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RICH MOUNTAIN ELECTRIC COOPERATIVE, Inc. *v.* Jerry REVELS, Richard Leach, and Mary High

92-422 841 S.W.2d 151

Supreme Court of Arkansas
Opinion delivered November 9, 1992

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Friday, Eldredge and Clark, by: *Barry E. Coplin*, for appellant.

Dowd, Harrelson, Moore & Giles, by: *Greg Giles*, for appellees.

JACK HOLT, JR., Chief Justice. The appellees, Jerry Revels, Richard Leach and Mary High, are poultry growers in Howard County, Arkansas. After a nonjury trial the judge found the appellant, Rich Mountain Cooperative, Inc., fifty-one percent negligent in not correcting a power outage that resulted in the deaths of over 9,000 chickens owned by the appellees. The appellees were found forty-nine percent negligent because they failed to have adequate back-up generators. On appeal, Rich Mountain Electric argues that the trial court erred in considering certain photographs and that there was not substantial evidence to support the judgment. We agree that the court should not have admitted the photos into evidence as they are irrelevant. However, we find that the trial court's finding of substantial evidence to support a judgment was not clearly erroneous.

This situation arose out of the following scenario. Because of a severe storm the previous afternoon, there were power outages on the electric distribution line servicing the appellees' chicken houses. Apparently, the storm caused a tree to blow down into a phase wire causing it to sag within inches of the neutral wire (normally they are four feet apart). The following day's one hundred degree temperatures and high electricity usage made the line sag even more and become heavily loaded. Once the line sagged into the neutral stage, the circuit breaker would go out at the substation, and outages would occur.

Due to the power outages and appellees' lack of adequate back-up generators, the appellees did not have electricity to run the cooling equipment in their chicken houses. As a result of the ensuing heat, Mr. Revels lost approximately 6,300 chickens; Mr. Leach lost about 900 chickens; and Ms. High lost about 2,100 chickens.

There was testimony at trial that the power line problem had been discovered on the day before the outage and that the outage occurred when a pine tree fell into the power line. In support of this argument, the plaintiffs tendered several photographs of trees grown up in close proximity to power lines. The photos were taken over a year after the power outage and did not depict the same site as the power outage at issue. Over Rich Mountain Electric's objection, the trial judge admitted the photographs into evidence.

SUFFICIENCY OF THE EVIDENCE

In finding that there was substantial evidence, the court stated:

> [T]here is evidence that Defendant was negligent in that they could have more diligently pursued the cause of the outage. And, also, I believe these photographs are representative of the area and show that there's a general lack of maintenance on the easement right of way. Primarily I think they should have been more diligent. Maybe they were short-handed and had to run to other jobs is the reason they couldn't track down the tree across the line. And the plaintiffs are also somewhat negligent. I think anybody that's dependent upon electricity knows there are outages, especially if your livelihood depends on chickens. I think — even though Tyson's may not require you to have back-up generators, I think it's a general rule everybody knows you ought to. The court finds that the defendant is 51 percent negligent and the plaintiffs are 49 percent negligent. They're entitled to their damages less 49 percent of their own negligence, which, I think, it was undisputed what those damages were.

When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is:

> [N]ot whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous (clearly against the preponderance of the evidence). In reviewing a finding of fact by a trial court, we consider the evidence and all reasonable inferences in a light most favorable to the appellee.

City of Pocahontas v. *Huddleston*, 309 Ark. 353, 831 S.W.2d 138 (1992) (citations omitted).

The court's findings that defendant should have been more diligent were not clearly erroneous. Evidence presented at trial indicated that Rich Mountain Electric was aware of the downed line on the day prior to the power outage and that the company was not actively diligent in discovering the cause of the outage on the day of the incident and making repair.

An electric utility company has a duty to inspect and maintain its power lines in safe and working order. *Stacks* v. *Arkansas Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (1989). However:

> Negligence of the company can not be inferred merely from the occurrence of the accident. That must be proved, and the burden of establishing it is on the party who alleges it.
>
> It is recognized generally as well as by the courts that electric utility companies, such as appellant, must meet the public demand for a ready and adequate supply of power. In doing so they are not insurers against accident or injury, and are not held liable for such as can not be reasonably foreseen.

Arkansas Power & Light Co. v. *Lum*, 222 Ark. 678, 262 S.W.2d 920 (1953).

Electric companies must exercise ordinary care in the construction of their services lines, to make inspections at reasonable times to see that equipment is kept in a reasonably safe condition and to diligently discover and repair defects. *Arkansas Power & Light Co.* v. *Johnson*, 260 Ark. 237, 538 S.W.2d 541 (1976). They must use commensurate care to keep all electrical apparatus in a proper state of repair. *Arkansas Power & Light Co.* v. *Cates*, 180 Ark. 1003, 24 S.W.2d 846 (1930). "The obligation of repairing does not mean merely that the company is required to remedy defective conditions as are brought to its actual knowledge. The company is required to use active diligence to discover defects in its system." *Stacks* v. *Arkansas Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (1989), (citing *Arkansas Gen. Utils. Co.* v. *Shipman*, 188 Ark. 580, 76

S.W.2d 178 (1934)).

The evidence indicated that the electric company did not use active diligence to discover and correct the problem. Mr. Revels testified that Johnny Braswell, foreman for Rich Mountain Electric, told him that the power line problem was discovered on Monday. When Mr. Braswell testified, he denied having told the appellee that the sagging line had been discovered on Monday. However, Mr. Braswell admitted that a power company crew has a responsibility to resag a power line once this situation is discovered.

Although the evidence of the power company's negligence in failing to resag the line the day prior to the outage rests in part on Mr. Revel's testimony, as opposed to Mr. Braswell's testimony, we must defer to the trial judge's discretion in weighing the witnesses' credibility. *State* v. *Massery*, 302 Ark. 407, 790 S.W.2d 175 (1990).

Mr. Braswell testified as to the stages taken to correct the outage on the day it occurred. According to his testimony, he received a call shortly before noon that the power on the appellees' line was out. He sent the lineman to the substation and Mr. Braswell patrolled the line between the substation and the first breaker. (The whole line is approximately eight to ten miles long from the substation to the end.) When the lineman got inside the substation, he reset the breaker. Once reset, the line held and the power stayed.

Approximately thirty minutes later, the line went off again. Mr. Braswell stated that he and the lineman repeated the same routine: the lineman reset the breaker, and Mr. Braswell patrolled another portion of the line. Once again, resetting the breaker brought the power back on.

At about 2:30 p.m., Braswell learned that the power on this same line was down again. Following the same procedure, he got power returned to the appellees without discovering the actual problem. Mr. Braswell testified that he then inspected the full line. In a wooded area just before the end of the line, he discovered the problem — the wires were out of sag. He found the wires, normally four feet apart, merely inches apart. He resagged the line and had the lineman reset the breaker. The electricity

returned to the line and remained on.

Braswell indicated that he did not discover the actual cause of the sagging lines until after Mr. Revels made his inquiry. Mr. Braswell then returned to the site and discovered that a tree had blown over, probably causing the problem.

In sum, Mr. Braswell patrolled various sections of the line on three separate occasions; yet, he did not find the problem until he inspected the entire line, after the power had repeatedly failed. As stated in *Stacks*, *supra*, "The company is required to use active diligence to discover defects in its system." The evidence of record corresponds with the court's finding that Rich Mountain Electric had not been actively diligent in pursuing the outage. After reviewing this evidence in the light most favorable to the appellees, Mr. Revels, Ms. High and Mr. Leach, we find that the evidence is not clearly against the preponderance.

RELEVANCY OF PHOTOGRAPHS

The relevancy of evidence is within the trial court's discretion, subject to reversal only if an abuse of discretion is demonstrated. *Bradford* v. *State*, 306 Ark. 590, 815 S.W.2d 947 (1991); *Turner* v. *Lamitina*, 297 Ark. 361, 761 S.W.2d 929 (1988); *Ryker* v. *Fisher*, 291 Ark. 177, 722 S.W.2d 864 (1987). The test for determining whether photographs are admissible into evidence depends upon the fairness and correctness of the portrayal of the subject. *Ryker*, supra.

A.R.E. Rule 401 defines relevant evidence as evidence having any tendency to make the existence of the fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence. Although the definition of relevant evidence is broad, in order to be relevant, the evidence must be probative of the proposition toward which it is directed.

The photos depicted trees growing near power lines a year after the incident in question and in a different site. Further, they did not depict trees that were blown into power lines after a storm, as was the case in the power outage at issue.

The photos admitted into evidence did not fairly and correctly depict the situation at issue. They were not probative of

the issue of whether the power company failed to clean up a situation after a storm, and for this reason, the trial court erred in accepting the pictures into evidence.

Although we find error on the part of the trial court, this error does not justify reversal. "[A] nonjury case should not be reversed because of admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made." *Butler* v. *Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991).

Even though the photographs were inadmissible, the trial court based its ruling on Rich Mountain Electric's failure to diligently pursue the cause of the outage, rather than on the photographs; for as the court stated, "[T]here is evidence that Defendant was negligent in that they could have more diligently pursued the cause of the outage."

Accordingly, we find that the admission of the photographs was harmless error and that the trial court should be affirmed.

Affirmed.

Carl William DIVELBLISS *v.* Laverne SUCHOR and Renell Suchor

92-164 841 S.W.2d 600

Supreme Court of Arkansas
Opinion delivered November 9, 1992

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

Marc I. Baretz, for appellees.

ROBERT H. DUDLEY, Justice. We affirm the trial court's denial of a motion to set aside default judgments in this case. In late November, 1989, plaintiff Laverne Suchor was standing inside a boom bucket, or cherry picker, atop a truck while stringing the city's Christmas lights on Missouri Street in West Memphis. Defendant Carl Divelbliss was driving a tractor-trailer that was owned by co-defendant, Monroe Contractors Equipment, Inc. Royal Insurance Co. carried liability insurance on the tractor-trailer. The tractor-trailer, while being operated by Divelbliss, struck the plaintiff's rig, causing him to fall twenty to thirty feet to the ground and suffer severe and permanent injuries.

Plaintiff initially contacted an attorney in Memphis, but subsequently secured Arkansas counsel, Kent Rubens and Marc Baretz. On June 6, 1990, Rubens and Baretz filed suit for plaintiffs Laverne Suchor and Renell Suchor, husband and wife, against defendant Divelbliss and co-defendant Monroe Contractors. At about the same time, Lea Shedlock, a claims representative for Royal Insurance, contacted Rubens by phone. On June 8, 1990, Rubens wrote Lea Shedlock to advise her that he and Baretz represented plaintiffs. The material part of the letter is as follows:

> We have taken over representation, and as I told you we have filed a complaint, a copy of which is enclosed. We have not sought to obtain service; however, our clients

> insist that we either show progress or we should proceed with it. We will forward the medicals to you as soon as possible.

On June 19, 1990, Ms. Shedlock, the claims representative, responded, in part, as follows:

> As we discussed, when I am in receipt of the medicals, I will be in contact with your office. Also, please forward your theory of liability. As of this date, I do not have your client's version as to how this incident occurred.
>
> I look forward to reaching a timely and equitable resolution.

On June 25, 1990, Rubens responded, in material part, as follows:

> With regard to your request for a statement of liability, it seems that we have set that out in the pleading which I sent you. You want a statement from our client, but I am sure you realize that it will be in conformity with the allegations of the complaint. We are getting together all the medicals and the medical expenses for review, and we will be sending them to you shortly.

Between June 25 and August 1, there was no communication from Ms. Shedlock to Rubens or Baretz, and, on August 1, 1990, Rubens attempted to have service of process upon both Divelbliss and Monroe Contractors. Service was never had on Monroe Contractors, but was perfected on Divelbliss on August 4, 1990. Divelbliss immediately give the summons and copy of the complaint to his employer, Monroe Contractors, who immediately forwarded the documents to Interstate Motor Carriers, the independent insurance agent for Monroe Contractors. The agent received the summons and complaint on August 8, 1990. The record does not disclose when the agent forwarded the summons and complaint to Royal Insurance, but it does show that the agent had not forwarded these documents by January 8, 1991, five months later. Obviously, Divelbliss was in default long before the agent forwarded the summons and complaint to the insurance company.

On September 18, 1990, Royal sent a letter to Rubens

requesting medical reports, and on January 8, 1991, Royal sent letters to Monroe Contractors and Interstate Motor Carriers, the agent, warning of the possibility of a lawsuit.

On February 4, 1991, the trial court granted default judgments as to liability against Divelbliss since service had been perfected but no answer had been filed. The trial court heard evidence in open court on the amount of damages, and found that plaintiff Laverne Suchor had suffered damages in the amount of $200,000, and that plaintiff Renell Suchor had suffered damages in the amount of $25,000. Judgments were entered accordingly. On May 17, 1991, Rubens notified Royal that the judgments had been taken, and three months later, on August 22, 1991, Royal took its first action when it caused Divelbliss to file a motion to set aside the default judgments. The motion was denied and Divelbliss appeals.

Appellant first argues that the trial court committed reversible error in refusing to set aside the default judgments in their entirety. His argument centers around the recently amended A.R.C.P. Rule 55. On December 10, 1990, we amended Rule 55 by making it more lenient, and allowing more discretion to trial courts in deciding whether to enter a default judgment. The amendment changed paragraph (a) to read:

> When a party against whom a judgment for affirmative relief is sought has failed to appear or otherwise defend as provided by these rules, judgment by default *may* be entered by the court.

(Emphasis supplied.) Previously, the last clause of the paragraph read, "judgment by default *shall* be entered by the court." (Emphasis supplied.)

Old Rule 55(c) listed the following factors that could warrant setting aside a default judgment: "Excusable neglect, unavoidable casualty, or other just cause." The new Rule 55(c) reads as follows:

> The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason

justifying relief from the operation of the judgment.

The new rule is more liberal in its treatment of default judgments and represents a preference for deciding cases on the merits rather than technicalities. Ark. R. Civ. P. 55 reporter's note (1990).

The amended rule is a procedural rule, is remedial in nature and, accordingly, should be given retroactive effect. *Forrest City Machine Works* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981). In addition, the effective date of the amended rule was before the date of the default judgments, and therefore, the amended rule is the applicable rule. Even applying the amended rule, the judgments on the issue of liability must be affirmed. We recently discussed the amended rule in *B & F Engineering, Inc.* v. *Controneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). There, the agent for the insurance company received two summonses and complaints in two different actions stemming from the same accident. When the agent received the second summons and complaint, he mistakenly thought that the answer filed in response to the first suit also answered the second, and, as a result, failed to forward the second summons and complaint to the insurance company's counsel. Our holding affirmed the trial court's order granting default judgments. In reaching our decision, we held that the standard of review was whether the trial court abused its discretion, and we said that standard required us to consider the nature of the mistake causing a failure to respond on a case by case basis. Here, the insurance agent received a copy of the summons and complaint but did nothing with those documents for, at the very least, five months. There is no showing that the agent made an excusable mistake, or that there was some inadvertent occurrence, or that any excusable neglect took place. The trial court found, "The agent apparently did not tend to business." The proof in the record discloses nothing more than carelessness on the part of the agent, and, on such proof, the trial court ruled correctly in refusing to set aside the default judgments.

Appellant also argues that the trial court erred in refusing to set aside the default judgments because Kent Rubens, the plaintiffs' attorney, was guilty of misconduct. Appellant states:

> The correspondence between Ms. Shedlock [the claims adjuster] and appellees' [plaintiffs'] attorneys reveal that the parties were working in a cooperative manner (at least in her mind) and that she was reasonable in expecting to be advised of service. Appellant submits that such failure to advise Ms. Shedlock that service had been obtained on Divelbliss constitutes "misconduct of an adverse party" sufficient to set aside the default judgment under Rule 55 (c) (3).

In her affidavit of August 16, 1991, which was made a part of the motion to set aside the default judgments, Ms. Shedlock stated that she had a phone conversation with Rubens, and received the quoted letter and her understanding was that plaintiffs' attorney "would withhold from obtaining service of process and advise me if and when service of process was obtained . . . . "However, the letter alone simply did not state that Rubens would notify her when service was obtained. Rather, the material part of it provides: "We have not sought to obtain service; however, our clients insist that we either show progress or we should proceed . . . ." The record does not reveal the content of the phone conversation. It does reveal that, in preparation for the hearing on the motion to set aside the default judgments, the plaintiffs sought to obtain specific information from Ms. Shedlock about the phone conversation. By interrogatory plaintiffs asked: "Do you have any notes, diaries, memoranda of any phone conversations with the plaintiffs' counsel concerning the above styled lawsuit?" Divelbliss responded:

> Objection, Rule 33 of the Arkansas Rules of Civil Procedure provides that Interrogatories may be served upon and answered only by parties to the lawsuit. Lea Shedlock is not even a named party to this lawsuit, no service has been obtained upon her and the Court has thereby acquired no jurisdiction over her person . . . . Therefore, to the extent that these discovery requests seek information from . . . Lea Shedlock, they are objectionable.

Ms. Shedlock refused to answer the interrogatory set out and refused to answer similar others. In sum, we cannot say the trial court was clearly erroneous in its implied ruling that there was no

"misconduct" on the part of the plaintiffs' lawyer, or that the trial court abused its discretion in its clear ruling that alleged "misconduct" on the part of the plaintiffs' attorney was not the cause of the Divelbliss default. The trial court sagaciously observed that the cause of the default was not Rubens' letter, but instead the cause was the failure of the agent to forward the summons and complaint.

Appellant next argues that the trial court erred in refusing to set aside the default judgments because Divelbliss was not given three days written notice of the application for the judgments. A.R.C.P. Rule 55(b) provides that if the party against whom the default judgment is sought has *appeared* in the action, he shall be served with written notice at least three days prior to the hearing on the application. Appellant tacitly admits that Divelbliss did not answer within the time specified, but contends that Ms. Shedlock's contacts with Rubens constituted an "appearance" and, as authority for the contention, cites the case of *H. F. Livermore Corp.* v. *Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689 (D.C. App. 1970). While the contacts in *Livermore* were much more extensive than the contacts in this case, and we could distinguish this case on that basis, we decline to do so because we choose not to follow the reasoning of that court.

We have cases decided before the adoption of the Arkansas Rules of Civil Procedure that hold that an "appearance" can be something other than the filing of a written pleading. For example, a defendant asking for a continuance constituted an appearance in *Price* v. *Shope*, 212 Ark. 420, 206 S.W.2d 752 (1948). In *Spratley* v. *Louisiana & Arkansas Railway Co.*, 77 Ark. 412, 416, 95 S.W. 776, 777 (1906), we wrote:

> There is no doubt but that where a party, who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance.

The rationale is that the "appearance" was sufficient to constitute an implied waiver of the service of process. *Price* v. *Shope*, 212 Ark. at 421, 206 S.W.2d at 752. "Appearance" in all of our cases designates some overt act by which a party against whom a suit has been commenced submits himself to the jurisdiction of the

court. Here, there was no act by which Divelbliss can be said to have impliedly waived the service of process or voluntarily submitted to the jurisdiction of the court prior to service. He took no action in court after service that would indicate an appearance. To the contrary, when his arguments are analyzed, they are the antitheses of a waiver of service. In this appeal, Divelbliss argues that the regular service of process was not sufficient, standing alone, to bring him within the jurisdiction of the court, but rather, in addition to that regular service, Rubens, because of his alleged misconduct, had a duty to notify the claims representative of service before Divelbliss could be brought within the jurisdiction. Below, he argued that Ms. Shedlock did not have to respond to an interrogatory as she was neither a party, nor within the jurisdiction of the court. These arguments are diametrically opposed to the concept that Divelbliss waived service of process through some act by Ms. Shedlock. In sum, Divelbliss did not make an appearance in the trial court until he filed a motion to set aside the default judgments.

Appellant's final argument is that the judgments should be reversed with respect to the damages. Generally, whether a defaulting defendant is entitled to notice of a hearing on the amount of damages is a matter of state, not federal, law. Annotation, *Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages*, 15 A.L.R.3d 586 (1967). In Arkansas, a default judgment establishes the liability, but not the amount of damages. A hearing is required to determine the amount of damages, and the plaintiff is required to introduce evidence of the damages. *B & F Engineering* v. *Controneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). Some jurisdictions require that notice of the hearing be given to a defaulting defendant even when he has never appeared, see synopsis of cases in *Defaulting Defendant's Right to Notice*, *supra*, § 3, but the Arkansas rule, A.R.C.P. Rule 55(b), does not require that notice be given to a defaulting defendant who has not appeared. Perhaps the reason is that it would be superfluous to again serve a defendant who already received one notice but failed on an ongoing basis to respond. Because Divelbliss did not timely file an answer, and because he did not make a subsequent appearance, the plaintiffs were entitled to the default as to liability without further notice, and subsequently, upon proving their damages,

they were entitled to the judgments in the amounts proven. The trial court did not err in refusing to set those judgments aside.

Affirmed.

Scott MANATT, Jr. *v.* STATE of Arkansas

92-566 842 S.W.2d 845

Supreme Court of Arkansas
Opinion delivered November 9, 1992

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Scott Manatt, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Shortly after midnight on September 1, 1991, State Trooper Steve Shults was driving his police car on Highway 67 near the Missouri state line when he saw a pickup truck exceeding the speed limit while traveling south toward Corning. The trooper followed the truck, as it continued to exceed the highway speed limit, into a 45 m.p.h. zone in Corning, where he saw it veer across a yellow line. The trooper thought the driver of the truck might be intoxicated and stopped the truck at 12:26 a.m. The trooper got out of his car, and, as he was approaching the pickup, he glanced into the bed of the truck and saw a case of beer in cans, six bottles of beer, and four wine coolers. The trooper asked the driver for his license, looked at it, and saw that the driver, appellant Scott Manatt, Jr., was only sixteen years old. There were three other teenagers in the truck. The trooper asked to whom the beer and wine belonged, and appellant responded that it was his. The trooper satisfied himself that appellant had not been drinking and shortly afterwards issued a citation to appellant as being a minor in possession of intoxicants, and let him go. The case was processed in the juvenile division of chancery court. The chancellor found that appellant was a delinquent juvenile because he had violated the statute prohibiting minors from possessing intoxicants. He entered an order denying appellant's driving privileges for one year, but allowed him to drive to and from work and school. Court costs amounted to $35.00. Appellant makes five assignments of error,

and those assignments, in turn, contain many subpoints. Some of the subpoints are not easily followed, but we are satisfied that there is no merit in any of them and, accordingly, affirm.

