, again reviewing the totality of the circumstances, there is no evidence that Day (a repeat offender with five previous convictions) was not fully aware of his rights. Officer Bell testified that Day appeared sober and reasonable and clearly indicated that he understood the rights read to him. Once Day received and understood the *Miranda* warnings administered to him but, nonetheless, insisted on talking to Officer Bell, he waived those rights.

With regard to the statement made to Captain O'Kelly, Day contends that it, too, was tainted and also, that when he informed Officer Bell he wanted an attorney, all interrogation should have ceased. The trial court ruled that Day effectively recanted this request when he informed Captain O'Kelly that Officer Bell had been wrong about his desire for counsel, and that he wanted to talk. In addition, the trial court noted that there was

a serious question as to whether Day actually asserted his right to counsel. In either event, the trial court was correct.

Professors LaFave and Israel state in *Criminal Procedure*, Vol. 1, § 6.9 (1984 and Supp. 1991), "there is much to be said for the conclusion some courts have reached: 'where a suspect makes an equivocal assertion of counsel, the police must cease all questioning, except that they may attempt to clarify the suspect's desire for counsel.' " (Citing *Towne* v. *Dugger*, 899 F.2d 1104 (11th Cir. 1990)). *See also United States* v. *Fouche*, 776 F.2d 1398 (9th Cir. 1985). Here, Day's comment that he wanted to talk to a lawyer "before I sign anything" constitutes the type of "equivocal" assertion to which Professors LaFave and Israel are referring, and should not preclude further questioning to clarify the matter. *See* Criminal Procedure, supp. 1991 at 132.

We do not agree with Day that Captain O'Kelly's dialogue with him following his announcement that he would like to talk with counsel before signing anything amounted to "interrogation." Captain O'Kelly was merely clarifying Day's request and took no action to elicit incriminating information. Even if we found that Day properly invoked his right to counsel, his statement still became admissible evidence since it was he, and not the police, who initiated further discussion of the evening's events. *See Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988).

For the foregoing reasons, we affirm.

Joseph Harold WENZEL *v.* STATE of Arkansas

CR 91-76 815 S.W.2d 938

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Davis and Associates, P.A., by: *Charles E. Davis*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Joseph Harold Wenzel, was charged with breaking into two homes and raping the occupants. He was tried by a jury, convicted of two counts of burglary and two counts of rape, and sentenced to a total of sixty years imprisonment.

On appeal, Wenzel claims the trial court erred in allowing the admission of FBI DNA profile test results because 1) the DNA laboratory proficiency test results were not timely dis-

closed, and 2) the DNA profile test results were obtained from vaginal swab samples which were depleted during testing. There is no merit to either of Wenzel's arguments, and we affirm.

Wenzel first argues that the DNA profile test results should not have been admitted into evidence since the State's failure to timely provide the proficiency test results, with regard to the profiles, deprived him of due process and his right to pretrial discovery.

The FBI DNA profile results were obtained by comparing Wenzel's blood samples with vaginal swab samples containing semen, taken from both victims. Agent Lawrence Presley, who conducted the analyses, testified that both tests revealed a "match" between the DNA profile of Wenzel's blood and the semen obtained from the vaginal swabs. Although the record is unclear as to its definition, proficiency testing apparently is an internal procedure, conducted by the FBI on occasion, to determine whether its laboratory technicians are performing the analyses correctly.

In preparation for trial, Wenzel's counsel filed a motion for discovery of all scientific tests. Later, Wenzel filed an amended motion for discovery in which he requested a number of documents pertaining to the DNA tests. Wenzel received all the items requested, including autoradiographs, laboratory notes and the profile results, except for the proficiency test results.

The trial court conducted what it termed a "*Frye*" hearing[1] on July 11, 1990, to determine whether the DNA profile tests constituted admissible evidence and to consider Wenzel's discovery motions, particularly with regard to discovery of the proficiency tests. Agent Presley testified that it was the policy of the FBI not to release the proficiency tests. The hearing was contin-

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[1] The term "*Frye*" hearing stems from the seminal case of *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), which first promulgated a standard for determining the admissibility of novel scientific evidence. Although it labeled the hearing as such, the trial court noted that this court has not yet decided whether to adopt the *Frye* standard of admissibility (*see Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 78 (1986)), and thus considered the matter in light of both *Frye* and the Arkansas Rules of Evidence. Again, we need not determine which standard is appropriate since the issue of reliability and admissibility of the DNA tests, themselves, is not before us.

ued on August 30, on which date Wenzel filed a motion *in limine* requesting that the DNA profiling results be excluded since he had been denied access to the proficiency tests. The trial court ruled that the profile tests were generally admissible but reserved ruling on the motion *in limine* until the day of trial, which was to begin on September 4. The court, apparently concerned as to whether it had jurisdiction to order the FBI's release of the proficiency tests, instructed the State to determine why the FBI maintained a policy against releasing the proficiency "grades," and cautioned that Agent Presley should bring the records to trial and be ready to release them if so ordered.

On the second day of trial, just prior to the State's direct examination of Agent Presley, the trial court took up the matter of Wenzel's motion *in limine*. The following dialogue took place:

> THE COURT: The next one is that the defendant has been denied access to the proficiency tests. We had a hearing — I don't remember what day it was — when the FBI man was down here, Mr. Presley. It was about a month ago, maybe?
>
> MR. ZISER: The first part of July, Your Honor.
>
> THE COURT: And then on August 30th this Motion in Limine. Now, I've told you both on the record, I believe, that I was going to delay my ruling until I was able to have some information from the prosecutor. Are you willing to give — I know he said it was their policy not to give out proficiency tests. Now, are you not wanting to give them out?
>
> MR. ZISER: Your Honor, Agent Presley arrived today and he brought the proficiency test results with him. He told me that as far as he was concerned, just to release them. So the State is in position to release them to the defendant in this case if they still want them. I've got them right here on my desk. I would like to have a copy made so that I have one as well as the defense does, but I certainly have no objection to them seeing them.
>
> THE COURT: Mr. Davis?
>
> MR. DAVIS: Your Honor, I'm most grateful to the

State, but it's a little bit late in the hour to further proceed or call this witness until I have an opportunity to see those, Your Honor. Apparently, they were here not only today but yesterday.

MR. ZISER: No, sir, I got them over the lunch hour today.

THE COURT: Well, your original discovery motion has requested those, but it wasn't brought to my attention that you were still — you know, wanted a motion to compel. A month ago you asked this fellow on the stand, or the first part of July, and he said, Well, by golly, our policy is we don't give them up. Now on August 30th is when you filed your Motion in Limine asking me to do something about it, and I'm trying to do it. I've told them we're going to wait until this fellow comes down here and see what he's got. Now, he's got these proficiency tests and what I'm going to do is let you make copies of them, Mr. Ziser, or give him the originals one, so Mr. Davis can look at them before he has to cross examine the witness. *Over your objection, Mr. Davis*, I'm going to allow him to call the witness to get his testimony started this evening, and I'm going to quit about five o'clock and he can finish up his testimony in the morning. That will give you this evening to go through these proficiency tests to see if there's any bad test results in there or what's in there. I don't know. But that's how we're going to work it. Your objection to my ruling will be noted.

MR. DAVIS: Thank you, Your Honor.

THE COURT: Anything else on your motion? I think that finally got all your motion covered, didn't it?

MR. DAVIS: Yes, Your Honor.

(Emphasis added.)

[redacted] Wenzel's argument on appeal, that because he was not furnished the proficiency tests in a timely manner, he was denied due process and his right to pretrial discovery under A.R.Cr.P. Rule 17.1, was not raised below. Wenzel argued, in his motion *in limine* and at the pretrial hearing, that denial of *access* to the

proficiency tests violated the due process clause and the sixth amendment. Then, at trial, Wenzel's objection appears to have been premised on the fact that the court was going to permit Agent Presley to testify before Wenzel had an opportunity to examine the proficiency tests, to which the court responded, "Over your objection, Mr. Davis, I am going to allow them to call the witness, and he can finish up his testimony in the morning. That will give you this evening to go through these tests." Wenzel never objected, however, to untimely discovery and lack of time to examine the evidence, either when the court announced its decision to defer a ruling until the day of trial, or during the trial itself. More importantly, Wenzel did not ask for an additional continuance following his overnight examination of the records. *See Renton* v. *State*, 274 Ark. 87, 622 S.W.2d 171 (1981); *Hughes* v. *State*, 264 Ark. 723, 574 S.W.2d 888 (1978). Only specific objections made at trial are preserved for appeal. *Prince* v. *State*, 304 Ark. 692, 805 S.W.2d 46 (1991).

[redacted] Furthermore, by failing to object on the basis of untimely discovery, both when the trial court deferred its ruling at the pretrial hearing and when it granted an overnight continuance, Wenzel, in effect, agreed with the trial court's ruling by which the profile results would be admitted and cannot now attack that ruling on appeal. *See Matthews* v. *State*, 305 Ark. 207, 807 S.W.2d 29 (1991).

Wenzel also objects to the admission of the DNA profile test results on the basis that FBI technicians used up all of the semen found on the vaginal swabs, during the DNA testing. This objection was properly preserved in Wenzel's motion *in limine* and at the pretrial hearing.

[redacted] Wenzel concedes that the State did not technically *withhold* the samples, but argues that its failure to preserve enough evidence so that the defense could conduct its own tests, deprived him of a fair trial. The United States Supreme Court addressed the issue in *California* v. *Trombetta*, 476 U.S. 479, 488 (1984), stating: "[w]hatever duty the Constitution imposes on the State to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." The court opined that "evidence must both possess an exculpatory value that was *apparent before the*

evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. (Emphasis ours.) Later, in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), the court reiterated the necessity of showing the apparent exculpatory value of the evidence at issue and further held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. The court directed its holding to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.*

Wenzel has made no showing that the evidence possessed any apparent exculpatory value before it was destroyed, as required by the first prong of the standard in *Trombetta*, nor has he alleged or proven bad faith on the part of the State, as required by *Arizona*. Also, from the evidence presented at trial, the chance that the swab samples would have exonerated Wenzel appears virtually nil.

Affirmed.

Kenneth FERRELL *v.* COLUMBIA MUTUAL CASUALTY INSURANCE COMPANY

90-221 816 S.W.2d 593

Supreme court of Arkansas
Opinion delivered September 30, 1991

Arnold, Hamilton & Streetman, by: *Thomas S. Streetman*, for appellant.

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

ROBERT H. DUDLEY, Justice. The basic issue in this case is whether the statute setting out the method for prospectively

cancelling an automobile insurance policy has abrogated an insurance company's common law right to rescind an automobile insurance policy *ab initio*. We hold that under some circumstances an insurance company still has the right to rescission *ab initio*. In so holding, we reverse the trial court.

Kenneth Ferrell's automobile insurance policy, which had been issued by Southern Farm Bureau Insurance Company, ended at midnight, January 31, 1988. Early the next morning, February 1, he went to Jarvis Insurance Agency in Crossett to purchase a new policy, which would provide bodily injury, property damage, and collision coverage on his three (3) personal cars and a 1988 Toyota owned by his daughter Christi. The agency apparently assumed that he owned the Toyota. Harold Jarvis, the agent, quoted a price for such a policy. Kenneth said he wanted the cars to be covered immediately, and a clerk took his application. The trial court found that he made numerous material misrepresentations in the application including: not acknowledging his moving traffic violations; not acknowledging his wife's moving traffic violations; not listing his son's moving traffic violations or accidents; and, most importantly to this case, not listing his daughter's moving traffic violations. The trial court found that his daughter, Christi, had no knowledge of the material misrepresentations and did not participate in making them. However, Christi testified that her father was her agent in the procurement of the policy:

> Q. Were you relying on your father to get insurance for you or your car?
>
> A. Yes, sir.
>
> Q. And was he authorized to make an application on your behalf to get that insurance?
>
> A. Yes, sir. He was paying for my insurance, so I didn't—
>
> Q. I understand.

Kenneth paid the premium, and the Jarvis Agency issued a preferred-risk binder on Columbia Mutual Insurance Company. Three (3) days later, on February 4, 1988, Christi did not see a stop sign in Monroe, Louisiana, ran through it, and was hit by

another car. The market value of her 1988 Toyota was diminished by $11,500.00. In addition, her car destroyed a nearby street sign for which the City asked $89.03 in damages. She immediately reported the accident to the Jarvis Agency.

In the meantime, Columbia Mutual was processing the binder through its normal channels. It had requested U.S. Data, a reporting company, to check the driving history of the listed drivers. U.S. Data furnished the history, probably on February 9. On February 10, an underwriter for Columbia Mutual rejected the binder because of Kenneth's and Christi's driving records. The records reflected that Kenneth had two speeding infractions; Christi had four speeding infractions and one accident within the last three years. Under its preferred plan, Columbia Mutual will not issue coverage if a driver has had a driving offense within three years. On February 18, 1988, Columbia Mutual refunded the premium to Kenneth and advised him it was rescinding the policy, *ab initio*, because of his fraud. At that time, the underwriter did not know about Christi's wreck.

On February 25, 1988, Columbia Mutual filed suit in chancery court against Kenneth and Christi. The suit sought rescission of the policy retroactive to the date of issue, February 1. The basis of the suit was the material misrepresentation in the policy application.

Kenneth and Christi answered and filed a counterclaim and an amended counterclaim. They alleged that they had suffered property damages of $11,500.00 less a deductible amount of $250.00, and that they had paid $89.03 to the City of Monroe, for a total of $11,339.03 plus interest. They also sought a 12% penalty, and a reasonable attorney's fee pursuant to Ark. Code Ann. § 23-79-208 (1987). Finally, they prayed for punitive damages in the amount of $250,000 because of Columbia Mutual's "bad faith" in the "cancellation" of the insurance policy.

Columbia Mutual filed an amended complaint in which it asked alternatively that if the policy were not retroactively rescinded and if Columbia Mutual were required to pay any losses under the binder, then it be given judgment over and against Kenneth for his fraudulent misrepresentation. This amounted to an alternate common law action of deceit. The

chancery court took jurisdiction and began to hear all of the causes of action; however, at the conclusion of all the evidence, the chancellor granted Columbia Mutual's motion to strike Kenneth's and Christi's counterclaim for punitive damages on the ground that equity lacks jurisdiction to award punitive damages.

On September 30, 1988, the chancellor granted a partial summary judgment in favor of Christi. He found that the "notice of cancellation" provisions of Ark. Code Ann. §§ 23-89-303 and 304 (1987) and the public policy of this State prohibited Columbia Mutual's rescission of coverage *ab initio*. Subsequently, the chancellor granted Christi judgment against Columbia Mutual for $11,339.03, a 12% penalty of $1,360.72, and an attorney's fee of $8,507.37. The Chancellor awarded Columbia Mutual a judgment over and against Kenneth for the same amount. Kenneth appeals and designates four (4) points for reversal. Columbia Mutual cross-appeals and designates two (2) points. Because the cross-appeal determines the complete outcome of the case, we discuss it first.

In this appeal, Columbia Mutual argues that the trial court erred in refusing to rescind the binder *ab initio*. It argues Ark. Code Ann. §§ 23-89-303 and 304 (1987), which provide that an insurer must give notice before cancelling a policy, do not apply to first-party property damage coverage. The argument is meritorious.

It is undisputed that at common law an insurance company could retroactively rescind coverage because of fraud or material misrepresentation. *Old Colony Life Ins. Co.* v. *Fetzer*, 176 Ark. 361, 3 S.W.2d 46 (1928). Rescission of a contract and cancellation of a contract are two distinct remedies, based on different grounds, 17 G.J. Couch, *Couch Cyclopedia of Insurance Law*, §§ 67:33, 67:54 (R.A. Anderson, ed., 2d rev. ed. 1983). Cancellation takes effect only prospectively, while rescission voids the contract *ab initio*. *Id.*

Many courts have interpreted "no fault" insurance legislation, *see* Ark. Code Ann. § 23-89-202 (1987), and compulsory motor vehicle acts, *see* Ark. Code Ann. §§ 27-22-101—104 (Supp. 1991), as expressing a public policy that one who suffers a loss as the result of an automobile accident shall have a source and

means of recovery. As a result, courts have held that when an innocent third party has suffered damages as a result of an insured's negligent operation of an insured vehicle, there is no right of retroactive rescission. These courts have held that the insurance company's right of retroactive rescission has been abrogated, and the only remedy for an insurance company is prospective cancellation in accordance with the terms of the statute. *See Teeter* v. *Allstate Ins. Co.*, 9 App. Div. 2d 176, 192 N.Y.S.2d 610 (1959), *aff'd* 9 N.Y.2d 655, 212 N.Y.S.2d 71, 173 N.E.2d 47 (1961). There are additional reasons for holding that prospective cancellation statutes abrogate retroactive rescission of a policy of liability insurance. If an insurer could unilaterally rescind coverage, unscrupulous insurers could hold the threat over the head of third party claimants in an attempt to bargain down their claims; and immediately issued binders are a marketing gimmick, and insurers are not entitled to be protected from their own gimmicks because they could verify information before extending coverage. *See Metropolitan Property & Liability Ins. Co.* v. *Insurance Comm'r*, 535 A.2d 588 (Pa. 1987).

[redacted] Regardless of the reasoning used, all courts that have considered the question as it applies to an innocent third-party claimant have held that the insurer cannot, on the ground of fraud or misrepresentation, retroactively avoid coverage under a compulsory insurance or financial responsibility law. *See Dunn* v. *Safeco Ins. Co.*, 14 Kan. App. 2d 732, 798 P.2d 955 (1990), for a listing of cases. In this case, however, we are not dealing with an innocent third-party claimant and make no holding on that issue. Instead, we are dealing with the insureds themselves, Kenneth Ferrell and his daughter Christi, and we are not dealing with a liability policy, but instead with collision coverage. Kenneth made the material misrepresentations for himself and as agent for his daughter. His misconduct is imputed to her.

[redacted] There is no compulsory insurance statute which requires one to insure oneself against his own property loss. *See* Ark. Code Ann. § 27-22-104 (Supp. 1991). Thus, when a case involves only the insured and the insurer, and the loss involves the insured's property, there is no public policy reason to hold that the insurance company's common law right to rescission has been abrogated. *Dunn* v. *Safeco Ins. Co.*, *supra*; *United Security Ins. Co.* v. *Comm'r of Insurance*, 133 Mich. App. 38, 348 N.W.2d 34

(1984). To hold otherwise would permit an insured to benefit from his fraudulent misrepresentations and leave the insurer without a remedy.

One case is contra, but it is based upon a statute that is markedly different from ours. In *Metropolitan Property & Liability Ins. Co.* v. *Insurance Comm'r*, 535 A.2d 588 (Pa. 1987), the court held that the statute providing for prospective cancellation abrogated the common law right of retroactive rescission between the insurer and the insured because the statute provided:

> Nothing in this Act shall apply . . .
>
> (3) To any policy of automobile insurance which has been in effect less than sixty days, unless it is a renewal policy, except that no insurer shall decline to continue in force such a policy of automobile insurance on the basis of the grounds set forth in subsecton (a) *of section 3 hereof and except that if an insurer cancels a policy of automobile insurance in the first sixty days, the insurer shall supply the insured with a written statement of the reason for cancellation.*

Id. at 594.

In construing the italicized language the court wrote:

> the explicit language of the exception . . . clearly indicates the legislative intent to govern the termination of policies even during the sixty day period. Although that language prescribes only minimal procedures to be followed, it nevertheless clearly prescribes what an insurer *must* do.

Id. at 594.

On the other hand, our statute clearly provides a sixty day grace period during which the common law rules of rescission apply.

> This section shall not apply to any policy or coverage which has been in effect less than sixty (60) days at the time notice of cancellation is mailed or delivered by the insurer unless it is a renewal policy.

Ark. Code Ann. § 23-89-303(b) (1987).

[redacted] Accordingly, we hold that the Arkansas compulsory insurance statutes have not abrogated the insurer's common law right to rescission when: (1) only the insurer and the insured are involved in a non-compulsory provision of the policy, and (2) the policy has been in existence less than sixty (60) days, unless it is a renewal policy.

[redacted] Courts may sever compulsory provisions of an insurance policy from non-compulsory provisions and permit rescission only as to non-compulsory provisions. *Dunn* v. *Safeco Ins. Co.*, *supra*. In *Bankers & Shippers Ins. Co.* v. *McElveen*, the court wrote:

> The generally accepted rule is that "[w]here a compulsory automobile insurance policy contains additional clauses providing for noncompulsory coverage, a cancellation of the policy will be effective as to the latter clauses even if it does not comply with the statutory requirements as to the cancellation of the compulsory insurance." Annotation. Cancellation of Compulsory Automobile Insurance, 171 ALR 550, 554 (1947).

Bankers & Shippers Ins. Co., 668 F.2d 185, 187 (3d Cir. 1981).

[redacted] In the case at bar the chancellor held that the insurer's cause of action for rescission had been abrogated by the cited statutes. Such a ruling was in error since, under the facts of this case, rescission was still a viable cause of action. As has been previously set out, there were misrepresentations of material facts, the knowledge of which would have caused the insurer to decline to issue the policy, and therefore, rescission is the proper remedy. We so hold in this de novo review.

All of the damages prayed for and awarded were based upon the policy remaining in effect. That policy now has been ordered rescinded. It follows that the damages awarded on the counterclaim and an amended complaint cannot be allowed to stand. Accordingly, the award of damages is reversed. Since no damages are awarded, it is not necessary for us to determine whether the chancellor correctly assumed jurisdiction of all facets of this case.

Reversed on cross-appeal.

Lloyd Edwin FLETCHER *v.* STATE of Arkansas

CR 91-95 816 S.W.2d 592

Supreme Court of Arkansas
Opinion delivered September 30, 1991

James P. Massie, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Shelley Sanford, the victim in this aggravated robbery case, drove her car to the parking lot of the Harvest Foods store at 12th and Battery Streets in Little Rock. It was about 9:00 at night. She got out of her car and walked up to the doors of the store only to discover that the doors were locked and the store was closed. She noticed appellant and a companion standing nearby. She made a remark to them about the store's closing hours and walked back to her car. As she was

unlocking her car door, appellant came up behind her and said that he wanted to tell her something. As she turned toward him, he said, "This is a robbery." He moved his hand inside his jacket pocket; it appeared that he had a pistol pointed at her. He had a serious look on his face. She saw a group of people coming out of a nearby building. She screamed as loudly as she could for help. Appellant and his companion ran to their car which was parked in front of the victim's car. The victim jumped into her car. She was able to read the license number on appellant's car. She hurriedly drove away, and after she had gone some distance, stopped long enough to write the license number on a piece of paper. She then drove several miles to another grocery store and called the police. Two days later, she viewed a police photo spread and identified appellant as her assailant.

Appellant was convicted of violating Ark. Code Ann. § 5-12-103(a)(1) (1987), which provides:

> (a) A person commits aggravated robbery if he commits robbery as defined in § 5-12-102, and he:
> (1) Is armed with a deadly weapon or represents by word or conduct that he is so armed; . . .

Ark. Code Ann. § 5-12-102 (1987) provides in part:

> A person commits robbery if, with the purpose of committing . . . a theft . . . , he employs or threatens to immediately employ physical force upon another.

Appellant's sole argument on appeal is that the proof is not sufficient to show his intent to commit theft. Intent or purpose to commit a crime is a state of mind which is not ordinarily capable of proof by direct evidence, so it must be inferred from the circumstances. *Smith* v. *State*, 264 Ark. 874, 575 S.W.2d 677 (1979). The jury is allowed to draw upon their common knowledge and experience in reaching a verdict from the facts directly proved. *Johnson & Carroll* v. *State*, 276 Ark. 56, 632 S.W.2d 416 (1982). Circumstantial evidence can be sufficient to support a finding of guilt in a criminal case if it excludes every other reasonable hypothesis consistent with innocence. *Smith* v. *State*, *supra*.

Here, the victim testified that appellant approached her and said, "This is a robbery." It appeared to her that he had a pistol in

his pocket and had it pointed at her. When she screamed for help, he ran away. The only reasonable inference to be drawn is that appellant intended to take property from the victim.

In the second part of his argument, the appellant contends that the only reasonable inference to be drawn from the evidence is that his intent was to play a joke on the victim. Such an argument is a restatement of the first part of the argument. It is a different way of arguing that there are reasonable inferences to be drawn from appellant's conduct other than an intent to take property. Such an argument has already been rejected. In addition, we note that the appellant did not testify the event was a joke. There is no evidence that appellant or his companion were acquainted with the victim. He approached a stranger at night on the parking lot of a closed store. When she screamed he did not try to explain that he was only joking. He looked and acted serious. The only reasonable inference to be drawn about appellant's intent is that which the jury drew. As previously stated, there was substantial evidence to support appellant's conviction for aggravated robbery.

Affirmed.

Vernon Roy RICHARD *v.* STATE of Arkansas

CR 91-129 815 S.W.2d 941

Supreme Court of Arkansas
Opinion delivered September 30, 1991

David Wisdom Harrod, for appellant.

Winston Bryant, Att'y Gen., by: *Teena White*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant was charged with the rape of a three-year-old girl. The State moved to videotape the deposition of the victim so that her testimony could be heard, but she would not be required to suffer the humiliation of appearing in a public courtroom. *See* Ark. Code Ann. § 16-44-203 (1987). By this time the child was four years and ten months old. The appellant contended that the victim was incompetent and, on that basis, objected to taping her testimony. The trial court held a preliminary hearing on the issue and, after hearing extensive testimony by the child, ruled that the appellant had not shown her to be incompetent.

The case proceeded to trial. The appellant was found guilty of rape and sentenced, as a habitual offender, to life in prison. We need not detail the facts of the crime since the only argument on appeal involves the competency ruling. We cannot say the trial court abused its discretion in making that ruling and, accordingly, affirm the judgment of conviction.

In *Logan* v. *State*, we set out the following standards to be used in the trial and appellate courts to determine competency:

> A trial court must begin with the presumption that every person is competent to be a witness. A.R.E. Rule 601. The burden of persuasion is upon the party alleging that

> the potential witness is incompetent. To meet that burden the challenging party must establish the lack of at least one of the following: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false swearing; or (3) the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the factfinder a reasonable statement of what was seen, felt or heard. The competency of a witness is a matter lying within the sound discretion of the trial court and, in the absence of clear abuse, we will not reverse on appeal. (Citations omitted)

Logan v. *State*, 299 Ark. 266, 272, 773 S.W.2d 413, 416 (1989).

Appellant argues that the trial court erred in ruling that he did not establish either (1) lack of ability to understand the oath and its obligation, or (2) lack of understanding of the consequences of false swearing.

While the victim's answers to questions on these issues were at times inconsistent, more often than not she displayed a clear understanding of the undesirable consequences of telling a falsehood, and conversely, she understood the positive and desirable consequences of telling the truth. She clearly had "a moral awareness of the duty to tell the truth." *Hoggard* v. *State*, 277 Ark. 117, 122, 640 S.W.2d 102, 105 (1982). In sum, we cannot say that the trial court abused its discretion in determining the victim was competent and in allowing her to testify by means of a videotaped deposition. Thus, we affirm on the only point argued on appeal.

In addition, because the sentence imposed is life in prison, the complete record has been examined, and we find no other ruling by the trial court which we consider to be prejudicial error. *See* Rule 11(f) of the Rules of the Supreme Court and Court of Appeals.

Affirmed.

Howard Dewayne BEARD, Jr. *v.* STATE of Arkansas

CR 91-85 816 S.W.2d 860

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Terry Garner and *Larry Dean Kissee*, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant Howard Dewayne Beard, Jr., was tried and found guilty of attempted capital murder and aggravated robbery. The trial court dismissed the charge of attempted capital murder and appellant was sentenced as a habitual offender to eighty-five years in the Department of Correction. We find no merit in the four points of error argued on appeal and, accordingly, the judgment of conviction is affirmed.

I

The Trial Court Erred in Denying the Appellant's Motion for a Directed Verdict

Bruce Delargy testified that on the evening of December 16, 1989, he was working on a tire when appellant entered Herb's Tire Sales and Service. Appellant asked Delargy for a check which had been returned for insufficient funds. As Delargy walked toward a desk to retrieve the check he heard a "gun snap." He turned and saw appellant holding a cocked pistol. Delargy

lunged for the bathroom and appellant fired, striking Delargy in the left shoulder. When Delargy came out of the bathroom moments later, he saw appellant turning his truck around on the parking lot headed back toward the shop. Delargy locked the front door and hid in the bathroom. He heard appellant fire a second shot, enter the building and fire a third shot through the bathroom door. Delargy could hear appellant rummaging through drawers and when he came out of the bathroom he found appellant had taken the cash register.

Appellant was charged with aggravated robbery, defined in Ark. Code Ann. § 5-12-103 (1987), as robbery while armed with a deadly weapon, or inflicting or attempting to inflict death or serious injury upon another person. Ark. Code Ann. § 5-12-102 (Supp. 1989).

Appellant argues that there was insufficient evidence to support his conviction of aggravated robbery because he left the premises and did not employ or threaten physical force upon Bruce Delargy at the time he stole the cash register.

A defendant's threats or acts of physical force "must occur either *before* the taking (though continuing to have an operative effect until the time of the taking) or *at* the time of the taking" to constitute robbery. 2 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 8.11(e) (1986) (emphasis in the original); *see also*, 67 Am. Jur. 2d *Robbery* § 28 (1985). The correlation necessary between the physical force and the theft to sustain a conviction for aggravated robbery was addressed in *Carter* v. *State*, 295 Ark. 218, 748 S.W.2d 127 (1988), where the appellant argued that while physical force was used to commit a rape, no force was used to commit a subsequent robbery. The prosecutrix testified that during the rape the appellant threatened her with a knife and afterward, when he was going through her purse, she believed he would hit her again. We affirmed the conviction of aggravated robbery. *See also Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Here, even though appellant left the building briefly, his use of a deadly weapon on both occasions provides all the threat necessary to sustain the charge. Looking at the circumstances as a whole, we cannot say as a matter of law there was no connection between the force exerted and the theft of the cash

register. That issue was properly put to the jury.

II

The Trial Court Erred in Overruling Appellant's Objection to Testimony From the State Psychiatrist About Statements Made by the Appellant Concerning Other Bad Acts

Dr. O. Wendell Hall, a psychiatrist and the medical director of forensic services at the Arkansas State Hospital, who examined the appellant pursuant to court order, was called as an expert witness during the state's case-in-chief. During the course of direct examination Dr. Hall testified about his examination to determine appellant's mental status with regard to the criminal charges. Asked whether he arrived at a precise diagnosis, Dr. Hall responded:

> I found Mr. Beard to be alert, friendly, seemed to be very willing to talk to me and the other people in the room. Seemed very much at ease talking to us. One of the comments that I remember making about him, he had on a white shirt and he looked real clean and fresh, that he looked cool as a cucumber, and it was a real hot day the day we saw him. And he just looked calm as he could be, talking about what he did. He even seemed to be pretty proud of some of the things that he had done or gotten away with.

The appellant objected and requested a mistrial. He argues that Ark. R. Evid. 503 was violated because the communications between appellant and Dr. Hall were not related to the particular purpose for which the examination was ordered. Instead, appellant argues Dr. Hall was allowed to testify about unrelated acts of misconduct, and his Fifth and Sixth Amendment rights were violated.

We need not dwell on this point. The remarks were only marginally objectionable at best, and certainly not of the magnitude to entail the drastic remedy of a mistrial. *Richmond* v. *State*, 302 Ark. 498, 791 S.W.2d 691 (1990). Moreover, nothing in the quoted excerpt from Dr. Hall's testimony suggests that he was referring to confidential communication made by the appellant. Nor is it at all inferable that the mention of "some of the things [appellant] had done or gotten away with," referred to

other wrongs, if indeed they were that. The remarks may well have been in reference to the very acts in question. Thus, neither Ark. R. Evid. 404(b) nor 503 is applicable.

III

The Trial Court Erred in Denying the Appellant's Motion for Assistance of Expert and Overruling the Appellant's Objection to the Determination of the Appellant's Mental Capacity to Proceed

Subsequent to the appellant's notice of intent to raise the defense of mental disease or defect the trial judge ordered the appellant sent to the Arkansas State Hospital or the Diagnostic Unit of the Arkansas Department of Correction for a determination of his ability to assist in the preparation and conduct of his defense. Pursuant to the court order an evaluation was conducted by an evaluation team from the Arkansas State Hospital.

Appellant argues that the psychiatric evaluation was inadequate because it lasted only an hour. However, in comparing Dr. Hall's letter of evaluation with the requirements of the report of examination set out in Ark. Code Ann. § 5-2-305(d)(1) through (4) (1987), it is clear there was compliance with the statutory requirement as to a mental examination. *See also Wright* v. *State*, 270 Ark. 78, 603 S.W.2d 408 (1980).

Appellant also moved for the assistance of an expert psychologist and psychiatrist in addition to the court ordered examination. The court denied this motion. Appellant argues that because he relied solely upon the insanity defense it was error to refuse this request. *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). He urges the state is required to provide an indigent defendant with competent psychiatric assistance.

We note that Beard made no preliminary showing that his sanity at the time of the offense was likely to be a significant factor at trial, a threshold requirement under *Ake*. More importantly, we have held that where a defendant is evaluated by the State Hospital, as here, such an evaluation complies with the dictates of *Ake*. *Branscomb* v. *State*, 299 Ark. 482, 744 S.W.2d 426 (1989); *Wilson* v. *State*, 297 Ark. 568, 765 S.W.2d 1 (1989); *See* v. *State*, 296 Ark. 498, 757 S.W.2d 947 (1988); *Starr* v. *State*, 297 Ark. 26, 759 S.W.2d 535 (1988); *Dunn* v. *State*, 291

Ark. 131, 722 S.W.2d 595 (1987); *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

IV

The Trial Court Erred in Overruling the Appellant's Objections to Further Closing Arguments After the Jury Was Instructed on the Appellant's Previous Convictions

Appellant was charged under the Habitual Offenders Act and a bifurcated trial was conducted on guilt and punishment. Following the guilt phase, verdict forms were submitted to the jury for both the aggravated robbery charge and attempted capital murder. The jury returned a verdict of guilty on both charges. Following the jury verdict the trial court addressed the appellant's prior motion to dismiss on the basis of the same conduct. At that time the state requested the attempted capital murder conviction be dismissed, however, the trial court submitted both charges to the jury at the punishment phase and reserved a ruling on the motion. After the punishment phase was completed the court dismissed the attempted capital murder conviction.

The appellant argues that it was error to submit both the aggravated robbery conviction and the attempted capital murder conviction to the jury for sentencing consideration because it violated the double jeopardy clause to the Arkansas Constitution.

Ark. Code Ann. § 5-1-110(a)(1) and (b)(1)-(2) (1987) provides:

> Conduct Constituting More Than One Offense-Prosecution.
>
> (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 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; or (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
>
> It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

[redacted] The general rule is when a criminal offense by definition includes a specified lesser offense, a conviction cannot be had for both offenses under Ark. Code Ann. § 5-1-110. In accordance with the general rule, when the appellant was convicted of both attempted capital murder and aggravated robbery, the conviction for aggravated robbery was set aside under the reasoning that aggravated robbery was the lesser included offense. *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982); *Barnum* v. *State*, 276 Ark. 477, 637 S.W.2d 534 (1982).

The problem here, under the reasoning of *Barnum* and *Rowe*, is that the trial court set aside the attempted capital murder conviction instead of the aggravated robbery charge, ostensibly the less serious crime. Nevertheless, that was in accord with a case decided soon after *Rowe* and *Barnum*. In *Wilson* v. *State*, 277 Ark. 219, 640 S.W.2d 440 (1982), this Court set aside one of the two convictions based on the *classification* of the crime rather than whether it was a lesser included offense:

> While it was necessary for the jury to find petitioner guilty of a felony, i.e., aggravated robbery, to find him guilty of attempted first degree murder, the jury and the legislature clearly considered aggravated robbery to be the more serious crime. The jury's intention can be seen in its verdict specifying 50 years for aggravated robbery and 34 years for attempted murder. The legislative intention can be discerned from the classification at the time of the crime of aggravated robbery as a class A felony, Ark. Stat. Ann. § 41-2102(2) (Repl. 1977), while attempted first degree murder was punishable as a class B felony, Ark. Stat. Ann. §§ 41-703(2), 41-1502(3) (Repl. 1977). Accordingly, the conviction and sentence for the less serious offense, at-

> tempted first degree murder, are set aside. The conviction and sentence for aggravated robbery are not disturbed.

Id. at 221.

In this case, attempted capital murder is a class A felony Ark. Code Ann. § 5-3-203(1) (1987) and aggravated robbery is a class Y felony. Ark. Code Ann. § 5-12-103 (1987). The jury sentenced Beard to fifty years for the attempted capital murder conviction and eighty-five years for aggravated robbery. Therefore, under the reasoning in *Wilson* the trial court was correct in setting aside the attempted capital murder conviction.

The appellant also argues that it was error to allow additional closing argument in the sentencing phase of the trial because it is not provided for in the statutory provision [Ark. Code Ann. § 5-4-202 (1987)] providing for sentencing procedure for habitual offenders. He maintains it prejudiced him because the prosecutor was able to argue punishment on both convictions. The appellant cites no authority for his contention beyond the language of Ark. Code Ann. § 5-4-502, which gives us no guidance. However, we find some analogy to the procedure in capital cases, *see* Ark. Code Ann. § 5-4-602 (1987), and that, coupled with the trial court's broad discretion in the management of trial proceedings generally, supports the conclusion there was no error.

The appellant's final point is that he should have been allowed to argue mitigation in his closing argument. In *Coley* v. *State*, 304 Ark. 304, 801 S.W.2d 647 (1991), we held that the proper time to introduce mitigating factors was in the guilt-innocence phase.

Affirmed.

Bill CLINTON, Governor of Arkansas; State Board of Correction, Ray Hobbs, Warden, Wrightsville Unit, State Department of Correction, and State of Arkansas *v.* Steven Earle BONDS

91-44 816 S.W.2d 169

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Winston Bryant, Att'y Gen., by: *Leslie M. Powell*, Senior Asst, Att'y Gen., for appellants.

Jacoway, Sherman & Pence, by: *William F. Sherman*, for appellee.

STEELE HAYS, Justice. The appellee, Steven Earl Bonds, is an inmate currently confined in the Arkansas State Penitentiary serving a thirty-year sentence for a conviction of burglary in 1985. Bonds worked on the Capitol grounds from August 1988 to February 1989. Bonds filed a grievance with the Arkansas Department of Correction, Wrightsville Unit, seeking good-time benefits under Ark. Code Ann. § 12-30-408 (1987) (Act 440 of 1983) for the work done at the Capitol. He received no response. After Bonds wrote to the Governor, George Brewer, Classification Administrator for the Department of Correction, responded to Bond's letter and informed him that Act 440 was repealed by Act 814 of 1983 and, therefore, inmates are not eligible to earn good-time under the provisions of Ark. Code Ann. § 12-30-408.

Thereafter Bonds filed a pro se petition in the Pulaski Circuit Court challenging the constitutionality of Act 709 of 1989 which amended the Arkansas Administrative Procedures Act by excluding prison inmates from judicial review of administrative adjudications. The respondents (now the appellants) moved to dismiss alleging that Bonds had no standing. The motion was denied. Bonds subsequently filed an amended petition seeking

declaratory relief and reasserting that Act 709 was unconstitutional.

After a hearing, the Circuit Court found that the only issue addressed was the validity of Act 709 and held that Act 709 was unconstitutional. Appellants raise two grounds for reversal of the circuit court's judgment: Bonds did not have standing to challenge Act 709 and the trial court erred in holding the act unconstitutional. We hold that the appellant had standing to challenge the constitutionality of Act 709; and the trial court did not err in finding the Act unconstitutional.

I

STANDING

Appellants state that their primary position has always been that while Bonds has standing to seek declaratory judgment of his rights regarding "good-time" under Act 440, he does not have standing to challenge Act 709, because there has been no administrative adjudication in this case.

But whether or not there was an administrative adjudication is not relevant where the sole issue is the constitutionality of Act 709 of 1989. Bonds sought declaratory relief pursuant to our Declaratory Judgment Act, Ark. Code Ann. §§ 16-111-101 through 16-111-111 (1987). Section 16-111-104 of the Act provides:

> Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.

See also Lawson v. *City of Mammoth Spring*, 287 Ark. 12, 696 S.W.2d 712 (1985). (A defendant who had been convicted in a municipal court had standing to seek declaratory relief, to challenge the constitutionality of legislation creating the court, as a person whose rights were affected by the legislation).

Bonds argues that he had no other avenue through which he could obtain judicial review and Act 709 of 1989 specifically excludes such review for inmates. Bonds' rights are directly affected by Act 709, thus, he has standing to challenge it.

II

Act 709 of 1989

Act 709, codified at Ark. Stat. Ann. § 25-15-212 (Supp. 1991), and entitled, *Administrative Adjudication- Judicial Review*, provides in part:

> (a) In cases of adjudication, any person, *except an inmate under sentence to the custody of the Department of Correction*, who considers himself injured in his person, business, or property by final agency action shall be entitled to judicial review of the action under this subchapter. Nothing in this section shall be construed to limit other means of review provided by law. (Emphasis added).

Bonds contends that Act 709's preclusion of inmates from judicial review of administrative action in state courts constitutes an unconstitutional denial of due process.

We review challenges to the constitutionality of statutes under the principle that statutes are presumed to be constitutional. *First Nat'l Bank* v. *Arkansas State Bank Comm'r*, 301 Ark. 1, 781 S.W.2d 744 (1989). Additionally, the burden of proving a statute unconstitutional is upon the party challenging it. *Urrey Ceramic Tile Co.* v. *Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991). On appeal, if it is possible to construe a statute as to meet the test of constitutionality, we will do so. *Id.*

We have recognized that administrative agencies, due to their specialization, experience, and greater flexibility of procedure, are better equipped than courts to analyze legal issues dealing with their agencies. *First Nat'l Bank* v. *Arkansas State Bank Commissioner*, *supra*. This accounts for the limited scope of review of administrative action and the reluctance of a court to substitute its judgment for that of the agency. *Id.*

In particular, the administration of prisons has generally been held to be beyond the province of the courts. *Stevens* v. *State*, 262 Ark. 216, 555 S.W.2d 229 (1977); *Walker* v. *Lockhart*, 713 F.2d 1378 (8th Cir. 1983). An exception to the courts' reticence to entertain prisoner's administrative complaints occurs when the petitioner asserts an infringement upon constitutional rights. *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir.

1968); *Glick* v. *Sargent*, 696 F.2d 413 (8th Cir. 1983), *Whittington* v. *Norris*, 602 F. Supp. 954 (E.D. Ark. 1984). Likewise, it is a general rule that judicial review of administrative action may be granted or withheld by a legislature in its discretion except when the Constitution requires it. R. Pierce, S. Shapiro and P. Verkuil, *Administrative Law and Process* § 5.2 (1985); 73 A. C.J.S. *Public Administrative Law and Procedures* § 174 (1983); 2 Am. Jur. 2d *Administrative Law* § 565 (1962). H. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

Despite the dicta in case law and the strong suggestions advanced by the United States Supreme Court,[1] as well as scholarly analysis, whether a statute that bars judicial review of a constitutional matter would be per se unconstitutional has not been clearly answered in present law. *See* 5 K. Davis, *Administrative Law Treatise* § 28:3 (2d ed. 1984). Whether there must be judicial review of the decision of an administrative body to revoke good-time credits was raised in *Superintendent, Mass. Corr. Institution* v. *Hill*, 472 U.S. 445 (1985). In *Hill*, the Supreme Court declined to directly answer the question by finding that the Massachusetts Court, in requiring judicial review, relied on state law rather than on federal constitutional principles; however, the *Hill* court did note that "[t]he extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." *Id.* at 451. The court also remarked, "[w]hether the Constitution requires judicial review is only at issue if such review is otherwise barred. . ." *Id.*

[redacted] In this case, while it was suggested that inmates have other means of judicial review in state courts, nothing was shown justifying that conclusion. Representative Ron Fuller, the sponsor of Act 709, testified about the objective of the legislation and its emergency clause which states ". . . inmates of the Depart-

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[1] "And except when the Constitution requires it judicial review of administrative action may be granted or withheld as Congress chooses." *Estep* v. *United States*, 327 U.S. 114, 120 (1946); "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to courts is essential to the decision of such questions. . ." *California* v. *Sanders*, 430 U.S. 99, 109 (1977); *see also*, *Johnson* v. *Robinson*, 415 U.S. 361 (1974).

ment of Correction have numerous avenues of administrative due process; that it is not necessary to provide them with judicial review under the Arkansas Administrative Procedure Act. . . ." Fuller could not recall receiving any factual data to support that contention at the time he presented the bill to the judiciary committee. The other testimony relevant to this issue was a characterization of the disciplinary and grievance procedures held within the Department of Correction which were described by the appellant, the assistant to the director for the Department's public and legislative relations, and the Wrightsville Unit's Warden. There was evidence that an inmate has the right to appeal action taken in a disciplinary proceeding, however, that process ends at the level of the Director within the Department. That being so, it does not clearly appear from the record that an inmate in the Department of Correction has a means of judicial review in state courts of constitutional questions arising from administrative decisions.

We are reluctant to find legislative acts unconstitutional, however, we are compelled to affirm the trial court's decision to insure that due process is afforded under the Arkansas and United States Constitutions. In doing so, we emphasize that Act 709 unconstitutionally deprives inmates of review of *constitutional* questions because judicial review of all other administrative questions may be granted, or withheld, according to the Legislature's discretion.

Affirmed.

William L. DEWITT *v.* STATE of Arkansas

CR 91-96 815 S.W.2d 942

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Paul J. Teufel, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. In this appeal from a rape/incest conviction, the appellant argues the trial court was without jurisdiction and the evidence was insufficient. Neither point is persuasive.

The state filed an information charging appellant, William DeWitt, with two counts of rape and one count of incest. Both rape counts alleged that appellant:

> did on or before the 20th day of November 1988, engage in deviate sexual activity with another person who is less than fourteen years of age, with all acts occurring in Greene County, Arkansas.