Appellant's first point is:

> UNDER RULE 29(1)(a), IT IS ALLEGED THAT THE LOWER COURT ERRED IN FAILING TO ENJOIN THE USE OF THE JUVENILE CODE AS FAILING IN EQUAL PROTECTION OF THE LAWS OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ALSO FAILED TO ACCORD TO PERSONS UNDER THE AGE OF 18 YEARS PRIVILEGES OR IMMUNITIES WHICH UPON THE SAME TERMS SHALL BELONG TO ALL CITIZENS UNDER ARTICLE 2, SECTION 18 OF THE ARKANSAS CONSTITUTION, JURISDICTIONALLY TREATING CITIZENS 18 TO 21 DIFFERENTLY THAN THOSE 16 TO 18 FOR THE SAME OFFENSE.

In this point appellant contends that the juvenile code is unconstitutional and that we should enjoin its use because, when a juvenile violates a criminal statute, he is subjected to more severe penalties than would be an adult for violating the same statute. We do not reach the merits of the argument because appellant was not sentenced under the juvenile code. Appellant was given a citation for being a minor in possession of intoxicating liquor. *See* Ark. Code Ann. § 3-3-203 (1987). The chancellor found that he violated the statute and consequently found him to be a delinquent juvenile. *See* Ark. Code Ann. § 9-27-303(11) (Repl. 1991). Without objection, the chancellor applied Ark. Code Ann. § 5-64-710 (1987), a part of the criminal code, and suspended his driving privileges. The criminal code provides that the trial court *shall* deny driving privileges when a person who is less than eighteen years old is found guilty of a criminal offense involving the illegal possession of alcohol. This penalty, denial of a driver's license, "shall be in addition to all other penalties." Ark. Code Ann. § 5-64-710 (Supp. 1991).

The salient fact is that there was no "disposition," such as commitment to a youth services center, probation, or fine, as provided for in Ark. Code Ann. § 9-27-330 (1987), the statute

that appellant contends unconstitutionally provides excessive punishment for juveniles. Instead, the only "disposition" was to deny appellant the privilege of holding a driver's license as provided for in the criminal statute and driver's license statute, and, by statute, that is to be "in addition to all other penalties."

In order to have standing to challenge the constitutionality of a statute, a party must demonstrate that the challenged statute had a prejudicial impact on him. *Montgomery* v. *State*, 277 Ark. 95, 640 S.W.2d 108 (1982). Here, the challenged statute had no impact on appellant, and, therefore, he has no standing to challenge it. In his reply brief the appellant contends that he has standing because court costs were assessed against him under the juvenile code, but he has not shown that court costs are discriminately applied in juvenile court. Accordingly, we affirm the trial court's refusal to enjoin the use of the juvenile code.

Appellant's second assertion of error is:

> THE LOWER COURT ERRED IN FAILING TO TREAT THE OVERBROAD DEFINITION OF "JUVENILE DELINQUENT" AS VOID FOR VAGUENESS BY FAILING TO FIND ACA 9-27-303 SUB PARAGRAPH 11 AS VOID FOR VAGUENESS AND BEING OVERBROAD WHICH DEFINITION CREATES AS A DELINQUENT EVERY CHILD IN ARKANSAS AT SOME TIME BEFORE ITS 18TH BIRTHDAY AS A JUVENILE.

The primary contention under this point is that the definition of "delinquent juvenile" contained in Ark. Code Ann. § 9-27-303(11) (1987) is facially void for vagueness. Appellant does not contend that the statute he was found to have violated, "minor in possession of intoxicants," is void for vagueness. Rather he argues that the definition of "delinquent juvenile" is void. Since there was no disposition of appellant under this definition, we do not need to reach the issue, but we do discuss it in a summary manner only as a prelude to another of his subpoints.

The statute defines the term "delinquent juvenile" as any juvenile ten years old or older who has committed an offense that would constitute a felony, misdemeanor, or violation for an adult,

excepting traffic offenses and game and fish violations. The statute sets out the age of a juvenile offender, and it defines the type of behavior that will cause one to be classified as a delinquent juvenile. Under the definition, a juvenile would only have to look to the criminal code and city ordinances to find the proscribed acts. Thus, the statute is not facially void. See *State* v. *Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992), for a complete discussion of the standard for determining whether a statute is void for vagueness.

Appellant alternatively argues that if the definition is not vague, and if it is literally followed, it is overbroad because it subjects every juvenile to being declared a delinquent. Appellant did not offer any empirical data to sustain this argument. The only data on the subject of which we are aware, and of which we can take judicial notice, are the statistical publications of the Administrative Office of the Courts and the United States Census, and this data does not sustain appellant's contention. Thus, the chancellor did not err in refusing to declare the juvenile code unconstitutional because the definition of "delinquent juveniles" is overbroad.

Also under the same point of appeal appellant contends that the statute he was convicted of violating, being a minor and possessing alcohol, is in violation of the Equal Protection Clause. Citing our legal drinking age of twenty-one, appellant contends that all persons who are under the age of twenty-one, and who possess alcohol, must be treated the same, but, under our statute, only persons less than eighteen years old lose their driver's license when they possess intoxicants. Such an argument loses sight of the fact that a person reaches majority in this State at the age of eighteen years, Ark. Code Ann. § 9-25-101 (1987), and it is only minors who are subject to losing their driving privileges under this act. It is adults over the age of eighteen, but under the age of twenty-one, who cannot purchase intoxicants, who might make a hollow equal protection argument. In addition, in *Carney* v. *State*, 305 Ark. 431, 808 S.W.2d 755 (1991), we set out the basis for this dichotomy, and we held that it is rational and, consequently, not unconstitutional. We need not repeat that reasoning here.

Appellant's third point of appeal is:

THE COURT ERRED IN EXERCISING JURISDICTION BEYOND ITS JURISDICTION BY ENFORCING ACT 93 OF 1989 ACA 5-65-116 WITHOUT REGARD TO ACT 1109 OF ACTS OF THE LEGISLATURE OF 1991 ACA 27-16-915 AND FAILING TO FIND THAT THE 1989 ACT WAS AMENDED BY THE 1991 ACT AND BY IMMEDIATE IMPOSITION OF THE RULING OF THE COURT WITHOUT REGARD TO THE DEFENDANT'S RIGHT TO APPEAL AND BY LETTER RULING DISALLOWS ANY STAY AGAINST IMPOSITION PENDING APPEAL.

Appellant contends that Ark. Code Ann. § 5-65-116 (Supp. 1991), the part of the criminal code passed in 1989 that provides for the suspension of driver's licenses of juveniles under eighteen who commit offenses involving intoxicants, was repealed by implication by Ark. Code Ann. § 27-16-916 (Supp. 1991), a part of the code dealing with driver's licenses that was passed in 1991.

The two statutes are not in conflict, and one does not repeal the other by implication. The criminal code section 5-65-116 provides that a person under eighteen who is convicted of driving while intoxicated, or who illegally possesses alcohol or a controlled substance, shall lose his driver's license. On the other hand, the driver's license statute, section 27-16-915, provides that any person, regardless of age, who illegally uses or possesses controlled drugs, as they are defined by the Controlled Substances Act, shall lose his driver's license. Thus, there was no repeal of that part of the criminal code providing for the loss of a driver's license by a person under eighteen years of age when he is found guilty of an offense involving intoxicants. In addition, this court has stated that repeal by implication is not favored. *Johnson* v. *Sunray Serv., Inc.*, 306 Ark. 497, 816 S.W.2d 582 (1991).

Under this same assignment of error appellant makes an additional equal protection argument. He contends that there is an unconstitutional disparity in the way section 5-65-116 treats juveniles under eighteen as compared to the way it treats adults, and also in the way it treats juveniles under eighteen compared to the way it treats people eighteen, nineteen, or twenty years of age. We do not reach the first subpart of this argument because an

adult cannot be convicted of the offense of possession of intoxicating liquor by a minor. *See* Ark. Code Ann. § 3-3-203 (1987). With regard to the second subpart of the argument, a person reaches majority in this State at the age of eighteen, Ark. Code Ann. § 9-25-101 (1987), and there is a rational basis for taking the privilege of driving from a minor who possesses intoxicants. *Carney* v. *State*, 305 Ark. 431, 808 S.W.2d 755 (1991). Under a different statute, a person must be twenty-one years of age before he can lawfully possess intoxicants. Ark. Code Ann. § 3-3-203 (1987). As we have already set out in the second assignment of error, there is a rational basis for treating minors under the age of eighteen differently from adults who have not yet reached the lawful drinking age of twenty-one.

Appellant makes yet another subargument under this assignment of error, "[T]he lower Arkansas trial court is acting beyond its jurisdiction in denying the Appellant an opportunity to appeal . . . ." We summarily dismiss this argument as we are now hearing this case on appeal.

Appellant's fourth assignment of error is:

> THE COURT ERRED IN ALLOWING THE JUVENILE INTAKE OFFICER AS ITS APPOINTEE AND ADVISER TO MAKE AN EXPARTE RECOMMENDATION TO THE COURT BY WRITTEN RECOMMENDATION PRIOR TO AN ADJUDICATION OF GUILT DURING THE TIME THAT THE COURT WAS SITTING AS A TRIER OF FACT AND INJECTING THE COURT INTO THE ROLE OF AN ADVOCATE.

Appellant's first argument under this assignment of error is that the trial court violated Ark. Code Ann. § 9-27-321 (Repl. 1991), which provides that a statement made by the juvenile to the intake officer shall not be admissible in evidence against the juvenile. There simply was no statement to an intake officer that was admitted into evidence. An incriminating statement made to the trooper was admitted into evidence, but that is not prohibited by the cited statute.

Additionally under this assignment, appellant argues that the trial court abused its discretion in allowing the intake

officer to sit at counsel table with the deputy prosecutor during this proceeding, and that the trial court erred in allowing the intake officer to make the recommendation that appellant's driver's license should be suspended for one year. Again, we treat the matter summarily because, even if appellant's arguments were valid, there was no possible prejudice. There is no doubt appellant was a minor and that he was in possession of intoxicants, and the applicable statute provides that in such case the trial court is *required* to suspend the minor's driver's license. *See* Ark. Code Ann. § 5-65-116 (Supp. 1991).

Appellant next argues that this case should be reversed because the chancellor took an adversary posture at trial. The argument is based upon the following: At the beginning of the case the chancellor asked appellant's attorney: "How old is your son?" and, during the trooper's testimony, appellant made an objection, based on the lack of a *Miranda* warning. The trial court then asked five pertinent questions of the trooper before ruling. One of these questions was: "How did he claim ownership?" Appellant cites no authority that these questions by the court were improper in a juvenile hearing, and we know of none. When a party cites neither cases, nor authority for an argument, nor gives a convincing argument, and the argument has no readily apparent validity, we will not further consider the matter. *Brown* v. *Minor*, 305 Ark. 556, 810 S.W.2d 334 (1991).

In his final assignment of error, appellant contends:

> THE COURT ERRED IN FINDING A LINK BETWEEN THE POSSESSION OF ALCOHOL, AND THE DRIVER OF A VEHICLE, AND IN ALLOWING ALLEGED STATEMENTS BY THE DEFENDANT WITHOUT BENEFIT OF MIRANDA WARNINGS BY AN OFFICER STOPPING A JUVENILE WHEN THE QUESTIONS AND ANSWERS OF THE TARGETED JUVENILE RESULT IN ARREST AND COMPLETING A "LINK."

Appellant makes a number of arguments under this assignment of error, but all but one of them are based upon the contention that the trial court erred in allowing the trooper to testify that appellant admitted that the intoxicants were his because the officer did not give a *Miranda* warning to appellant. The ruling

was correct. Here, the officer issued a citation in lieu of an arrest. *See* A.R.Cr.P. Rules 5.1 and 5.2. The officer did not take appellant into custody. In *Berkemer* v. *McCarthy*, 468 U.S. 420 (1984), the United States Supreme Court held that persons temporarily detained pursuant to a routine traffic stop are not "in custody" for purposes of *Miranda*. The Court reasoned that *Miranda* warnings were not required in such cases because the stop was temporary, it was in public, and the atmosphere on a public street is not comparable to the "police dominated" custodial interrogation. The Court held that a motorist who is detained pursuant to a traffic stop is entitled to a recitation of his rights only when the stop becomes such that he is "subjected to treatment that renders him 'in custody' for practical purposes." *Id.* at 440.

Finally, in two separate subarguments, appellant contends that this case should be reversed because the trial court did not act in an impartial manner and that there was a "predisposition" to "make an example out of this defendant." The record does not show that the trial court acted unfairly or partially in any manner, or sought to make an example of appellant. We consider the argument to be disrespectful of the trial court and in violation of Rule 6 of the Rules of the Supreme Court and Court of Appeals, but, rather than take punitive action, we state that the argument is completely without a basis and inappropriate.

Affirmed.

NEWBERN, J., not participating.

TROUTT BROTHERS, INC. d/b/a The Jonesboro Sun, John Troutt, Jr. and Larry Fugate *v.* Larry EMISON, Sheriff of Craighead County and T.R. "Dickie" Howell, His Chief Deputy

92-522 841 S.W.2d 604

Supreme Court of Arkansas
Opinion delivered November 9, 1992

Penix, Penix & Lusby, by: *Bill Penix* and *Robin Nix*, for appellants.

Henry, Walden, Davis & Halsey, by: *Mike Walden*, for appellees.

ROBERT H. DUDLEY, Justice. This appeal requires us to

construe the Freedom of Information Act, Ark. Code Ann. §§ 25-19-101—108 (Repl. 1992). Two sixteen-year-old girls and one fifteen-year old girl were arrested in Mississippi County. One was arrested for stabbing a victim to death, another for carrying a deadly weapon, and the third for felony theft. After their arrests, the three were transported to the Craighead County Juvenile Detention Center, a regional facility. Under the governing statutes, the two sixteen-year-old girls could have been charged as adults, Ark. Code Ann. § 9-27-318 (Repl. 1991), and treated as adults, or they could have been charged as juveniles and would have remained in the juvenile detention facility until the juvenile division of the chancery court ordered otherwise. *See* Ark. Code Ann. §§ 9-27-326, 327 (Repl. 1991) & § 9-28-209 (Supp. 1991). If the fifteen-year-old were the one arrested for stabbing her victim to death she too might have been charged as an adult, *see* Ark. Code Ann. § 9-27-318(b)(1) (Repl. 1991), or she might have been charged as a delinquent juvenile offender. *See* Ark. Code Ann. § 9-27-303(11) (Repl. 1991). The salient fact is that none of the juveniles had been charged in the juvenile division of chancery court at the time the issue in this case arose, and, therefore, no juvenile proceedings had been commenced. Ark. Code Ann. § 9-27-310 (Repl. 1991). Subsequent testimony showed that both of the sixteen-year-old girls were later charged as adults in circuit court, one being charged with capital murder, and the other being charged in connection with another homicide. The fifteen-year-old was charged as a delinquent juvenile.

While in the regional juvenile facility, the three detainees attacked a matron, broke several of her ribs while overpowering her, took the keys to the facility and to her car, got out of the facility with one of the keys, and, with the use of the other key, escaped in her car. Newsroom employees of the *Jonesboro Sun* heard the police broadcasts of the escape through use of a radio scanner. Larry Fugate, the managing editor of the *Sun*, immediately went to the facility to ask what had happened. The Craighead County Juvenile Detention Facility is located in the same building as the Craighead County Jail, or adult jail, but the two facilities are separate. They have separate entrances, separate facilities, separate records, separate personnel, and separate standards. Upon arriving at the building Fugate asked Dickie Howell, Chief Deputy Sheriff of Craighead County, for the

names of the escapees. The deputy sheriff responded that he understood the law to be that the names of juvenile offenders were not to be released and, accordingly, did not divulge the girls' names. Later, he refused to allow Fugate to see the logs and booking sheets on the girls. The *Sun* filed suit in circuit court against Sheriff Larry Emison and Deputy Dickie Howell asking that the names and records be made public information. The trial court examined applicable statutes, considered the possibility that the General Assembly did not word one of statutes as it intended, and, in this case of first impression, concluded that the public policy in favor of keeping juveniles' names confidential outweighed the public policy represented by the Freedom of Information Act. Accordingly, the trial court found no violation of the Freedom of Information Act. We reverse, primarily because the legislative branch rather than the judicial branch can create exceptions to the act, and the legislature has not created an exception specifically applicable to this set of facts.

The Arkansas Freedom of Information Act provides in pertinent part:

> Except as otherwise *specifically provided by this section or by laws specifically enacted to provide otherwise*, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.

Ark. Code Ann. § 25-19-105(a) (Repl. 1992) (emphasis added). This language provides that only the General Assembly can create exceptions to the FOIA. We have followed this directive and have required that a statute *specifically* provide for nondisclosure before we will exempt a public record from the act. *See Legislative Joint Auditing Comm.* v. *Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987). Therefore, the issue is whether there is a statute that specifically provides for the exemption of the names of juveniles arrested for felonies, but not charged as delinquent juveniles, and whether detention facility logs and booking sheets of juvenile detention facilities are exempt.

Deputy Sheriff Howell obviously thought that a part of the juvenile code, Ark. Code Ann. § 9-27-348 (Repl. 1991), provided for the exemption. However, the language of that exemption is as follows:

> No information whereby the name or identity of a juvenile *who is the subject of proceedings under this subchapter* may be ascertained shall be published by the news media *without written order of the juvenile court.* [Emphasis supplied.]

Another statute, Ark. Code Ann. § 9-27-310(a) (Repl. 1991), provides that juvenile "[p]roceedings shall be commenced by filing a petition with the clerk of the chancery court or by transfer by another court." Thus, these juveniles were not "the subject of proceedings," and the exemption does not specifically apply. This construction of the statute is confirmed by the phrase "without written order of the juvenile court," which clearly means that the exemption is to apply only to cases filed in the juvenile court.

One might argue that our construction of these statutes defeats, to some extent, the public policy of shielding juvenile offenders since our construction leaves a window of time, between the arrest and the charge, in which the name of a delinquent juvenile can be discovered. However, that result is in accordance with the language of the statute. If it is to be changed, it should be changed by the General Assembly and not by this court. If the General Assembly wants to declare the public policy to be that the names of all juvenile offenders are exempt public records, whether the juvenile is charged, or if charged, whether charged in juvenile court or in circuit court, it knows how to do so.

■ However, the General Assembly might not choose to create such a blanket exemption. One of these cases is a good example. There was testimony that the juvenile, who was charged as an adult with the crime of capital murder, stabbed her victim twenty-two times, then attacked the matron, escaped, and was loose in public. The General Assembly might well think that, for its safety, the public had a right to know the name or see a picture of such a dangerous escapee. But again, that is not for this court to decide. Our long standing position is clear. FOIA exemptions are to be narrowly construed, *Hengel* v. *City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991), and when the legislature "is less than clear in its intendments, then privacy must yield to openness and secrecy to the public's right to know." *Ragland* v. *Yeargan*, 288 Ark. 81, 86, 702 S.W.2d 23, 25 (1986). Accordingly, we hold that this statute does not provide an exemption to FOIA.

Appellees also contend that two federal statutes provide for nondisclosure in these cases. The statutes, 42 U.S.C. §§ 5676 and 5731 (1988) are a part of the federal program for assisting states with their juvenile justice systems. Under the federal program the states submit plans to the Office of Juvenile Justice and Delinquency Prevention in order to receive grant money. 42 U.S.C. § 5633 (1988). If the states do not comply with the federal program they will not receive grant money. The first of the statutes, 42 U.S.C. § 5676, provides:

> Except as authorized by law, program records containing the identity of individual juveniles gathered for purposes pursuant to this subchapter may not be disclosed without the consent of the service recipient or legally authorized representative, or as may be necessary to carry out this subchapter. Under no circumstances may program reports or findings available for public dissemination contain the actual names of individual service recipients.

The first sentence above protects "program records." Here, the citizen asked the public official for the names of the girls before they were charged in any court. At that time their names were not part of the juvenile program records. In fact, two of the names never became part of the juvenile program records. Accordingly, we cannot say that this provision *specifically* provides for exemption. The same reasoning applies to the second sentence which prohibits printing the names of juveniles in "program reports or findings available for public dissemination."

The second of the federal statutes advanced by the appellees as proving an exception is 42 U.S.C. § 5731. However, that statute is a part of the subchapter entitled "Runaway and Homeless Youth" and is simply not applicable to the case at bar.

The cited federal statutes are not laws "specifically enacted" to countermand the Arkansas FOIA's general rule that public records must be available, and we hold that they do not provide an exemption. We are aware that this holding may make it more difficult for the State to receive federal funding for its juvenile justice program. One authority has written on the subject. *See* Watkins, *The Freedom of Information Act: Time For A Change*, 44 Ark. L. Rev. 535 (1991). But again, if a change in the state act is to be made, it must be made by the legislature.

Until it is changed we hold that a federal law which does not prohibit disclosure, but only provides for the loss of funds if the information is disclosed, does not supersede the state FOIA. *Accord, Student Bar Assoc.* v. *Byrd*, 239 S.E.2d 415 (N.C. 1977).

Reversed and remanded for proceedings consistent with this opinion.