The incest count alleged that appellant:

> did on or before the 9th day of November 1989, being sixteen years or older, engage in deviate sexual activity with a person he knows to be a stepchild with all said acts occurring in Greene County, Arkansas.

A jury trial resulted in appellant being convicted of all three counts with a sentence of thirty years on each count of rape and ten years on the count of incest. The two thirty year sentences were ordered to run consecutively and the ten year sentence

concurrently.

Appellant first argues the trial court lacked jurisdiction to try the two rape counts, based on insufficient testimony indicating the exact location of the crimes.

Appellant moved from Louisiana to Greene County, Arkansas, along with his wife and stepdaughter. The record shows that from that time on appellant committed sexual criminal acts with the stepdaughter, who was twelve at the time of this move. Appellant argues that the trial court was without jurisdiction to hear this case, relying on Ark. Code Ann. § 5-1-111 (1987) which provides:

> Burden of proof-Defenses and affirmative defenses-Presumption.
>
> (a) Except as provided in subsections (b), (c), and (d) of this section, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:
>
> (1) Each element of the offense;
> (2) Jurisdiction;
> (3) Venue; and
> (4) The commission of the offense within the time period specified in § 5-1-109.
>
> (b) The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue.

We have dealt with this issue before and have found that the requirement of proof of jurisdiction under § 5-1-111(a) is tempered by section (b) of the same statute. We responded recently to the same argument in *Dix* v. *State*, 290 Ark. 28, 715 S.W.2d 879 (1986):

> The state need not prove jurisdiction however, "unless evidence is admitted that affirmatively shows that the court lacks jurisdiction." § 5-1-111. In *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. den., 440 U.S. 911 (1979), we held that before the state is called upon to offer any evidence on the question of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court.

We find in this case that there was not "positive evidence" that the crime occurred outside the jurisdiction of the state, and hence no error.

[redacted] Appellant cites testimony which he submits is "positive evidence" that the offense occurred outside the jurisdiction of Arkansas. The most that can be said of that evidence is that while it may imply that the first offense occurred during the trip from Louisiana, and hence, before reaching Arkansas, the proof also established that the crime was repeated numerous times after the arrival in Arkansas. The affirmative proof that jurisdiction in Arkansas is lacking is even weaker than in other cases where we found the evidence suggesting lack of jurisdiction to be insufficient. *See Dix* v. *State*, *supra*; *Richards* v. *State*, 279 Ark. 219, 650 S.W.2d 566 (1983).

Secondly, appellant argues the state failed to prove beyond a reasonable doubt that the two counts of rape occurred before the victim was fourteen years of age.

The charge of rape was based on Ark. Code Ann. § 5-14-103 (1987):

> (A) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
>
> * * *
>
> (3) Who is less than fourteen years of age.

Appellant argues the state failed to prove that he committed the two counts of rape when the victim was less than fourteen years old. The argument is a claim that the state failed to prove an element of its case and therefore the information should be dismissed for lack of substantial evidence.

[redacted] This is a challenge to the sufficiency of the evidence and it has been waived. In a jury trial, the defendant's failure to move for a directed verdict at the conclusion of evidence presented by the prosecution and at the close of the case constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. Ark. R. Crim. P. 36.21(b); *Starling* v. *State*, 301 Ark. 603, 786 S.W.2d 114 (1990). Appellant made no directed verdict motions, either at the end of the state's case or the

end of all the evidence.

Affirmed.

Anthony PACEE *v.* STATE of Arkansas

CR 90-285 816 S.W.2d 856

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Edward Oglesby, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant Anthony Pacee appeals from a judgment on conviction of four counts of violation of the Arkansas Uniform Controlled Substance Act and felon in possession of a firearm, resulting in concurrent sentences of twenty, twelve, twelve and life. Sentencing was enhanced by reason of prior convictions.

Appellant presents four issues on appeal: one, the trial court erred in denying a motion to quash the jury panel and declare a mistrial because of improper use of peremptory challenges by the prosecutor; two, there was insufficient evidence linking appellant to the contraband seized from his residence and from a vehicle; three, the trial court erred in not allowing appellant or his counsel to testify at either the guilt or punishment phase concerning appellant's attempts at compliance with a plea bargain agreement; and four, it was error to admit state's exhibits two, three and four as evidence at the penalty phase of the trial.

I

Appellant is a fifty-one year old black male. He was tried by a panel consisting of eleven white and one black jurors. After the jury was seated, but prior to its being sworn, appellant moved to quash the venire and declare a mistrial upon the contention that the state had used its peremptory challenges to strike five of six black prospective jurors in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court retired to chambers where counsel for the state explained the reasons behind his strikes. Four of the five jurors excused by the state had served on juries during the current term. Ms. Westbrook had served on a jury which had been unable to reach a verdict in a criminal trial. Additionally, she had demonstrated some "preconceived notions" that the use of undercover agents in drug arrests was improper. (A. p. 55). Appellant's brief tacitly concedes that the state was justified in excusing Ms. Westbrook. Another juror, Robert Smith, had served on a jury in a criminal trial which had been unable to reach a verdict and was believed to have made disparaging remarks about a prospective witness, Officer Lancaster. Two of the five, Grigsby and McDaniel, had served as jurors in criminal trials which had difficulty in arriving at a verdict and had been unable to agree on a sentence. Additionally, Ms. McDaniel was believed by the state to be an acquaintance of some individuals who frequented Pacee's trailer where drugs were allegedly sold and used. As to the remaining juror, Ms. Carson, the state contends that her demeanor and her relationship with a witness in a recent criminal trial whose testimony the state regarded as perjured, rendered her subject to peremptory challenge. The state's sixth and final peremptory challenge was used to excuse Wilma Williams, a white juror, who like other members of the panel, had served on a hung jury in a criminal trial. The appellant submits these reasons are insufficient.

[redacted] In *Batson* v. *Kentucky*, *supra*, the United States Supreme Court, while recognizing that a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried [citing *United States* v. *Robinson*, 421 F. Supp. 467 (Conn. 1976)], held that the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on the basis of race, or the assumption that

black jurors as a group will be unable impartially to consider the state's case against a black defendant.[1] If a discriminatory pattern in the use of peremptory challenges is demonstrated, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. The *Batson* court noted that while the scope of peremptory strikes was thus limited somewhat in relation to its historical exercise, the prosecutor's explanation need not rise to the level justifying the exercise of a challenge for cause. *Batson* at 97. This court has applied the law adopted in *Batson*, procedural and substantive, in several recent cases: *Thompson* v. *State*, 301 Ark. 488, 785 S.W.2d 29 (1990); *Owens* v. *State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *White* v. *State*, 298 Ark. 55, 59, 764 S.W.2d 613 (1989); *Mitchell* v. *State*, 295 Ark. 341, 750 S.W.2d 936 (1988); *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987). *Ford* v. *State*, 296 Ark. 8, 20, 753 S.W.2d 258 (1988); and *see Shields* v. *State*, 29 Ark. App. 141, 143, 778 S.W.2d 649 (1989). We have said that the standard by which we review the trial court's evaluation of the sufficiency of the prosecutor's explanation is whether those findings are clearly against a preponderance of the evidence. *Colbert* v. *State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

In view of the state not having used all of its peremptory challenges to exclude members of the appellant's race, or appellant having been tried by an all white jury, and the fact that the state's explanations were found by the trial court to be sustained by the preponderance of the evidence, we reject the argument that a *Batson* violation has been demonstrated. However, we reach that conclusion because of the record presented. The notice of appeal designates the entire record as the record on appeal, yet a notation from the court reporter reflects that at the direction of counsel for the appellant the voir dire was excluded from the transcript. Thus we are deprived of that critical portion of the trial proceedings which would enable us to consider "all relevant circumstances" [*Batson*, 476 U.S. at 86-97] from which to determine how and why peremptory challenges were used or withheld, and whether the state's explanations are race neutral and credible. We note the nonuse of peremptory challenges may

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[1] In *Edmonston* v. *Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S. Ct. 207 (1991), the *Batson* principle was extended to civil trials.

be just as relevant as the use, because it sometimes develops that the state's purported reason for striking a venire person of one race is not exercised in a neutral manner. See, for example, *Floyd* v. *State*, 511 So.2d 762 (Fla. Dist. Ct. of App. 1987), and cases cited in an exhaustive treatise on issues arising in the wake of *Batson*. A. Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson* v. *Kentucky*, 293 Williamette L. Rev. 297 (1989). Before leaving the matter of the state's explanation for its strikes, we point out that the state's explanation that Ms. Carson was struck because of her "demeanor" could not withstand scrutiny for lack of specificity.

Appellant argues that the prosecutor failed to question several of the five panelists, arguing that grounds for peremptory challenge must be established by interrogation during voir dire. No authority is cited for this position and we are not persuaded. Certainly the prosecutor must be prepared to defend a strike on race neutral grounds if a sensitive inquiry is conducted, but we know of no reason why that ground, if sufficient, must be developed by question and answer. For that matter, it would not be permissible for the prosecutor to ask venire persons how they had voted on a case that had ended in a hung jury.

The state urges that appellant's objection under *Batson* was untimely, since it did not come until the jury was seated. It is the state's position that the objection must be advanced at the first opportunity, that is, when the first strike is used and, which is subject to challenge under *Batson*. But we are not convinced that a "pattern of discrimination" is demonstrated, at least for purposes of preserving the point for review, when the first member of a minority class is struck. So long as the objection is made before the jury is sworn, we regard it as timely. *Stanley* v. *State*, 313 Md. 50, 542 A.2d 1267 (1988). It has been suggested that panelists who have been struck not be released until the jury is sworn. In that manner reversible error can be averted should the trial court, after hearing the state's explanation, decide the state's grounds are insufficient and order the juror reinstated. That procedure appears sound.

II

Appellant claims the trial court should have granted a directed verdict of acquittal in that there was no proof that

appellant was in constructive possession of contraband forming the basis of the four counts with which he was charged. Appellant cites *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990), as holding that constructive possession can only be inferred where the contraband is found in a place "immediately and exclusively accessible to the defendant and subject to his control." He maintains that since there were two women present, the contraband could not have been exclusively in appellant's control. The argument presupposes that a showing of joint possession or occupancy of premises where drugs are located defeats a charge of constructive possession. That is a misconception. When the facts demonstrate that the defendant's accessibility is not *exclusive*, the state must show additional factors to establish possession. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 25 (1982); *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988). Since appellant's brief fails to address this point further, we will observe only that the two women were not residents of the trailer and, in fact, had never been there previously. Furthermore, the briefcase in which drugs and drug parapernalia were found contained records identifying the appellant. A vehicle containing illegal items was registered in his name. It is enough for the state to prove two elements: 1) that the appellant exercised care, control and management over the contraband and 2) he knew the material possessed was contraband. *Id.*

III

Appellant assigns error to the trial court's refusal to permit appellant to testify with reference to plea bargaining negotiations between the state and the appellant which evidently did not materialize. The trial court excluded the evidence on grounds of relevancy. Since we find neither a proffer nor any clear account of what the evidence would have been, we cannot say the trial court's ruling was an abuse of discretion. Counsel for appellant then asked that the evidence be introduced in the penalty phase as a matter of mitigation, with respect to which the trial court expressed some doubt. The outcome was that the trial judge reserved judgment on the prospective offer of this proof and the request was never renewed. Appellant's failure to obtain a ruling is fatal. *Shaw* v. *State*, 299 Ark. 474, 773 S.W.2d 827 (1989).

IV

In the penalty phase of the trial the state purported to show that appellant, Anthony Curtis Pacee, had two prior felony convictions. State's exhibit one reflects a felony conviction with a sentence of five/ten years in the United States District Court for the Southern District of California for possession of a controlled substance with intent to distribute. Appellant does not controvert this conviction. State's exhibit two reflects a felony conviction in the Superior Court of Los Angeles County, California, for first degree robbery by Anthony C. Pace. Appellant objected to the introduction of exhibit two because the surname is Pace rather than Pacee. Exhibits three and four are records of the Department of Justice, Bureau of Criminal Identification, listing some sixteen alias[2] assumed by appellant between 1956 and 1976 involving criminal offenses in California in the vicinity of Los Angeles. The state contends the appellant's connection to these alias is evidenced by the number assigned by the FBI to Pacee-893 989 C. Appellant's objection to exhibits three and four is that they are not certified by the custodian or other official of the Department of Justice as being true and correct copies. But our statute provides that a previous conviction or finding of guilt of a felony may be proved by *any* evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. Arkansas Code Ann. § 5-4-504 (1987). We think these documents more than satisfy that requirement.

Affirmed.

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[2] Alias: Curtis Lee Jacobson, Jr; Curtis Lee Jacobs; Curtis Junior Jacobson; Lee Jacobs Prentice; Anthony Curtis Pace; Curtis Pace; Anthony Pase; Anthony Cornilius Pase; Anthony Cornilius Pasee; Anthony C. Passee; Tony Cornelius Passe; Cornelius Passe; A.C. Pacee; Tony C. Pacee; Anthony Passe; A.C. Passe.

Leon ASHWORTH *v.* STATE of Arkansas

CR 91-104 816 S.W.2d 597

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Murphy and Carlisle, by: *Marshall N. Carlisle*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Leon Ashworth contends the Municipal Court, in which he was convicted of driving while intoxicated and failure to maintain control of a motor vehicle, lacked jurisdiction. Ashworth was arrested in Fayetteville where the offenses allegedly occurred but tried in the Elkins Municipal Court. He contends that county-wide jurisdiction granted to Municipal Courts by Ark. Code Ann. § 16-17-206(b) (Supp. 1989) violates the Arkansas and United States Constitution.

We affirm the conviction. The real issue here is whether the Washington County Circuit Court had jurisdiction when it tried Ashworth de novo. If the Elkins Court had no jurisdiction, then neither did the Washington County Circuit Court. *Miles* v. *Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988); *Bynum* v. *Patty*, 207 Ark. 1084, 184 S.W.2d 254 (1944). We have clearly held that the Statute does not violate the Arkansas Constitution, and we do not consider the questions argued here with respect to the United States Constitution because they were not raised in the Circuit Court.

1. The record

As his first point, Ashworth contends the Circuit Court should have granted his motion to remand to the Municipal Court to make a record of his constitutional arguments made there, citing *Horn* v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1980). The point of our decision in the *Horn* case was that the constitutional issue had not been raised in the Circuit Court and would not be reviewed on appeal. We review only the decision of the Circuit Court. *Pshier* v. *State*. 297 Ark. 260, 760 S.W.2d 858 (1988). Here the Circuit Court considered the issue of the validity of the Statute, and Ashworth has in no manner been prejudiced by the lack of a record of his contentions in the Municipal Court.

2. Constitutionality

Because Ashworth did not raise the federal constitutional question in Circuit Court, it will not be considered on appeal. Even constitutional issues will not be considered for the first time on appeal. *Chapin* v. *Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985); *Taylor* v. *Patterson*, 283 Ark. 11, 670 S.W.2d 444 (1984).

In *State ex rel. Moose* v. *Woodruff*, 120 Ark. 406, 179 S.W. 813 (1915), this Court held there was no express constitutional limitation upon the General Assembly's power to vest jurisdiction in Municipal Courts beyond the geographical limits of the municipalities. Although not by unanimous decisions, this Court has upheld legislative granting of extraterritorial jurisdiction to Municipal Courts against every challenge based on Ark. Const. art. 7. *Griffin* v. *State*, 297 Ark. 208, 760 S.W.2d 852

(1988); *Pshier* v. *State*, *supra*; *Pulaski County Municipal Court* v. *Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981).

Affirmed.

CORBIN, J., concurs.

CARROLL ELECTRIC COOPERATIVE CORP. *v.* CITY OF BENTONVILLE, ARKANSAS

91-20 815 S.W.2d 944

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Vowell & Atchley, P.A., by: *Stevan E. Vowell*, for appellant.

Kevin J. Pawlik, for appellee.

TOM GLAZE, Justice. Statutory construction of Act 639 of 1989 (codified as Ark. Code Ann. §§ 14-207-101 to -106) is the

subject of this appeal. The City of Bentonville, appellee, annexed certain territory located near the city limits. Under authority of the Public Service Commission, appellant Carroll Electric Cooperative (Cooperative) provided the electricity for this territory. After annexation, the City put up poles and lines so it, too, could provide electricity to this newly annexed area. Three of the Cooperative's customers requested that their electrical service be disconnected, so that the City could now provide them with electricity. It is undisputed that the City did not acquire any of the Cooperative's poles, lines, facilities or other physical property, but the Cooperative argues that the City must still compensate it for the loss of its customers under Act 639.

This appeal is the consolidation of two cases involving the three customers who requested the Cooperative to disconnect their services. The Cooperative filed suit for temporary and permanent injunctions to prevent the City from providing electrical service to any of the Cooperative's member customers without first complying with Act 639 of 1989. The trial court granted a preliminary injunction in one of the cases, but it later granted the City's motion to dismiss both complaints finding that Act 639 does not apply unless the city takes physical property or facilities. On appeal, the Cooperative argues that the trial court erred in ruling that Act 639 does not provide compensation for the loss of its customers. We do not agree and therefore affirm.

Under section 3 of Act 639, Arkansas municipal corporations owning and operating electric utility systems have the right to acquire any or all properties and facilities of the electric public utilities serving within the newly annexed areas after giving a six-month written notice. Further, section 4 of the Act provides the procedures and valuation formulae governing the compensation of an electric public utility whose properties and facilities have been acquired by a municipality. Subsections (A), (B) and (C) of section 4 are pertinent here and provide as follows:

> (A) *After the six month notification by the municipality of its election to acquire public utility system properties and facilities the municipality shall pay to the electric public utility an amount equal to the following*:
>
> (i) The present-day reproduction cost new of the properties and facilities being acquired, less depreciation

computed on a straight-line basis, plus

(ii) An amount equal to the cost of constructing any necessary facilities to reintegrate the system of the electric public utility outside the annexed area after detaching the portion to be sold.

(B) *In the event that the electric public utility system does not provide wholesale power service to the municipality acquiring its properties and facilities, the municipality and the electric public utility shall*, for a period of six (6) months after the notification required by Section 3 of this act, consistent with laws, rules and regulations of appropriate regulatory authorities and existing power supply agreements *negotiate, in good faith, for power contracts which would provide for the purchase of power by the municipality from the electric public utility for an amount of power equivalent to the loss of any sales to customers of the electric public utility acquired by the municipality under this act.* In the event that the municipality ceases the receipt of wholesale power service from the electric public utility system consistent with the terms of the wholesale power supply agreement prior to five (5) years after the acquisition of electric public utility system properties and facilities under this act, then the municipality will pay, pro rata for the remainder of such five (5) year period in accordance with subsection (C)(ii) of this section.

(C) *In the event that such an agreement pursuant to Section 4 (B) cannot be reached* within such six (6) month period, *then the municipality will pay the public utility for facilities in addition to amounts required by subsection A (i) and (ii)* of this section either:

(i) Two hundred thirty percent (230%) of gross revenues less gross receipts taxes received by the public utility for the twelve (12) month period preceding notification from customers in the annexed area or;

(ii) The amount required by subsection (C)(i) payable over five (5) years with interest at the then prevailing AAA insured tax exempt municipal bond interest rate.

(Emphasis added.)

In its argument, the Cooperative refers to the language "loss of any sales to customers" in subsection B above and contends that provision provides the Cooperative is entitled to compensation merely for the loss of its customers regardless of whether the City acquired the Cooperative's property and facilities. Such an interpretation takes the "loss of sales" language out of context and ignores the purpose and plain meaning of the section as a whole. Each subsection of section 4 providing compensation to an electric public utility is triggered when a municipality acquires a public utility's properties and facilities and the public utility no longer supplies electricity to that municipality. In the present case, the City acquired none of the Cooperative's properties or facilities, and although it has lost a few customers who chose to switch to the City's system, the Cooperative continues to provide electrical service to other customers in the annexed area.

The Cooperative also relies strongly on the case of *Woodruff Electric Coop. Corp.* v. *Ark. Public Service Comm.*, 234 Ark. 118, 351 S.W.2d 136 (1961). There, Forrest City annexed territory where Woodruff Electric Cooperative provided electricity. When Forrest City annexed the territory, Arkansas Power and Light, a lessee of the City, commenced furnishing electricity for the area, and as a result, the Woodruff Cooperative lost nine customers. The *Woodruff* court construed Act 85 of 1955 which was the controlling law at the time. That Act 85 in pertinent part provided as follows:

> If any rural area allocated by the Public Service Commission to a corporation organized under this Act shall be included in, or become a part of any incorporated city, town, or village already being served with electricity by a regulated public utility, then the members of said corporation residing or operating within such city, town or village shall lose their membership and right to receive service from said corporation. It shall be the duty of the Commission to enforce the provisions of this Act and to provide adequate compensation to the corporation for its loss of area and property. . .

Based on the provision quoted above, Woodruff Electric Cooperative was no longer able to provide electrical service to its

customers when Forrest City annexed the area. Thus, this court held that Forrest City under the Act, was required to compensate Woodruff for the loss of its nine customers.

The *Woodruff* case involved different law and different facts. The above-cited provision in Act 85 relied on in *Woodruff* has since been omitted when Act 85 was amended by Act 103 of 1957, now codified as Ark. Code Ann. § 23-18-331 (1987). Act 103 now provides that cooperatives can continue to provide service to the annexed areas and that the cooperative corporation continuing its electrical service into this newly annexed area must charge a comparable rate.

[redacted] In sum, under the current statutory provisions, when the City acquires the Cooperative's properties or facilities, it owes compensation to the Cooperative under section 4(A) of Act 639 of 1989. Further, in the event the Cooperative provides no electricity to the City acquiring its properties or facilities, then the City must compensate the Cooperative as described under subsection 4(B) of Act 639. When the City, however, does not acquire the Cooperative's properties or facilities, Act 639 does not apply. Instead, the Cooperative merely becomes an alternative supplier, and the City and the Cooperative can both provide electrical service to the area and compete for customers as provided under Act 103 of 1957.[1]

Because the City here acquired none of the Cooperative's facilities, it owes no compensation to the Cooperative. Instead, the Cooperative can compete with the City for customers.

[redacted] Finally, we note that the Cooperative, in oral argument, cited several cases from other jurisdictions, but primarily relied on *Delmarva Power & Light* v. *Seaford*, 575 A.2d 1089 (Del. 1990), where an electric public utility filed a claim for inverse condemnation after the city annexed territory where the public utility provided services and its customers subsequently switched to the city utility. While there are many similarities between the facts before us and the ones in *Seaford*, we cannot agree the holding in *Seaford* is applicable or persuasive. The Cooperative

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[1] The Act 103 of 1957 language pertinent here is still in effect, but the Act was amended for other purposes.

has presented no inverse condemnation claims in this case. Instead, both parties below and on appeal argued Arkansas statutory and case law, and the trial court made its ruling based on this law, as we have on appeal.

For the reasons stated above, we affirm the trial judge's construction of Act 639.

J.D. FISHER, *Appellant* v. Gerald JONES, Jones Olds-GMC-Buick, Inc., Mercedes-Benz of North America, Inc., Mercedes-Benz Credit Corporation, *Appellees*

Kelly Hill, Thelma C. Hill, Hill Investment Company, Hill Motor Cars II, Inc. and Hill Motor Cars, Inc., *Appellees/Cross-Appellants*

McIlroy Bank & Trust Company, *Appellee* v. John L. Fisher, James A. Fisher, Fisher Buick, Inc., Fisher Motor Cars, Inc., McIlroy Bank and Colonel Raymond C. Smith, *Cross-Appellees*

90-271 816 S.W.2d 865

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Joe Benson and *Jennifer Morris Horan*, for appellant.

Ball & Mourton, Ltd., by: *E.J. Ball* and *Andy E. Adams*, for appellees Gerald Jones and Jones Olds-GMC-Buick, Inc.

Everett & Stutte, by: *John C. Everett*, for appellee Mercedes-Benz of North America, Inc.

Crockett & Brown, P.A., by: *R.J. Brown*, for appellees Kelly Hill, Thelma C. Hill, Hill Investment Co., Hill Motor Cars II, Inc., and Hill Motor Cars, Inc.

TOM GLAZE, Justice. This multi-faceted litigation revolves around the February 28, 1986, asset sale of a Mercedes-Benz dealership in Fayetteville, Arkansas by Fisher to Hill.[1] Hill took possession, continued the business without interruption, and was granted a Mercedes-Benz franchise. In October 1989, Hill defaulted on his monthly payments, shut down the operation, and removed the inventory and most of the supplies and equipment. On October 31, 1989, Fisher filed a complaint in Washington County Chancery Court (Case No. E-89-1524), and obtained a restraining order in an attempt to maintain the status quo. By amended pleadings he sought a money judgment on the balance due and rescission of the sale agreement with substitutionary restitution where appropriate. Hill, in a counterclaim, asked for rescission and damages.

A short time later, Fisher filed a second complaint in Washington County Chancery Court (Case No. E-89-1592) against, among others, Mercedes-Benz North America, Inc. (MBNA) to enjoin the transfer, sale or award of the Mercedes-Benz franchise, and also for specific performance of an alleged MBNA contractual obligation to now award the franchise to Fisher. The actions were consolidated for trial, and after trial on the merits, all claims, third party claims and counterclaims were dismissed. Both Fisher and Hill have appealed. The decisions of the trial court in denying rescission (E-89-1524), performance (E-89-1592), and other related claims are affirmed.

Fisher first chooses to argue that the chancellor erred in

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[1] When referring to Fisher, we generally mean J. D. Fisher, but at times may include John L. Fisher, James A. Fisher, and Fisher Buick, Inc., d/b/a Fisher Motor Cars, Inc. Hill generally refers to Kelly W. Hill, but may include Thelma C. Hill, his wife, Hill Investment Co., Hill Motor Cars, Inc., and Hill Motor Cars II, Inc.

concluding MBNA was not legally obligated to re-issue its Fayetteville franchise to Fisher. The evidence, we believe, supports the chancellor's legal and factual conclusions on this point.

For many years prior to February 28, 1986, Fisher operated an automobile dealership at 2396 North College Avenue in Fayetteville. During the previous thirteen years, he held a Mercedes-Benz franchise with his then current franchise being for the two-year period from January 1, 1986, to December 31, 1987. On February 28, 1986, Fisher and Hill executed an offer and acceptance contract for the sale of the assets of the dealership for a total of $2,500,000.00. Payment, financed by Fisher, was to be in monthly installments of principal and interest over a period of twenty-five years. It was agreed that until Hill's performance was complete, Hill would not sell, without Fisher's written consent, described tracts of land, the dealership or the Mercedes-Benz franchise. Further, should Hill ever elect to transfer, relinquish, abandon or sell any interest in the franchise or either tract of land, Fisher would have the right of first refusal. Fisher consented to the transfer of the Mercedes-Benz franchise to Hill and their sale contract was subject to Mercedes-Benz approving the franchise transfer to Hill. Fisher agreed not to compete for five years within 100 miles. The parties placed the contract documents in escrow with McIlroy Bank & Trust Company, which was also to handle some disbursements.

Before the execution of the February 28, 1986 Fisher-Hill agreement, Fisher had notified MBNA of his plans to sell to Hill, had submitted the proposed sale agreement, and had stated that if Hill ever defaulted, Fisher wanted to get back the Mercedes-Benz franchise. Mercedes-Benz zone representatives, admittedly without authority to bind Mercedes-Benz to any franchise commitments, told Fisher that in the event of such a default, they saw no reason why Mercedes-Benz would not again award the franchise to Fisher, provided he still qualified.

Significantly, the record reflects that everyone involved knew and understood that MBNA had the exclusive right to select dealers, including successors, and that only the president or vice president of MBNA, headquartered in Montvale, New Jersey, had authority to act with respect to franchises. It was also recognized that MBNA would not discuss granting a franchise to

an applicant unless and until the current dealer had approved such a discussion. Accordingly, MBNA would not proceed to process an application until the current dealer had authorized its consideration or MBNA had canceled that dealership. In practice, MBNA did not proceed until there was submitted to it a proposed sale agreement between the terminating dealer and the proposed new dealer.

Hill's default problems included owing MBNA $31,751.18 and owing Mercedes-Benz Credit Corporation approximately $568,000.00 incident to his having sold automobiles "out of trust." That is, he sold mortgaged automobiles and retained the proceeds.

When Gerald Jones of Jones Olds-GMC-Buick, Inc. (Jones) observed Hill's Mercedes-Benz operation going out of business, he became interested in acquiring the Mercedes-Benz franchise in Fayetteville. Hill and Jones entered into an arrangement whereby Jones would pay to MBNA and Mercedes-Benz Credit Corporation a total of $301,000.00, provided that Jones was awarded the Mercedes-Benz franchise and provided further that MBNA and Mercedes-Benz Credit Corporation released Hill "of all debts that Hill owes to either." Thus, by Jones disbursing $301,000.00 to MBNA and Mercedes-Benz Credit Corporation, Jones would acquire a Mercedes-Benz franchise, and Hill would be released from debts totaling approximately $600,000.00.

From the foregoing, the chancellor determined that MBNA had not contractually obligated itself to deal with Fisher in the matter of the Mercedes-Benz franchise or to issue a franchise to Fisher. Further, the zone or regional officials of MBNA had no authority to bind the company to award a franchise, and Fisher had actual knowledge of such lack of authority.

In sum, the trial judge found that the Fisher-Hill agreement simply did not bind MBNA to any obligation. These findings cut across any suggestion made by Fisher that MBNA could be bound by zone officer representatives in Houston. They negate, as well, Fisher's claim that MBNA had in some way ratified statements attributed to their representatives that might otherwise have been reasonably relied on by Fisher, leading him to believe MBNA would reassign him the Fayetteville franchise after Hill defaulted. Furthermore, these facts in no way justify

Fisher's argument that a contract obligation should be imposed on MBNA so as to prevent an unjust enrichment.

Each of the chancellor's determinations was a permissible one and not clearly against the preponderance of the evidence. Accordingly, they cannot be set aside as clearly erroneous under Rule 52 of the Arkansas Rules of Civil Procedure.

Fisher also argues estoppel. While Fisher had high hopes and reasonable expectations that he would be re-awarded a Mercedes-Benz franchise, he, at all times, knew the relevant facts, was not ignorant of the true facts, and knew that he could not rely on his hope and expectations for favorable action. *See Foote's Dixie Dandy, Inc.* v. *McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980).

We mention, too, Fisher's argument that MBNA violated the Arkansas Franchise Act (Act) and, therefore, it would be fundamentally unfair for MBNA to refuse to renew, reassign or transfer the Fayetteville Mercedes-Benz franchise to Fisher. Under that Act, a franchisee is defined as a "person to whom a franchise is offered or granted." Ark. Code Ann. § 4-72-202(4). As already mentioned, the chancellor determined, permissably we have held, that MBNA had not contractually obligated itself to deal with Fisher in the matter of the franchise or to issue a franchise to Fisher. While the Act provides certain rights and imposes certain obligations between franchisors and franchisees, Fisher was not a franchisee after he sold his business to Hill. The Act simply is not applicable to the circumstances described in this case.

In sum, we hold the evidence supports the chancellor's decision that no express or implied contract existed and therefore no judgment against MBNA for specific performance could be granted. Thus, the decision in case E-89-1592 is affirmed.

In case E-89-1524, the balance admittedly owed by Hill to Fisher was in excess of $2,331,000.00 at the time of default. Fisher sought a money judgment on the contract balance due, less the value of assets returned, along with a declaration that the February 28, 1986, contract be rescinded and that the court determine the amount of substitutionary restitution. The chancellor was of the opinion that Fisher had not met the burden of

proof so as to entitle him to restitution, and concluded that the circumstances had been so altered by part execution that the parties could not even be closely restored to status quo so that it was impossible to grant rescission. We agree.

Fisher cites the case of *Economy Swimming Pool Company* v. *Freeling*, 236 Ark. 888, 370 S.W.2d 438 (1963), for the rule that where there is a material breach of contract, substantial nonperformance, and substantial failure of consideration, the injured party is entitled to rescind the contract and recover money paid thereunder. Fisher asserts that since $2,331,000.00 remained due on the $2,500,000.00 purchase price, Hill's failure to pay constituted substantial nonperformance of the parties' February 28, 1986 agreement. Furthermore, Fisher claims he and Hill can be restored to their original positions because Fisher has offered to excuse Hill's entire debt in exchange for Hill's return of the automobile dealership and two tracts of land to Fisher.

Hill's testimony, on the other hand, reflected that he had substantially performed under the parties' agreement. For example, he testified he was paying ten percent interest on this debt and had paid monthly payments of $24,100.00 for three and one-half years, totaling over $1,000,000.00. And, as has already been discussed, the Mercedes-Benz dealership franchise could not be restored to Fisher.

Even Fisher, in his argument, concedes the difficulty in trying to achieve a correct valuation of assets and application of credits and set-offs in any attempt to put the parties back to their original positions. The chancellor, on these facts, simply found such a goal to be unachieveable, and in our review of the record, we are unable to say his findings are against the preponderance of the evidence. *Economy Swimming Pool Company*, 236 Ark. 888, 370 S.W.2d 438.

Fisher attempts to avoid the chancellor's findings on the foregoing rescission issue by arguing the single exception to the "status quo" rule, *viz.*, parties can still rescind a contract if they mutually consent to do so. *See Herrick* v. *Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980). In other words, parties to a contract may at any time rescind it in whole or in part by mutual consent, and the surrender of their mutual rights and the substitution of new obligations is a sufficient consideration. *Afflick* v. *Lambert*,

187 Ark. 416, 60 S.W.2d 176 (1933); *see also Haering Oil Co.* v. *Beasley*, 221 Ark. 607, 254 S.W.2d 951 (1924) (where Haering and Beasley mutually agreed to terms to end their original contract before its termination date).

In the present case, Fisher and Hill never entered into an agreement to modify or rescind their original contract — either before or after the contract was performed. At one juncture, both parties had sought the rescission remedy, but never came close to arriving at an agreement to resolve their differences. Certainly, Hill never agreed that Fisher was entitled to rescission as was alleged and argued below, and argues now on appeal that the chancellor was correct in denying Fisher's claim for rescission. Suffice it to say, the rules set out above in *Herrick* and *Afflick* are intended to cover those situations where the parties mutually agree to rescind their original agreement — a situation that never occurred between Fisher and Hill.

Fisher also relies on the case of *Stanford* v. *Smith*, 163 Ark. 583, 260 S.W. 435 (1924), when generally arguing that the chancellor was not precluded from awarding the remedy of rescission. In that case, Stanford had filed suit to rescind an exchange of property for fraud. Fisher offers no fraud argument on appeal, nor did the chancellor find any fraud on either the part of Hill or Fisher. Another important distinction is that the court in *Stanford* was able to adjust the inequities so as to award the remedy that Stanford (the injured party) sought and to place Smith, the wrongdoer, in status quo. Again, as discussed previously, the chancellor here simply found it impossible to restore the parties to status quo.

Finally, we turn to Hill's argument that the chancellor erred in finding Hill had failed to meet his burden of proof on his counterclaims for tort of interference, breach of contract and fraud. None of Hill's claims have merit.

First, we have reviewed the record, and cannot find where Hill had the chancellor consider and rule on the tort of interference issue. While such a claim appears to have little merit for other reasons, we simply do not address it because it is an issue raised for the first time on appeal.

Next, Hill contends Fisher breached the parties' February

28, 1986 dealership sale contract which included the property upon which Fisher's business was situated. Apparently, Fisher and Hill signed their February 28, 1986 contract, agreeing the deeds conveying the business property would be placed in escrow. On the same day, Fisher's two sons executed deeds to the property in Fisher's name and these deeds were then held by Fisher's attorney and not filed for record until Hill later breached the parties' contract and vacated the business premises. Hill claims Fisher placed deeds in escrow which never conveyed title to the land and, by doing so, breached the parties' contract, resulting in damages to Hill. We disagree.

The record reflects the parties' sale agreement provided the deeds to the property would not be transferred until the contract was paid in full, and Hill knew the title to the subject property would remain in Fisher's name, pending completion of the contract. Hill's assertions that Fisher's action concerning the deeds was a material breach of the parties' contract or that such action constituted fraud is not supported by our reading of the record. Thus, we agree with the chancellor's dismissal of Hill's counterclaim and third party complaints.

For the reasons presented above, we affirm the trial court in each of its decisions.

Special Justice ROBERT S. LINDSEY dissents in part. NEWBERN, J., not participating.

ROBERT S. LINDSEY, Special Justice. I concur in the denial of specific performance (E-89-1592). It is only in denying rescission that I would reverse and remand (E-89-1524).

The Chancellor was of the opinion that Fisher had not met the burden of proof so as to entitle him to restitution, and concluded that the circumstances had been so altered by part execution that the parties could not even be closely restored to status quo so that it was impossible to grant rescission.

As a general rule, restoration of the status quo is a prerequisite to rescission. Absolute and literal restoration is not required, but only such restoration as is reasonably possible in accordance with equitable principles. *Stanford* v. *Smith*, 163 Ark. 583, 260 S.W. 435 (1924).

The Chancellor noted that both parties asked for rescission. Two other filings pinpoint an agreement to rescind. In a motion filed January 9, 1990, Hill included:

> 3.3 Plaintiff has requested rescission. . . .
>
> 4. Plaintiff and defendants concur that rescission is an appropriate remedy. It is therefore appropriate for the court to enter its order granting rescission at the request of both parties.

In a response filed January 11, 1990, Fisher included:

> Respondents concur that the court should order rescission of the contract relating to the sale of the Mercedes-Benz - dealership in Fayetteville, Arkansas, . . .

A Restatement comment makes a distinction between an "agreement of rescission" and the exercising of a right of rescission. Restatement (Second) of Contracts § 283 (1981). Arkansas cases recognize this distinction.

In Arkansas, by mutual consent, the parties to a contract may rescind it in whole or in part. In *Elkins* v. *Aliceville*, 170 Ark. 195, 279 S.W. 379 (1926), we said:

> It is well settled that the parties to a contract may at any time rescind it in whole or in part by mutual consent, . . .

Id. at 200.

In *Afflick* v. *Lambert*, 187 Ark. 416, 60 S.W.2d 176 (1933), we said:

> It is therefore a well settled rule of this Court that any parties who can make a contract can rescind or modify it by mutual consent. . . .

Id. at 418.

It is urged that these cases only encompass situations where the parties mutually agreed to rescind before any performance, and that the principle is not applicable here. This court, however, quoting the rescission language from both *Elkins* and *Afflick*, said that a contract was terminated in midterm by mutual consent in *Haering Oil Co.* v. *Beasley*, 221 Ark. 607, 254 S.W.2d 951 (1953). Haering was a bulk sales agent for petroleum

products and furnished equipment such as hydraulic lifts, tanks, pumps and air compressors. Beasley owned a filling station and contracted with Haering to sell his petroleum products for one year from September 1, 1947, to August 31, 1948, and thereafter from year to year, subject to termination at the end of any year upon 30 days notice. In February 1949, Beasley notified Haering that he was going to purchase his petroleum products from Lion Oil Company and asked Haering to invoice the equipment which was at Beasley's to Lion Oil Company. Haering contended that Beasley could not terminate the contract until August 31 of any year and sought damages for breach of contract. The court said that the contract was terminated by mutual consent when Haering, in accordance with Beasley's request, sold the equipment to Lion Oil Company and stopped selling petroleum products to Beasley.

Cases that apply the principle that restitution must be substantially in toto recognize a "mutual consent" exception. In *Herrick* v. *Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980), a seller of assets sued the buyer for the balance due. The buyer's counterclaim included an allegation that the contract had been rescinded. The court denied rescission on the ground that the attempt to rescind was not timely. It was also argued that the buyer had never made an offer of restoration. We said:

> A contract cannot be rescinded, *except by mutual consent*, where the circumstances have been so altered by part execution, that the parties cannot be put in statu quo.

Id., 267 Ark. at 588 (emphasis supplied).

In *Bellows* v. *Cheek*, 20 Ark. 424 (1859), we said:

> A contract cannot be rescinded *without mutual consent*, when circumstances have been so altered, by part execution, that the parties cannot be put in statu quo; for if it is to be rescinded at all, it must be rescinded in toto. (Emphasis supplied)

Similar language from this court is in *Desha's Exrs.* v. *Robinson, Admr.*, 17 Ark. 228, 238 (1856).

While *Stanford* v. *Smith* recognized that generally rescission called for restoration of the status quo, it also pointed out that

if full restoration were not possible, the court could proceed with partial restoration and adjust the equities.[1] A one-half interest in a mercantile business in Dumas was a problem. Stanford owned a house and the one-half interest. Smith owned forty acres of land in Texas. A trade was made but when Stanford arrived in Texas, he found the Texas property not as represented. This court held that rescission was in order even though it could not reestablish the mercantile partnership.

> The mercantile business was operated as a partnership, and that partnership was, of course, dissolved by the sale of Stanford's interest therein. We cannot re-establish this partnership, but we can charge Smith with the value of the property which he received, after giving him credit for the debts against it which he assumed.

The one-half interest in the mercantile partnership could not be and was not restored but, nevertheless, the Court ordered rescission and adjusted the equities. Equity will not decline to grant aid "merely because circumstances intervening since the occurrence of the transaction complained of may render it difficult to restore the parties exactly to their original situations," citing 4 R.C.L. p. 511. I similarly view the Mercedes-Benz franchise.

Although there may be a technical differentiation of a rescission by "mutual consent" before performance, there are forceful reasons for giving effect to separate and joint requests from the parties for equitable rescission. This is particularly so when the parties seem to agree as to what will be adequate compliance with the status quo restoration requirement. Each appears to be suggesting, in general, that Fisher would get return of physical assets still in existence; Hill would be given credit for the $1,270,902.44 paid by him through the escrow accounts; and Fisher would offset the fair rental value of the assets in the enterprise during the period of Hill's operation. Fisher's counsel urged that the parties could be placed in status quo "by the Court's giving appellee Hill credit for 'monies paid' and giving

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[1] This case also stands for the general rule that if there cannot be restoration, a party "is remitted to action for damages." Here, damages were sought but there is no reference to nor discussion of the damage claim in light of the denial of the rescission claim.

appellant Fisher an offset for the 'fair rental value.' "

Hill's testimony was abstracted in this manner:

> If this contract were to be rescinded and both parties restored to their position before execution on February 28, 1986, that would be fine with me. I would get my million dollars back and pay the Fishers for the fair market value and rent for their property for 3 1/2 years, or whatever the time is that I had the property.

Obviously, the Mercedes-Benz franchise is out of the picture, whether there is or is not rescission.

One annotator has written:

> The object of the rule [restoration of status quo] is theoretically to place the parties in statu quo; but the rule is equitable, not technical, and does not require more than that such restoration be made as is reasonably possible and such as the merits of the case demand.

17A Am. Jur. 2d *Contracts* § 592 (1991).

Again:

> In the event restoration of the status quo is impossible, restoration may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief.

17A Am. Jur. 2d *Contracts* § 597 (1991).

If this is a matter of rescission by "mutual consent," then it was within the rights of the contracting parties. If there were only requests by both parties for rescission, then under the equitable principles and guidelines established by the courts, restoration of the status quo was not so impossible as to preclude giving effect to what was agreed.

Accordingly, I would reverse and remand E-89-1524 for further proceedings consistent with this opinion.

Charles Edward BRADFORD *v.* STATE of Arkansas

CR 91-105 815 S.W.2d 947

Supreme Court of Arkansas
Opinion delivered September 30, 1991

Davis H. Loftin, for appellant.

Winston Bryant, Att'y Gen., *Catherine Templeton*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, Charles E. Bradford, was convicted of first degree murder by a Crittenden County Circuit Court jury and sentenced to life imprisonment. On appeal, he challenges the admission of three statements and some photographs. We affirm his conviction.

The evidence in this case reveals that Yvonne Parker was murdered on November 17, 1989. On November 22, 1989, appellant went to the West Memphis Police Department and, after being informed of and waiving his *Miranda* rights, gave a statement regarding Yvonne Parker's murder. Appellant denied any involvement in the murder, but admitted that he went to Parker's trailer on November 17th and found her dead. He told the officers that he panicked and ran from the trailer, taking a bloody towel with him. Toward the end of the statement, Detective James Sudbury told appellant he thought appellant had killed Parker. At that point, appellant told Detective Sudbury he did not want to say any more until he could obtain an attorney. The statement was concluded and appellant was arrested and held pursuant to an outstanding warrant on a drug charge.

On either November 24th or 25th, appellant told a jailer that he wanted to speak to the detectives. The jailer, Rodney Ivy, could not contact the detectives for a few days because of the Thanksgiving holiday. A bond hearing was held on November 27, 1989, and appellant's father asked the judge for some time to obtain an attorney to represent appellant. The judge granted this request. On November 29th, after being informed that appellant wished to speak with a detective, Detective Sudbury went to see appellant at the jail and asked if he still wanted to speak to a detective. Appellant indicated that he did. Detective Sudbury informed appellant of his rights in the presence of Lieutenant Tony Miller and Detective McCraken. Appellant then signed a waiver of rights form. Following the waiver of his rights, appellant discussed the case with Lieutenant Miller and Detec-

tive McCraken. At the end of the discussion, appellant agreed to take a polygraph examination.

A polygraph examination was set up with the Arkansas State Police in Jonesboro and appellant was transported to Jonesboro that afternoon, November 29, 1989. State Police Investigator Charles Beal informed appellant of his rights. Appellant signed a waiver of rights form and gave a statement, telling Investigator Beal that he had also taken Yvonne Parker's purse when he left the trailer that night. Investigator Beal testified that after the examination was concluded, he read appellant his rights again and appellant then gave a statement admitting that he killed Yvonne Parker.

On November 30, 1989, appellant called Linda McCoy, Yvonne Parker's sister, from the West Memphis jail and told her that he had killed her sister. Appellant and McCoy lived together for thirteen years and had three children. Appellant's father was apparently unable to obtain an attorney for him, and counsel was appointed to represent him on December 1, 1989. Appellant was charged with first degree murder on January 12, 1990.