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. The majority directs the reader's attention to the Arkansas Freedom of Information Act, Ark. Code Ann. §§ 25-19-101 to -107 (Repl. 1991), which provides in pertinent part:

> Except as otherwise *specifically provided by this section or by laws specifically enacted to provide otherwise,* all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.

Ark. Code Ann. § 25-19-105(a) (Repl. 1992) (emphasis added).

This court, very laudably, has followed the basic precept that the objectives of the FOIA are such that whenever the legislature fails to specify that any records in the public domain are to be excluded from inspection, then privacy must yield to openness. *Ragland* v. *Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). We have with lock-step precision consistently affirmed the view that the FOIA should be interpreted broadly and exceptions narrowly in order to counterbalance the self-protecting interests of governmental bureaucracy. *McCambridge* v. *City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). This is as it should be in order to safeguard the citizens rights to openness of government.

The Arkansas Juvenile Code of 1989 provides that "[a]ll records may be closed and confidential within the discretion of the court." Ark. Code Ann. § 9-27-309(a) (Repl. 1991). The Juvenile Code further provides that "[n]o information whereby the name or identity of a juvenile who is the subject of proceedings under this subchapter may be ascertained shall be published by the news media without written order of the juvenile court." Ark. Code Ann. § 9-27-348 (Repl. 1991). I read these two provisions to

encompass the FOIA.

The majority notes that Ark. Code Ann. § 9-27-310(a) (1987) states that proceedings are commenced with the filing of a petition and that since no petition had been filed these juveniles were not subject to the discretion of the court. I do not believe the legislature intended this statement to be a definition of "proceedings" as used in section 9-27-348. Such an interpretation would result in a situation where the records of any juvenile being held in a juvenile detention center could be released just because the juvenile justice system had not yet permitted a petition to be filed. What an absurd result — it would render the policy of protecting juveniles' identity absolutely meaningless. Thus, the majority holds today that it makes no difference that while a juvenile is held in a juvenile detention center awaiting charges on a matter that could possibly come before the juvenile court, his or her identity and any records relating thereto are subject to publication by the media without the prior approval of the juvenile court. This is so simply because the authorities have not yet filed a petition to trigger the "proceedings."

There is an additional reason for affirming this case and that is the fact that these juveniles were being held in a federally funded juvenile facility which is housed in the same facility as the Craighead County Jail. The means to hold these juveniles in a regional juvenile facility were provided by our federal government. In order to receive federal funds, this regional juvenile detention center was subject to the following provision of Juvenile Justice Detention and Prevention Act (JJDPA):

> Except as authorized by law, program records containing the identity of individual juveniles gathered for purposes pursuant to this title [42 U.S.C. §§ 5601 *et. seq.*] may not be disclosed without the consent of the service recipient or legally authorized representative, or as may be necessary to carry out this title. *Under no circumstances may program reports or findings available for public dissemination contain the actual names of individual service recipients.*

42 U.S.C. § 5676 (emphasis added).

The majority opinion places in jeopardy not only the juvenile

detention center in Craighead County, but also any other juvenile facility in our state in which is federally funded and faced with a request similar to the one made in this case. The majority opinion thus forces our juvenile facilities to make a Hobson's choice—a choice of violating the Juvenile Code with its policy of protecting juveniles' identities or violating the JJDPA and losing federal funding. This is the point at which the precision of the majority loses touch with reality by opining that the Juvenile Code and the federal act in question are not applicable as exceptions to the FOIA. I fail to see that our legislature acted irresponsibly in this respect.

This court has faced conflicting public policies courageously in times past. Today's decision impairs, even more so than previous decisions, the concept of a juvenile system of justice; a concept which was approved as a Constitutional Amendment, after the passage of the FOIA, and for which a whole tier of new judges was authorized and funded (who may not have anything to do if this court continues to chip away the Juvenile Code). Today's decision is a significant chip at the Juvenile Code because it not only threatens the regional juvenile facility in question, but also threatens any other juvenile facilities who have received federal funding under the JJDPA. Our juvenile facilities may now find their funds cut off because of today's requirement of disclosure of the names of juveniles who are being held in a federally funded juvenile detention center while awaiting the filing of formal charges.

Sometimes, we create more problems than we solve. Fortunately, the legislature is set to go into session, otherwise the decision today would be a disaster.

Lee Edward ELLIS and Lereatha Ellis *v.* Dennis J. LITER and Marlene K. Liter and Boatmen's National Bank of St. Louis

91-348 841 S.W.2d 155

Supreme Court of Arkansas
Opinion delivered November 9, 1992

Davidson Law Firm, Ltd., by: *Charles Phillip Boyd, Jr.*, for appellant.

Bridges, Young, Matthews, Holmes & Drake, by: *David L. Sims*, for appellees.

Pierce, Stanley & Robinson, by: *William S. Robinson*, for appellees Dennis J. Liter and Marlene K. Liter.

STEELE HAYS, Justice. Lee Edward Ellis and Lereatha Ellis brought this action alleging that a home purchased by the Ellises from Dennis and Marlene Liter and Boatmen's National Bank of St. Louis in 1979 was misrepresented. The trial court directed a verdict in favor of the Liters and Boatmen's and the Ellises have appealed. We affirm as to Boatmen's and reverse as to the Liters.

When Dennis was reassigned to another area by his employer, Southwestern Bell, Southwestern Bell offered to help with the sale of the Liters' home. The Liters agreed and Southwestern Bell secured the services of Boatmen's National Bank of St. Louis. Boatmen's worked with clients like Southwestern Bell and its employees who were relocating. Boatmen's clients would "turn over" the properties to the bank (the details of these arrangements are not explained) and the bank would seek buyers for the properties.

It appears that Boatmen's hired the Norton and Dunklin Real Estate Agency to secure a buyer for the Liter home. Norton and Dunklin were handling the Liters' house and sold it to the Ellises through one of their agents, Evelyn Edington. The offer and acceptance is signed by the Ellises as buyers, and Ms. Edington as the seller. The warranty deed reflects a sale by the Liters to the Ellises.

After the Ellises moved in they encountered problems with the house, but were unable to determine the cause. In 1987 Mr. Ellis went to the office of the city clerk and discovered a statement by a building inspector at the time the house was built referring to a crack in the foundation. Ellis also found a waiver signed by the Liters stating they were aware of the crack but would not hold anyone responsible for problems which might result. The Ellises

also learned the crack could ultimately cause serious problems and would be expensive to remedy. At that point the Ellises filed suit against the Liters and Boatmen's, charging them with misrepresentation in the sale of the home.

The case was tried on April 19, 1991. When the plaintiffs rested, both Boatmen's and the Liters moved for a directed verdict. The trial court granted the motion on the premise that the Ellises had not made a prima facie case against Boatmen's because they failed to show Boatmen's had any knowledge there was a crack in the foundation, and against the Liters because the defect was insignificant at the time the house was sold.

The Liters

The trial court found that if in fact there had been a misrepresentation by the Liters, a directed verdict was appropriate because the misrepresentation was not a material one. The trial court expressed doubt that anyone knew it was a serious problem when the Ellises bought the house in 1979:

> Now that's sort of going in the back door, but I've been wondering all along how would they know in 1980—'89 or '87 whenever they —'70 —'78 when they sold the house, how could the Liters know that there was a significant problem that they needed to reveal to anybody.
>
> ***
>
> . . . I frankly doubt if the normal housewife or the normal house owner that knows nothing about concrete would be terribly disturbed about a hairline crack in the foundation.
>
> ***
>
> . . . Now ten years later somebody finds some little something insignificant they thought, I suppose. But you don't have a fact question to go to the jury.

We believe it was error to direct a verdict. The materiality of a misrepresentation is not a matter for the trial court but for the fact-finder. In *Southern Equipment & Tractor Co.* v. *K&K Mines*, 272 Ark. 278, 613 S.W.2d 596 (1981), we wrote:

> To prove materiality of a misrepresentation, it is only necessary to show the misrepresented fact was a material *influence* on the decision; it must have been a substantial factor, but it is not necessary that it was the paramount or decisive inducement. This is a question of fact for the fact-finder. [Our emphasis.] Prosser, *Law of Torts*, 4th Ed. § 108; *also see* 37 Am. Jur. 2d *Fraud and Deceit* § § 177 and 178.

Prosser elaborates in his fifth edition at § 108:

> The party deceived must not only be justified in his belief that the representation is true, but he must also be justified in taking action on that basis. This usually is expressed by saying that the fact represented must be a material one. There are misstatements which are so trivial, or so far unrelated to anything of real importance in the transaction, that the plaintiff will not be heard to say that they substantially affected his decision. Necessarily the test must be an objective one and it cannot be stated in the form of any definite rule, but must depend upon the circumstances of the transaction itself. . . . Thus, in particular cases, matters entirely collateral to a contract, and apparently of no significance to any reasonable man under the circumstances, have been held to be immaterial; the defendant's social, political and religious associations; his motive or purpose in entering into the bargain; the details of a seller's title, where good title is still conveyed; a false financial statement which still gives an accurate picture; the identity of the party for whom a purchase is made; and many other items of similar nature.
>
> On the other hand facts to which a reasonable man might be expected to attach importance in making his choice of action, such as the identity of an individual or the directors of a corporation with whom he is dealing, the character of stock sold as treasury stock, the age, horse power and capacity of an automobile, the train service to a suburb . . . have been held to be material. The question is frequently for the jury whether the statement made might justifiably induce the action taken.

W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 108, at 753-754 (5th ed. 1984).

As Prosser suggests, there may be matters so clearly trivial and unimportant that they could be said to be immaterial as a matter of law, but that is not the situation before us. We cannot say as a matter of law that a defect in the foundational structure of a home can be relegated to the trivial status comparable to that discussed in Prosser, *supra*. Nor can we say as a matter of law that the Ellises were not justified in treating the defect as posing a material influence on their decision. Furthermore, Mr. Mann, the original inspector of the house, testified the crack posed a very serious problem that would be expensive to rectify. Even the Liters testified they would want to be told about such a defect. Mr. Liter testified:

> Q: Now, Mr. Liter, did you ever at any time during the course of this transaction communicate or tell Mr. and Mrs. Ellis sitting over there about this crack—this problem with the house you were selling? Did you ever tell them?
>
> A: No sir. I've never met them or even seen them before today.
>
> Q: Did you make any effort to try to tell them?
>
> A: No sir.
>
> Q: Don't you think that's something that they needed to know before they bought the house?
>
> A: Well, I certainly think so, yes, sir.
>
> Q: You didn't—in fact, you would want to know about that crack if you had been buying the house, wouldn't you?
>
> A: Yes, sir.

And Mrs. Liter testified:

> Q: Okay. I also asked at that deposition, [Mrs. Liter] if you were purchasing a house and there was a crack in the slab running the length of one of the rooms in the house, I asked you—wouldn't you want to know about it?
>
> A: Yes, I would want to know about it.

Whether a crack in the foundation was a material fact in this case was a question for the jury. As to the trial court's comment that even if the Liters had known about the crack there may not have been any culpable intent on their part because they thought it was not a significant problem, this too is clearly a question for the jury— a credibility matter as to the defendant's intent.

Additionally, there was actually an admission of awareness of the seriousness of the crack on the part of Mrs. Liter. She testified about appraisers who had come to the house prior to their selling to the Ellises, and stated that one of the appraisers who was aware of the crack, apparently through the inspector's note and the Liters' waiver of the previous year, commented to her about the crack and told her that he had been a building inspector and he would never have approved the house in that condition.

The trial court referred to the Liters having signed a waiver of liability by the builders for the defect as an indication the problem was minor. However, why the Liters ultimately signed the waiver is not revealed and the waiver alone is not sufficient to remove this issue from the jury. To the contrary, it goes to the question of credibility as to the Liters' intent. "In cases of deceit, the credibility of the witnesses is all important in determining liability, and it is the trier of fact that is the sole judge of the credibility of the witnesses and of the weight and value of the evidence." *Nicholson* v. *Century 21*, 307 Ark. 161, 818 S.W.2d 245 (1991).

Boatmen's

The trial court granted a directed verdict for Boatmen's on grounds that the appellants had failed to prove any knowledge on Boatmen's part of the crack in the foundation. The trial court was correct.

When the record is read in its entirety, it is clear the appellants failed to establish that any information about the crack ever reached Boatmen's. The evidence was simply inconclusive that Boatmen's had any awareness of the original building inspector's report, or the appraiser's report. There is evidence that appraisers visited the property when the Liters planned to sell, in 1979, and that one of them mentioned the crack to Mrs. Liter at

that time. However, there is no evidence that it was Boatmen's which hired the appraisers and therefore had even constructive knowledge of the crack. While the record indicates that in all likelihood the appraisers were hired either by Southwestern Bell or Boatmen's there is nothing conclusive in the record as to hiring and a finding by a jury would be based solely on speculation.

For the same reasons, a negligence theory, which appellants also advance, must fail because the information of the crack was never shown to come within Boatmen's purview, even constructively.

Appellants argue alternatively that Boatmen's is liable under either strict liability or breach of warranty. However, these theories were not raised in the complaint nor were they argued to the trial court. *Johnson* v. *Ramsey*, 307 Ark. 4, 817 S.W.2d 200 (1991).

Reversed in part and affirmed in part and remanded.

Kim L. LIVELY *v.* LIBBEY MEMORIAL PHYSICAL MEDICINE CENTER, INC.

92-398 841 S.W.2d 609

Supreme Court of Arkansas
Opinion delivered November 9, 1992

[redacted]

[redacted]

[redacted]

Wright, Chaney, Berry, & Daniel, P.A., by: *Benny M. Tucker*, for appellant.

Friday, Eldredge and Clark, by: *William M. Griffin, III* and *Sarah J. Heffley*, for appellee.

DAVID NEWBERN, Justice. This is a premises liability case in which the Trial Court granted summary judgment in favor of the premises owner, Libbey Memorial Physical Medicine Center, Inc. (Libbey Memorial). The appellant, Kim Lively, argues the Trial Court erred in determining there were no remaining material issues of fact with respect to whether she was a licensee when she was injured on Libbey Memorial's property and whether Libbey Memorial breached its duty owed to her. We hold there were remaining material issues of fact, and thus we reverse and remand. Ark. R. Civ. P. 56(c).

Evidence before the Trial Court in the form of discovery documents and affidavits revealed these facts. Libbey Memorial is a business in Hot Springs providing medical and exercise services to the public. Its facilities are open to members and non-members for a fee. At the time of the accident Lively was an employee of Libbey Memorial.

Libbey Memorial maintains whirlpool baths powered by jet pumps mounted along the sides of the pool. Intake suction pipes are located below the surface of the water. On a day when she was not working, Lively went to Libbey Memorial to use the whirlpool, and while doing so, her hair was sucked into an intake pipe. Although Lively's hair was fastened to the top of her head, she believed a few strands got loose and were sucked into the pipe. After hearing Lively cry for help, another patron shut off the whirlpool machines. Some of her hair was cut off because it could not be extricated from the suction pipe. She claimed she almost drowned as a result of the incident.

Lively admitted being aware of a sign in the pool area warning patrons to keep a certain distance away from the whirlpool jets. Although she could not be certain, she believed the sign said to stay ten or fifteen inches away from the jets. She explained, however, that she did not know to keep a distance away from the underwater suction. She stated she was inexperienced in using whirlpools and did not know about the suction pipes located below the surface of the water. There was also evidence of a small sign in the women's dressing room warning women who had long hair to either put their hair up or wear a bathing cap while using the whirlpool. Lively stated she had not seen that warning.

Lively filed suit against Libbey Memorial claiming she was an invitee on the premises at the time of the accident. She alleged Libbey Memorial's negligence caused her to suffer serious injuries and requested $250,000 in compensatory damages. With respect to her punitive damages claim, Lively stated Libbey Memorial was on actual notice that two other, similar incidents had occurred prior to her accident and, despite this knowledge, Libbey Memorial took no action to protect Lively or the general public from injury. She contended this conduct showed "an utter indifference to, and a conscious disregard for, the safety of others," and Lively claimed entitlement to $500,000 in punitive damages.

Libbey Memorial moved for summary judgment on the grounds that Lively was a mere licensee and the complaint did not allege willful or wanton conduct. Libbey Memorial supported its motion with Lively's deposition statement that she did not believe anyone at Libbey Memorial intentionally injured her.

In response, Lively produced the deposition of the president of Libbey Memorial, Dewey Crow, who said allowing employees to use the whirlpool facilities free of charge was a fringe benefit of employment. Lively argued she was an invitee because Libbey Memorial received an economic benefit from her use of the whirlpool. She contended that by offering employees the use of the facilities free of charge, Libbey Memorial was better able to attract and retain employees and minimize out-of-pocket expenses.

The Trial Court stated there was no evidence that Libbey Memorial derived any economic benefit by allowing employees to

use the whirlpool facilities during non-work hours. The use was merely gratuitous. The Trial Court thus held Lively was a licensee and Libbey Memorial owed no duty except to refrain from injuring her through willful or wanton conduct. The Trial Court also recognized that Libbey Memorial owed Lively the duty to warn of hidden dangers if she did not know, or had no reason to know, of the condition or risk involved.

The Trial Court reasoned (1) willful or wanton conduct was not pleaded and there was no evidence of such conduct, (2) there were no hidden dangers of which Libbey Memorial was obligated to warn Lively, (3) she had used the whirlpool on numerous occasions prior to the accident, and (4) she was aware of the sign warning patrons to keep a distance from the whirlpool jets.

1. Lively's status

Lively first argues there were material questions of fact as to whether she was an invitee and it was reversible error for the Trial Court to determine she was a licensee as a matter of law. The burden of proving that there is no genuine issue of material fact is upon the summary judgment movant, and all proof submitted must be viewed in a light most favorable to the party resisting the motion. Any doubt and all inferences must be resolved against the moving party. *Carmichael* v. *Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991).

We have defined "invitee" as "one induced to come onto property for the business benefit of the possessor." *Kay* v. *Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991); *Coleman* v. *United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984). A "licensee" is one who goes upon the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Tucker* v. *Sullivan*, 307 Ark. 440, 821 S.W.2d 440 (1991).

In *Tucker* v. *Sullivan*, *supra*, citing *Restatement (Second) of Torts* § 332 (1965), we recognized an invitee may either be a public invitee or a business visitor. A public invitee is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings of the possessor of

the land.

Lively contended that allowing employees to use the facilities free of charge as a fringe benefit better enabled Libbey Memorial to attract prospective employees and retain them. We cannot agree that there were no material questions of fact presented as to whether Libbey Memorial obtained a potential business benefit from Lively's use of the whirlpool baths.

Libbey Memorial argues *St. Louis I.M. & S Co.* v. *Pyles*, 114 Ark. 218, 169 S.W.2d 799 (1914), is directly on point and requires an affirmance of the Trial Court's decision that Lively was a licensee. Pyles was an employee of the defendant railroad company. His duties included traveling with supply cars and distributing oil. On a Saturday night, Pyles had traveled from El Dorado to Gurdon and was en route to Argenta the next day. Pyles obtained permission from his foreman to leave the cars at Gurdon and travel to Argenta on Saturday night instead of waiting for the cars to be transported on Sunday. The railroad company had furnished Pyles a pass allowing him to ride on all trains.

As Pyles was running down a path located between the main track and a sidetrack in an attempt to board a train bound for Little Rock, he stumbled on a pile of coal and fell under a slowly moving freight train. Pyles sued the railroad company for negligence in allowing the pile of coal to remain on the path. In finding Pyles to be a mere licensee when using the path, we stated,

> There is not the slightest evidence to indicate that the pathway was used in a way that an invitation can be implied on the part of the railway company to the public or its employees to use it. The use was, at the most, merely permissive, and those who used it were licensees, who took the privilege with its concomitant peril.

Lively offered to prove her use of the whirlpool facility as a fringe benefit was more than merely permissive. A factual issue thus remained in that respect.

2. Duty owed to licensee

Lively next contends that even assuming the Trial Court correctly found she was a licensee as a matter of law, there

were material questions of fact as to whether Libbey Memorial breached the duty owed to her. A landowner owes a licensee the duty to refrain from injuring him or her through willful or wanton conduct. *King* v. *Jackson*, 302 Ark. 540, 790 S.W.2d 904 (1990); *Baldwin* v. *Moseley*, 295 Ark. 285, 748 S.W.2d 146 (1988). If, however, a landowner discovers a licensee is in peril, he or she has a duty of ordinary care to avoid injury to the licensee. This duty takes the form of warning a licensee of hidden dangers if the licensee does not know or have reason to know of the conditions or risks involved. *King* v. *Jackson, supra.*

To support her argument that Libbey Memorial engaged in willful or wanton conduct, Lively produced evidence that the president of Libbey Memorial knew of at least one similar incident which had previously occurred involving a woman named Donna. In deposition testimony, Dewey Crow admitted he knew of an accident involving a woman named Donna which had occurred shortly before Lively's alleged accident. Donna's physician called Crow after the accident and told him Libbey Memorial should put up more signs in the pool area to make it more obvious that the whirlpool could be dangerous. Crow failed to take any further precautionary steps to avoid injury.

Despite this evidence, the Trial Court held there was no material issue of fact regarding whether Libbey Memorial acted willfully or wantonly. To constitute willful or wanton conduct, there must be a course of action which shows a deliberate intention to harm or which shows utter indifference to, or conscious disregard of, the safety of others. *Daniel Const. Co.* v. *Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979); AMI Civ. 3d 1101 (1989). Our view of it is that Lively's statement that she did not think anyone at Libbey Memorial intentionally injured her does not settle the issue with respect to that standard of care. A question of fact remained whether Libbey Memorial acted with utter indifference to, or conscious disregard of, the safety of others.

Not only must a landowner refrain from injuring a licensee through willful or wanton conduct, he or she must also warn a licensee of hidden dangers if the licensee does not know or have reason to know of the risk. The Trial Court noted Lively's awareness of the sign requiring she stay 10 to 15 inches away from

the pump.