Appellant filed a motion to suppress the November 22, 1989 statement, the statement following the polygraph examination on November 29, 1989, and his statement to Linda McCoy. After a hearing on the motion to suppress, the trial court ruled that all three statements were admissible into evidence.

Appellant first contends the trial court erred by admitting the November 22, 1989 statement to the West Memphis Police Department. Appellant argues this statement should have been suppressed because he was arrested on November 23, 1989, and an attorney was not appointed to represent him until December 1, 1989. He contends this delay, from the time of his arrest until the time counsel was appointed to represent him, violated his constitutional right to counsel; thus, the statement made to the West Memphis police on November 22, 1989, should be suppressed. Appellee responds with the argument that appellant waived his right to counsel prior to giving the November 22, 1989 statement.

The burden is on the state to establish that appellant waived his rights and all doubts must be resolved in favor of the individual rights and constitutional safeguards. *Sutton* v. *State*,

262 Ark. 492, 559 S.W.2d 16 (1977). The inquiry into the validity of appellant's waiver of his *Miranda* rights, specifically his right to counsel, has two distinct dimensions. *Colorado* v. *Spring*, 479 U.S. 564 (1987); *Burin* v. *State*, 298 Ark. 611, 770 S.W.2d 125 (1989). The waiver must be voluntary and it must be made knowingly and intelligently. *Colorado*, *supra*; *Burin*, *supra*.

The requirement that a waiver of *Miranda* rights be voluntary is concerned with coercive police activity. *Burin*, *supra*. As appellant never alleged any coercive activity by the police in connection with this statement, we need only consider whether appellant waived his right to counsel knowingly and intelligently prior to giving the statement. Factors bearing on this determination include appellant's age, experience, education, background, and the length of detention. *Burin*, *supra*. Appellant was thirty-three years old and had a twelfth-grade education at the time he gave the statement in question. He had been arrested previously for a drug offense. The statement began at 11:21 p.m. on November 22, 1989, and was concluded at 12:03 a.m. on November 23, 1989. As stated previously in this opinion, appellant signed a waiver of rights form prior to giving the statement. When he exercised his right to counsel during the statement, the statement was quickly concluded.

Counsel had not been appointed for appellant because he indicated he was trying to obtain his own counsel. On November 22, 1989, appellant told the West Memphis police officers that he did not want to talk any more until he got himself an attorney. Similarly, at appellant's bond hearing on November 27, 1989, his father asked the judge for some time to obtain an attorney to represent appellant. At no time did appellant indicate that he wanted appointed counsel. Appellant's father was apparently unable to obtain counsel for him, thus counsel was appointed to represent him on December 1, 1989. We conclude the statement was not taken in violation of appellant's right to counsel, and the trial court correctly denied the motion to suppress it.

For his second argument on appeal, appellant contends the trial court erred in admitting the statement he made on November 29, 1989, to Investigator Beal after taking the polygraph test. Investigator Beal testified that at 5:18 p.m. on November 29,

1989, he advised appellant of his rights. Investigator Beal testified that appellant indicated to him verbally that he understood those rights and that he signed the rights form. Beal testified further that no force, promises, threats, or coercion were used to get appellant's signature on the form. After waiving his rights and before taking the polygraph examination, appellant made a brief statement, admitting that he had taken Yvonne Parker's purse from the trailer on the night of the murder.

Investigator Beal then conducted a polygraph examination on appellant. Following the examination, appellant made another statement to investigator Beal admitting that he killed Yvonne Parker. Investigator Beal testified at trial that he read appellant his rights before appellant gave this incriminating statement. Investigator Beal then wrote the statement down in appellant's exact words and went over each word with him. He testified that he observed appellant sign each page of the statement and again at the end of the statement.

Appellant contends that because the results of his polygraph examination were inadmissible, this incriminating statement was also inadmissible as it resulted from his polygraph examination. We have specifically held that incriminating statements and admissions made freely and voluntarily after or as a result of a polygraph examination are admissible into evidence, if they are not otherwise involuntary. *See Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979). Appellant does not allege the statement was involuntary in any manner.

The state submits that the statement appellant made following his polygraph examination was admissible under *Gardner*. Although appellant had invoked his right to counsel a few days prior to taking the polygraph examination, he reinitiated contact with the police on November 29, 1989. He then waived his rights knowingly, intelligently, and voluntarily prior to making this statement after the polygraph examination. Accordingly, the trial court correctly allowed the statement to be introduced into evidence.

As his third argument, appellant contends the trial court erred in allowing the victim's sister to testify that appellant called her from the West Memphis jail on November 30, 1989, and

admitted that he had killed her sister. Appellant sought to have this statement suppressed on the basis that he was in custody at the time this call was made and that he was without the benefit of counsel.

We find no merit in this argument. The requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), do not come into play unless a defendant is subjected to custodial interrogation or the functional equivalent thereof. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Appellant made this statement to a third party. We cannot say this phone call was the functional equivalent of custodial interrogation. The trial court did not err in denying the motion to suppress the statement made to the victim's sister.

For his final argument, appellant contends the trial court erred in admitting photographs of the victim's body into evidence. He argues the photograph depicting the victim's neck bent backward to demonstrate her cut throat and the photograph demonstrating eight stab wounds into the heart area had a prejudicial effect that outweighs the probative value of the photographs.

Both the state and the defense rely on the rule announced in *Berry* v. *State*, 290 Ark. 223, 227, 718 S.W.2d 447, 449 (1986) where this court stated:

> The fact that photographs are inflammatory is not alone sufficient reason to exclude them. [Citations omitted.] Inflammatory pictures are "admissible in the discretion of the trial judge, if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony." [Citation omitted.]

The two photographs may have enabled the medical examiner to better describe the wounds that contributed to the victim's death and demonstrate to the jury the nature and extent of the wounds she suffered, as well as the savagery of the attack on her. We stated in *Cash* v. *State*, 301 Ark. 370, 784 S.W.2d 166 (1990), that pictures may also be useful to the jury by showing the nature and extent of wounds and savagery of the attack on the victim.

The admissibility of photographs is in the sound discretion of the trial judge, whose decision will not be set aside absent an abuse of that discretion. *Owens* v. *State*, 300 Ark. 73, 777 S.W.2d 205 (1989). We do not find the trial court abused its discretion in admitting the photographs into evidence.

As required by Ark. Sup. Ct. R. 11(f), the objections decided adversely to appellant have been abstracted; we have reviewed these objections and find that none of them merits reversal.

Affirmed.

Kenneth Ray CLEMENTS *v.* STATE of Arkansas

CR 91-160 817 S.W.2d 194

Supreme Court of Arkansas
Opinion delivered October 7, 1991

Ray Hartenstein, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Kenneth Ray Clements, brings this interlocutory appeal alleging that the trial court's removal of his appointed attorney, Richard Atkinson, violated his sixth and fourteenth amendment rights to counsel under the United States Constitution and his right to counsel under Art. 2, Section 10 of the Arkansas Constitution. The State agreed with Clements and has waived its right to file a brief in response. We also agree, and reverse and remand.

This case involves the retrial of Clements for capital murder in the shooting death of police officer Ray Noblett. *See Clements v. State*, 303 Ark. 319, 796 S.W.2d 839 (1990). On April 23, 1991, Messrs. Richard Atkinson and Kenneth Suggs were appointed by Judge Floyd Lofton to defend Clements at his second trial. Judge Lofton was assigned to the case following the recusal of the Faulkner County judges. A trial date was scheduled for June 24, 1991.

At a pretrial hearing on June 17, Atkinson moved for a continuance of the June 24 trial date, citing the voluminous nature of the discovery, the time needed to review the transcript and documents from the previous trial, and the fact that a new theory of defense was being developed. Judge Lofton found both Messrs. Atkinson and Suggs negligent, held them in contempt of court, fined them $1,000 each, and removed them from the case. Judge Lofton appointed attorneys, Messrs. Ray Hartenstein and Blake Hendrix, as replacements. [Mr. Atkinson has filed a separate appeal with this court, challenging the contempt citation, Case No. 91-191, filed July 10, 1991.]

Clements now appeals, requesting the reinstatement of Mr. Atkinson. Clements stated that he was not pleased with Mr. Suggs' representation, and the record reflects Mr. Suggs did not object to his discharge from the case.

In order to provide a full understanding of what occurred at

the pretrial conference, we find it necessary to set out the entire record colloquy pertaining to Mr. Atkinson's motion for continuance.

MR. ATKINSON: Your Honor, at this time I'd like to make an oral motion for a continuance —

THE COURT: We've already ruled on that.

MR. ATKINSON: — in this case. Your Honor, I'd like to make a record.

THE COURT: Your man says he's ready to go. Says he's satisfied with you.

THE DEFENDANT: I said I was satisfied with the attorneys. I never said anything about satisfied with the trial, your Honor.

THE COURT: Well, we haven't even started the trial yet.

THE DEFENDANT: I know it. But you said I said I was satisfied with it.

THE COURT: Well, you told me you were satisfied with it.

THE DEFENDANT: With the attorneys.

THE COURT: Well, we'll — we'll —

THE DEFENDANT: I haven't said anything about trial.

MR. ATKINSON: Your Honor, in all fairness, I think you were asking Mr. Clements to make conclusions that an attorney would have to make as far as readiness for trial.

THE COURT: Well —

MR. ATKINSON: I don't think that he has the expertise to make those determinations. And from discussions prior to and up until this morning, it is Mr. Clements' desire that this case be continued based upon —

THE COURT: Well, he hasn't —

MR. ATKINSON: — his consultation with his counsel.

THE COURT: But he hasn't told me why. He wants some things done but he doesn't know what they are. And, Mr. Atkinson, are you telling me that you've been negligent?

MR. ATKINSON: No, your Honor, I am not.

THE COURT: Well —

MR. ATKINSON: I am telling you that sixty days has not been sufficient time to prepare for this case.

THE COURT: Why isn't it?

MR. ATKINSON: Because the case is too complex. The discovery is too much. There are piles and piles of papers that need to be gone through. I was not privy to this trial the first time it was tried. I have a transcript of that trial —

THE COURT: Have you read it?

MR. ATKINSON: — which I have read.

THE COURT: Well.

MR. ATKINSON: I have read that transcript.

THE COURT: Well, that's —

MR. ATKINSON: In all fairness to Mr. Suggs, Mr. Suggs has not read that transcript. It's been in my possession. But Mr. Suggs has not read that transcript. Your Honor, the discovery has not been completely digested by Defense in order to completely develop the defense that's been offered. This defense was not offered at the first trial.

THE COURT: Which is amusing to me. But go ahead.

MR. ATKINSON: I do not know why the defense was not offered at the first trial. I can't answer for that. I was not defense counsel —

THE COURT: Well, you know, we don't know that it will be offered at the next one either. We may find another one.

MR. ATKINSON: That's very correct, your Honor. But

there is no way that defense can be readied and properly presented fairly for this man on the twenty-fourth.

THE COURT: If that is so, Mr. Atkinson, then the Court will have no choice but to find you negligent and in contempt, and so with Mr. Suggs, because you represented to this Court that you could and would get ready. I sent notices out to you. You both concurred in this trial date. And all I hear you saying is that, "We've sat on our fanny and not done anything about this and we want a continuance." But you can't tell me what it is you want to do. And you have no assurance — I have no assurance that if I give you another thirty days you'll do any more than you have in the last sixty.

MR. ATKINSON: I'll tell you exactly what we want to do, your Honor. I have spent hours upon hours and almost bankrupted my law practice in trying to prepare for this case by the twenty-fourth. I have come to the conclusion within the last five or six days that it's humanly impossible to be prepared to give this man a fair defense on the twenty-fourth of this month.

THE COURT: Why?

MR. ATKINSON: Because I have not been able to go through the discovery, much of it, more than one time. I have not had the time to do it. I have read the transcript. I have gone through the discovery as it has come in. Discovery was available but not produced to the Defense by the prosecution, much of it —

THE COURT: See, he's not —

MR. ATKINSON: — until the last week.

THE COURT: He's not dissatisfied with you. He thinks you're doing a wonderful job. And you haven't done a damn thing apparently. He's just unhappy with Kenny.

MR. ATKINSON: Your Honor, the discovery has not been fully disseminated. The witnesses have not been — have not had opportunity to develop who all of the witnesses will be or to interview the witnesses that will be called. And this defense needs more time to be developed.

THE COURT: If I have to give you a continuance, I'm going to find you ill prepared and relieve you from the case and you will not try it at all. I'll get somebody else to do it. That means you don't take care of your practice apparently.

MR. ATKINSON: I understand, your Honor. But this man deserves a fair trial.

THE COURT: Well, why haven't you been busy about it, Mr. Atkinson?

MR. ATKINSON: I have been very busy, your Honor.

THE COURT: Not very busy. If you can't read a transcript and get prepared in sixty days, then you've got no business practicing this kind of law.

MR. ATKINSON: With all due respect, your Honor, we're not trying the last trial. We're trying a new trial —

THE COURT: I know.

MR. ATKINSON: — and we're not trying that transcript again.

THE COURT: That's why it's not important for you to have read it. If there's not anything in there, what difference does it make if you haven't read it but one time?

MR. ATKINSON: I have read the transcript.

THE COURT: One time. And there's nothing in there. You're trying a new case. So. You should have found that out early on.

MR. ATKINSON: I never represented to the Court that there was nothing in the transcript. There's very valuable information in the transcript.

THE COURT: You just told me you're not trying that other case, you're trying a new case.

MR. ATKINSON: That's absolutely correct.

THE COURT: Mr. Hartenstein?

MR. HARTENSTEIN: Yes, your Honor.

THE COURT: Can you represent this man?

MR. HARTENSTEIN: No way I can represent him by Monday.

THE COURT: I'm not asking about Monday.

MR. HARTENSTEIN: If the Court sees to — wants to appoint me, I will accept the appointment.

THE COURT: But, now, when will you try it?

MR. HARTENSTEIN: All I have seen of this case thus far is a sixteen volume transcript and several huge boxes of paper.

THE COURT: Well, you can rest assured that's not going to help you because they're read it and they don't know what they's talking about —

MR. HARTENSTEIN: I may differ.

THE COURT: — and they're not trying that other case. Huh?

MR. HARTENSTEIN: I may differ with them.

THE COURT: Well, I'm sure you will.

MR. HARTENSTEIN: I don't want to —

THE COURT: Mr. Foster, I don't really see much sense in pursuing this when we've got two lawyers admitting negligence on their part and dereliction of duty. I don't see any sense in pursuing this. Do you?

MR. FOSTER: Pursuing the?

THE COURT: Trial.

MR. FOSTER: Your Honor, it's — It's our — We do resist the motion for a continuance, your Honor.

THE COURT: I understand. But, you know, if you've got two lawyers who admit their negligence and haven't prepared this case and can't represent this man, we're just kidding ourselves. It's going to be expensive for both of them. But, Ray, I tell you what I'll do. I'll recess this case

until you can go back to your office and get your calendar back over here. And, if you will accept it, do you want some help?

MR. HARTENSTEIN: Certainly.

THE COURT: Who?

MR. HARTENSTEIN: Can I think about that while I —

THE COURT: Sure. What time is it? Can you be back by noon?

MR. HARTENSTEIN: Yes, sir.

THE COURT: Let's recess until 11:45. Gentlemen, you all stay in the courtroom. And, Mr. Clements, let me ask you this. Are you satisfied with Mr. Hartenstein?

THE DEFENDANT: Yes, sir.

THE COURT: There ain't going to be no more, "I'm not satisfied."

THE DEFENDANT: No, sir.

THE COURT: And your defense is, "I didn't do it; somebody else did."

THE DEFENDANT: Yes, sir.

THE COURT: All right. We're in recess until 11:45.

(THEREUPON, court was in recess for approximately thirty minutes; then the following proceedings occurred:)

THE COURT: All right. Mr. Atkinson, the motion before the Court is for a continuance. I've asked Mr. Hartenstein if he can accept an appointment. Mr. Hartenstein, can you?

MR. HARTENSTEIN: Yes, your Honor.

THE COURT: And you want Mr. Blake Hendrix to help you?

MR. HARTENSTEIN: Yes, your Honor.

THE COURT: You're relieved, Mr. Atkinson. Do you

want to be relieved?

MR. ATKINSON: No, your Honor.

THE COURT: Do you want to be relieved?

MR. SUGGS: Yes, I do.

THE COURT: Ken Suggs and Richard Atkinson relieved, held to be negligent and failing to prepare case and get ready for trial, and held in contempt of Court and assessed a fine of a thousand dollars each to be paid within ten days unless a Notice of Intent to Appeal is filed. Ray Hartenstein and Blake Hendrix are appointed. Mr. Clements, have you got any problem with what I'm doing?

THE DEFENDANT: No, sir. I was just hoping that Mr. Atkinson can stay.

THE COURT: Well, I wish you'd make up your mind. You weren't happy with him. Now, you're unhappy [sic] with him.

THE DEFENDANT: I told you earlier I was happy with him.

THE COURT: Well, he hasn't done anything for you.

THE DEFENDANT: Well, I see that he has, your Honor.

THE COURT: Well, are you ready to go to trial with him Monday?

THE DEFENDANT: That's up to the attorneys.

THE COURT: Now, wait a minute. Now wait a minute. I'm talking to you. If you're happy with him, I'll let him stay on the case and we'll go to trial Monday.

(THEREUPON, Counsel for the Defense conferred privately with the Defendant; then the following proceedings occurred:)

THE DEFENDANT: No, sir.

THE COURT: No, sir, what?

THE DEFENDANT: I'm not happy with him.

THE COURT: Well, he just told you that.

THE DEFENDANT: I'm not ready to go to trial.

THE COURT: I know. You're not ever going to get ready to go to trial. But that may not be an election that you have. Are you happy with Mr. Atkinson and you want to go to trial Monday?

THE DEFENDANT: No, sir, I don't.

THE COURT: All right. When's the trial date, Mr. Prosecutor?

MR. FOSTER: Your Honor, I believe that September 23rd the courtroom would be available in Conway.

THE COURT: September 23rd?

MR. FOSTER: I believe that's correct, your Honor.

THE COURT: At nine a.m.

MR. FOSTER: Yes, sir.

THE COURT: Ray and Mr. Prosecutor, after you all have had some time, let me know when you want a hearing, an omnibus hearing, and get with Terry and I'll set it any time you all want it. I'm at your mercy. And I'll stay as late as you need. And I want this man represented and I don't want to hear him complaining and fussing anymore, although I'm not really upset with him. If I had two lawyers that hadn't done anything about it, I'd be upset, too. And they're relieved and have no more responsibility in it. And I'll expect a check from them. You all let me know what you want to do.

MR. FOSTER: We'll do so, your Honor.

THE COURT: All right. Thank you, sir. Court's adjourned.

A defendant's right to counsel of choice is grounded in the sixth amendment to the United States Constitution, and is also granted by Art. 2 Section 10 of the Arkansas Constitution. Applying this principal to court-appointed, as well as privately retained, attorneys we have held, however, that the right to

counsel of one's choosing is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. *Burns* v. *State*, 300 Ark. 469, 780 S.W.2d 23 (1989). An example of such purposeful frustration occurs when a defendant requests new counsel merely in order to obtain a continuance of trial. *See Bryant* v. *State*, 304 Ark. 514, 803 S.W.2d 546 (1991). Certainly this was not the situation here, and, in fact, both Clements and Mr. Atkinson clearly expressed their desire for Mr. Atkinson to remain on the case. Clements only relinquished that request when the trial court literally forced him to choose between accepting new counsel, to whom he was opposed, in order to obtain the continuance, or retaining Mr. Atkinson, as he wished and immediately proceeding to trial unprepared.

This case thus presents the unique situation where a trial court removes an attorney from the case against the wishes of both the defendant and the attorney. Some courts have found this to be a violation of the accused's sixth amendment right to counsel, and we find their logic compelling.

In *Harling* v. *United States*, 387 A.2d 1101 (1978), the trial court removed the defendant's appointed attorney, over the protestations of both client and attorney, because the attorney stated that he could not be an effective advocate without access to the names of certain eyewitnesses. The trial court abruptly cut him off and construed the attorney's statement as an attempt at making a record for ineffectiveness of counsel when, in reality, the attorney was simply trying to convince the court to grant his motion for discovery.

In reversing, the District of Columbia Court of Appeals recognized that an indigent does not have an unqualified right to counsel of his choice, and that substitution of counsel rests within the discretion of the trial court. The court concluded, however, that:

> '[O]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of *that* counsel at trial.' The right to assistance of chosen counsel is not absolute, however. A trial judge may 'in the interest of justice' substitute one counsel for another. Gross incompetence or physical incapacity of counsel, or contumacious

> conduct that cannot be cured by a citation for contempt may justify the court's removal of an attorney, even over the defendant's objection.

Harling, 387 A.2d at 1105 (citations omitted). The appellate court found that there was no justifiable basis for the trial court's removal of the appointed attorney:

> Counsel's efforts were within the bounds of reasonable advocacy. His conduct appears neither contemptuous, insolent, nor unprofessional. The court's response to counsel's persistence was both intemperate and unwise. Mere disagreement as to the conduct of the defense certainly is not sufficient to permit the removal of any attorney.

Id. Likewise, we find no support in the record for the trial court's discharge of Mr. Atkinson.

Mr. Atkinson was appointed to the case only two months prior to the trial date. The case has a complex history, involving two other alleged accomplices. *See Leach* v. *State*, 303 Ark. 309, 796 S.W.2d 837 (1990); *McMillen* v. *State*, 302 Ark. 601, 792 S.W.2d 315 (1990). Mr. Atkinson was not only attempting to read and digest what must have constituted reams of documentation compiled during the first trial, but was conducting his own investigation as he is required to do. *See David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988). The record reflects that he and Mr. Suggs had already filed numerous motions before they were released from their representation of Clements. Even assuming Mr. Atkinson to have been negligent, as the trial court charged, there was certainly no evidence of gross malfeasance, physical incapacity, or belligerent conduct, such as would justify his removal.

We have held that once competent counsel is obtained, any request for a change in counsel must be considered in the context of the public's interest in the prompt dispensation of justice. *Leggins* v. *State*, 271 Ark. 616, 609 S.W.2d 76 (1980). Certainly, the same consideration should apply to a trial court's removal of appointed counsel. We find the holding of the Supreme Court of California particularly instructive:

> [W]e must consider whether a court-appointed counsel may be dismissed, over the defendant's objection, in

> circumstances in which a retained counsel could not be removed.
>
> A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary; it involves not only just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service. It follows that once counsel is appointed to represent an indigent defendant the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Smith v. *Superior Court of Los Angeles*, 68 Cal. Rptr. 1, 440 P.2d 65 (1968). *Accord*, *McKinnon* v. *State*, 526 P.2d 18 (Alaska 1974); *People* v. *Davis*, 114 Ill. App. 3d 537, 449 N.E.2d 237 (1983); *Matter of Welfare of M.R.S.*, 400 N.W.2d 147 (Minn. Ct. App. 1987). Recognizing that each case must be examined on its own set of facts, we hold that where, as here, a trial court terminates the representation of an attorney, either private or appointed, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice, a violation of the accused's right to particular counsel occurs.

[redacted] Here, the trial court did not simply grant or deny Mr. Atkinson's motion for continuance as it should have, rather it placed Clements in a catch-22 position that compelled him to accept new, unrequested counsel in order to gain a continuance or proceed immediately to trial against the advice of his previously assigned attorney, with whom he had developed a working

relationship. In essence, the trial court attempted to barter with Clements for a continuance. This action on the part of the trial court is arbitrary and unacceptable. Granted, the public has an interest in the prompt disposition of justice, *Leggins* v. *State*, *supra*, however, it must be served in an even-handed manner. . .fair to the state, yet fair to the defendant. Under the circumstances of this case, Clements is entitled to retain Mr. Atkinson as his counsel.

This case is reversed and remanded with instructions to the trial court to proceed consistent with this opinion.

Joe BRAWLEY *v.* STATE of Arkansas

CR 90-59 816 S.W.2d 598

Supreme Court of Arkansas
Opinion delivered October 7, 1991
[Supplemental Opinion on Denial of Rehearing
November 25, 1991.*]

*Glaze, J., concurs.

Henry J. Swift; and *Sloan, Rubens & Peeples*, by: *Kent J. Rubens*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Joe Brawley, was convicted of murder and sentenced to life imprisonment in connection with the shooting death of his stepfather-in-law, Ray Tittle. He was arrested at the scene of the shooting on May 3, 1988. The evidence showed he had been involved in an on-going altercation with his estranged wife throughout the day, and the couple had exchanged threats. At 9:00 p.m. they were involved in a scuffle at a liquor store broken up by a police officer called to the scene. Brawley was obviously under the influence of intoxicants at that time and was told by the officer to go home. Instead he followed his wife and son to the home of her parents and waited outside in his truck with a 30.06 rifle. When she and her stepfather came out of the house to obtain items from her car

Brawley fired in their direction. The bullet struck Mr. Tittle who fell injured behind the car. Brawley's wife ran into the home where her mother was in the process of calling the police. Brawley broke into the house with the rifle. The two women grabbed the gun, and they were all struggling for it when the police arrived. Brawley and the gun were taken into custody. Before being taken away in an ambulance, Mr. Tittle identified Brawley as his assailant. Brawley admitted firing the fatal shot in a statement given shortly after his arrival at the county jail. Some two hours later a blood alcohol test was administered, and Brawley's blood alcohol measured .11%.

On September 27, 1988, Brawley filed a motion requesting a psychiatric evaluation. He could not make bail and had been held in custody since his arrest. The Court granted the request, and an appointment was made for Brawley at the George Jackson Mental Health Center for October 5, 1988. Brawley was not taken to the appointment. A second appointment was set for October 28, 1988. Again, he was not taken to meet the appointment. He was not taken for an evaluation until May 9, 1989, and he was returned to jail on the same day. The report finding him competent for all purposes was received by the Court on July 24, 1989. Brawley remained incarcerated.

Before his trial on September 12, 1989, Brawley made an oral motion in chambers to dismiss the charges due to a violation of his right to a speedy trial. The motion was denied. He also asked the Court to suppress his confession on the ground that he could not, due to his intoxication, make a knowing and voluntary waiver of his rights. Both requests were renewed in a post-trial motion for new trial filed by new counsel. Following a hearing the Trial Court held that, because Brawley requested the psychiatric evaluation, the entire period of time between his request and the receipt of the report was excludable and that he was not too intoxicated to waive his rights and make a voluntary statement.

Brawley contends the Court erred in denying his motion to dismiss for violation of his right to a speedy trial and that the court erred in finding his custodial statements admissible. We affirm the conviction, as there was no violation of the speedy trial guarantee, and the totality of the circumstances indicates that the custodial statement was voluntarily made.

In accordance with our Rule 11(f), the record has been examined to determine the Court made no error prejudicial to the defendant.

1. Speedy trial

Brawley was arrested on May 3, 1988. He argues that he was entitled, pursuant to Ark. R. Crim. P. 28.1(c) and 28.2(a), to be brought to trial by May 3, 1989. Instead he was tried in September, approximately 132 days in excess of the one year period. He contends that, as he was not brought to trial within the speedy trial period set out in Ark. R. Crim. P. 28.1, the State had the burden to show that any delay was the result of Brawley's conduct or was otherwise legally justified. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). At a hearing before trial and on the new trial motion the State argued the delay was the result of Brawley's request for a psychiatric examination.

We have held that under Ark. R. Crim. P. 28.3(a), a period of delay resulting from an examination and hearing on the competency of the defendant is excludable. *Nelson* v. *State*, 297 Ark. 58, 759 S.W.2d 215 (1988). In the case now before us, the motion granting the evaluation was entered on September 27,1988, and the report was filed on July 24, 1989. That is the period the Trial Court excluded. Brawley argues that the period of 9 and 3/4 months from the granting of the request to receipt of the report is not excludable because he was not responsible for the fact that he missed his appointment set for October 5, 1988. He argues that the burden of justifying the delay beyond that date shifts back to the State as he was incarcerated at that time and had no control over the matter of keeping the appointment. He points out that there is no explanation offered for the failure of the State to ensure that he arrived at his appointment.

In response to this argument the State asserts that as the oral motion was not made a part of the record and this specific argument was not included in the motion for new trial it is waived and should not be considered. It is clear from the reconstructed record that the Trial Court found to the contrary and ruled that the argument was made in the pretrial motion and again in the new trial motion.

As there is no procedural bar to consideration of this

issue, we proceed to consider the argument that the State did not meet its burden by merely raising the period after the motion for psychiatric examination as an excludable period. Brawley's argument continues that once he presented proof that the appellant missed the scheduled appointments, and the Trial Court found that the delay was not attributable to him personally, the burden shifted back to the State to come forward with an explanation. The literal language of Rule 28.3(a) states simply that the period required by a competency examination is excluded. Brawley cites no authority for his assertion that the burden should shift back to the State, and we are not persuaded by his argument.

2. Suppression of the statement

Brawley argues the blood alcohol test administered some two hours after he gave his statement, and showing that his blood contained .11 % alcohol, showed he was too intoxicated to waive his rights voluntarily and intelligently or to make a statement.

All the officers involved in his arrest and in the taking of the subsequent statement testified that, while Brawley had been drinking and the odor of alcohol did emanate from his person, he appeared lucid and to understand what was going on. Their testimony was unequivocal that Brawley did not show any signs of intoxication, that he was completely responsive and coherent, and that there was no coercion or deception involved in the obtaining of the statement.

The test for voluntariness of both the waiver and statement are essentially the same in this case. When a custodial statement is challenged, the State has the burden of proving by a preponderance of the evidence that the statement was voluntarily given. *Baker* v. *State*, 299 Ark. 430, 711 S.W.2d 816 (1986). On appeal we make an independent determination of this issue considering the totality of the circumstances and affirm the trial court's ruling unless it is clearly wrong. *Fleming* v. *State*, 284 Ark. 307, 681 S.W.2d 390 (1984). In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Supreme Court recognized the inherently coercive nature of custodial waivers and held that a suspect's waiver of rights is valid only if it is made voluntarily, knowingly, and intelligently. The voluntariness requirement is concerned with any sort of coercive or deceptive police activity. The

knowledge and intelligence requirements are concerned with the level of comprehension of the accused. Only if the " '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." *Burin* v. *State*, 298 Ark. 611, 770 S.W.2d 125 (1989); *Moran* v. *Burbine*, 475 U.S. 412, at 421 (1986).

In our review of the totality of the circumstances, we defer to the trial court with respect to the credibility of witnesses. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

Brawley argues that he was so intoxicated that he does not recollect his statement at all nor does he recall signing the waiver. In a similar case, *Hunes* v. *State*, 274 Ark. 268, 623 S.W.2d 835 (1981), the appellant claimed he had taken drugs prior to the time he was interrogated and was unable to remember being questioned or signing the confession. We found the State's evidence that the appellant appeared to be lucid and understood his rights was sufficient and concluded that it was for the Trial Court to weigh the evidence and resolve the credibility of the witnesses. The testimony here suggests that Brawley was sober enough. There is no evidence of any sort of duress. We cannot say the Trial Court was wrong in refusing to suppress the statement.

Affirmed.

DUDLEY, J., concurs.

ROBERT H. DUDLEY, Justice, concurring. Arkansas R. Crim. P. 28.1(a) provides that an incarcerated defendant is to be tried within nine (9) months or released from incarceration. There is no provision in our Rules stating directly that an incarcerated person is entitled to be tried within one year or discharged absolutely. At least one of our decisions, however, suggests that the provision of Rule 28.1(c), requiring trial within one year of a person "held to bail, or otherwise lawfully set at liberty," applies as well to an incarcerated person. *Gooden* v. *State*, 295 Ark. 385, 749 S.W.2d 657 (1988).

Although Brawley is not "at liberty," the State's brief concedes he must be tried within one year unless there are excludable periods. I raise the issue here solely to suggest that our Committee on Criminal Practice may wish to consider reviewing

the Rules with a view toward suggesting a change to specify the period within which an incarcerated person must be tried or discharged.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
NOVEMBER 25, 1991

819 S.W.2d 704

Henry J. Swift and *Kent J. Ruebens*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

PER CURIAM. The petition for rehearing is denied.

TOM GLAZE, Justice, concurring. I agree with the court's denial of appellant's petition for rehearing. However, appellant voices his concern that the court's opinion can be read to mean that, once a defendant requests a psychiatric evaluation, all delays in obtaining that evaluation are chargeable to the defendant for speedy trial purposes regardless of who caused the delays. I would not agree with such a proposition, and I believe a close look at the record dispels such a notion.

The state had twelve months to bring the appellant to trial, but appellant was tried sixteen months and nine days after his arrest and incarceration. Thus, the state had the burden of showing the delay was legally justified. *Gooden* v. *State*, 295 Ark. 385, 749 S.W.2d 657 (1988).

In its opinion, this court, citing Ark. R. Crim. P. 28.3(a), excluded the entire period it took for appellant to be evaluated. In so holding, the court rejected appellant's argument that his evaluation had been delayed through no fault of his and that the state should have been charged with the period of delay from the two dates he was not taken to his appointments in October 1988, until his evaluation was obtained in May 1989, or when the report was submitted in July 1989. The trial court found that the appellant did nothing to prevent his attending the two scheduled appointments in October 1988, but neither did the trial court find the state at fault. Appellant's position, however, is the period of delay was still chargeable to the state because it had the burden to show the delay was legally justified.

Appellant's argument assumes that he did nothing to delay his evaluation in this matter. I cannot agree. Appellant ignores the fact that the prosecutor, in February 1989, was the one who recognized that appellant's evaluation had been delayed, and the prosecutor petitioned well within the designated twelve-month

period (about nine months) for the trial court to appoint a private psychiatrist to evaluate appellant. In his petition, the prosecutor specifically mentioned the state's inability to have appellant evaluated at the George W. Jackson Mental Health Center and his concern that the speedy trial period could expire if action was not taken. The prosecutor offered that the state would pay the expense of an independent psychiatric evaluation. The trial court, in settling the record for appeal purposes, related in the following what occurred at the February 22, 1989 hearing on the prosecutor's petition:

> There was colloquy about who was responsible, why it was taking so long, what could be done and et cetera. And I believe I informed Mr. Swift and the prosecutor to look into the matter, to get it straightened out, to proceed with it, and that if he wasn't having any luck, to file a motion for habeas, and that I would rule on it promptly.
>
> Then he asked for a continuance, and I granted at that time the motion for private evaluation. There was never an order filed apparently. But the case was continued on defense motions at defense request for the term.

From the above, it is clear to me that the prosecutor petitioned the trial court in an attempt to show the state was not responsible for the delay in appellant's evaluation, and, in doing so, he actually sought a private evaluation to avoid any further delay. Appellant, on the other hand, moved for a continuance which was granted, thus, cutting off any further consideration of the prosecutor's petition. The appellant, strategically suspect, chose not to proceed further at the hearing held on the prosecutor's petition and the trial court was obviously left with the impression that both the state and the appellant would work matters out. If they could not, the trial court would expect appellant to file a habeas corpus petition, which the court would promptly rule on. Instead, appellant raised no speedy trial issue *until after trial* when he filed a motion for new trial.

The entire dispute over appellant's failure to obtain an evaluation could have been resolved at the February hearing if appellant had not chosen to ask for a continuance. Appellant cannot be expected to have it both ways, i.e., he cannot charge the state with the extended period of time after appellant missed his October 1988 appointments and at the same time frustrate the state's efforts to obtain appellant's evaluation. There was some confusion over whether appellant's continuance was until March or August 1989, but regardless of the length of time requested by

appellant, he simply did nothing related to an evaluation after the February hearing. While it is true the state has the burden to bring a defendant to trial within the twelve-month period required under Rule 28, the defendant cannot benefit from actions he takes that frustrate the state's efforts that are designed to achieve a speedy trial for the appellant. In my view, appellant's action at the February hearing did just that and he then chose to lie behind the log while time accrued past the required twelve-month period. The appellant should be charged with all the time that transpired from the February 22, 1989 hearing until the evaluation report was submitted on July 24, 1989.

This time alone, when excluded, brings appellant's trial date within the required twelve months. While I agree with the majority that sufficient excludable time exists in this case under Rule 28.3(a), I also believe that, in light of appellant's actions and inactions, such excluded time is warranted under Rule 28.3(h), which covers other periods of delay for good cause.

For the foregoing reasons, I concur with the court's decision denying appellant's request for rehearing.

Curtis Bernard EASTER *v.* STATE of Arkansas

CR 91-130 816 S.W.2d 602

Supreme Court of Arkansas
Opinion delivered October 7, 1991

The Lowber Hendricks Law Firm, P.A., by: *Lowber Henricks*, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Curtis Bernard Easter, was convicted of first degree murder and sentenced to forty years imprisonment in connection with the shooting death of Darin Waymack. On appeal, Easter contends the Trial Court erred by (1) failing to grant a directed verdict because there was no evidence he had the purposeful mental state necessary for the offense, (2) admitting evidence of a conversation between Easter and his roommate, Buddy Arnold, about Easter "pulling his own weight around the house," (3) instructing the jury that Easter's prior convictions could be considered for impeachment purposes although not introduced to impeach a witness, and (4) not instructing the jury on the lesser included offense of manslaughter.

We affirm the conviction. (1) There was evidence from which the jury could infer Easter had the purposeful mental state necessary for first degree murder. (2) The Trial Court did not abuse its discretion in admitting evidence of a conversation between Easter and his housemate because the evidence was probative of Easter's motive for committing the crime. (3) Easter

was not prejudiced by the instruction to the jury that his prior crimes could only be used for impeachment purposes. (4) As the jury found Easter guilty of first degree murder, not second degree murder, any error resulting from the failure to give a manslaughter instruction was cured.

Buddy Arnold and Easter lived together in a trailer outside Jacksonville. Arnold owned the trailer and Easter lived there as a tenant. About 7:30 p.m. one evening, Darin Waymack brought a half-gallon of whiskey and some marijuana cigarettes to the trailer. Chris, Kim, and Joe Wuneburger came to the trailer around midnight, and Dwain Foreman, Waymack's half-brother, arrived shortly thereafter. Everyone except Joe Wuneburger was either drinking alcoholic beverages or smoking marijuana that night. Easter testified that he, Waymack and Arnold also took LSD. Arnold denied taking LSD, and the autopsy revealed no evidence of LSD in Waymack's system. Arnold testified Easter was not acting normally and was staying to himself. Kim Wuneburger stated something was wrong with Easter that night.

Easter disappeared from the trailer for a time, and Arnold found him on his hands and knees, apparently ill. Arnold asked him what was wrong, and Easter said he didn't feel good and wanted a gun. Easter then came back inside the trailer, but left again. Arnold followed Easter and again asked him what was wrong. Easter said "Can't you see what's going on?" and "Man, could you just get me a gun?"

Easter was later found sitting in Waymack's car, and Waymack told Easter to get out. Easter got out of the car, walked up the front steps of the trailer, went inside, and pulled a loaded 12-gauge shotgun from beneath a couch. Easter cocked the gun twice, walked outside, and shot Waymack twice in the head and once in the shoulder in the presence of four witnesses. Joe Wuneburger testified that when Easter was entering the trailer to get the gun, he was in a "mad rage" and said "Darin is a . . . narc." Kim Wuneburger stated Easter looked "furious."

To provide a possible motive for the crime, the prosecutor elicited testimony from Arnold that he and Easter had a conversation about Easter doing more work around the house. Arnold further testified he had allowed Waymack to store some furniture in the trailer. As a result of the drugs and alcohol, Easter might have killed Waymack because he believed Arnold was moving

him out of the trailer and Waymack in. Ken Richardson, a drug abuse counselor for the State, testified Easter had an extensive drug abuse history. Easter admitted to Richardson he had a drug addiction.

Easter testified in his own defense and stated that, as a result of taking LSD, he didn't remember shooting Waymack. He did remember feeling nervous and sick that night. Easter stated he and Waymack were friends and had never argued before. He also explained he told Arnold he wanted a gun because he felt nervous and did not want to go back inside with a gun in the trailer.

Dr. Henderson, who examined Easter at the county jail, diagnosed him as having a chronic substance abuse problem. It was his opinion that, at the time of the shooting, Easter had a diminished mental capacity caused by taking drugs. Dr. Henderson testified Easter was experiencing delusional thinking that Waymack had a gun and was threatening him.

The judge instructed the jury on murder in the first degree and murder in the second degree. He refused to instruct on the lesser included offense of manslaughter. The jury found Easter guilty of murder in the first degree.

1. Directed verdict

A person commits first degree murder if he purposely causes the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Supp. 1991). "Purposely" is defined by Ark. Code Ann. § 5-2-202(1) (1987) as follows: "A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result." Easter contends the only evidence regarding his mental state at the time of the offense was that he was heavily drugged, experiencing delusions, and acting under a diminished mental capacity.

On appeal from a denial of a directed verdict, this Court views the evidence in the light most favorable to the appellee, in this case the State, and affirms if there is any substantial evidence to support the verdict. Evidence is substantial to support the verdict if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion or conjecture. *Williams* v. *State*, 304 Ark. 509, 804 S.W.2d 346 (1991).

Intent is seldom capable of proof by direct evidence and must usually be inferred from the circumstances surrounding the

killing. *Starling* v. *State*, 301 Ark. 603, 786 S.W.2d 114 (1990). The intent necessary for first degree murder may be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Garza* v. *State*, 293 Ark. 175, 735 S.W.2d 702 (1987).

Kim and Joe Wuneburger testified that Curtis Easter shot Darin Waymack twice in the head and once in the shoulder with a shotgun. There was testimony that at the time of the killing, Easter was in a "mad rage" and "furious." Easter had twice asked Arnold for a gun. The State's Chief Medical Examiner testified Waymack was shot twice in the face and once in the right shoulder. Based on the type weapon used, the manner of its use, and the location of the wounds, the jury could reasonably have inferred Easter purposely killed Waymack.

Voluntary intoxication is not a defense. It is neither a statutory affirmative defense nor a common law defense negating intent in crimes requiring a purposeful mental state. *Cox* v. *State*, 305 Ark. 244, 808 S.W.2d 306 (1991); *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

2. The conversation evidence

On direct examination, the prosecutor asked Arnold whether he recalled a conversation in which he told Easter he should start "pulling his weight around the house." Easter argues that this question was improper under A.R.E. 608(b), 404(b), and 403; however, the basis of the objection at trial was that the testimony was irrelevant.

The judge ruled the conversation between Arnold and Easter was relevant in showing a possible motive for the killing. We find no error. A ruling on the relevancy of evidence is discretionary, and we will not reverse absent an abuse of discretion. *Smith* v. *State*, 282 Ark. 535, 669 S.W.2d 201 (1984); *Willett* v. *State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986). We find no abuse of discretion.

3. AMCI 203

Defense counsel asked Easter during direct examination about his previous convictions for two counts of delivery of marijuana and one count of theft by receiving. The Trial Court instructed the jury that "evidence that the defendant has previously been convicted of a crime may be considered by you for the purpose of judging the credibility of the defendant, but not as evidence of his guilt." AMCI 203. Easter argues that because the

evidence was not introduced to impeach a witness, the jury instruction was erroneous.

Easter cites no authority and makes no argument convincing us he has suffered prejudice as a result of the instruction. This Court does not reverse without a showing of unfair prejudice. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985).

4. Manslaughter as a lesser included offense

In his last point, Easter contends that it was reversible error for the Trial Court to decline to instruct on the lesser included offense of manslaughter. The Trial Court instructed on first and second degree murder. When a lesser included offense has been the subject of an instruction, and the jury convicts of the greater offense, error resulting from failure to give an instruction on another still lesser included offense is cured. *Branscomb* v. *State*, 299 Ark. 482, 774 S.W.2d 426 (1989); *Harris* v. *State*, 291 Ark. 504, 726 S.W.2d 267 (1987). This is commonly referred to as "the skip rule."

Affirmed.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I agree with the majority opinion on all points except its reasoning on the trial court's refusal to give an instruction on manslaughter as a lesser included offense. This case, factually, does not lend itself to a manslaughter instruction in my opinion, because there was not sufficient evidence in the record to support it. For that reason the trial judge did not abuse his discretion in denying the instruction.

The majority, however, bases affirmance in point four on the "skip rule." The rationale for the skip rule, as explained by the majority, troubles me. What the majority is saying is if a jury convicts a defendant of an offense two grades more serious than the lesser offense, this "cures" the failure to give an instruction on that lesser offense. Such reasoning fails to consider the effect that an instruction on the lesser offense, not to mention defense counsel's closing argument, could have on a jury and its verdict. The skip rule suggests after-the-fact rationalization and for that reason is a concept this court needs to examine more closely when the circumstances warrant it.

Doyle David BRADLEY, Brent Clifton Clayton, and Elton Williams *v.* STATE of Arkansas

CR 91-145 816 S.W.2d 605

Supreme Court of Arkansas
Opinion delivered October 7, 1991

William M. Hoard, Jr., for appellants.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. This is an interlocutory appeal from the trial court's denial of the appellants' motion to transfer their case to juvenile court. The state charged the appellants with aggravated assault arising out of a shooting that occurred while the appellants were in a crowd of people at Riverfest. At the time of the incident, appellant Bradley was seventeen years old and appellants Clayton and Williams were sixteen years old. During the hearing on the motion to transfer, the appellants presented no evidence and the state relied solely on the information charging the appellants. On appeal, the appellants contend that the trial court erred in denying their motion to transfer when the state offered no evidence other than the charge. We find no merit in the appellants' argument, and therefore affirm.

In making his decision on whether to transfer a case to juvenile court, the trial judge is required to consider the following factors:

(1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the

> offense;
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Ark. Code Ann. § 9-27-318(e) (Supp. 1991). The trial judge need not give equal weight to each factor and proof on all factors need not be against the defendants. *Ashing* v. *State*, 288 Ark. 75, 702 S.W.2d 20 (1986). Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect. Ark. Code Ann. § 9-27-318(f).