A jury could have determined that the dangers associated with the underwater suction were hidden or not easily recognized. Summary judgment is inappropriate when there are disputed issues of fact. Although Lively admitted being aware of a sign warning her to stay a certain distance away from the whirlpool jets, there is no evidence that she understood this meant to stay away from the underwater suction. Lively said she did not know there were suction pipes located below the surface of the water. It cannot be stated that as a matter of law Lively was aware of the risk presented. A jury could conclude there was a hidden danger of which Lively was unaware and of which Libbey Memorial was obligated to warn. The adequacy of the warnings in evidence remained at issue. *Rowland* v. *Gastroenterology Assoc., P.A.*, 280 Ark. 278, 657 S.W.2d 536 (1983).

Libbey Memorial contends Ark. Code Ann. § 18-11-305 (1987) provides immunity to landowners who allow "any person" to use their property for recreational purposes free of charge. The Trial Court did not rule on the applicability of the Statute, thus we will not consider it on appeal. *See, e.g., Gatlin* v. *Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991); *McDonald* v. *Wilcox*, 300 Ark. 445, 780 S.W.2d 17 (1989).

Reversed and remanded.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. This case was submitted to the trial court on motion for summary judgment with extensive supporting and opposing materials. The trial court determined that appellant had used the appellee's walk-in hot water pool with whirlpool on numerous prior occasions and was warned by a sign in place near the whirlpool intake advising users to stay at least twelve inches from the pumps. In response to appellant's claim that she was an invitee, the trial court determined that appellant had failed to establish that she had come on the premises for the business benefit of the appellee, citing *Coleman* v. *United Fence Company*, 282 Ark. 344, 668 S.W.2d 536 (1984). The trial court noted an absence of any proof that appellant was induced to accept employment because of the whirlpool and that its permissive use was nothing more than a gratuitous act by the appellee.

See Garrett v. *Arkansas Power & Light Co.*, 218 Ark. 575, 437 S.W.2d 895 (1951), where we said:

> It is sometimes difficult to distinguish between an invitee and a licensee, especially where each is implied, but a rule to do so was quoted with approval in the case of *Knight* v. *Farmers' & Merchants' Gin Co.*, 159 Ark. 423, 252 S.W. 30, as follows: "It is not always clear under a given state of facts as to what inference may be drawn as to a person being a licensee or an invitee but one of the sure tests is whether or not the owner of the premises is interested in the presence of the visitor."

The trial court also rejected the alternative argument that appellant was a licensee. That contention was not pled but was raised orally and rejected on the ground that no evidence of wanton conduct by the appellee was pled or demonstrated. *King* v. *Jackson*, 302 Ark. 540, 790 S.W.2d 904 (1990).

Appellant has not shown the trial court's rulings to have been erroneous and I believe summary judgment was appropriate.

Tony SMITH *v.* Jerry THORNBURG

92-528 841 S.W.2d 616

Supreme Court of Arkansas
Opinion delivered November 10, 1992

Odom, Elliott & Winburn, by: *Bobby Lee Odom* and *J. Timothy Smith*, for appellant.

Parker, Settle & McCarty, by: *Patrick McCarty*, for appellee.

TOM GLAZE, Justice. In this negligence action, Tony Smith, a pawn shop owner, was sued by Jerry Thornburg, who alleged he had left his pickup truck with Smith to secure a loan in the amount of $365.00. Thornburg further asserted that, in obtaining the loan, he parked his vehicle on Smith's lot, locked his truck's doors and left his keys and title to the truck with Smith as collateral. Smith gave Thornburg a claim ticket that provided Smith was not responsible for goods lost in pawn. Two weeks later, Thornburg drove by Smith's lot and noticed his truck was missing; he stopped and asked Smith where the truck was. Smith, unaware the truck had been removed, advised Thornburg to notify the police that the vehicle had been stolen. The keys and title to Thornburg's truck were still in Smith's safe. After notifying the police, Thornburg filed suit against Smith in municipal court which returned a civil judgment in favor of Thornburg for $730.00 plus $65.45 in costs.

Smith appealed to the Sebastian County Circuit Court. After a nonjury trial, the trial judge stated that, when comparing the negligence of the respective parties, he found in Thornburg's favor, thus, ordering Thornburg's loan, interest and other related charges cancelled and adjudging Smith to pay Thornburg $150.00 in damages and $63.45 in costs. In this appeal, Smith argues Thornburg failed to show that Smith breached his duty of

ordinary care. We agree.

In *Howard's Laundry & Cleaners* v. *Brown*, 266 Ark. 460, 585 S.W.2d 944 (1979), we discussed negligence and its applicability to bailment situations as the one here as follows:

> The rule in bailment cases is that the bailee may overcome the inference of negligence arising against it because of delivery in good condition and return in damaged condition by telling all that it knows of the casualty, and that it exercised ordinary care in all that it did with respect to the vessel. This burden, unlike that of persuasion which rested at all times on [the bailor], simply required [the bailee] to go forward with evidence sufficient to show that it had no more knowledge of the cause of the casualty than was available to the [bailor] and that it exercised ordinary care. At this juncture the burden of going forward would shift back to [the bailor] to ultimately persuade the trier of facts of negligence on the part of [bailee] proximately causing the casualty.

In applying the above rule to the facts before us, Thornburg's only evidence was that he parked his truck on Smith's lot, locked the truck and took his keys and title into Smith who loaned Thornburg the money. Thornburg had previously pawned a vehicle, and he said that he guessed the same standard of care or practice in pawning vehicles was followed in Arkansas. He figured his truck would stay on Smith's lot unless Smith got more automobiles and had to move Thornburg's. Thornburg offered no further evidence.

Smith testified that he had always put pawned cars on his parking lot, and he never told his customers that their vehicles would be taken anywhere else. Smith said that all he can do to protect the cars is to have them locked and placed on his lighted lot. Smith further stated that other pawn brokers in the area do the same thing with their pawned cars. Smith testified that he informs each person that pawns a car that he cannot be responsible for the customer's vehicle. This information is also printed on the pawn claim ticket. Smith stated that he has owned the pawn shop for twenty years, had pawned probably a hundred vehicles and had never had one stolen. Smith had no employee at his pawn shop at night.

Another pawn shop owner, Thomas Ray Lester, testified that when he makes loans on vehicles, he has the customer park his or her car on his lot, tells the customer to lock and secure the vehicle, and puts the title and keys in his vault. Lester testified that he did not have anyone at his pawn shop at night. Further, he testified without objection that to the best of his knowledge other pawn shops in the area follow this same standard of care.

In sum, Smith presented unrebutted evidence that the procedure he followed in this pawn transaction with Thornburg was the standard or reasonable procedure and ordinary care followed by others in his business. Thornburg actually appeared to agree, and never offered any proof to show his truck was unsafe in the manner or in the lot he left it. Nor did Thornburg attempt to show Smith's lot was in an unsafe location or, for safety reasons, in need of a fence. *See, e.g.*, Annotation, *Pawned or Pledged Property — Theft*, 68 ALR 2d 1259, 1261, § 2, § 4(b) (1959).

Because Thornburg failed to show Smith breached his duty of ordinary care, we must reverse.

Virginia WELCHMAN *v.* Bobby NORMAN, Sr., and Patsy M. Norman, Kevin Coakley and Mary Lisa Coakley, and Debra Jones

92-9 841 S.W.2d 614

Supreme Court of Arkansas
Opinion delivered November 10, 1992

Hobbs, Lewis, Mitchell, Garnett & Naramore, P.A. by: *Ronald G. Naramore*, for appellant.

J.E. Sanders, for appellee.

TOM GLAZE, Justice. This is an appeal from the chancellor's finding that the appellant's residence violates a restriction in the appellant's deed prohibiting mobile homes. Below and here on appeal, appellant does not deny the existence of the restriction but instead contends that her residence is a manufactured home and is not covered by the restriction. Appellant also argues that the restrictive covenant is invalid because a general development plan had not been maintained in the subdivision. We are not persuaded by the appellant's arguments and therefore affirm.

Neighbors of the appellant, appellees, brought this lawsuit to force the appellant to remove her residence from her property because it violated the land use restriction against mobile homes found in both parties' deeds. This restriction provided the following: "No house trailer or mobile home shall be parked on any part of said tract nor maintained thereon for residence or other purposes." The neighbors all testified that they were worried that a mobile home on the appellant's property would adversely affect their property values.

On appellate review, we try chancery cases *de novo* and will not reverse the chancellor's findings unless clearly erroneous. *Conway Corporation* v. *Construction Engineers, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989). In considering the sufficiency of the evidence to support the chancellor's finding, we view the evidence most favorable to the appellee. *Wasp Oil, Inc.* v. *Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

The chancellor heard the following evidence about the appellant's residence. Appellant's residence was transported to her property in two sections. Each section had steel beams attached underneath with wheels attached. Upon arrival at the property site, the wheels, axles and tongue were removed and the two sections were put together. Concrete footings were not poured prior to the placement of the home and tie-downs or anchors were used to stabilize the home. Appellant's residence rests on concrete piers.

After the placement of the home, appellant spent approximately $5,000 in putting in a septic tank, and building a front porch, a carport and storage room. Appellant also had a rock "foundation" built around the front of her mobile home, but she testified that she did not know if the foundation supported the house absent the concrete piers. Other witnesses stated the rock "foundation" was merely a skirting around the appellant's residence. While there was evidence presented to the contrary, three witnesses, who were familiar with mobile homes, testified that the appellant's residence was a mobile home.

Other evidence before the chancellor included a copy of the Department of Finance and Administration Registration listing the appellant's residence as a mobile home.[1] Appellant's policy of insurance on her residence also lists the insured structure as a mobile home. In addition, appellant bought her residence from Quality Mobile Homes.

This court has never addressed the difference between a mobile home and manufactured home. But both parties cited the court to cases from other jurisdictions discussing the differences

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[1] Appellant testified that when she signed the registration certificate the place for the body style was blank and that someone filled in mobile home after she signed the form.

between mobile homes and manufactured homes. The case most similar to the present case is *Albert* v. *Orwige*, 731 S.W.2d 63 (Tenn. Ct. App. 1987). There, the Orwiges also argued that their home was a manufactured home, not a mobile home. The residence was transported by truck to the property in two units. The two parts were bolted together and tied down by anchors to concrete footings. The structure was further enclosed by an additional concrete foundation. The Tennessee court held that the Orwiges' home was a mobile home.

Likewise, we hold here that the chancellor's finding that the appellant's residence is a mobile home is not clearly erroneous. Witnesses identified the appellant's residence as a mobile home, and most telling, the majority of the appellant's papers concerning her residence labeled it as a mobile home. While we note the appellant's contention that, in order for the residence to be moved, the rock "foundation" would have to be removed and the wheels reattached, a majority of jurisdictions have held that a mobile home remains a mobile home notwithstanding removal of the wheels and placement on a permanent foundation. R. Anderson, *American Law of Zoning*, § 14.03, p. 675 (1986).

In the second issue, the appellant argues that the restrictive covenant cannot be upheld because there is no general plan of development. We do not agree. The primary test of the existence of a general plan of development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated. *Jones* v. *Cook*, 271 Ark. 870, 611 S.W.2d 506 (1981). Out of the forty-three tracts in the subdivision, only six tracts, one a cemetery, were not subject to the same restrictions. As we stated in *Jones*, the mere showing of other violations does not always constitute acquiescence or waiver of the restrictions. That is the situation here.

For the reasons stated above, we affirm.

Richard ATKINSON *v.* Floyd J. LOFTON, Circuit Judge

91-191 842 S.W.2d 425

Supreme Court of Arkansas
Opinion delivered November 9, 1992

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, Richard Atkinson, appealed his citation and conviction of contempt by Judge Floyd Lofton. We remanded for an evidentiary hearing. The evidentiary hearing was stayed until after the trial of Kenneth Ray Clements, the defendant in the case leading to Mr. Atkinson's contempt citation and conviction, to avoid any possible prejudice to Mr. Clements. On May 29, 1992, an evidentiary hearing was held before the Honorable Fred D. Davis, III, Circuit-Chancery Judge. The case is now ready for our consideration. Our jurisdiction is proper pursuant to Ark. Sup. Ct. R. 29(1)(h).

On April 23, 1991, appellant, Richard Atkinson, was appointed by the Honorable Floyd Lofton, Circuit Judge, to assist Kenneth Suggs in the representation of Kenneth Clements in his retrial for capital murder in the shooting death of police officer Ray Noblett. Judge Lofton was assigned to the case following the recusal of the Faulkner County judges. The trial was scheduled for June 24, 1991, only sixty days away. At a pretrial hearing on June 17, 1991, Atkinson moved for a continuance of the June 24 trial date. Atkinson cited the voluminous nature of the discovery

materials and his inability to sufficiently review this material in order to ready and properly present a defense for Mr. Clements by June 24. Judge Lofton held Mr. Atkinson and Mr. Suggs in contempt, removed them both from the case, and fined them each $1,000.00 holding they were negligent in failing to prepare the case and get ready for trial.

On appeal, appellant cites two points for reversal. They are: (1) the contempt conviction should be reversed because Atkinson never received proper notice, opportunity to defend or fair hearing as required under federal and state due process and fair trial guarantees; and (2) the evidence cannot sustain a finding of contempt of court under any formulation. We find the evidence cannot sustain a finding of contempt of court and reverse on this ground, therefore we need not address appellant's first argument.

SUFFICIENCY OF THE EVIDENCE

In a review of a case of criminal contempt, we view the record in the light most favorable to the trial judge's decision and sustain that decision if supported by substantial evidence. *McCullough* v. *Lessenberry*, 300 Ark. 426, 780 S.W.2d 9 (1989); *Lilly* v. *Earl*, 299 Ark. 103, 771 S.W.2d 277 (1989). In a related case, the defendant, Kenneth Ray Clements, appealed the removal of Richard Atkinson as his attorney. *Clements* v. *State*, 306 Ark. 596, 817 S.W.2d 194 (1991). In *Clements*, we found the removal of Mr. Atkinson as Mr. Clements' attorney improper and said: "we find no support in the record for the trial court's discharge of Mr. Atkinson." *Id.* at 607, 817 S.W.2d at 199. Since we set out the entire record colloquy pertaining to Mr. Atkinson's motion for continuance in *Clements*, we do not find it necessary to repeat that information here, although it is necessary for purposes of our decision. As noted in *Clements*, the court did not actually grant or deny Mr. Atkinson's motion for continuance, instead, the court asked another attorney, Mr. Hartenstein, whom the court had just assigned to help Mr. Suggs and Mr. Atkinson prepare for trial if he could represent Mr. Clements. After a brief recess for Mr. Hartenstein to consult his calendar, Mr. Hartenstein stated he could accept the appointment, although there was no way he could be ready for trial on June 24 as originally scheduled. Whereupon the court relieved Mr. Atkinson and Mr. Suggs, held them both to be negligent in failing to prepare the case and get

ready for trial, held them both in contempt and assessed a fine of a thousand dollars each. The judge also forced Mr. Clements into a catch-22 position where he was compelled to "accept new, unrequested counsel in order to gain a continuance or proceed immediately to trial against the advice of his . . . attorney." *Clements*, 306 Ark. at 608, 817 S.W.2d at 200.

There is no doubt the discovery in the *Clements* case was voluminous and the record reflects that Mr. Atkinson made a good faith effort to digest the material before the June 24 trial date. As Mr. Hartenstein noted during the pre-trial hearing, the transcript from the previous trial alone was sixteen (16) volumes and there were several boxes full of discovery material. At the evidentiary hearing, Mr. Atkinson testified in detail about the extent of the discovery material and the time he spent working on Mr. Clements' case up to the pre-trial hearing. The discovery material consisted of about twenty (20) volumes of grand jury transcripts, approximately eight (8) hours of audiotape, and over one thousand (1000) pages of other material in addition to the transcript from the previous trial. Discovery material was being given to Mr. Atkinson by the prosecutor's office in stages as they were able to prepare it. Mr. Atkinson had received the last installment of discovery material only four (4) days prior to the pre-trial hearing. Mr. Atkinson, who is a sole practitioner, had been working on Mr. Clements' case almost exclusively for over forty (40) hours a week for approximately seven weeks reviewing the material he received through discovery and conducting his own investigation when the pre-trial hearing took place. Mr. Atkinson felt he was not able to spend the time reviewing the material and developing his case that was necessary for his client's best interest. Therefore, he appropriately asked the trial court for a continuance.

Judge Lofton never asked Mr. Atkinson if he would go to trial on June 24th if his motion for a continuance were overruled, nor did Judge Lofton actually rule on the motion, although Judge Lofton did say at one point during the hearing "[i]f 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." We held Mr. Atkinson's removal from the case was improper in *Clements*, 306 Ark. 596, 817 S.W.2d 194. However this is not dispositive of the contempt conviction because as we

noted in *Clements*, "[g]ross 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." *Clements*, 306 Ark. at 606-07, 817 S.W.2d at 199 (quoting *Harling* v. *United States*, 387 A.2d 1101, 1105 (1978)). Therefore implying problems with counsel that can be cured by a citation for contempt do not justify the court's removal of an attorney. Thus, our decision in *Clements* that removal of Mr. Atkinson as counsel was improper is not dispositive of the propriety of the contempt citation and conviction.

During the hearing on the motion for continuance, the following exchange occurred between Mr. Atkinson and Judge Lofton:

> MR. ATKINSON: [T]here 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.

When Mr. Atkinson pursued his motion for continuance, continuing to cite the volume of material and his inability to adequately review it in the provided time, Judge Lofton said "[i]f 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." Shortly thereafter, Judge Lofton asked Mr. Hartenstein if he would be able to represent Mr. Clements. Mr. Hartenstein replied there was no way he could represent him by the 24th, Judge Lofton replied he wasn't asking about the 24th and Mr. Hartenstein replied he would accept appointment if the court wanted to appoint him. After a brief recess for Mr. Hartenstein to consult his calendar, the following 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: 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.

By implication, it could be said the court granted the continuance because Judge Lofton relieved Mr. Atkinson from the case after having said "[i]f I have to give you a continuance, I'm going to find you ill prepared and relieve you from the case." However, we found in *Clements* there was no ruling on the motion and we still find there was no clear ruling on the motion. Since there was no ruling, there was no opportunity for Mr. Atkinson to comply with the court's ruling before being found in contempt.

■ We do not find any indication in the record Mr. Atkinson had not been spending enough time working on the case as the trial judge apparently understood him to be saying. Every indication in the transcript of the hearing was that Mr. Atkinson had in fact been working on Mr. Clements' case and had been very busy doing so. An attorney has a duty to "provide competent representation to [his] client." Model Rules of Professional Conduct Rule 1.1 (1987). "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* In any event, it is improper for a judge to hold an attorney in contempt for simply

asking for a continuance as appears to have occurred here. There is no evidence in the record Mr. Atkinson would have disobeyed the court's order and refused to try the case on the 24th if his continuance had been denied. The court's action in holding Mr. Atkinson in contempt for asking for a continuance was arbitrary and unacceptable.

We do not find any evidence supporting the judge's finding of contempt and, therefore, reverse and dismiss the case with prejudice.

INTEGON INDEMNITY CORPORATION and Amwest Surety Insurance Company *v.* Tony BULL, Individually, and Tony Bull Chevrolet Buick, Inc.

91-284 842 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered November 9, 1992
[Rehearing denied December 21, 1992.]

[redacted]

[redacted]

Hardin & Grace, for appellant Integon Indemnity Corporation.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellant Amwest Surety Insurance Company.

David Hodges, for appellee.

DONALD L. CORBIN, Justice. This is an appeal by two surety companies from a judgment requiring both to make payments under statutory public works performance bonds pursuant to Ark. Code Ann. § 22-9-401 (1987). Appellants assert eight points of error on direct appeal while appellee asserts two points of error on cross-appeal. Our consideration of these alleged errors requires construction of numerous statutes; thus, our jurisdiction is pursuant to Ark. Sup. Ct. R. 29(1)(c). Because we find no merit to appellants' argument that appellee should not have been allowed to recover on the bonds as a matter of law, we reverse the judgment.

Vester Cornelious Construction Company contracted with the Arkansas Highway Commission to build several public works construction projects. The relevant public works projects are referred to throughout this opinion as the Wynne job, the Hope job, and the Hick's Station job. Separate appellant, Integon Indemnity Corporation, issued the statutory performance bonds on both the Wynne and Hick's Station jobs. Both of Integon's bonds listed Cornelious as the principal. Separate appellant, Amwest Surety Insurance Company, issued the bond for the Hope job which also listed Cornelious as principal.

As Cornelious was constructing the various public works jobs, the company experienced financial difficulties. Vester Cornelious requested financial assistance from appellees, Tony Bull and Tony Bull Chevrolet Buick Company. Eventually, Cornelious defaulted on the public works contracts and the appellant surety companies were required to arrange for comple-

tion of the projects. Bull filed a complaint against both Integon and Amwest claiming he supplied labor and materials for completion of the public works jobs and was therefore entitled to payment under the bonds. Bull also sought a declaration of his prior right to three certificates of deposit owned by Bull and Cornelious jointly and assigned by Cornelious to the sureties as security for the bonds. The case was tried before a jury which rendered separate verdicts for Bull against Integon and Amwest for $75,118.79 and $55,982.13 respectively. The jury also found for the sureties regarding the ownership of the certificates of deposit. Integon and Amwest have appealed from the judgment entering the respective verdicts. Bull has cross-appealed on the issue of the certificates of deposit.

On appeal, the first of Integon's eight arguments for reversal is that the trial court erred in refusing to hold, as a matter of law, that Bull did not have a claim against the bond because he did not supply labor or materials to the public works jobs. Amwest makes essentially the same argument as its first point of error and then joins in three of Integon's remaining arguments. As the first arguments are so similar, we consider them both together. Because we reverse and dismiss on that common point, we need not consider any of appellants' remaining arguments. We must however, address Bull's two points argued on cross-appeal.

The argument for reversal is that Bull was not entitled to recover under the bonds because he merely advanced funds to Cornelious or directly to Cornelious' laborers and suppliers rather than actually supplying the labor and materials for the bonded projects as required by section 22-9-401. Integon and Amwest claim that by advancing funds or even paying materialmen and laborers directly, as a matter of law, Bull occupied the status of a lender or creditor of Cornelious rather than a supplier or materialman, and therefore could not recover under the statutory bonds. Bull first responds to this claim by asserting that the argument is a challenge to the sufficiency of the evidence and our review is therefore precluded because the abstract does not include the motions for directed verdict. Bull counters the merits of the argument by claiming Bull's testimony provided substantial evidence to support the jury's verdict.

As Bull correctly points out, the abstract does not

contain the motions for directed verdict. Generally, the failure to comply with Ark. Sup. Ct. R. 9 by not abstracting a motion for directed verdict precludes appellate review of that issue. *Cozart* v. *Lewis*, 299 Ark. 500, 774 S.W.2d 127 (1989). However, we have found that affirmance for non-compliance with Rule 9 is not necessarily warranted when the needed information can be gained from some other part of the abstract. *Ransopher* v. *Chapman*, 302 Ark. 480, 791 S.W.2d 686 (1990). In this case, the abstract does include both appellants' motions for judgments notwithstanding the verdicts. Both motions state that the necessary directed verdict motions were made. Thus, consistent with *Ransopher*, the abstract is not deficient in its failure to contain the motions for directed verdict and we need not affirm for failure to comply with Rule 9.

A trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the jury verdict, and the moving party is entitled to judgment as a matter of law. *Dedman* v. *Porch*, 293 Ark. 571, 739 S.W.2d 685 (1987). In reviewing the denial of a motion for directed verdict, we give the proof its strongest probative force viewed in the light most favorable to the party against whom the motion was sought, and affirm the trial court's denial if there is any substantial evidence to support the verdict. *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987).

The evidence, as viewed most favorably to Bull, reveals the following. Bull is in the automobile business and was not involved in the construction business prior to his dealings with Cornelious. Bull loaned money to Cornelious on two occasions in exchange for two promissory notes of $1,500.00 and $5,000.00, the latter of which was not repaid. Here, we add parenthetically that Bull does not seek recovery of the two loans totaling $6,500.00—he testified that they were indeed loans and therefore he knew he could not recover them under the bonds. Bull executed a written agreement with Cornelious to provide the "financial backing" for existing jobs and future jobs in return for one half of the profits. The agreement also stated that both parties agreed Bull would "handle and disburse all proceeds from each job." Bull testified that he agreed to continue furnishing the financial backing so he could get his $5,000.00 back.

Bull testified that he was never Cornelious' partner, rather he was a supplier of labor and materials to Cornelious' various construction projects. Bull stated that he borrowed close to $200,000.00 from the Bank of Augusta to pay for labor and supplies; his purpose was to see where the money was going, to make sure the supplies were going on the jobs, and not to advance funds to finish the jobs. Numerous exhibits were introduced by all parties showing either the checks or summaries of checks drawn on the Bank of Augusta by Bull and made payable not just to Cornelious but also directly to suppliers of labor and materials on all three public works jobs. Bull testified that he paid the bills associated with the jobs and did not make a loan; that he paid the suppliers, but did not advance funds.

Bull argues that the foregoing evidence is substantial evidence that he was a supplier of labor and materials and therefore held a valid claim against Amwest and Integon under the bonds they issued. We disagree with Bull's contention that there is substantial evidence to support the jury's verdict. To the contrary, we agree with Amwest and Integon that they were entitled to judgment as a matter of law.

The bonds at issue in this appeal are performance bonds for public works projects. Recovery under these bonds is controlled by section 22-9-401(a) which states that:

> All surety bonds required by the State of Arkansas . . . for the repair, alteration, construction, or improvement of any public works . . . shall be liable on all claims for labor and materials entering into the construction, or necessary or incident to or used in the course of construction, of the public improvements.

The question presented is whether, by writing checks directly to suppliers of material and labor, Bull has a claim for labor and materials that section 22-9-401 requires the sureties to pay.

We have previously decided this precise issue in *Ayres & Graves* v. *Ellis*, 185 Ark. 818, 49 S.W.2d 1056 (1932). Although the *Ellis* decision applied an earlier version of section 22-9-401, both statutes are similar in all relevant respects. In *Ellis*, W.C. Ellis d/b/a as the W.C. Ellis Lumber Company contracted with A.O. Freeman to furnish Freeman money and material to carry

out Freeman's sub-contract for concrete structural work on a public works project. When Freeman completed the work on his sub-contract, he had a balance due Ellis. Ellis sued to recover the balance under the principal contractor's bond. The evidence presented in the *Ellis* case revealed that Ellis undertook to finance Freeman's contract, to order and deliver all material required, to keep a payroll record, and to render monthly statements of Freeman's account to which Ellis added a charge of 8%. The statements included, among other items furnished to Freeman, cash advances. Ellis' right to recover the materials furnished was not questioned; however, his right to recover from the surety the money he paid directly to Freeman's laborers was questioned. In *Ellis*, we stated that the case of *Norton* v. *Maryland Casualty Co.*, 182 Ark. 609, 32 S.W.2d 172 (1930), was controlling. *Norton* held that one who advances money to a public works contractor is not a sub-contractor but a creditor and therefore does not have a claim against the surety. In *Ellis*, we stated:

> The fact that Ellis personally paid the laborers in the instant case does not alter the legal principles there announced [in *Norton*]. Such payment was nothing more than an advance to Freeman, and created only the relation of debtor and creditor between Ellis and Freeman, and did not constitute Ellis a subcontractor, as appellee contends, nor did it make him a person holding such a claim as the statute requires the surety to pay.

Ellis, 185 Ark. at 822-23, 49 S.W.2d at 1058. Ultimately, *Ellis* held that Ellis had a claim against the surety for materials furnished Freeman, but that the only claim Ellis had for the payments he made to Freeman's laborers was against Freeman himself, not the surety.

■ The *Ellis* case controls the present case. The two cases present almost identical facts. We see no distinction in the fact that *Ellis* involved direct payments only to suppliers of labor, while the present case involves payments to both suppliers of labor and suppliers of materials. The evidence, when viewed most favorably to Bull as is required, can lead reasonable minds to only one conclusion—that, Bull directly paid for labor and materials that were part of a public works project. Consistent with *Ellis* and *Norton*, we hold the fact that Bull paid Cornelious' laborers and

suppliers directly, makes Bull Cornelious' creditor, not a supplier of labor and materials with a claim against the surety. As a matter of law, Amwest and Integon were entitled to judgment and the trial court erred in denying the motions for directed verdicts and judgments notwithstanding the verdicts. The jury verdicts in favor of Bull against Integon and Amwest are reversed and Bull's claims are dismissed.

The first issue on Bull's cross-appeal is a challenge to four jury instructions given by the trial court. Bull argues the instructions are a "hodge-podge of incorrect law, inapplicable to the facts in the case and constitute prejudicial error."

First, Bull challenges Instruction #32, which states as follows:

JURY INSTRUCTION NO. 32

> Integon asserts that it is entitled to proceeds of the Bank of Augusta certificate of deposit number 17923 in the amount of $14,257.00 by virtue of having a perfected assignment in such certificate of deposit. To establish that it has a perfect assignment, Integon has the burden of establishing each of the following essential propositions:
>
> 1. The certificate of deposit is in the possession of Integon pursuant to agreement.
>
> 2. Integon has given value for the assignment.
>
> 3. Cornelious had rights in the certificate of deposit assigned to Integon.
>
> Whether Integon has proved each of these elements by a preponderance of the evidence is for you to determine.

Bull claims this instruction was misleading to the jury because it suggested that proving an assignment would entitle Integon to the proceeds of the certificate of deposit. Bull claims this was error because the proper issue before the jury was who was entitled to the proceeds, not whether Integon was entitled to the proceeds by virtue of its assignment. Bull also argues the instruction was "inherently erroneous, redundant and covered by verdict form." However, Bull does not allege which of the sixteen verdict forms addressed the substance of the challenged

instruction.

Integon asserts that Instruction #32 is a correct statement of the law pursuant to Ark. Code Ann. § 4-9-305 (Repl. 1991), and *General Electric Co.* v. *M & C Mfg. Co.*, 283 Ark. 110, 671 S.W.2d 189 (1984). Those two authorities stand for the proposition that a security interest in a certificate of deposit is perfected by possession. In addition, Integon relies on the Official Commentary to Ark. Code Ann. § 4-3-116 (Repl. 1991), which states that an instrument payable to one party "and/or" another party is payable in the alternative to either or to both of the stated parties.

We note that, by way of Instruction #23, the jury was instructed that Bull, Integon and Amwest claim superior rights in the respective certificates of deposit and that entitlement to the proceeds of the respective certificates of deposit was an issue the jury would have to decide. We cannot disagree with the authorities cited by Integon in support of Instruction #32. Bull has cited us to no authority that indicates the instruction was an incorrect statement of applicable law. Instruction #32 was not misleading to the jury in light of the fact that Instruction #23 was given. The trial court did not err in giving Instruction #32.

Second, Bull challenges Instruction #33. He claims Instruction #33 is not based on any statute and is in conflict with Instruction #24. The two instructions state as follows:

JURY INSTRUCTION NO. 24 [Official Commentary to] (ACA § 4-3-116)

> You must determine whether or not the certificates of deposits are payable to Cornelious Construction Company and Tony Bull jointly or in the alternative.
>
> If an instrument is found to be payable jointly, all of the payees must participate in any negotiation, discharge or enforcement of the instrument. But if the instrument is found to be payable in the alternative, any one of the payees may negotiate, enforce or discharge the instrument, provided they have possession of the certificate of deposit.
>
> In deciding whether an agreement is payable in the alternative or jointly, you must look to the intent of the parties in drawing the instrument.

You are instructed that if it is not clear that the parties intended to make the instrument payable in the alternative, then you should find it to be payable jointly.

JURY INSTRUCTION NO. 33

A certificate of deposit payable to one party "and/or" another party, is payable in the alternative. An alternative payee in possession can assign or transfer a certificate of deposit by his signature alone.

We disagree with Bull's contention that Instructions #24 and #33 are in conflict. To the contrary, the two instructions are in harmony. In addition, while the two instructions overlap somewhat, they are both accurate statements of applicable law. *General Elec. Co.*, 283 Ark. 110, 671 S.W.2d 189; section 4-9-305; Official Commentary to section 4-3-116. Moreover, since the jury was instructed that the priority of ownership of the certificates of deposit was an issue for their determination, the trial court did not err in giving Instruction #33.

Third, Bull challenges Instruction #34, which states that:

JURY INSTRUCTION NO. 34

By the terms of its agreement, the assigned funds may be used to indemnify Integon for all losses, costs and expense associated with bonds written on behalf of Cornelious Construction Company. Integon may indemnify itself for the following losses, costs and expenses from the assigned funds:

1. Amounts paid to subcontractors, suppliers and laborers of Cornelious Construction Company which you find were reasonable, proper and made in good faith by Integon under the terms of its bond.

2. Amounts paid by Integon to complete or monitor the completion of the various construction projects in which you find were reasonable, proper and made in good faith under the terms of its bond.

3. Amounts paid by Integon to attorneys in connection with investigating, defending and paying claims against its bonds which you find were reasonable, proper

and made in good faith.

Whether any of these types of losses have been proved by the evidence is for you to determine.

Bull claims that the instruction is erroneous because it permits Integon to indemnify itself from the assigned funds for expenses associated with projects not involved in the current litigation. This argument is without merit. First of all, we note that each of the expenses subject to indemnification is limited by a requirement that the jury find the expenses to be "reasonable, proper, and made in good faith." Thus, it is unlikely that the jury would permit Integon to receive indemnification for expenses that were not even associated with the bonded projects at issue in this case. Any possible bias the jury may have had toward Integon is contradicted by the fact that, of the $22,000.00 certificate of deposit, the jury only awarded Integon the amount it claimed it was entitled to, $14,257.00. In addition, Bull does not allege that Integon made such a request for indemnification of expenses associated with bonded projects unrelated to this case. Thus, any alleged error is hypothetical and not prejudicial to Bull.

Fourth, Bull challenges Instruction #35, which states that:

JURY INSTRUCTION NO. 35

Alternatively, Integon asserts a right to Bank of Augusta certificate of deposit number 17923 by virtue of a Writ of Garnishment which is served on Bank of Augusta in enforcement of a judgment which Integon has against Cornelious Construction Company. This certificate of deposit is garnishable by Integon in proportion to Cornelious Construction Company's ownership of the funds.

You may consider relevant evidence to determine the respective contributions of Bull and Cornelious Construction Company, as well as any intent of Bull to make a gift to Cornelious Construction Company.

Bull has the burden of proving what portion of the certificate of deposit is actually owned by him.

Bull asserts the instruction is erroneous because there was no evidence of any gift from Bull to Cornelious and because it places the burden of proving Integon's claim to the certificate on Bull.

Bull asserts the proper instruction should state that each party has the burden of proving its own interest in or claim to the certificate.

Bull's argument with respect to Instruction #35 is wholly without merit. First, while there is testimony abstracted that directly indicates Bull made a gift to Cornelious, there is evidence that Bull included Cornelious as joint owner of the certificate of deposit in question. From this evidence, the jury could infer, among other things, that Bull made a gift to Cornelious. Second, Bull's assertion that the challenged instruction improperly distributes the burden of proof is entirely without merit. Instruction #23 informed the jury that Bull claimed superior ownership of the certificate of deposit. Thus, Instruction #35 reads exactly as Bull argues it should read, i.e., it places the burden of proving a claim on the party asserting the claim. There was no error in the trial court's giving Instruction #35.

Bull's second argument on cross-appeal is that he should have been awarded penalties and attorneys fees pursuant to Ark. Code Ann § 23-79-208 (1987). The trial court denied Bull's request for penalties and fees because he did not recover the amount sued for as required by section 23-79-208. Bull argued that the pleadings were amended to conform to the proof, therefore he recovered the amount sued for and should be awarded the penalties and fees.

Obviously, our reversal of Bull's verdicts renders this issue moot. There is no longer any doubt that he did not recover the amount sued for. Therefore, there was no prejudicial error in the denial of penalties and fees.

The judgment is reversed and dismissed on direct appeal and affirmed on cross-appeal.

Barbara KELLEY, Records Supervisor, Diagnostic Unit; Charlotte Sumner, Records Coordinator, Arkansas Department of Corrections *v.* Wardell WASHINGTON

92-588 843 S.W.2d 797

Supreme Court of Arkansas
Opinion delivered November 9, 1992

Winston Bryant, Att'y Gen., by: *Olan W. Reeves*, Senior Asst. Att'y Gen., for appellant.

Appellee, pro se.

ROBERT L. BROWN, Justice. The appellants, who are records personnel with the Arkansas Department of Correction and the Department itself, raise two issues in this appeal: 1) whether the Pulaski County Circuit Court lacked jurisdiction to amend its judgment to run its sentence consecutively to previous sentences; and 2) whether the Jefferson County Circuit Court erred in computing parole eligibility based on time served in a federal institution. We affirm in part and reverse in part and remand.

On July 2, 1975, appellee Wardell Washington was convicted in Pulaski County Circuit Court of possession of heroin and intent to deliver heroin. He was sentenced to fifteen years and five years, respectively, to be served concurrently. On that same date, Washington was also convicted in federal court of the offense of delivering heroin, arising out of the same incident, and sentenced to fifteen years. He was subsequently incarcerated in the Federal Correctional Facility in Texarkana, Texas. His state sentences were to run concurrently with his federal sentence so that a day served in the federal institution would also reduce his state sentences by a day.

In 1987, while on parole from the federal institution, Washington forged several checks, which resulted in two state court convictions. On August 22, 1988, he was convicted in Jefferson County Circuit Court of second degree forgery and was sentenced to fifteen years to be served concurrently with the remainder of his 1975 state sentences and consecutively with the remainder of his 1975 federal conviction. His parole was revoked due to this conviction.

On May 9, 1989, Washington was convicted in Pulaski

County Circuit Court of second-degree forgery and sentenced to thirty years to be served concurrently with the 1975 state sentences and consecutively with the 1975 federal sentence. At this time, Washington had thirteen months and twenty-three days left to serve on his 1975 state convictions, which meant that the sentences would expire on July 2, 1990. He was still imprisoned in the federal facility.

On June 20, 1990, Washington completed his federal sentence and was taken, for the first time, to the Arkansas Department of Correction. Shortly after arriving at the Department, Washington petitioned the Pulaski County Circuit Court to amend his 1989 sentence to run that sentence consecutively to his 1975 state convictions. On September 10, 1990, the circuit court entered an order amending the original sentence and granting Washington the relief requested.

On February 8, 1991, Washington filed a petition for writ of mandamus and declaratory judgment in Jefferson County Circuit Court, requesting that the 1975 sentences, the 1988 sentence in Jefferson County, and the 1989 sentence in Pulaski County be considered as consecutive sentences which would allow cumulative treatment under our decision in *Bosnick* v. *Lockhart*, 283 Ark. 206, 672 S.W.2d 52 (1984). He then petitioned for an amended order from the Pulaski County Circuit Court to run the 1989 sentence consecutively to the 1975 state sentences. When Washington did so, however, he failed to tell that court that he had been convicted in Jefferson County for forgery and sentenced to fifteen years in 1988. Because of this, the Pulaski County Circuit Court's order of September 10, 1990, did not run the 1989 sentence consecutively to the Jefferson County sentence. In order to correct the matter further, Washington made an oral motion to the Pulaski County Circuit Court to amend its order to include the fact that its 1989 sentence should also run consecutively to the 1988 Jefferson County sentence. The Pulaski County Circuit Court then issued the requested amended order on February 13, 1992.

After issuing that amended order, the Jefferson County Circuit Court decided the petition in Washington's favor under *Bosnick* v. *Lockhart* and calculated his total sentence as a single commitment for sixty years with one-third to serve for parole

eligibility under then-existing law, which was Act 50 of 1968. The Department has now appealed from the circuit court's order.

The Department first contends that the Pulaski County Circuit Court lacked jurisdiction to amend its 1989 sentence and run it consecutively to the 1975 Arkansas judgments. The circuit court amended its judgment in response to Washington's motion which was made within 120 days after the conviction was affirmed. The circuit court noted in its order that its first sentence was a legal sentence imposed in an illegal manner and that it could be corrected if the motion requesting relief was filed within 120 days of affirmance by the appellate court. Here, Washington's motion to correct the sentence was filed 96 days after affirmance. But a mere filing of the motion does not suffice. The statute clearly reads that the *correction* of a sentence imposed in an illegal manner must occur within 120 days "after receipt by the court of a mandate issued upon affirmance . . . ." *See* Ark. Code Ann. § 16-90-111 (Supp. 1991); *see also Fritts* v. *State*, 298 Ark. 533, 768 S.W.2d 541 (1989).

It is clear that a circuit court only retains jurisdiction to correct or modify a sentence for this 120 day period, and that after the sentence is placed into execution, the court loses jurisdiction. *See Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987). Here, however, the record is silent on when the mandate was received by the court. The record does reflect that the order correcting the sentence was issued on September 10, 1990—145 days *after the affirmance of the sentence* on April 18, 1990. The mandate, though, could not be issued sooner than seventeen days after that affirmance under Supreme Court Rule 22, and since a motion for reconsideration could have delayed the mandate even further, we cannot say with any certainty that the Pulaski County Circuit Court's first order running the thirty-year sentence consecutively to the 1975 state sentences was outside of the 120 day time limit for jurisdiction. By failing to show when the circuit court received the mandate, the Department simply failed to prove facts sufficient to sustain lack of jurisdiction in that court.

We, further, do not agree with the Department that the applicable statute used by the Pulaski County Circuit Court to assess consecutive punishment was inappropriate. *See* Ark. Code Ann. § 16-93-607(e)(1) (1987). That statute reads:

> When any convicted felon, while on parole, is convicted of another felony, the felon shall be committed to the Department of Correction to serve the remainder of his original sentence, including any portion suspended, with credit for good-time allowances. Upon conviction for the subsequent felony, the court shall require the sentence for the subsequent felony to be served consecutively with the sentence for the previous felony.

It is true that the statute speaks in terms of revoking parole and returning to the Department of Correction. We can discern no material difference, though, between parole from a state sentence and parole from a federal institution where the defendant is serving state time concurrently with the federal sentence. Since this is the case, the Pulaski County Circuit Court's order providing that its thirty-year sentence should run consecutively to the 1975 state sentences was not in error.

We do not agree, however, that the Pulaski County Circuit Court had jurisdiction to issue its second amended order dated February 13, 1992, running the thirty-year sentence consecutively to the Jefferson County Circuit Court's sentence of fifteen years for forgery. The circuit court offered the following rationale for retaining jurisdiction:

> However, due to the specific finding that there was a fraud perpetrated upon this Court and by the express waiver of any procedural defect announced on the record by this defendant in the aforementioned hearing in Jefferson County and by the express waiver on behalf of the state of Arkansas by and through its Assistant Attorney General Olan Reeves, this Court is of the opinion that it may enter its amended order as set forth herein.

That amended order, however, was clearly outside of the 120 days from the date the circuit court received the mandate, and waiver of the parties cannot confer subject matter jurisdiction. *Hargis* v. *Hargis*, 292 Ark. 487, 731 S.W.2d 198 (1987). Nor can Washington's failure to advise the Pulaski County Circuit Court of his Jefferson County conviction be a basis for retention of jurisdiction. Hence, by the time of its second amended order the circuit court had lost jurisdiction to change its original sentence. Accordingly, to the extent that the Jefferson County Circuit Court's

supplemental order dated March 16, 1992, which calculates parole eligibility, relies on the Pulaski County Circuit Court's invalid amended order, it is reversed.