In *Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502 (1991), we held that the party moving for transfer to juvenile court has the burden of proof to show that he or she meets the criteria of the statute to warrant transfer. If he or she meets the burden, then the transfer is made unless there is clear and convincing countervailing evidence to support a finding that the juvenile should remain in circuit court. A trial judge may consider the criminal information as evidence. *Walker* v. *State*, 304 Ark. 402-A, 805 S.W.2d 80 (1991) (supplemental opinion denying rehearing). However, the state's mere filing of the information will not qualify as sufficient evidence in every case. *Id.*

Here, as stated earlier, the appellants presented no evidence, mistakenly believing that the state had the burden of proof. The state relied on the information, which provided the following:

> The said defendant(s), in Pulaski County, on or about May 25, 1990, unlawfully, feloniously, under circumstances manifesting extreme indifference to the value of human life, did purposely engage in conduct that created a substantial danger of death or serious physical injury of several unarmed victims, and did have in his possession the following deadly weapon, a revolver, against the peace and dignity of the State of Arkansas.

Also, the trial judge was informed of the ages of the appellants and that appellant Williams had a previous juvenile record. In denying the appellants' motion to transfer, the trial judge relied on the seriousness of the alleged offense — the appellants were sixteen and seventeen years old, possessed a gun, and shot it into a crowd of people.

Appellants here simply failed to meet their burden. Thus, based upon the record before us, we cannot say that the trial court's finding by clear and convincing evidence that the appellants should be tried as adults under § 9-27-318 is clearly against the preponderance of the evidence. *Walker*, 304 Ark. 402-A, 805 S.W.2d 80 (supplemental opinion denying rehearing).

At this point, we take the opportunity to clarify our standard of review in these cases. In our original opinion in *Walker*, we inappropriately applied an abuse of discretion standard, and we repeated that measure of review in *Pennington* v. *State*, 305 Ark. 312, 807 S.W.2d 660 (1991). However, we then subsequently and correctly applied the clearly erroneous standard in our supplemental opinion in *Walker*, but failed to mention that correction in *Pennington*. We do so now. Accordingly, the original opinion in *Walker* and the *Pennington* opinion are modified to the extent those opinions fail to recite the clearly erroneous standard.

For the reasons stated above, we affirm.

Larry VAN PELT *v.* STATE of Arkansas

CR 90-275 816 S.W.2d 607

Supreme Court of Arkansas
Opinion delivered October 7, 1991

[redacted]

Killough, Ford & Hunter, by: *S. Kyle Hunter*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant, Larry Van Pelt, was convicted of capital murder and sentenced to life without parole for the shooting death of a store clerk, Bernice Henyard, in Parkin, Arkansas. The appellant raises five arguments on appeal. The arguments have no merit, and we affirm the conviction.

On October 24, 1989, between 11:00 p.m. and 11:30 p.m., Henyard was working at P.J.'s Country Store in Parkin. Her fiance, Anthony Dinwiddie, was in the store eating chicken at a booth and visiting with her. While there, Dinwiddie noticed a man in a white cowboy hat walking down the sidewalk toward the store. The man pushed his hat down over his head as he passed the store window. He then stopped and returned to his car. Dinwiddie's next recollection was of the man in the store talking to the victim. Dinwiddie heard the sound of money in the cash register, and then Henyard screamed his name. The man pointed a gun at Dinwiddie and said, "Get your ass up here." Dinwiddie went to the counter and was within six to eight feet of the man, who said to Henyard, "Give me all your money, bitch." She handed him a stack of bills. The gunman pointed the gun at her head and shot her in the right eye, killing her instantly. Dinwiddie immediately raced to the door, and the gunman fired a shot at him which missed but shattered the glass in the door. Dinwiddie ran across the parking lot, turned, and saw the man get into his white car. Because of the lighting Dinwiddie was able to get part of the license number. He gave chase in his car, encountered a police

officer, told him the story, and the officer continued pursuit. The license number and car description were dispatched over police radio, and a man in a white Lincoln was stopped and arrested within the hour. The arresting deputies seized a white cowboy hat, a baseball cap containing money, and a .22 automatic pistol from the suspect's car. Dinwiddie, meanwhile, had returned to P.J.'s Country Store, and then went to his uncle's house, his own home, and finally to the Parkin police station.

While at the station Dinwiddie heard a report from the radio dispatcher that a suspect had been arrested. When the sheriff and car with the suspect arrived, Dinwiddie looked out the window and saw the handcuffed man. At that point he said, "Yeah, that's the son-of-a-bitch that did it." When the suspect was escorted into the room where Dinwiddie was sitting, Dinwiddie struck him in the face with his fist. Dinwiddie was shown no photographs, and no line-up was conducted.

At the trial, which took place from July 30 through August 2, 1990, Dinwiddie identified the appellant in court as the gunman. The shell casings found at the country store were also identified by expert testimony as having been fired from the pistol found in the appellant's car.

For reversal of his conviction the appellant first argues that the death penalty as set out at Ark. Code Ann. § 5-10-101 (Supp. 1991) constitutes cruel and unusual punishment under the Eighth Amendment. We dismiss this argument. Case authority is clear that the appellant, having received a sentence of life without parole, has no standing to challenge the constitutionality of the death penalty. *See Weaver* v. *State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Sumlin* v. *State*, 266 Ark. 709, 587 S.W.2d 571 (1979).

The appellant next asserts that the trial court erred in denying his motion to prohibit the prosecutor from qualifying the jury for consideration of the death penalty, which denied him an impartial jury under the Sixth Amendment. This argument has been raised many times and has also been decisively disposed of by both the United States Supreme Court and this court. *See Lockhart* v. *McCree*, 476 U.S. 162 (1986); *Bell* v. *State*, 296 Ark. 458, 757 S.W.2d 937 (1988). The appellant gives us no compelling reason to reexamine the issue.

For his third argument the appellant contends that the capital murder statute overlaps impermissibily with our first-degree murder statute. *See* Ark. Code Ann. §§ 5-10-102(a)(2) and 5-10-101(a)(4) (Supp. 1991). This overlapping occurs, according to the appellant, with the degree of purposeful action required in the two statutes. Capital murder requires "the premeditated and deliberated purpose of causing the death of another person" while first-degree murder mandates "the purpose of causing the death of another person." We have held repeatedly that while the two statutes may appear to overlap on the degree of required intent, this does not render them unconstitutional due to vagueness or arbitrariness. *See Smith* v. *State*, No. CR 91-71 (September 23, 1991); *Weaver* v. *State*, *supra*; *Hill* v. *State*, 303 Ark. 462, 798 S.W.2d 65 (1990). As we said in *Hill*, our case law regards first-degree murder as a lesser included offense subsumed in the capital murder offense. The appearance of overlap raised by the appellant does not deny the appellant his right to due process, and we affirm yet again the constitutionality of both sections of our Criminal Code.

The appellant's principal argument centers on the trial court's decision to allow Dinwiddie's in-court identification, irrespective of his prior encounter with the appellant at the police station. The appellant's theory is that the "show-up" procedure with the deputies' escorting only the appellant into the police station was unduly suggestive and tainted any further identification by Dinwiddie. We disagree. We will not reverse a trial court's ruling on the admissibility of an in-court identification unless that ruling is clearly erroneous under the totality of the circumstances. *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988). In determining whether an in-court identification is admissible, we first look at whether the pretrial identification procedure was unnecessarily suggestive or otherwise constitutionally suspect. *Maulding* v. *State*, 296 Ark. 328, 757 S.W.2d 916 (1988); *Bowden* v. *State*, *supra*. It is the appellant's burden to show that the pre-trial identification procedure was suspect. *Shuffield* v. *State*, 23 Ark. App. 167, 745 S.W.2d 630 (1988).

In the case before us, although Dinwiddie was present at the time of the appellant's arrival in custody, there is no evidence suggesting that the police brought the appellant to the station to facilitate an identification by Dinwiddie. Dinwiddie

made his initial identification spontaneously and before the appellant was brought inside the building. Moreover, he could not have known for certain that the person who was getting out of the sheriff's car was indeed the suspect in that crime.

We have previously recognized that witness identification of a suspect at a police station, when the police have not orchestrated a pre-trial identification, does not invalidate a subsequent in-court identification. *Murphy* v. *State*, 269 Ark. 181, 599 S.W.2d 138 (1980); *Pollard* v. *State*, 258 Ark. 512, 527 S.W.2d 627 (1975); *see also Coleman* v. *Alabama*, 399 U.S. 1 (1970), which involved a spontaneous identification of a suspect as he stepped onto the stage in the line-up room. In *Murphy*, the witness saw a suspect get out of a police vehicle at the station after having seen the man outside her bedroom window a short time before. In *Pollard*, a witness who was waiting for a line-up identified the suspect as he walked with other line-up participants from the jail-cell area. We upheld the identifications in both cases.

Even had the pre-trial identification been impermissibly suggestive, the taint of an improper "show-up" was removed by the clear and convincing evidence that the in-court identification was based upon Dinwiddie's independent observations of the suspect. *See Bowden* v. *State, supra*. Reliability is the linchpin in determining the admissibility of identification testimony, and in determining reliability, the following factors are considered: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pre-trial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pre-trial identification procedure. *Id.*

[redacted] Here, Dinwiddie was at the store when the person he identified as the appellant entered, ordered him to approach, took money from the victim, and shot her. For approximately thirty seconds the appellant had his gun trained on both Dinwiddie and the victim, and Dinwiddie stood within six to eight feet of him. He could see the uncovered face of the appellant clearly and later described him as a white male about forty years of age, clean-shaven with two-tone blond hair, who was wearing a light shirt,

dark pants, and a white cowboy hat. This description fit the appellant at the time of his arrest. Dinwiddie never identified another person as the culprit, and his identification of the appellant after arrest was certain and unwavering. Furthermore, the time between the murder and the identification was relatively brief. The murder occurred at about 11:30 p.m., the arrest was effected between 11:30 and 12:00 midnight, and the identification at the station followed soon thereafter.

It is for the trial court to determine whether there are sufficient aspects of reliability surrounding the identification to permit its use as evidence, and it is then for the jury to decide what weight should be given to the identification testimony. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). Under the facts of this case, the in-court identification was reliable, and we affirm the trial court's ruling.

For his last point the appellant argues that a substantial break in the chain of custody of the two spent shell casings occurred which warranted suppression of those casings. Evidencing this break, according to the appellant, was a lack of testimony at trial by the person who physically received the items from the investigator and by the person who took them to the firearms expert.

The record does not support the appellant's assertions. The Crime Lab investigator testified that he received the box of physical evidence, which included the casings, from the police officer who retrieved the evidence at the crime scene. The investigator further testified that, though he did not place his initials on the box, he had it exclusively in his custody until he delivered it to the State Crime Lab where it was placed in the evidence vault. He stated that standard procedure was for the Chief Morgue Technician to transfer the evidence to the Central Receiving Area. From there it would be taken to the Firearms Section. He further testified that though he did not put his initials on the evidence box, the box presented to him at trial appeared "similar" or "identical" to that received from the Parkin police. Nothing in the record before us indicates that this routine procedure was disrupted.

We have held that it is necessary for the prosecutor to demonstrate that the evidence has not been altered in any

significant manner before it reached the Crime Lab expert. *See Holbird* v. *State*, 301 Ark. 382, 784 S.W.2d 171 (1990). It is not necessary, however, that every possibility of tampering be eliminated; it is only necessary that the trial court, in its discretion, be satisfied that the evidence presented is genuine and has not, in reasonable probability, been subjected to tampering. *Id*; *Munnerlyn* v. *State*, 264 Ark. 928, 576 S.W.2d 714 (1979). It is not required, moreover, that every moment, from the time the evidence came into the possession of a law enforcement officer 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. *Phills* v. *State*, 301 Ark. 265, 783 S.W.2d 348 (1990).

We acknowledge that there were gaps in the testimony concerning the movement of the box with the casings from the time it left the custody of the Crime Lab investigator to the time the casings came into the custody of the firearms expert. These relatively minor discrepancies, though, are committed to the trial court's discretion for weighing. The court found that the gaps were not substantial enough to warrant suppression. We agree and will not reverse the trial court's ruling absent some evidence of tampering, which the appellant did not produce. On this point we note that though the Crime Lab investigator did not put his initials on the sealed evidence box containing the casings, he was sufficiently certain that box presented to him at trial which contained the casings was the same box he placed in the evidence vault.

An examination of the record has been made in accordance with Ark. Sup. Ct. R. 11(f) and it has been determined that there were no rulings adverse to the appellant which constituted prejudicial error.

Affirmed.

Zealous Allen JONES a/k/a Zealouse Allen Jones *v.* STATE of Arkansas

CR 91-134 819 S.W.2d 683

Supreme Court of Arkansas
Opinion delivered October 7, 1991

Edward T. Ogelsby, for appellant.

Winston Bryant, Att'y Gen., by: *Catherine Templeton*, Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant, Zealous Allen Jones, was found guilty of murder in the second degree on October 12, 1990, during that window of time when Rule 37 of the Arkansas Rules of Criminal Procedure was not in effect. Appellant was represented at trial by John Kearney who filed a timely notice of appeal on November 9, 1990. On November 12, 1990, after the notice of appeal had been filed but within the time for filing a timely petition under Rule 36.4,[1] a new attorney, Tim Womack, filed a motion under Ark. R. Crim. P. 36.4, claiming ineffective assistance of counsel.[2] Rule 36.4 provided that claims of ineffective

[1] November 11, 1990, was the thirtieth day, but as it fell on a Sunday, the motion filed Monday, November 12, 1990, was timely.

[2] The record does not reflect that John Kearney ever asked to be relieved as counsel by this court which he was obligated to do under Sup. Ct. R. 11(h), once the notice of appeal had been filed or that Womack ever asked this court to be declared attorney-of-

assistance of counsel could be raised in a motion for new trial filed within thirty days of the date the judgment was entered.

After a hearing on the motion for new trial, the trial court denied relief. A second notice of appeal, this one filed by Mr. Womack, was filed, expressing the intention to appeal from both the judgment of conviction and the order denying the motion for new trial.

When the appellant's brief was filed in this court, Mr. Womack argued only that the trial court erred in denying the motion for a new trial. He did not abstract the trial record; instead, he simply stated that there was no reversible error in the trial proper. Assuming that Mr. Womack can be considered attorney-of-record, he was obligated under Sup. Ct. R. 11(h), and in accordance with *Anders* v. *California*, 386 U.S. 738 (1967), to ask to be relieved with respect to that portion of the appeal which he contends is meritless and to support the motion with "a brief referring to anything in the record that might arguably support the appeal, together with a list of all objections made by the appellant and overruled by the court and of all motions and requests made by the appellant and denied by the court, accompanied by a statement as to the reason counsel considers the points thus raised would not arguably support an appeal."

In an analogous situation, where an attorney contended there was merit to the appeal of the judgment but not of an order denying post-conviction relief, we required the attorney-of-record to file a motion to be relieved as counsel with respect to that part of the case in which he contended there was no merit. A copy of the motion and counsel's brief, which complied with Rule 11(h) and *Anders*, were mailed to the appellant so that he could respond, if he desired to do so, within thirty days.

[redacted] There has been no compliance with Rule 11(h) in this case, nor any listing of objections made by the appellant and overruled by the court, nor of the motions and requests made by the appellant and denied by the court, accompanied by a statement as to the reason counsel considers that the points would

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record. This court has never had occasion to decide whether an attorney under these circumstances must ask this court to declare him attorney-of-record.

not arguably support an appeal. Thus, to comply with Rule 11(h), appellant's counsel is required to rebrief the case. Once a motion to be relieved and brief have been filed in conformance with the rule, the motion and brief will be mailed to the appellant with a letter advising him of his right to respond to the "no merit" portion of the case.

This case is removed from the list of cases under active submission, awaiting further briefing in accordance with this per curiam.

David FELTY *v.* STATE of Arkansas

CR 91-132 816 S.W.2d 872

Supreme Court of Arkansas
Opinion delivered October 14, 1991

Robert N. Jeffrey, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant raped the prosecutrix in Hot Spring County, and then, only a short distance away and a short time later, raped her in Garland County. He was charged by separate informations with the crime of rape in each county. On his motion both offenses were joined, as part of a single scheme or plan, in Hot Spring County. He was tried there and found guilty of both charges. He appeals and argues five (5) points for reversal. None of them has merit, and we affirm both judgments of conviction.

The prosecutrix, a fourteen-year-old girl, was at the Pizza Hut Restaurant in the City of Hot Springs at about 11 p.m. and sought a ride home. The appellant responded that he would drive her home. Two (2) other men were with him. The four (4) of them got in appellant's car, and appellant drove toward Malvern. Along the way, he turned his car into a cemetery which is located in Hot Spring County. The two (2) other men got out of the car. Appellant remained in the car with the prosecutrix and twice forced her to have sexual intercourse with him. The prosecutrix and both of the other men were eyewitnesses and testified to the above facts.

The four (4) of them left the cemetery in appellant's car, and

appellant drove back to the City of Hot Springs and let the two (2) men out. He then drove the victim to a location near Carpenter Dam in Garland County and again raped her. The prosecutrix testified to this crime. Appellant's car ran out of gasoline and, when he went to get more gasoline, the prosecutrix got away and went to a friend's home. The friend's mother described the prosecutrix as upset and reporting that she had been raped. She was taken to the hospital. She had abrasions on her back and buttocks and had a tear in the external area of her vagina. The examining physician concluded there had been trauma to the area. After hearing all of the testimony, the jury found appellant guilty of both charges.

Appellant argues that there was insufficient evidence to convict him. We affirm a conviction if substantial evidence exists to support it. Evidence is substantial if the jury reaches its conclusion without having to resort to speculation or conjecture. The testimony of a rape victim satisfies the substantial evidence requirement in a rape case. The testimony of the victim alone was sufficient to support the verdict.

However, in this case, unlike most rape cases, there were two (2) eyewitnesses to one of the crimes. The testimony of the examining physician provided further proof of rape. Appellant questions the testimony of some of these witnesses by pointing out alleged discrepancies in their testimony. However, the credibility of witnesses and any discrepancy in testimony are for the jury to resolve. *Wilkins* v. *State*, 292 Ark. 596, 600, 731 S.W.2d 775, 778 (1987).

Appellant next argues that the trial court erred by not granting a mistrial after an allegedly prejudicial statement was made by the prosecutor on voir dire. The statement and the discussion which ensued between the prosecutor, defense counsel, and the trial judge were as follows:

> THE DEPUTY PROSECUTOR: The charge against [the appellant] is a Class Y Felony that carries from 10 to 40 years or life. He's charged with two counts of that. Is there anyone here, that if they found that he committed these acts, that could not sentence him to a long term in the penitentiary? If you can't do that, even though the law requires it based on the facts, is there anyone here that

can't—

THE DEFENSE ATTORNEY: Objection, Your Honor, may we approach the bench.

BY THE COURT: Sure.

THE DEFENSE ATTORNEY: Your Honor, I move for a mistrial. Mr Scrimshire [the deputy prosecutor] has inappropriately stated the law, that it requires a long sentence, and that is incorrect. The sentence is 10 to 40 to life, not a "long sentence."

BY THE COURT: [Directed to Mr. Scrimshire:] You may ask them if they will consider the full range of sentences, but don't try to commit them to a particular length of sentence.

BY PROSECUTOR: Sure.

BY THE COURT: [Directed to Mr. Becker:] Your motion for a mistrial is denied.

Appellant argues that he was prejudiced by the prosecutor's use of the phrase "long sentence" since it suggested to the jury that it was not possible to impose a minimum sentence. We have previously addressed prosecutorial inquiry on voir dire into jurors' feelings about the penalties applicable to the particular crime or crimes. In *Haynes* v. *State*, 270 Ark. 685, 606 S.W.2d 563 (1980), we held that it was prejudicial error for the prosecutor to repeatedly ask jurors if they would impose the maximum penalty upon a finding of guilt. We expressed concern that the jury may have felt obligated in advance of hearing the evidence to impose the maximum penalty upon finding the defendant guilty. *Id.* at 690-91, 606 S.W.2d at 565. In *Stephens* v. *State*, 277 Ark. 113, 640 S.W.2d 94 (1982), we revisited the issue presented in *Haynes*. There, we held the prosecutorial conduct was distinguishable from that in *Haynes* because the prosecutor, after stating the minimum and maximum penalties, merely asked the prospective jurors whether they would consider the maximum sentence. *Id.* at 115, 640 S.W.2d at 95. We wrote, "Unlike the situation in *Haynes*, no juror was in this case asked to commit to a possible penalty or to express an opinion on whether such a penalty would be suitable." *Id.* We found such an inquiry

to be proper on voir dire. *Id.*

The prosecutor's statement in this case is similar to that in *Stephens*. Here, the prosecutor gave the minimum and maximum sentences for the crime committed and then asked the potential jurors whether any of them could not sentence appellant to a "long term in the penitentiary." The prosecutor was essentially asking the jurors whether they could impose the maximum sentence. In *Stephens* we sanctioned such questioning. Thus, appellant's second argument is without merit.

Appellant further contends that the trial court erred by not allowing the attorneys to strike members of the jury panel in chambers. Voir dire of jury panels is provided for by Ark. Code Ann. §§ 16-33-101 and 16-33-301 to -308 and by A.R.Cr.P. Rule 32.2. Sections 16-33-303 to -308 give the number of peremptory and "for cause" challenges each party shall have and the manner in which they are to be exercised. Nothing is mentioned in any of these Code sections nor in Rule 32.2 concerning exercising one's challenges in chambers as distinguished from open court. The customary procedure has been to strike jurors in open court.

An analogous request for a particular voir dire procedure is the request for a sequestered voir dire. In *Heffernan* v. *State*, 278 Ark. 325, 327, 645 S.W.2d 666, 667 (1983), we said that sequestration of a jury for purposes of voir dire is within the discretion of the trial court. In *Heffernan*, a death penalty case, we found no abuse of that discretion by the trial court's refusal to allow sequestered voir dire. *Id.* The trial court did permit individual voir dire in *Heffernan* to alleviate the defendant's concern that the jurors would not be as candid in the presence of one another. *Id.*

We have discussed the issue of conducting voir dire in chambers. In *Commercial Printing Co.* v. *Lee*, 262 Ark. 87, 93, 553 S.W.2d 270, 273 (1977), we held that a court order which excluded the public from voir dire was invalid. We based our decision on the fact that voir dire is an essential part of the trial and that the defendant is guaranteed a right to a public trial. "[T]here is nothing in our constitution or the federal constitution which guarantees a private trial." *Id.* at 94, 553 S.W.2d at 273. In *Commercial Printing Co.* it was the defendant who requested that voir dire be held in chambers. In *Taylor* v. *State*, 284 Ark.

103, 679 S.W.2d 797 (1984), it was at the State's request that voir dire was conducted in chambers, and it was the defendant who asserted his right to public voir dire. *See also, Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990).

In sum, sequestration of the jury for voir dire purposes and the conducting of voir dire in general is within the broad discretion of the trial judge. *Goodwin* v. *Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989). The appellant has not shown that the trial court abused that broad discretion by refusing to allow him to strike members of the jury panel in chambers.

Appellant's next argument is an evidentiary one. He argues that the trial court erred by admitting testimony of two (2) lay witnesses because "their statements were a conclusion by each witness which could not be supported by personal knowledge." The alleged conclusory testimony of one of the male witnesses was as follows: "—and [the victim] was like sitting against Joe, away from [appellant], whenever all this was going on. She was like scared of [appellant], and he was like insisting—." Appellant also objected to the following testimony of the other male witness: "Well, they really didn't stay down there that long. I mean, you know, he really—when he was up by the car is when it really all was going on. You know, she was just trying to get away from him, and she went down—."

Rule 701 of the Arkansas Rules of Evidence governs opinion testimony of lay witnesses. It provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (1) Rationally based on the perception of the witnesses; and (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

A.R.E. Rule 701.

The Rule today is not a rule against conclusions, but it is a rule conditionally favoring them. *Carton* v. *Missouri Pac. R.R.*, 303 Ark. 568, 572, 798 S.W.2d 674, 675 (1990). It provides that a lay witness may give an opinion with two (2) limitations. Limitation (1) is the requirement of firsthand knowledge or observation. Limitation (2) is phrased in terms of requiring

testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not an opinion or conclusion. For example, if a witness is asked, "What kind of day was it?" he might respond, "Beautiful." It would be an admissible opinion. He would not have to state it was a clear skied, sunny, 72 degree spring day with a slight breeze. The witness can respond in everyday language which includes his conclusion about the type of day. However, if attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the Rule. *See* Advisory Committee's Notes to Federal Rule 701.

In sum, opinion testimony by lay witnesses is allowed in observation of everyday occurrences, or matters within the common experience of most persons. Statements by eyewitnesses that the victim was "scared" and "trying to get away" easily fit within the limitations imposed on lay witness opinion. The trial court did not abuse its discretion in allowing the testimony.

Appellant's final argument is that the trial court erred in overruling his objection to the introduction of a photo lineup into evidence. The basis of his objection was that the evidence was cumulative because it was presented after four (4) witnesses had testified and identified the appellant. We have said, "The mere fact that evidence is cumulative may be a ground for its exclusion, in the sound discretion of the trial judge, but it is hardly a basis for holding that its admission, otherwise proper, constitutes an abuse of discretion." *Beed* v. *State*, 271 Ark. 526, 542, 609 S.W.2d 898, 909 (1980).

Affirmed.

Vickie SCARBROUGH *v.* CHEROKEE ENTERPRISES

91-54 816 S.W.2d 876

Supreme Court of Arkansas
Opinion delivered October 14, 1991

Anthony W. Bartels, for petitioner.

Barrett, Wheatley, Smith & Deacon, by: *Paul Waddell*, for respondent.

Winston Bryant, Att'y Gen., by: *R.B. Friedlander*, Solicitor Gen., for amicus curiae Arkansas Public Service Commission.

The Bassett Law Firm, by: *W.W. Bassett, Jr.*, and *Gary Weeks*, for amicus curiae Tyson Foods, Inc.

Wright, Lindsey & Jennings, for amicus curiae Associated Industries of Arkansas, Arkansas State Chamber of Commerce, and Arkansas Self Insurers Association.

Kemp, Duckett, Hopkins & Spradley, for amicus curiae

Arkansas Motor Carriers Association.

DAVID NEWBERN, Justice. This is a workers' compensation case in which we review a decision of the Arkansas Court of Appeals. The parties and *amici curiae* have, at our request, submitted briefs on the question of the appropriate standard of review of fact determinations in such cases. Our decision leaves unchanged the "substantial evidence" standard but saves for another day the question whether a constitutional violation may result when the Workers' Compensation Commission and a reviewing court are permitted to ignore the findings of an Administrative Law Judge, the only adjudicator to see and hear the witnesses.

Vickie Scarbrough was injured while working as a housekeeper for Cherokee Enterprises. She filed a workers' compensation claim, and an Administrative Law Judge (ALJ) awarded temporary total disability benefits, but not permanent total disability benefits. Scarbrough later filed another claim contending she was entitled to permanent total disability benefits. The ALJ again found no permanent disability, and the Commission affirmed.

The Court of Appeals affirmed the Commission, holding there was substantial evidence to support the finding. *Scarbrough* v. *Cherokee Enterprises*, 33 Ark. App. 139, 803 S.W.2d 561 (1991). In its opinion, the Court of Appeals alluded to the problem of the lack of direct contact between the Commission and the witnesses, citing an earlier minority opinion which had raised the issue. *Webb* v. *Workers' Compensation Comm.*, 292 Ark. 349 at 352, 730 S.W.2d 222 at 726 (1987) (Newbern, J., concurring). *See also Hamby* v. *Everett*, 4 Ark. App. 52 at 55, 627 S.W.2d 266 at 267 (1982) (Glaze, J., dissenting). A petition for review was granted to address the question concerning the standard of review in workers' compensation cases. Scarbrough urges this Court to reverse by adopting a new standard of review by which we would require a finding that the Commission's decision is supported not just by "substantial evidence" but by "substantial evidence on the record as a whole." The point of the suggestion is that the Court would be allowed to consider the record compiled by the ALJ and not ignore that Judge's decision by reviewing only the findings of the Commission. We affirm the

Court of Appeals decision.

1. The current standard

The General Assembly has provided that the Court of Appeals may reverse the Commission only on four bases. The one obviously pertaining to factual determinations is, "That the order or award was not supported by substantial evidence of record." Ark. Code Ann. § 11-9-711(b)(1)(B)(4) (1987). While the statute has not always been worded just that way, *see* Act 319 of 1939, § 25(b), the standard today is not different from that of 50 years ago. *See, e.g.*, *Williams* v. *Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943).

Prior to 1979, workers' compensation cases were appealed from the Commission to Circuit Courts and then to the Supreme Court. In applying the substantial evidence standard to a decision of the Commission, this Court wrote that, upon review, "we give the law judge's findings no weight whatever." *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). The General Assembly, in Acts 252, 253, and 597 of 1979, changed the appellate chain in such cases, eliminating the Circuit Courts from the review process and providing for appeal directly from the Commission to the Court of Appeals, which properly followed the lead we had established in reviewing only the Commission decision and ignoring the findings of the ALJs. *See, e.g.*, *Tyson Foods, Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988); *Oller* v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). While we have gone so far as to allow the Commission to rely on an ALJ's stated perceptions of the "demeanor, conduct, appearance, or reaction at the hearing," *Wade* v. *Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989), it has not been held that a court may use an ALJ's remarks to reverse a credibility determination made by the Commission.

2. The suggested new standard

In support of her suggestion that we adopt the "substantial evidence on the record as a whole" standard, Scarbrough cites two cases involving social security benefits, *Thomas* v. *Sullivan*, 876 F.2d 666 (8th Cir. 1989), and *Gavin* v. *Heckler*, 811 F.2d

1195 (8th Cir. 1987). These federal court cases relied on the standard of review applied by the United States Supreme Court in *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 474 (1951). The United States Supreme Court held that in reviewing administrative findings, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The *Gavin, Thomas*, and *Universal Camera* cases were based upon 5 U.S.C. § 706 (1989) which requires federal courts to examine the whole record when reviewing administrative decisions. The Court in the *Universal Camera* case held Congress left no room for doubt as to the kind of scrutiny to be given Labor Board decisions. Because these cases are based upon a statutory requirement not applicable here, we do not find them persuasive.

In two other jurisdictions, the appellate courts have apparently also been troubled by the problem of ignoring the "credibility" findings of the initial hearing officer. The Supreme Court of Florida addressed the problem in *U.S. Casualty Co.* v. *Maryland Casualty Co.*, 55 So. 2d 741 (1951), holding the Commission should not reverse findings of fact made by a Deputy Commissioner unless the findings were not supported by substantial evidence. In *Powell* v. *Industrial Commission*, 4 Ariz. App. 172, 418 P.2d 602 (1966), the Arizona Court of Appeals held that, when the Commission reversed a factual determination made by a referee, the Court would set aside the Commission's decision when the weight of the evidence supported the referee's finding. These cases were based upon the hearing officer's superior vantage point in making factual findings and judging the credibility of witnesses.

Despite persuasive arguments in favor of the Florida and Arizona approaches, we feel the constraint of *stare decisis*, especially when dealing with legislative intent in the interpretation of a statute. *Knapp* v. *State*, 283 Ark. 346, 676 S.W.2d 729 (1984). Section 11-9-711(b)(4) requires the Court to affirm the Commission's decision if it is supported by substantial evidence. This Court and the Court of Appeals have interpreted substantial evidence consistently over the past fifty years. The General Assembly is presumed to have known of our decisions, *J.L. McEntire & Sons* v. *Hart Cotton Co.*, 256 Ark. 937, 511 S.W.2d

179 (1974). It has even codified the language we have used. *See* Act 253 of 1979 and Act 631 of 1981. If we were to reinterpret the term "substantial evidence" at this point to include "on the record as a whole," we would be overruling precedent without a compelling reason appearing in this case.

3. The due process issue

A reason which might indeed be compelling for holding that the initial fact finder's determinations of facts where credibility is at issue cannot be ignored would be that it deprives a party of due process of law. One of the *amicus curiae* has suggested that issue and has contended it is exacerbated by the partisan nature of the selection process for the members of the Commission. One member of the Commission represents employees, another represents employers, and the third is an attorney with no specified further affiliation. Ark. Code Ann. § 11-9-201(a) (1987). Our *amicus* cites statistics which, it contends, show how the system of partisan commissioners skews the decision making process, making it something other than an impartial determination of workers' compensation claims.

The due process question as it relates to credibility issues is, however, not one we can decide in this case. There is no disagreement among the ALJ, the Commission, and the Court of Appeals with respect to the factor in this case.

Affirmed.

Garland F. MORRIS, Jr. *v.* Sophia R. CULLIPHER, Executrix of the Estate of Garland F. Morris, Sr., Deceased

91-42 816 S.W.2d 878

Supreme Court of Arkansas
Opinion delivered October 14, 1991

David J. Potter, for appellant.

Hubbard, Patton, Peek, Haltom & Roberts, by: *George L. McWilliams* and *Randall D. Goodwin*; and *Smilie Watkins*, for appellee.

ROBERT L. BROWN, Justice. This appeal is a probate matter in which the appellant, Garland F. Morris, Jr., contests the

performance of the appellee, Sophia R. Cullipher, as executrix of the decedent's estate on various grounds, including breach of fiduciary duty. The probate court entered an order denying relief on September 13, 1990. Morris Jr. now appeals and raises five points for reversal. There is no merit in any of the arguments, and we affirm.

The decedent, Garland F. Morris, Sr., died testate in Garland, Miller County, Arkansas on January 7, 1985. He was survived by Cullipher, who was his second wife and who has since remarried, and by Morris Jr., who was his only son by a previous marriage. Morris Sr. divorced his first wife in 1966 and married Cullipher that same year. Prior to the divorce Morris Sr. had lived in Texas but upon remarrying, he and Cullipher moved to Garland. For the duration of their marriage, they farmed 1,123.22 acres of land in Miller County — 370 acres were owned solely by Cullipher, 633.22 acres were owned as tenants by the entirety, and 120 acres were owned solely by Morris Sr. As they made money, they bought certificates of deposit from four Texas banks in their joint names. They also held their Arkansas farm operation as tenants by the entirety and used the money derived from that operation to buy farm equipment and livestock.

Morris Sr. died in 1985, and his will was admitted to probate. Cullipher was appointed executrix of his estate, which was valued at approximately $295,000. The jointly held Texas certificates of deposit which Cullipher determined passed to her by right of survivorship under Arkansas law were valued at $268,848. Cullipher took ownership of those certificates and transferred them to Arkansas. More than two years later on November 17, 1987, Morris Jr. petitioned to have Cullipher removed as executrix. Hearings on this petition and other matters relating to discovery and the administration of this estate were held with the final hearing commencing on May 3, 1990. The probate judge denied the petition and entered his order with accompanying findings of fact and conclusions of law on September 13, 1990.

I.

REMOVAL OF EXECUTRIX

Morris Jr. urged the probate judge to remove Cullipher for multiple reasons. His first argument was premised on a perceived

failure on her part to prepare inventories and accountings for the estate in a satisfactory manner. The facts, however, undermine Morris Jr.'s assertions. On April 29, 1985, Morris Jr. waived the necessity for an inventory and accounting. A year later on May 22, 1986, he changed his mind and withdrew his waiver. He further petitioned to compel Cullipher to file the documents. The probate judge ordered her to do so on August 11, 1986, but directed that the documents not be filed as part of the probate clerk's record. Cullipher proceeded to prepare and send an inventory and accounting to counsel for Morris Jr. within thirty days of that order. She then filed amended and supplemental accountings on March 7, 1988, and November 28, 1989. On March 30, 1990, she filed a comprehensive accounting and amended inventory. The comprehensive accounting replaced previous accountings filed. On May 1, 1990, she filed a supplemental accounting.

We have held that where there is substantial compliance with the executrix's obligation to file an inventory and accounting and no evidence of wrongdoing, we will deny relief for a fiduciary breach. *See Petty* v. *Lewis*, 285 Ark. 3, 684 S.W.2d 250 (1985). Here, it is clear from the above that Cullipher did prepare and furnish accountings as well as an inventory after Morris Jr. withdrew his waiver. Although Morris Jr. contests the sufficiency of these documents, the probate judge found no deficiency in Cullipher's performance in this regard. We agree and affirm the probate judge's ruling.

Morris Jr. also presses the point that a fiduciary breach occurred because Cullipher refused to comply with the decedent's "desire" in his will that Cullipher and Morris Jr. engage in joint farming operations. This language is clearly precatory and, as such, is ineffective to dispose of property. In addition, the Arkansas farm passed to Cullipher by right of survivorship, and, therefore, was not affected by language in the will. *See Estate of Wells* v. *Sanford*, 281 Ark. 242, 663 S.W.2d 174 (1984).

Nor does the will direct or require Cullipher to make disbursements of money to Morris Jr. There is only the "desire" that Cullipher do so which, again, is precatory. Allegations were also made regarding Cullipher's administration of the Texas C.D.'s and claims against the estate. These issues are discussed

more fully below but, in sum, we agree that evidence of wrongdoing is lacking, as the probate judge found. Finally, Cullipher's failure to close out the estate has been due in no small part to the multiple lawsuits prosecuted by Morris Jr. against Cullipher and the estate. There was no error in the probate judge's refusal to find any breach of fiduciary duty.

II.

DISCOVERY RESTRICTION AND CONTINUANCE

Though the original petition for removal of Cullipher was filed by Morris Jr. on November 17, 1987, the trial on the petition did not commence until March 16, 1990. No discovery had been conducted by Morris Jr. at the time the trial commenced. The probate judge recessed the trial on March 19, 1990, until May 3, 1990, and subsequently entered a scheduling order on March 27, 1990, which mandated preparation of the comprehensive accounting and inventory and which contemplated additional discovery pertaining to the bank accounts and C.D.'s. On March 30, 1990, Cullipher filed a comprehensive accounting and inventory. On April 12, 1990, Morris Jr. filed requests for production of business documents regarding the decedent's farm operation going back twenty-three years, which were to be furnished in five days. The ostensible reason for the request was to trace the title of the property to determine what was individually owned by the decedent or jointly owned. On May 1, 1990, the probate judge entered a protective order denying the expansive discovery, and on July 30, 1990, the probate judge struck subsequent discovery which had been served by Morris Jr. on Cullipher. (Cullipher contends in this regard that most of the title records to personal property were provided to Morris Jr. in advance of the May 3, 1990 hearing.) When the trial reconvened on May 3, Morris Jr. moved for a continuance on the basis that he had not had an opportunity to review all of the provided material. The motion was denied as untimely.

Lack of diligence is a factor to consider in denying a continuance. *Mixon* v. *Chrysler Corp.*, 281 Ark. 202, 663 S.W.2d 713 (1984). Moreover, a trial judge has broad discretion in matters pertaining to discovery, and that discretion will not be second-guessed by this court absent abuse of discretion which is prejudicial to the appealing party. *See Bolden* v. *Carter*, 269 Ark.

391, 602 S.W.2d 640 (1989); *Marrow* v. *State Farm Ins. Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978). Also, when the continuance is based on a request for additional discovery, the appellant must not only show that there has been an abuse of discretion, but also that the additional discovery would have changed the outcome of the trial. *See Pinkston* v. *Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988). We hold that the probate judge was correct, and that there was no abuse of discretion regarding discovery and the continuance.

III.

PAYMENT OF CLAIMS

Morris Jr. next contests the procedure by which Cullipher paid claims filed against the estate. Specifically, he argues that certain claims timely presented as debts of the decedent were not filed with verifications and allowed by the court prior to payment. The Statute of Nonclaim is not raised by the appellant as an issue.

It is true that the probate judge did not allow these claims prior to their payment by Cullipher. But the judge approved their payment after the fact in his September 13, 1990, order. In the past we have held that substantial compliance with the formalities for filing and approving claims is sufficient under certain circumstances. *See Merritt* v. *Rollins*, 231 Ark. 384, 329 S.W.2d 544 (1959) (registered mail of claim to personal representative as specified by statute not required when claim is personally delivered). Because of the probate judge's subsequent approval of these claims, we hold that there was substantial compliance in this case.

Morris Jr. further contests payment of significant legal and accounting fees as administrative expenses of the estate. The authorizing statute reads:

> (b) Claims for expenses of administration may be allowed upon application of the claimant or of the personal representative, or may be allowed at any accounting, regardless of whether or not they have been paid by the personal representative.

Ark. Code Ann. § 28-50-105(b). Morris Jr. maintains that the fees claimed and paid were excessive in view of the size of the

estate.

[redacted] The fees are high — $81,932 for legal fees and $23,450 for accounting fees, according to Morris Jr. — but the value of such services rendered is primarily a matter within the discretion of the probate judge, and we will not reverse that finding absent an abuse of discretion. Again, we note, as did the probate judge, that there were "numerous" lawsuits brought against Cullipher and the estate by Morris Jr. We are not privy to precisely what those lawsuits entailed, since they are not part of the record. The probate judge, however, found that they were suits against Cullipher in her official capacity, and there is nothing before us to counter that. We also agree with the probate judge that in the instant case Cullipher's actions, which are now contested by Morris Jr., were taken in her official capacity. The legal defense of lawsuits brought by Morris Jr. as principal descendant of the testator as well as his demand for comprehensive accountings undoubtedly enhanced the administrative claims.

[redacted] It is true that had the statutory formula been used for the award of attorney's fees, the award would have been much less than the $81,932 paid in legal fees, even if part of the decedent's property passing to Cullipher by operation of law had formed part of the estate. *See* Ark. Code Ann. § 28-48-108(d)(1987). But, the probate judge has authority to approve legal fees in excess of the statutory legal fees under § 28-48-108(d) and did so in this case. He further was authorized to approve accounting fees under Ark. Code Ann. § 28-48-108(e) (1987). For the reasons set out above, we hold that his ruling on the fees did not constitute an abuse of discretion.

IV.

CHOICE OF LAW

The choice of law question lies at the heart of Morris Jr.'s appeal. Specifically, there is the issue of whether the Texas C.D.'s legitimately passed by right of survivorship under Arkansas law or whether one-half of the C.D.'s should have become part of Morris Sr.'s estate under Texas's community property law. Morris Jr. argues vigorously that the C.D.'s were movable personal property and, as such, the law of the situs state — Texas — should apply. Texas, unlike Arkansas, requires a separate

writing signed by the parties evidencing a survivorship intent in order for the C.D.'s to pass by operation of law. *See* Texas Probate Code Annotated § 439 (Vernon, 1980). Under Arkansas law no separate writing is required for the C.D.'s to pass automatically to the survivor at time of death. *See* Ark. Code Ann. § 23-32-1005(3) (1987). And Cullipher contends that the applicable law for the C.D.'s is Arkansas law which is the law of the domicile of the decedent at the time the C.D.'s were acquired.

There is no question but that the Texas C.D.'s were placed in the joint names of Morris Sr. and Cullipher while husband and wife and were purchased either with funds from the Arkansas farm operation or from Morris Sr.'s separate property. The C.D.'s were purchased and held in Texas. The decedent also had other Texas contacts, but he lived in Arkansas and was living in Arkansas at the time the C.D.'s were purchased. We turn to Leflar on Conflicts for resolution of the issue and find a legitimate policy in favor of applying the law of the domicile:

> As between the spouses on divorce, or [a]s between a surviving spouse, . . . the whole of their movable property will be most fairly divided if the distribution can be in accord with some single basis of marital ownership and the rule which refers the question to the law of the domicile is the only one which can approximate this result. Otherwise the place of acquisition of each item of personalty, including choses in action, acquired by either of the spouses will have to be remembered, and its law studied, to learn what marital property interests exist in the item, though it may have long since been intermingled with the mass of the spouses' personalty at their domicile.

Id. at 646. *See also Restatement of Conflict of Laws* § 290 (1934). R. Leflar, *American Conflicts Law*, § 233, p. 647 (1986). Leflar further states that the great body of American authority favors the law of the domicile at the time the marital property is acquired. *Id.*

Morris Jr. cites a 1933 case in support of his position that Texas law should apply. *See Francis* v. *Turner*, 188 Ark. 158, 67 S.W.2d 211 (1933). In *Francis* our court did appear to honor Mississippi law to determine title to a Mississippi bank account, though the decedent had been a resident of Arkansas. We believe

Francis is distinguishable on its facts, since the widow in that case agreed that the bank account should pass through the estate. That is not the situation in the case before us. Rather, Cullipher exerted ownership by right of survivorship. This court did indicate that had a localized Mississippi bank account been properly proven, Mississippi law would have been applied. This is contrary to Leflar on Conflicts, as noted above, and our holding today. To the extent that *Francis* v. *Turner* stands for the proposition that the marital property law of the situs as opposed to the domicile applies to movable personal property, we overrule it.

Along this same line Morris Jr. argues that certain farm equipment and livestock should have passed through the estate and not to Cullipher by right of survivorship. It was undisputed, though, that this personal property was either purchased with the proceeds from the Arkansas farm operation which Cullipher and Morris Sr. jointly held as husband and wife or was given to them as tenants by the entirety. This court held early on that a tenancy by the entirety could exist in personal property. *See Dickson* v. *Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57 (1922). We have further held that personal property acquired with the proceeds of land held by the entirety also constituted an estate by the entirety. *See Bostic* v. *Bostic Estate*, 281 Ark. 167, 662 S.W.2d 815 (1984). It was, therefore, appropriate for the farm equipment and livestock to pass to Cullipher by operation of law.

V.

For his final point, Morris Jr. requests review of his petition for affirmative relief filed on April 12, 1990, where he asks for penalties, interest, and rents on property which should be included in the estate together with attorney's fees. Since we hold against the appellant on all points, we find it unnecessary to consider this argument. Morris Jr. further asked in that petition for the inclusion in the estate of a vendor's lien note originally held jointly by Morris Sr. and Cullipher. In Arkansas there is a strong presumption that a promissory note held by husband and wife was held as tenants by the entirety. *See Ramsey* v. *Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1985). There is nothing to suggest otherwise in this case.

Affirmed.

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