The Department next contends that because Washington served time for the 1975 state offenses in a federal institution as opposed to the Department of Correction, he could not receive credit for state parole eligibility purposes while so serving. Again, we disagree. Suffice it to say, Washington was serving his state time for the 1975 convictions concurrently with federal time for the same offense in a federal institution. This is not a situation such as we had in *Brown* v. *Lockhart*, 288 Ark. 483, 707 S.W.2d 304 (1986), where an inmate sought to calculate parole eligibility using a prior federal conviction. Because the state and federal sentences were being served simultaneously in the present case, it was appropriate for the Jefferson County Circuit Court to calculate eligibility based on the 1975 convictions irrespective of whether Washington was physically present in the Arkansas Department of Correction.

The Department finally argues that the 1975 state sentences had expired by May 9, 1989, when Washington was sentenced to thirty years by the Pulaski County Circuit Court. But that is incorrect. The 1975 state sentences had not expired on May 9, 1989, as the Pulaski County Circuit Court's order correctly points out. On that date, Washington had thirteen months and twenty-three days left on the 1975 state sentences, for an expiration date of July 2, 1990. The circuit court subsequently corrected its 1989 sentence to run it consecutively to the 1975 state sentences. It did not err in doing so.

In sum, we cannot say, based on the proof before us, that when the Pulaski County Circuit Court first corrected its original thirty-year sentence to run that sentence consecutively to the 1975 state sentences, it acted outside of the 120-day period for extending jurisdiction. That court was, however, without jurisdiction to run that same sentence consecutively to the 1988 Jefferson County Circuit Court sentence of fifteen years because it did so clearly after the 120 days had expired. Otherwise, the Jefferson County Circuit Court was correct in stating the formula for parole eligibility under *Bosnick* v. *Lockhart, supra*, and Act 50 of 1968.

Affirmed in part. Reversed in part and remanded for an order consistent with this opinion.

Richard G. ECKL *v.* STATE of Arkansas

CR 92-1188 841 S.W.2d 617

Supreme Court of Arkansas
Opinion delivered November 9, 1992

Michael Knollmeyer, for appellant.

No response.

PER CURIAM. Appellant, Richard G. Eckl, by his attorney, Michael Knollmeyer has filed a motion for rule on the clerk. His attorney admits that the record was tendered late.

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. 965; *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.

David A. LUPO, M.D. *v.* Honorable John LINEBERGER, Chancellor

92-1168 841 S.W.2d 158

Supreme Court of Arkansas
Opinion delivered November 9, 1992

Charles L. Schlumberger and *Edwin L. Lowther, Jr.*, for appellant.

No response.

PER CURIAM. Dr. David A. Lupo, the petitioner, seeks writs of prohibition and certiorari to prevent his having to give a deposition as an expert witness involuntarily in the case of William Rodgers, Individually and as Administrator of the Estate of Patricia Rodgers v. Dr. Robert Teryl Brooks, Jefferson County Circuit Court No. 91-439-2-3. Counsel for William Rodgers has subpoenaed Dr. Lupo, contending that he will only be asked "factual" questions rather than for expert opinion. Dr. Lupo asserts that the "facts" he expects to be asked are within his knowledge only because of his status as an expert and he should not have to submit involuntarily to the deposition.

All proceedings, including discovery, in *Rodgers* v. *Brooks*, are temporarily stayed. Counsel for the petitioner and for the respondent are ordered to brief the issue fully pursuant to Arkansas Supreme Court and Court of Appeals Rule 16 and 7. In addition to the merits of the question presented by the petition, the parties are directed to brief the question of the propriety of a writ of certiorari in the circumstances presented in this case.

Delma RICHEY *v.* Jessie Frank LUFFMAN

92-589 841 S.W.2d 622

Supreme Court of Arkansas
Opinion delivered November 16, 1992

Murrey L. Grider, for appellant.

Reid, Burge, Prevallet & Coleman, for appellee.

JACK HOLT, JR., Chief Justice. Delma Richey, plaintiff-appellant, sought recovery for damages arising out of an automobile collision that occurred between her and the appellee, Jessie Frank Luffman. The jury verdict favored Mr. Luffman. Mrs. Richey appeals the verdict claiming the trial court erred in refusing her proffered jury instruction based upon Ark. Code Ann. § 27-51-306 (1987), relating to use of an audible signal by an overtaking vehicle. We find the trial court did not err and

affirm.

On January 17, 1988, Mrs. Richey was traveling west on a two lane highway, Highway 62, in Randolph County, Arkansas. Mr. Luffman, accompanied by his mother, was traveling behind her. Although the facts are in dispute, the record indicates that Mrs. Richey turned left toward her church parking lot simultaneously to Mr. Luffman passing her on the left. It is disputed whether Ms. Richey signaled to turn. Anyway, as Mr. Luffman passed Mrs. Richey the two vehicles collided. Mr. Luffman's vehicle, a 1971 Ford truck, was damaged in the right rear end. There was no evidence to indicate that Mr. Luffman honked as he passed Mrs. Richey. Mrs. Richey's vehicle, an Oldsmobile, sustained a damage to the driver's side door and front fender.

Ms. Richey sued Mr. Luffman to recover $750.98 in property damages to her car as well as $12,187.92 for her personal injuries. At trial Mr.Luffman and his mother testified that Mrs. Richey pulled to the right hand shoulder of the roadway, and that Mr. Luffman gave a turn signal with his left blinker, pulled in the left lane and was in the left lane, along side of Mrs. Richey when she turned into him as he turned into a driveway trying to avoid the accident.The parties dispute whether she used a turn signal. Although no evidence was presented regarding whether Mr. Luffman honked his horn as he proceeded past Mrs. Richey on the left,there was a stipulation that if Mrs. Richey testified, she would say that she did not hear Mr. Luffman honk his horn prior to the collision. After hearing all of the evidence, the jury reached a verdict in favor of Mr. Luffman.

Mrs. Richey requested that a modified version of AMI 601 be given to the jury. This instruction is based upon Ark. Code Ann. § 27-51-306 (1987). Mrs. Richey wanted the jury instructed as to the following:

PROFFERED INSTRUCTION NO. 1

There were (sic) in force in the state of Arkansas at the time of occurrence a statute which provided:

First: When overtaking and passing a vehicle on the left the driver of an overtaken vehicle shall yield to the right when given an audible signal by the overtaking vehicle.

AMI 601

Ark. Code Ann. § 27-51-306 (1987)

The trial judge refused this instruction stating that it causes prejudice.

The jury instruction at issue, Proffered Instruction Number 1, asserts that once the overtaking vehicle gives an audible signal, the overtaken vehicle must yield the right-of-way, even though he has properly given a turn signal. By implication, it provides that an overtaking driver has a duty to make an audible noise when passing on the left. This is not a correct statement of the law.The relevant statute, Ark. Code Ann. § 27-51-306 (2) (1987), places a duty on the overtaken driver to yield right of way *only* if the overtaking driver does use an audible signal:

> Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall yield to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

Since there was no evidence presented that Mr. Luffman sounded a signal as he passed Mrs. Richey, the proffered jury instruction is not relevant.

We came to the same conclusion in *Smith* v. *Alexander*, 245 Ark. 567, 433 S.W.2d 157 (19868). There, two cars were traveling the same direction behind a third car. Apparently, the two cars decided to pass the lead car at the same time which resulted in a rear end collision. We affirmed the trial court's refusal of a jury instruction based upon Ark. Code Ann. § 27-51-306 (2) (1987) explaining:

> First, there was no evidence of audible signal having been given by either vehicle. Therefore the instruction tendered an issue not in contention. To that extent the instruction was abstract. . . . It should also be pointed out that this rule of the road imposes a duty on that driver being overtaken. There the requirement that an overtaking driver always sound his horn was deleted. Consequently, *the instruction should not be given unless there is evidence that the driver being overtaken failed to give way to the*

right on audible signal.

Smith, supra (emphasis added).

Mrs. Richey argues that the recent case of *Neal* v. *J.B. Hunt Transp. Inc.*, 305 Ark. 97, 805 S.W.2d 643 (1991), expands the *Smith, supra*, decision. In *Neal* two reasons were provided for not giving the instruction: where there is "neither evidence of audible signal nor evidence that the overtaken vehicle failed to give way to the right." Mrs. Richey argues that, by implication, *Neal, supra*, allows the proffered jury instruction if there is evidence of either an audible signal or that the overtaken vehicle didn't yield right of way. We disagree. *Neal* merely indicates two reasons for not giving the instruction.

We have held that "there is no error by refusing an instruction which may have misled or confused the jury." *Townsend* v. *State*, 308 Ark. 266, 824 S.W.2d 821 (1992). *See also Arkota Indus.* v. *Naekel*, 274 Ark. 173, 623 S.W.2d 194 (1981) ("The court properly refused a proffered instruction which contained several provisions of the statute that were not pertinent to the case and might have been confusing to the jury.")

Suffice it to say, the proffered instruction was not applicable to the facts at hand, and the trial court's refusal to give it was not error.

Affirmed.

Robert and Cindy WILSON *v.* GENERAL ELECTRIC CAPITAL AUTO LEASE, INC., and Jones Toyota Volvo

92-616 841 S.W.2d 619

Supreme Court of Arkansas
Opinion delivered November 16, 1992
[Rehearing denied December 21, 1992.*]

*Brown, J., not participating.

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

Wright, Lindsey & Jennings, for appellee.

JACK HOLT, JR., Chief Justice. The issue in this case is whether the trial court erred in its decision granting summary judgment to General Electric Capital Auto Lease, Inc. (GECAL) and Jones Toyota Volvo (Jones) on a contract to lease.

We find no error and affirm.

In February, 1987, Robert and Cindy Wilson signed a contract to lease a 1987 Toyota Camry from Jones for a period of five years. The contract was later assigned to GECAL.

The Wilsons claimed that Jones' leasing manager, Cliff Wright, made false representations to them that they could return the car to the dealership in three years, two years before the contract ended, and they could walk away not owing anything. They also alleged that Mr. Wright advised them that they would not need to purchase excess mileage coverage over the 75,000 mile limitation contained in the contract since they would be returning the car in three years.

After three years, the car reached the 75,000 mile mark and the Wilsons attempted to return the vehicle. GECAL and Jones would not take it back. The contract contained a clause, "K. Early Termination," which provided a formula for an early termination charge should the party contracting to lease the car want to terminate the contract before the five year term ended.

Three years and four months after executing the contract, the Wilsons filed a complaint in federal court. This case was dismissed and the Wilsons refiled it in Pulaski County Circuit Court alleging intentional misrepresentation and usury. GECAL and Jones replied, among other defenses, that the statute of limitations had run on their claims.

Both GECAL and Jones filed motions for summary judgment which were granted after a hearing. The trial court ruled that the contract was a lease and not an installment sale contract so no usury was practiced; that the Wilsons' claims of misrepresentation were barred by the statute of limitations; and that Mr. Wright's statements were opinion and not fact. Since we agree with the trial court that the Wilsons' claims were barred by the statute of limitations, we restrict our opinion to this issue.

■ The standard of review for summary judgment is whether the evidentiary items presented by the appellee in support of the motion left a material question of act unanswered. *Barraclough* v. *Arkansas Power & Light Co.*, 268 Ark. 1026, 597 S.W.2d 861 (1980). In appeals from the granting of summary judgment, we review facts in a light most favorable to the

appellant and resolve any doubt against the moving party. *Thomas* v. *Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991). Here, the pivotal question is whether there is any genuine issue of material fact concerning the statute of limitations. *Hickson* v. *Saig*, 309 Ark. 231, 234, 828 S.W.2d 840, 841 (1992).

The applicable statute of limitations to this appeal is three years. Ark. Code Ann. § 16-56-105 (1987). *See Scroggins Farms Corp.* v. *Howell*, 216 Ark. 569, 226 S.W.2d 562 (1950). The Wilsons' argued that although more than three years had elapsed from the contract date until the filing of the first complaint in federal court, Jones and GECAL perpetuated and concealed the intentional misrepresentation of Mr. Wright and thus tolled the statute of limitations. We conclude otherwise.

We have long held that where affirmative acts of concealment by the person charged with fraud prevent the discovery of that person's misrepresentations, the statute of limitations will be tolled until the fraud is discovered or should have been discovered with the exercise of reasonable diligence. *Walters* v. *Lewis*, 276 Ark., 286, 634 S.W.2d 129 (1982); *Williams* v. *Purdy*, 233 Ark. 275, 265 S.W.2d 534 (1954); *Meacham* v. *Mid-South Cotton Growers Assn.*, 196 Ark. 78, 115 S.W.2d 1078 (1938). *See also Williams* v. *Hartje*, 827 F.2d 1203 (8th Cir. 1987). We have said that the "classic language on this point in Arkansas" is:

> No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence,might have detected the fraud, he is presumed to have had reasonable knowledge of it.

Scroggins Farms Corp. v. *Howell*, 216 Ark. 569, 572-3, 226 S.W.2d 562, 565 (1950) (quoting *McKneely* v. *Terry*, 61 Ark. 527, 545, 33 S.W. 953, 957 (1896)). The same rationale holds true today.

Even assuming that GECAL and Jones actively con-

cealed a fraudulent misrepresentation, and there was no proof of this presented, the statute of limitations was suspended only until the alleged victims of the fraud discovered the fraud or "should have discovered it by the exercise of reasonable diligence." *Talbot* v. *Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988) (quoting *Hughes* v. *McCann*, 13 Ark. App. 28, 678 S.W.2d 784 (1984)). *See also Wrinkles* v. *Brown*, 217 Ark. 393, 230 S.W.2d 39 (1950); *City Nat'l Bank* v. *Sternberg*, 195 Ark. 503, 114 S.W.2d 39, *cert. denied*, 305 U.S. 614, *reh'g denied*, 305 U.S. 671 (1938). The depositions of Robert and Cindy Wilson filed with the court revealed that the Wilsons did discover or should have discovered the alleged fraudulent misrepresentations, and so there was no genuine issue of material fact concerning the running of the statute of limitations. The Wilsons made no effort to read the clause on the back of the contract which would have contradicted the "claims" purportedly made by Mr. Wright. Mr. Wilson testified:

Q. Did you ever read the document after Mr. Wright handed it to you?

A. No, I did not. Well, it was never handed to me. I signed it, but actually carrying it around with me, I did not.

Q. Have you ever read it,to this day?

A. To this day, I have—just recently, I've looked over the back of it. When my wife said something about what kind of payoff we had on the thing and after she discovered that there was (sic) some things pertinent to us, I kind of looked over it a little bit, but as far as actually having read every word on the back, I still haven't.

Q. Now, you've heard your wife indicate that at about the 24-month period in the lease, she inquired of GECAL and that was the first time she was aware that there was something on the back of the—or on the reverse side of the document.

A. Right.

Q. Did you become aware at that same time that there was language on the other side of the lease?

A. I was aware to the point that I knew that there was some printing of some kind on the back the day we did the deal. Now, as

far as I—I did not know there was anything that I should be aware of or be made aware of on the back of it. You know—I just assumed it was like a lot of other forms that have—for lack of a better word—a bunch of crap on the back—that other documents we've signed have been like. But I did know that there was some printing on the back of it.

Mrs. Wilson testified that she had "just stuck [the contract] in her purse and left" the dealership after it was signed, then "stuck it in [her] drawer at home." Most importantly, Mrs. Wilson testified that two years after the contract was signed, she called GECAL and was advised about the early termination change and then immediately read the termination provision section of the lease. Nevertheless, it was one and a half years after she called GECAL and over three years after the contract was signed before the Wilsons filed any complaint.

In sum, the Wilsons did not fulfill their duty to exercise reasonable diligence in examining the contract they executed to uncover what they alleged was a fraudulent misrepresentation by the leasing manager, so they cannot now complain that the statute of limitations should have been tolled. To the contrary, the evidence shows that they knew or should have know of the contract's actual provisions, so there was no genuine issue of material fact precluding summary judgment.

Affirmed.

BROWN, J., not participating.

Lewis S. LAMB, William D. Lynn, and William H. ROWE
v. JFM, INC.

92-623 842 S.W.2d 10

Supreme Court of Arkansas
Opinion delivered November 16, 1992
[Rehearing denied December 21, 1992.*]

*Brown, J., not participating.

Evans Benton, P.A., for appellant.

Arnold, Grobmyer & Haley, by: *Robert R. Ross*, for appellee.

ROBERT H. DUDLEY, Justice. This case presents the interesting, but difficult, appellate procedural question of whether an order vacating a judgment is a final order, and, consequently, whether it is an appealable order.

The material facts are as follows. Plaintiffs, Lewis S. Lamb, William D. Lynn, and William H. Rowe, filed suit for specific performance, an injunction, and damages against JFM, Inc. The defendant filed an answer and an amended answer, but inadvertently did not appear on the date set for trial. In their absence, the

plaintiffs took a judgment for $53,137.96. The judgment was entered on January 27, 1992. Four days later, on January 31, 1992, the defendant filed a motion to vacate judgment, and, on February 10, 1992, the chancellor entered an order vacating the judgment and setting the case for trial. The two most important facts are that the order vacating the judgment was entered within ninety days of the entry of the judgment, and that the case was never fully contested. The plaintiffs seek to appeal the order vacating the judgment rendered in their favor.

We have frequently held that we will not decide the merits of an appeal when the order appealed is not a final order. *Schueck Steel, Inc.* v. *McCarthy Bros. Co.*, 289 Ark. 436, 711 S.W.2d 820(1986) and supplemental opinion on rehearing 289 Ark. 437, 717 S.W.2d 816 (1986). For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Roberts Enters., Inc.* v. *Arkansas State Highway Comm'n*, 277 Ark. 25, 638 S.W.2d 75 (1982); Ark. R. App. P. 2. Even if neither party raises the issue of the finality of the judgment, the appellate court should raise it on its own. *Cigna Ins. Co.* v. *Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988) and supplemental opinion on rehearing 294 Ark. 506-A, 746 S.W.2d 558 (1988). The order vacating the judgment in this case does not dismiss or discharge the parties from the court, nor does it conclude their rights to the subject matter in controversy. Rather, the order vacating the judgment places both of the parties back in the position they were in before the judgment was entered, *see Hawkeye Tire & Rubber Co.*, v. *McFarlin*, 146 Ark. 491, 225 S.W. 632 (1920), and it is clear that neither party had a right to appeal before the judgment was entered.

The purpose of Rule 2 of the Arkansas Rules of Appellate Procedure is to avoid piecemeal litigation. Should we consider the plaintiffs' appeal and then affirm the chancellor's order vacating the judgment, the case would then be tried. The chancellor's rulings at that trial would be subject to appeal, and the case could be appealed a second time. The result would be two appeals where one will suffice.

However, the foregoing is applicable only when the order vacating the judgment is entered within ninety days of the entry

of the original judgment. Rule 60 of the Arkansas Rules of Civil Procedure provides for vacating judgments, and Rule 60(b) provides that a trial court has ninety days to modify or set aside a judgment to "correct any error or mistake or to prevent the miscarriage of justice." The order vacating the judgment in this case was entered within ninety days. To the contrary, after ninety days, the trial court loses its general power to vacate final judgments to "prevent the miscarriage of justice" and has only the power to vacate final judgments for the reasons set out in Rule 60(c). For example, after ninety days, a court may vacate a judgment for fraud practiced by the party who obtained the judgment. *See Diebold* v. *Myers Gen. Agency*, 292 Ark. 456, 731 S.W.2d 183 (1987).

If the final judgment is vacated after ninety days, the order vacating the judgment is an appealable order because it determines the outcome in the equivalent of an independent action to set aside a judgment. In such an independent action the judgment creditor could lose his established creditor's rights. *See Cigna Ins. Co.* v. *Brisson*, 294 Ark. 504, 506-A, 746 S.W.2d 558 (1988) (supplemental opinion granting rehearing); *Schueck Steel, Inc.* v. *McCarthy Bros. Co.*, 289 Ark. 436, 436-A, 717 S.W.2d 816 (1986) (supplemental opinion granting rehearing); *Blum* v. *Pulaski County*, 92 Ark. 101, 122 S.W. 109 (1909); *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 160, 116 S.W. 199 (1909). In summary, an order vacating a judgment within ninety days is not an appealable order because it is not a final order dismissing the parties from the action, but an order vacating a judgment after ninety days is an appealable order because it is the equivalent of an order in an independent action setting aside the judgment.

We recognize that we did not follow this distinction in *Arkansas State Highway Commission* v. *Johns*, 302 Ark. 291, 789 S.W.2d 450 (1990). There, the trial court granted a motion to vacate a judgment within ninety days of entry and, in the same order, granted a new trial. We stated that it was not necessary for us to decide whether the order vacating the judgment was a final and appealable order, since the trial court also granted a new trial, and an order granting a new trial is an appealable order. The deciding, although unmentioned, factor in that case was that there had been a complete trial with both parties present to fully

contest both the merits and the damages, and the granting of the new trial was the gist of the ruling. Thus, the rule is that, if after a complete adversarial proceeding, a trial court grants a new trial under Rule 59 of the Arkansas Rules of Civil Procedure, the order granting the new trial is appealable. Ark. R. App. P. 2(a)(3). However, the rules of appellate procedure do not give such a right of appeal when a judgment is obtained after less than a complete adversarial proceeding and is vacated within ninety days under Rule 60 even though, at the least, a partial new trial will be the result.

We have long recognized the distinction between an order granting a new trial and an order vacating a judgment within ninety days of the judgment. The original civil code provided that an appeal could be taken "when the order grants or refuses a new trial," Ark. Code Ann. § 16-67-303(a)(2) (1987), and that language has been preserved in the Rules of Appellate Procedure, Rule 2(a)(3). In addition, although we have sometimes mistakenly heard such cases, we have never allowed appeals from orders vacating judgments entered within ninety days of the judgment when the case had not been fully contested on both liability and damages, even though the order vacating the judgment would necessarily require a retrial of some part of the issues. *Henry* v. *Powell*, 262 Ark. 763, 561 S.W.2d 296 (1978); *Dodd* v. *Bonds*, 220 Ark. 951, 251 S.W.2d 587 (1952).

Since the order vacating the judgment in this case was entered within ninety days of the entry of the judgment and since the case has never been fully contested by both parties, it is not a final and appealable order. Accordingly, we dismiss the appeal.

BROWN, J., not participating.

George WILLIAMS, Chairman, Fayetteville Civil Service Commission *v.* Dennis E. TAYLOR

92-426 841 S.W.2d 618

Supreme Court of Arkansas
Opinion delivered November 16, 1992

Jones & Reynolds, by: *Terry D. Jones*, for appellant.

Mashburn & Taylor, by: *Lindlee Baker Norvell*, for appellee.

ROBERT H. DUDLEY, Justice. The Washington County Circuit Court issued a writ of mandamus ordering the Fayetteville Civil Service Commission to hold a hearing as required by its own rules. The Commission appeals. We affirm the trial court's issuance of the writ.

Fayetteville police officer Dennis Taylor received a written reprimand from the Chief of Police for violating the city's policy against smoking while on duty. Taylor gave notice of appeal and

requested a hearing by the Civil Service Commission. The Commission refused to hear the matter. Taylor requested a hearing from the City Manager, who is designated as the arbitrator of disputes involving the smoking policy as set out in Fayetteville's Clean Air/Smoking Policy, GA-2.1 (c). The City Manager agreed to an informal discussion, but noted that the city's personnel policy provided that civil service procedures superseded the personnel policy. Taylor then filed the petition for a writ of mandamus asking that the Commission be ordered to hear his grievance. The trial court issued the writ.

The Commission first argues that under our holding in *Stafford* v. *City of Hot Springs*, 276 Ark. 466, 637 S.W.2d 553 (1982), the trial court erred in issuing the writ. In that case a firefighter requested that the city civil service commission hear his appeal pursuant to the statute now codified as Ark. Code Ann. § 14-51-308 (Supp. 1991). We held that the statute provided for an appeal in the case of suspension, discharge, reduction in rank, or reduction in compensation, but that it did not provide for an appeal for a grievance such as penalty points imposed upon a firefighter for having an accident while driving a fire truck. However, a statute that was not applicable to the facts in *Stafford* provides that a city civil service commission may adopt rules and regulations governing its fire and police departments, and such rules "shall have the same force and effect of law." Ark. Code Ann. § 14-51-301(a)(2) (Supp. 1991). In this case, unlike *Stafford*, the Fayetteville Civil Service Commission has adopted rules and regulations. Commission Rule 5.07 provides:

> Any member of the respective departments or any applicant for appointment who has any grievance relating to the matters covered by these rules may present such grievance in writing to the Commission within fifteen days of the date on which the alleged grounds for the grievance arose and request a hearing thereon. The Commission *shall* hold a hearing on such grievance as soon as possible. [Emphasis supplied.]

The rule states that the Commission *shall* hold a hearing for a police officer who has *any* grievance relating to the matters covered by the rules. Thus, the Commission by its own rules was required to hold a hearing.

The Commission next argues that the trial court's ruling was in error because its rule requires the Commission to interfere with the day-to-day operations of the police department, and Ark. Code Ann. § 14-51-212 (Supp. 1991) prohibits civil service commissions from interfering with the daily operations of a police or fire department. In a comparable case, we held that the express purpose of the statutes authorizing the establishment of city civil service commissions is to review the employment, discharge, and discipline proceedings of the city fire and police departments, and, therefore, such a review should not be construed as the kind of "interference with the day-to-day management or operation of a fire or police department" that is prohibited by the same statute. *Tovey* v. *City of Jacksonville*, 305 Ark. 401, 808 S.W.2d 740 (1991). Likewise, in the case at bar, the Commission's rule requiring a grievance hearing for violating the city's policy does not constitute interference in the daily operations of the police department, and the trial court did not err in ordering the Commission to follow its own rule.

Affirmed.

The ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.* Shirley Palmer SPEARS

92-626 841 S.W.2d 624

Supreme Court of Arkansas
Opinion delivered November 16, 1992

Tami Harlan, for appellant Department of Human Services.

Jeanette Whatley, Central Arkansas Legal Services, for appellee.

STEELE HAYS, Justice. The Arkansas Department of Human Services (DHS) sought reimbursement from Shirley Palmer Spears for the purported overpayment of food stamps issued to Dorletha Berry. The trial court dismissed DHS's claim with prejudice and determined that Ms. Spears was not liable for the debt because she did not eat at least fifty percent (50%) of her meals in Ms. Berry's house. On appeal, DHS contends that the trial court's determination that Ms. Spears was required to have fifty percent of her meals in the Berry household to be considered a household member was clearly erroneous. We find no merit in appellant's argument and affirm.

The Dorletha Berry household received food stamps during 1985 and 1986. It was later learned that Ms. Berry had incorrectly reported her household composition on her application. As a result, $1,498.00 in excess food stamp benefits were paid. Ms. Berry made no payments on this account before her death on March 25, 1988.

Shirley Palmer Spears, appellee, was an adult daughter of Ms. Berry who temporarily lived with her mother during some of the period of time when the overissuance occurred. On December 11, 1989, Ms. Spears informed DHS of Ms. Berry's death. DHS later determined that Ms. Spears was also a member of the Berry household and, as such, was jointly and severally liable for the repayment of the debt as provided in 7 C.F.R. § 273.18(a)(1992).

When DHS determined that Ms. Spears was only a household member from November 1985 through January 1986 and September and October 1986, the claim was reduced to $708.00. Ms. Spears refused to reimburse DHS.

DHS filed a complaint in the Municipal Court of North Little Rock. A trial was held and judgment was entered in favor of Ms. Spears. DHS then appealed to the Circuit Court of Pulaski County. Following a trial, the court determined that Ms. Spears was not liable for the debt because the evidence did not show that she had eaten fifty percent of her meals in her mother's house. DHS's claim was dismissed with prejudice. It is from this order that DHS brings this appeal.

The sole argument on appeal is that Ms. Spears qualifies as an adult household member and is responsible for her mother's indebtedness. DHS contends it is entitled to judgment against Ms. Spears even if she did not eat fifty percent of her meals in the Berry household.

This case involves the interpretation of several provisions of the Food Stamp Act of 1964 as amended, 7 U.S.C.S. §§ 2011-2030 (1985 & Supp. 1992). Under the food stamp program, eligibility is determined and benefits are allocated per household rather than per individual. A household is defined in 7 C.F.R. § 273.1(iii)(1992) as "a group of individuals who live together and customarily purchase and prepare meals for home consumption." 7 U.S.C.S. § 2012 (i)(3), provides that "parents

and children, or siblings, who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so."

The Food Stamp Certification Manual, promulgated by the Food and Nutrition Service and issued to each state agency, describes in greater detail the criteria for determining household composition. Food Stamp Certification Manual, § 1600, reads as follows:

> A food stamp household is normally composed of an individual living alone or a group of individuals who *live together* and who customarily *purchase* food and *prepare* meals together. To "customarily purchase and prepare together" means that the household purchases food and prepares meals for home consumption as one unit *more* than 50% of the time. [Emphasis in original.]

Food Stamp Certification Manual, § 1630, states:

> This includes individuals whose work schedules allow them to be in the home only for short periods of time but who consider the home their primary residence and who are responsible household members. A responsible household member is a member such as a spouse who helps the household meet part or all of its expenses. Traveling salesmen, truck drivers, railroad employees, and offshore oil workers meet this criteria if these workers do not return to the home each night or even on a regular weekly or biweekly basis. Even though such individuals may be out of the home a majority of the time, they are considered household members. The work schedule and *not* the profession will establish these individuals as household members.

Under the food stamp program, benefits which exceed the household entitlement must be repaid by the household members. 7 C.F.R. § 273.18(a) states, "All adult household members shall be jointly and severally liable for the value of any overissuance of benefits to the household."

DHS cites *Robinson* v. *Black*, 869 F.2d 202 (1989) for the proposition that there is a presumption that Ms. Spears was a household member. However, *Robinson* is inapplicable because it

involved criteria for eligibility for food stamp benefits, which is not at issue in this case. Also, the Court held that all the circumstances surrounding living situations can be considered.

When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous. *City of Pocahontas* v. *Huddleston*, 309 Ark. 353, 831 S.W.2d 138 (1992). Under the circumstances of this case, the trial court's decision was not clearly erroneous.

Specifically, we do not believe the evidence established that Ms. Spears qualifies as an adult household member. She testified she moved in temporarily during a divorce and when she was recuperating from surgery for approximately a five month period. During this time, she had income of her own which she used to buy her own food and pay her own bills. She also testified that she ate less than fifty percent of her meals in her mother's home because she was a railroad employee and was frequently gone overnight. In addition, Ms. Spears testified the Berry household was not her primary residence.

Because Ms. Spears was not a member of the household, she is not liable for the debt of Dorletha Berry. Ms. Spears testified she was not aware that her mother ever listed her as a household member. Also, there was no evidence that Ms.Spears participated in the fraudulent acts of her mother or benefitted in any way from the overissuance of food stamps. Therefore, the trial court was not incorrect in refusing to hold her responsible for the collection of the debt owed by Dorletha Berry, and we affirm its decision.

IN THE MATTER OF THE GUARDIANSHIP OF Lois LaRue POWERS, An Incapacitated Person

Helen LaRue Roberts *v.* George H. Powers

92-615 841 S.W.2d 626

Supreme Court of Arkansas
Opinion delivered November 16, 1992

Evans, Farrar, Reis & Associates, by: *Bryan J. Reis*, for appellant.

Callahan, Bachelor, Newell & Oliver, P.A., by: *G. Latta Bachelor III*, for appellee.

DAVID NEWBERN, Justice. The Garland County Probate Court dismissed the petition in this guardianship case due to lack of jurisdiction. We reverse and hold that the Court had jurisdiction of the matter.

Helen LaRue Roberts, the appellant, petitioned to become guardian of the person and the estate of her sister, Lois LaRue Powers. Mrs. Powers' husband, George H. Powers, the appellee, contested the petition. Mrs. Powers owns substantial real and personal property in Oklahoma where she lived with Mr. Powers prior to being brought to Hot Springs by Ms. Roberts. Mr. Powers opposed the move, and considerable bitterness has developed over whether he or Ms. Roberts should be the guardian of Mrs. Powers whose mental condition unquestionably requires a guardianship.

The Probate Court's opinion stated that Mrs. Powers had resided in Oklahoma 68 years and the bulk of her property was there. The decision to dismiss Ms. Roberts' petition was based on the Court's finding that when Ms. Roberts brought Mrs. Powers to Hot Springs, Mrs. Powers lacked the capacity to change her

residence or domicile from Oklahoma to Arkansas. The issue before us is squarely that of whether a prospective ward must be a resident or domiciliary of Arkansas for an Arkansas probate court to have jurisdiction to establish a guardianship for the ward's person and estate.

Neither residence nor domicile is addressed in Ark. Code Ann. § 28-65-201 (1987) which provides simply, "(a) A guardian of the estate may be appointed for any incapacitated person. (b) A guardian of the person may be appointed for any incapacitated person except a married minor who is incapacitated solely by reason of his minority." The parties cite and argue portions of the venue provisions in Chapter 65 entitled "Guardians Generally." Those arguments are not very helpful because venue and jurisdiction are separate concepts. *Ozark Supply Co.* v. *Glass*, 261 Ark. 750, 552 S.W.2d 1 (1977).

It is our view that Mrs. Powers' mere physical presence in Garland County is a proper basis of jurisdiction of her person and estate. Jurisdiction to be exercised by a state through its courts of a person or property is established by mere presence. That was part of the scheme of jurisdiction established in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). We have followed it as to persons since our decision in *Moores* v. *Winter*, 67 Ark. 189, 53 S.W. 1057 (1899), although problems with the concept may exist in some contexts. *See Oden Optical Co., Inc.* v. *Optique Du Mond, Ltd.*, 268 Ark. 1105, 598 S.W.2d 456 (Ark. App. 1980). Nor is there any doubt that an Arkansas court may have jurisdiction of whatever property may belong to Mrs. Powers in Arkansas. *Arndt* v. *Griggs*, 134 U.S. 316 (1890); *Ingram* v. *Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968).

That the General Assembly has not restricted guardianship jurisdiction to the domicile of the prospective ward makes sense. If an incapacitated person is in this State and in need of the protection of guardianship proceedings our courts should not have to decline jurisdiction due to the fact that the person in need is domiciled elsewhere.

The Garland County Probate Court established temporary guardianships of the person and estate of Mrs. Powers, naming Ms. Roberts guardian in each instance. Thereafter, an Oklahoma court entered a permanent order, naming Mr. Powers guardian of

Mrs. Powers' estate. The temporary guardianships established by the Garland County Probate Court were vacated when the Court decided it lacked jurisdiction. While there may be remaining questions of comity or full faith and credit to be resolved in view of the actions of the two courts, the Probate Court has not yet dealt with them, and the record is not such that we can settle them without remand. Our holding is simply that the Probate Court erred in holding that it lacked jurisdiction to establish guardianships of the person and estate of Mrs. Powers.

Reversed and remanded.

HALL'S CLEANERS, et al. *v.* Gwendolyn WORTHAM

92-559 842 S.W.2d 7

Supreme Court of Arkansas
Opinion delivered November 16, 1992
[Rehearing denied December 14, 1992.]

Bailey, Trimble, Capps, Lowe, Sellars & Thomas, by: *Chester C. Lowe*, for appellants.

Lee A. Biggs, III, for appellee.

TOM GLAZE, Justice. The Arkansas Court of Appeals affirmed the Worker's Compensation Commission's affirmance of the administrative law judge's ruling that appellee's claim for initial benefits was filed within the two year statute of limitations mandated by Ark. Code Ann. § 11-9-702(a)(1) (1987). *Hall's Cleaners* v. *Wortham*, 38 Ark. App. 86, 829 S.W.2d 424 (1992). We agree that appellee's claim was timely, and affirm.

The statute of limitations issue was submitted to the Commission on the basis of a stipulated record, which essentially reflected that over a period of twelve years appellee developed a swan neck deformity in her left thumb. The deformity was caused by appellee's continuous operation of a pressing machine while employed by appellant, Hall's Cleaners. Some three years before she filed the claim at issue, appellee experienced pain and sought and paid for treatment from her family physician, Dr. Jim Citty. Dr. Citty informed appellee that appellee's thumb deformity was job-related and irreversible. Appellee reported Dr. Citty's opinion to appellant in September of 1987 and was thereafter removed from the position of press operator and reassigned to a less strenuous position at the front counter. The reassignment did not affect appellee's wages.

Appellee's pain increased, yet Dr. Citty maintained his position that the condition could not be remedied. However, he did recommend that appellee seek a second opinion and directed her to a Dr. Green. Dr. Green, after investigation, told appellee the deformity could be repaired by fusing the joints back together.

Relying on this information, appellee left her employ at Hall's Cleaners and consented to the surgery recommended by Dr. Green. The surgery took place on August 31, 1989. Appellee returned to work a little over a month after the operation. Appellee then filed her claim for benefits on October 12, 1989.

The administrative law judge ruled the injury to be a "gradual on-set injury" which did not accrue until August 31, 1989, when appellee first lost time from work, thus, her claim, having been filed on October 12, 1989, was well within the two year statute of limitations. Appellee was awarded temporary total disability from August 31, 1989, through October 9, 1989. She also received a permanent impairment rating of 25% to the left hand.

The Commission, in a 2-1 decision, affirmed, holding that, (1) appellee's injury was not a latent injury and (2) that the substantial character of her injury was known more than two years prior to the filing of her claim but that the claim was not barred by the statute of limitations because her injury did not cause an incapacity to earn wages until August 31,1989, and that the statute did not begin to run until that date. The Court of Appeals affirmed the decision, and we granted review.

The issue presented to the Court of Appeals was whether there was substantial evidence to support the Commission's decision that appellee's claim for benefits was not barred by the statute of limitations. On appeal the evidence must be viewed in the light most favorable to the Commission's decision and its decision must be upheld if it is supported by substantial evidence. *St. Michael Hospital* v. *Wright*, 250 Ark. 539, 465 S.W.2d 904 (1971). Thus, before the appellate court may reverse a decision by the Commission, it must be convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *International Paper Co.* v. *Tuberville*, 301 Ark. 22, 786 S.W.2d 830 (1990).

The statute under consideration is Ark. Code Ann. § 11-9-702(a)(1) (1987) which provides:

> TIME FOR FILING. (1) A claim for compensation for disability on account of injury, other than a occupational disability and occupational infection, shall be barred unless filed with the commission within two (2) years from the date of the injury.

The issue on appeal is when did appellee's condition first rise to the level of an "injury" for purposes of commencing the statute of limitation. The decisions of this Court, and those of the Court of Appeals, consistently proclaim Arkansas to be an "injury state," that is, the statute of limitations begins to run at the time of the injury as opposed to the time of the accident. *Donaldson* v. *Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950); *Cornish Welding Shop* v. *Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983); *Calion Lumber Co.* v. *Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985). However, review of the case law on this subject demonstrates that labelling Arkansas merely as an "injury state" is somewhat misleading.

In *Donaldson*, this court held that, for purposes of commencing the statute of limitations under § 11-9-702(a)(1), the word "injury" is to be construed as "compensable injury," and that an injury does not become "compensable" until (1) the injury develops or becomes apparent and (2) claimant suffers a loss in earnings on account of the injury. *Donaldson*, 217 Ark. at 629-631, 232 S.W.2d at 654. Thus, the statute of limitations does not begin to run until both elements of the rule are met. Therefore, Arkansas is technically a "compensable injury" state. (For a review of cases in which our decision in *Donaldson* was applied see, *Shepherd* v. *Easterling Const. Co.*, 7 Ark. App. 192, 195, 646 S.W.2d 37 (1983) and *Arkansas Louisiana Gas Co.* v. *Grooms*, 10 Ark. App. 92, 98-99, 661 S.W.2d 433 (1983)).

The following provision, Ark. Code Ann. § 11-9-501(a) (1987) determines at what point an injured worker first becomes entitled to benefits:

> Compensation to the injured employee shall not be allowed for the first seven (7) days disability resulting from injury, excluding the day of injury. If a disability extends

> beyond that period, compensation shall commence with the ninth day of disability. If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

Although appellee's injury had been apparent for some three years, it is undisputed that she was never absent from the job until she reported to the hospital for reconstructive surgery on August 31, 1989. Thus, it was not until that time, when she missed a month of work, that she became entitled to benefits under the Workers' Compensation Law. Therefore, we hold that it was not until she underwent surgery that the limitations period of Ark. Code Ann. § 11-9-702(a)(1) commenced to run. The Court of Appeals was correct in affirming the Commission's specific finding that appellee's claim was not barred by the statute of limitations.

On appeal, appellants contend that appellee's claim is barred by the statute of limitations and premises this point upon our decision in *Cornish Welding Shop* v. *Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983). They argue the statute commenced to run on the date Dr. Citty informed appellee that her deformity was both job related and irreversible. Appellant's reliance on *Cornish Welding Shops* is misplaced and the distinction between *Cornish Welding Shops* and the case at bar is rudimentary.

It is clear that the issue at bar today is, "what is a compensable injury for purposes of commencing the statute of limitations contained within §11-9-702(a)(1)," which applies to a claimant's right to recover benefits for an initial "compensable injury." However, in *Cornish Welding Shops*, this court was confronted with the issue, "when does the statute of limitations contained within § 11-9-702(b) commence to run?" That provision, in pertinent part, reads as follows:

> TIME FOR FILING FOR ADDITIONAL COMPENSATION. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one year one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater.

Therefore, § 11-9-702(b) and *Cornish Welding Shops* govern only the time in which a claimant, suffering a recurrence of an earlier fully compensated "compensable injury," must file a claim for "additional compensation." It is clear from a reading of both *Donaldson* and *Cornish Welding Shops* that the former is a "compensable injury" case under § 11-9-702(a)(1) and the latter a "recurrent injury" case under § 11-9-702(b). Likewise, the case at bar is a "compensable injury" case and thus, the Commission and the Court of Appeals were correct in ruling that *Donaldson* is controlling.

We therefore affirm the Court of Appeals.

HOLT, C.J., not participating.

Ron FULLER *v.* Jerry L. RUSSELL

92-15 842 S.W.2d 12

Supreme Court of Arkansas
Opinion delivered November 16, 1992

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Christopher O. Parker*, for appellant.

Jerry L. Russell, Pro Se.

DONALD L. CORBIN, Justice. This appeal is from a libel action filed by appellee, Jerry L. Russell, against appellant, Ron Fuller. Appellee is a political consultant. In the 1990 Republican Primary, he was hired as a consultant to the campaign of Daryl Coker in Coker's race against appellant for a seat in the Arkansas General Assembly. As part of his consultation to the Coker campaign, appellee prepared and distributed a postcard comparing the two candidates in areas such as the decision to run for various legislative positions, community leadership, business management, and views on taxes. In response to this comparison postcard, Fuller prepared and distributed to approximately 500 voters the following written message which states in pertinent part:

NEGATIVE CAMPAIGN ALERT

With less than one week remaining, my opponent, Daryl Coker has chosen to DISTORT my good record in a comparison mail piece. He and his hired Political Consultant "MR. NEGATIVE" Jerry Russell blatantly misrepresented the facts regarding my service to your community and my voting record. THE ONLY THING THEY GOT RIGHT WAS MY NAME!

HELP ME SEND NEGATIVE CAMPAIGNERS A MESSAGE!

I am not using a HIRED POLITICAL CONSULTANT, especially a NEGATIVE TACTICIAN such as Jerry Russell. Jerry is a Democratic Political Consultant and in this election cycle has (26 Democratic) candidates and (1 Republican), my opponent. Daryl has been mislead [sic] because DISTORTION and NEGATIVE campaigns are all Jerry Russell understands.

Let's show Mr. Negative, Jerry Russell and my opponent that the people of Western Pulaski County will not be fooled by distortions and negative campaign tactics. VOTE FOR RON FULLER ON MAY 29TH.

Appellee later filed suit against appellant, alleging appellant had libeled him as a result of the Negative Campaign Alert. Appellee claimed $10,000.00 in compensatory damages and $100,000.00 in punitive damages. Appellee tried his libel suit to a jury and received a verdict of $5,000.00 compensatory damages and $1,000.00 punitive damages. Judgment was entered according to the verdict. Appellant's motions for directed verdict and judgment notwithstanding the verdict were denied. This appeal followed.

For reversal of the judgment, appellant asserts three points of error. First, appellant claims his statements are ones of opinion rather than of provably false facts and are therefore protected speech. Second, appellant claims there is no substantial evidence from which the jury could have found actual malice. Third, appellant asserts there is no substantial evidence with reasonable certainty of damages to future income. We find merit to appellant's second argument and therefore reverse and dismiss the

judgment; we need not address appellant's remaining two assignments of error.

The trial court found that appellee was a limited public figure. Neither party challenges that finding on appeal. Both parties agree that under *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990), because the alleged defamatory statements are a matter of public concern, appellee had the burdens of proving the alleged defamatory statements false and, by clear and convincing evidence, that appellant made them with actual malice. Thus, the posture of the case presented to us is one involving a limited public figure plaintiff against a non-media defendant in a matter of public concern, a local political race.

Appellant maintains that his statements such as "Mr. Negative, Jerry Russell," "negative tactician," and "distortion and negative campaigns are all Jerry Russell understands" are expressions of opinion made within the context of a political campaign or matter of public concern and are not provable as false. In other words, appellant claims these statements are "opinions" of the kind protected in *Milkovich*, 497 U.S. 1. Appellant asserts there is only one statement in his "Negative Campaign Alert" that is not absolutely protected from the libel claim by the First Amendment:

> He [Daryl Coker] and his hired Political Consultant "MR. NEGATIVE" Jerry Russell blatantly misrepresented the facts regarding my service to your community and my voting record.

Appellant claims appellee never met his burden of proving the falsity of the foregoing statement or that the statement was made with actual malice. Appellee counters this argument with the assertion that he offered substantial evidence of the falsity of all the statements in the "Negative Campaign Alert" and of appellant's actual malice. We agree with appellant that appellee did not meet his burden of proving actual malice; therefore, we do not discuss the issue concerning protected speech as analyzed in *Milkovich*, 497 U.S. 1.

For purposes of addressing appellant's second argument then, our analysis is whether appellee met his burden of proving by clear and convincing evidence that the statements

were made with actual malice. Ordinarily, our standard of review would be whether the jury's verdict could be supported by substantial evidence. However, the Supreme Court has stated that when the First Amendment is involved, the appellate court is obligated to make an independent examination of the whole record to make sure the judgment does not constitute a forbidden intrusion on the field of free expression. *Bose Corp.* v. *Consumer's Union*, 466 U.S. 485 (1984). Because appellant's First Amendment right to free expression is at stake, we apply the higher standard of review.

In an attempt to define the actual malice standard, the Supreme Court has stated as follows:

> [T]he plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
>
> . . . .
>
> These cases are clear that reckless 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.
>
> . . . .
>
> The defendant in a defamation action brought by a public official[1] cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

St. Amant v. *Thompson*, 390 U.S. 727, 728, 731, 732 (1968).

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[1] Although *St. Amant* applies to a public official, it nevertheless discusses actual malice, a standard which was extended to apply to public figures and matters of public concern by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

The question of whether the evidence in the record is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989). Our review of the record reveals that appellant testified he believed his statements to be true. *St. Amant* instructs us that appellant's testimony that he believed he published the truth is of little consequence in making the actual malice determination. However, appellee simply failed to present any evidence of appellant's awareness of the probable falsity of the statements. Thus, we must conclude appellee failed to meet his burden of proving actual malice. The issue should never have reached the jury. We must reverse and dismiss for appellee's failure to prove actual malice.

Appellee makes a claim for attorney's fees and costs in his brief. He cites no authority authorizing such an award and the abstract does not indicate he presented his request for fees and costs to the trial court. Moreover, the abstract does not reveal that appellee cross-appealed from any judgment on the issue of fees and costs. Therefore, we do not address appellee's claim for attorney's fees and costs.

Reversed and dismissed.

BROWN, J., not participating.

MUSKOGEE BRIDGE COMPANY, INC. *v.* Cheryl A. STANSELL and Samantha Stansell, by Her Next Friend, Cheryl A. Stansell, and Patricia Sunday Lawson

92-441 842 S.W.2d 15

Supreme Court of Arkansas
Opinion delivered November 16, 1992
[Rehearing denied December 21, 1992.]

Davis, Cox & Wright, by: *Walter B. Cox* and *Tim E. Howell*, for appellant.

Lingle & Corley, by: *James G. Lingle*, for appellees Cheryl A. Stansell and Samantha Stansell by Her Next Friend, Cheryl A. Stansell.

Odum, Elliott & Winburn, by: *Bobby Lee Odom* and *J. Timothy Smith* and *Roy & Lambert*, by: *Brian P. Wood*, for appellee Patricia Sunday Lawson.

ROBERT L. BROWN, Justice. The appellant, Muskogee Bridge Company, Inc., raises five points for reversal in this appeal from a jury verdict finding it eighty percent at fault for an automobile accident which resulted in the death of Jim Lawson, husband of appellee Patricia Lawson, and injury to Patricia Lawson's son, Justin Lawson, and to appellees Samantha and Cheryl A. Stansell. The points raised are without merit, and we affirm.

On the morning of May 11, 1985, Jim Lawson of Springdale prepared to go to work at George's egg plant north of town and discovered that his truck would not start. He woke his wife, Patricia Lawson, and asked her to drive him to work. She agreed, placed the couple's two-year-old son, Justin, in a child safety seat in the right-rear passenger seat of her car, and they left for the plant. Jim Lawson was expected to report for work at 7:00 a.m.

Prior to this time, Muskogee Bridge, an Oklahoma corporation, contracted with the Arkansas State Highway Commission to embark on a bridge construction project involving two bridges on U.S. Highway 71 just north of Springdale. The work was to be done in accordance with Highway Commission plans and specifications and under supervision of Highway Department personnel. A state-approved subcontractor, McClinton-Anchor Company, was to do the paving and asphalt work, also under Highway Department supervision.

At approximately 6:45 a.m., while still in Springdale, Patricia Lawson was heading north toward Rogers on U.S. Highway 71-Business. She approached the bridge construction area where Muskogee Bridge had closed the outside lanes on the bridge and permitted traffic only in the two inside lanes. Pylon barriers narrowed the road to a single lane leading north to the bridge. No employee of Muscogee Bridge was present at the time to direct traffic. No flashing arrow board or dip or bump signs were in place to warn drivers of danger.

Patricia Lawson, who was unfamiliar with the route, was exceeding the speed limit when she approached the bridge construction. The road surface for the bridge was higher due to resurfacing. This caused a bump as you entered the construction area and a drop-off after you crossed the bridge on the north side. Estimates of her speed ranged from forty to sixty-five miles an

hour in a thirty-mile-per-hour zone at the construction site. At some point in the vicinity of the bridge construction, she lost control of the vehicle. Her skid and slide marks on the pavement began fifty to sixty feet from the end of the bridge construction according to Officer Kenneth Watson of the Springdale Police Department. Her car then jumped the median, crossed into the southbound lane, and crashed into an automobile driven by Cheryl Stansell and occupied by her daughter, Samantha Stansell. The impact destroyed the cars, killed Jim Lawson, and injured the appellees and their children.

Cheryl and Samantha Stansell filed a complaint in the Washington County Circuit Court, charging negligence on the part of both Muskogee Bridge and Patricia Lawson. Among the allegations asserted against Muskogee Bridge were failure to provide adequate warnings and "[l]eaving an abrupt dip or bump in the roadway which created an unreasonably dangerous condition." Patricia Lawson counterclaimed against Cheryl Stansell and cross-complained against Muskogee Bridge, advancing the same allegations against it that the Stansells made in their original complaint.

The case was tried before a jury over two days. The jury returned a verdict finding Muskogee Bridge eighty percent at fault in causing the accident and appellee Patricia Lawson twenty percent at fault. The jury awarded Cheryl Stansell, Samantha Stansell, and Justin Lawson the amounts of $25,000, $500, and $750,000, respectively.

I. SUBSTANTIAL EVIDENCE

Muskogee Bridge first contends that the jury's verdict in favor of the appellees was founded solely upon sheer speculation and sympathy rather than upon substantial evidence. Substantial evidence is defined as that which is of sufficient force and character to compel a conclusion one way or another; it must force or induce the mind to pass beyond suspicion or conjecture. *Derrick* v. *Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991); *Wal-Mart Stores, Inc.* v. *Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). We have held that we must affirm if there is substantial evidence to support the judgment below. *Derrick* v. *Mexico Chiquito, Inc., supra; Handy Dan Improvement Center, Inc.* v. *Peters*, 286 Ark. 102, 689 S.W.2d 551 (1985).

In testing whether the evidence is substantial on appellate review, we need only consider the evidence on behalf of the appellee and that part of the evidence that is most favorable to the appellee. *Derrick* v. *Mexico Chiquito, Inc., supra; Love* v. *H. F. Construction Co.*, 261 Ark. 831, 552 S.W.2d 15 (1977). The appellees asserted these instances of negligence: (1) the creation of a funnelling effect into the bridge with the reduction of four lanes to two lanes in a high-traffic, no-bypass area; (2) the creation of a "speed bump" at the south end of the bridge and a drop-off of several inches at the north end which caused Patricia Lawson to lose control; (3) the decision of Muskogee Bridge not to expend funds to pay for the installation of flashing arrow boards or additional warning signs; (4) the failure of Muskogee Bridge to comply with its contractual obligation to take "needed actions" to ensure the "safety of the public."

The following evidence presented at trial supports a finding of negligence on the part of Muskogee Bridge:

Mike Webb, secretary-treasurer of Muskogee Bridge Company, conceded that "[w]e were responsible for traffic signs, yes, sir." He acknowledged that there were no signs in place indicating either a "bump" or a "dip."

Leon Brewer of the Arkansas Highway Department testified that in a letter he wrote denying Muskogee Bridge's request for a flashing arrow panel he never said that such signs were not necessary but merely that they were not required by the Highway Department's standard drawings. He insisted that the drop-off on the north end of the bridge could only have been an inch-and-a-half according to project specifications, but he agreed that if something there created the effect of a speed bump then something "was not right."

Don Hooten, Muskogee Bridge's project supervisor, admitted that the drop-off, which he contended was an inch-and-a-half as set forth in the project specifications, had not been measured. He also stated that flashing signs are typically used in "high traffic areas" and conceded that no "bump" or "dip" sign had been set up.

Officer Clyde Martin of the Springdale Police Department testified that he patrolled the area on a regular basis and

estimated the drop-off on the north end of the bridge to be "anywhere from four to eight inches." He said that the drop-off was there both before and after the accident.

Officer Herschel D. Hardin of the Springdale Police Department stated that he had been on the bridge as many as a dozen times or more per eight-hour shift during the period of construction. He said regarding the drop-off: "It reminded me of a speed bump, the severity of the height of it which could cause a care to lose control going over it and maybe not being too familiar with it." He declared the condition to be "dangerous" because of the ramp on either side of the bridge. He estimated the drop-off at four to six inches.

Officer Kenneth Watson of the Springdale Police Department, who also patrolled the area with considerable frequency, recalled that "[I]t was a pretty good rise onto the bridge and then again going off of the bridge in either direction." He described the sensation of going over the ramp as "more like a speed bump than most anything else" and a "pretty good jump." On one occasion, when he was in pursuit of a suspect in a shooting incident at a speed of more than one hundred miles an hour, his vehicle became "airborne" after crossing the bridge.

Teresa Jo Nagles, a teacher and volunteer fire fighter who arrived on the scene after being summoned by beeper, said that the bridge construction area was "pretty bumpy." She also remarked that "if I hit it hard enough going faster than thirty miles an hour it would jar my car."

Loretta Feagin, an eyewitness to the accident, testified that she observed Patricia Lawson's car in the narrowed, two-lane area "weaving back and forth from one side to the other, back and forth. She was fighting it. She couldn't hold it straight." Loretta Feagin estimated Patricia Lawson's speed at forty miles an hour.

Muskogee Bridge's contract with the Highway Commission provided in a section titled "Safety; Accident Prevention" that:

> The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions, on his own responsibility, or as the State Highway Department contracting officer may determine, reasonably necessary to protect the life and health of employees on

> the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

In a special provision entitled "Traffic Control Devices for Construction Zones," the contract stated:

> It will be the responsibility of the contractor to furnish all other signs, barricades, channelization devices or temporary traffic control other than those covered above. These types of traffic control devices are those required for temporary hazard protection , i.e., . . . drop offs . . . .

The evidence outlines above was substantial and sufficient to allow a jury to conclude that the condition of the construction area with the drop-off of four to eight inches and the absence of warnings of the drop-off, though not specifically required under the Highway Commission's plans and specifications, constituted both negligence and a proximate cause of the accident. The jury had the right to believe or disbelieve all or any part of the testimony and was in a superior position to judge the credibility of the witnesses. *Boyd* v. *Redick*, 264 Ark. 671, 573 S.W.2d 634 (1978). This was a decision in which circumstantial evidence obviously played a significant role, because Patricia Lawson was unable to recall what happened after the crash. Nevertheless, any material fact in issue may be established by circumstantial evidence. *MFA Mutual Ins. Co.* v. *Pearrow*, 245 Ark. 795, 434 S.W.2d 269(1968); *see also Interstate Freeway Services, Inc.* v. *Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992). The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which a fact can be inferred. *Thomas* v. *Allstate Ins. Co.*, 27 Ark. App. 27, 766 S.W.2d 31 (1989). We hold that the evidence was sufficient to support the verdict and judgment.

II. SOVEREIGN IMMUNITY

For its second point, Muskogee Bridge argues that it may not be held liable for negligence arising out of the requirements of its contract with the Highway Commission, the reason being that it was performing work for a sovereign in accordance with the sovereign's specifications. The circuit court instructed

the jury as follows on the effect that performance under a government contract has on negligence:

> A contractor who performs in accordance with the terms of this contract with a governmental agency involved and under the direct supervision of that agency is not liable for damages resulting from that performance. However, a contractor is liable for damages resulting from negligence in the performance of the contract.

Muskogee Bridge then requested the following instruction which the court refused to give:

> . . . you are instructed that if Muscogee Bridge Company complied with the plans and specifications of its contract and committed no negligent acts apart from its work pursuant to the contract, then Muskogee Bridge cannot be held liable for any injuries and damages resulting from its work done in compliance with those plans and specifications.

Muskogee Bridge's proffered instruction is confusing as far as what is meant by "negligent acts apart from its work pursuant to the contract." Moreover, the law was correctly stated by the instruction given. Accordingly, the circuit court did not abuse its discretion in refusing to give the proffered instruction. *See Wal-Mart Stores, Inc.* v. *Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991).

III. DIRECTED VERDICT

Muskogee Bridge moved for a directed verdict based on its contentions 1) that it was entitled to immunity under the terms of its contract with the Highway Commission; 2) that the jury would have to engage in sheer speculation about whether the bump caused Patricia Lawson to lose control; 3) that all the paving work was performed by McClinton-Anchor, a state-approved subcontractor; and 4) that no evidence was adduced to show that a reasonably careful contractor would have put up any additional warning signs.

A motion for a directed verdict should be granted only if there is no substantial evidence to support the verdict. *Bank of Malvern* v. *Dunklin*, 307 Ark. 127, 817 S.W.2d 873

(1991). We have already addressed the substantial evidence and immunity points. Suffice it to say that the mere fact that a subcontractor performed the work in question does not automatically relieve the general contractor of all liability. *See, e.g., Construction Advisors, Inc.* v. *Sherrell*, 275 Ark. 183, 628 S.W.2d 309 (1982). The Highway Commission contract also addresses this point when it says that subcontracting or assignment does not "relieve the contractor of any responsibility for the fulfillment of the contract." Under the contract Muskogee Bridge was to provide safeguards to protect the public from dangerous conditions. But apart from the agreement, Muskogee Bridge, as general contractor, had a duty to protect the public against unreasonably dangerous conditions on the job site. Furthermore, the appellees were not required to present evidence of what a reasonably careful contractor would do. The circuit court correctly refused to direct a verdict.

IV. OFFICER OPINION

At trial, Officer Clyde Martin testified that he had been trained in accident investigation and that he had investigated approximately one hundred accidents a year. He then testified on direct examination by appellee Cheryl Stansell's attorney regarding contributing factors to the accident:

> Q. Do you have contributing factors to Mrs. Lawson?
>
> A. On Mrs. Lawson I have two contributing factors. One was the wrong side of the road as a result of crossing the median and failure to maintain control of the vehicle.

There was no objection to this testimony. Later, on cross-examination by Patricia Lawson's attorney, Officer Martin was asked about the bridge as a contributing factor:

> Q. In your opinion, Officer Martin, was the bridge a contributing factor to this accident?
>
> MR. COX: Your Honor, I am going to object. There is no foundation and it is expression of an opinion. There is not sufficient foundation.
>
> MR. ROBINSON: Your Honor, under Rule 702 his knowledge, experience and training help determine a fact in in issue that goes to causation and not the ultimate issue

of negligence. My asking Officer Martin's opinion does not mandate a legal conclusion.

THE COURT: I'm going to allow him to testify over your objection as to the bridge. He has testified to his memory of it. Your objection will be noted, Mr. Cox. Ask the question again.

Q. [Mr. Robinson continuing:] In your opinion, sir, was the bridge a contributing factor to this accident?

A. The bridge or the construction itself:

Q. The drop off, the rise in the bridge and the drop off areas, sir.

A. Yes, sir, I would say it was one of many contributing factors.

Under subsequent questioning by Muskogee Bridge, Officer Martin testified that he did not list the bridge construction as a contributing factor in his report and could not say what caused Mrs. Lawson to lose control of her vehicle. He added under cross examination by Lawson that the drop-off could have been a contributing factor. But on re-cross examination by Muskogee Bridge, he admitted that he could only say it was "a possible cause" of the accident.

The next day, the circuit court reconsidered its previous ruling, admitted it had erred, and admonished the jury not to consider Officer Martin's testimony on contributing factors. The court then struck the testimony. Muskogee Bridge asked for a mistrial, but the motion was denied.

The decision to grant a mistrial lies within the discretion of the trial court. *Schroeder* v. *Johnson*, 234 Ark. 443, 352 S.W.2d 570 (1962). Here, the circuit court, on the following day, admitted that it had erred in allowing Officer Martin to testify regarding contributing factors to the accident. We agree that this was error. The burden, however, is on the appellant to demonstrate that the circuit court committed prejudicial error. Error which does not result in prejudice is not reversible. *Robinson* v. *Abbott*, 292 Ark. 630, 731 S.W.2d 782 (1987).

Muskogee Bridge has not demonstrated that it was

prejudiced. Officer Martin, though initially giving an opinion on contributing factors, later hedged in his testimony and said he could not say that the bridge construction was a cause of the accident. It was only a *possible* factor. Furthermore, the circuit court admonished the jury not to consider his testimony on contributing factors. Had the police officer been more demonstrative in assessing blame and the court not admonished the jury, our attitude would be different. But here the circuit court made the appropriate decision to admonish the jury and go forward with the trial.

V. LAY TESTIMONY

Teresa Nagles testified that she crossed the bridge three or four times a week and that she experienced a jarring bump. She also testified that she told her father, jokingly, that she would sue the City if her wheels were knocked out of line. Her testimony was relevant under A.R.E. Rule 401 because it had a tendency to make the existence of the fact of a jarring bump more probable. After an objection from Muskogee Bridge, she limited her testimony to the time frame immediately before the accident. The circuit court committed no error in admitting this testimony.

Affirmed.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. Because I can find no substantial evidence in this record of a defect in the bridge construction which was the proximate cause of the collision between the Lawson and the Stansell vehicles, I would reverse the judgment entered on the verdict. It is not enough that the bump *could have* caused the Lawson vehicle, travelling at a high rate of speed, to swerve and lose control, the law sensibly requires causation in fact. *Missouri Pacific Railroad Co.* v. *Remel*, 185 Ark. 598, 48 S.W.2d 548 (1932). That proof is simply lacking in this case.

Melber WRIGHT d/b/a/ A.B.C. Termite & Pest Control *v.* ARKANSAS STATE PLANT BOARD

92-453 842 S.W.2d 42

Supreme Court of Arkansas
Opinion delivered November 23, 1992

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

Winston Bryant, Att'y Gen., by: *Arnold M. Jochums*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The primary issue in this case is whether the Arkansas State Plant Board's administrative action refusing to renew A.B.C. Termite and Pest Control's license was correct. We find that it was and affirm the trial court. A.B.C. also complains that the trial court erred in not making findings of fact and improperly limited its scope of review. We disagree.

In April, 1990, Melber Wright, owner and operator of A.B.C. Termite and Pest Control, was sent an Order and Notice of Hearing from the Pest Control Committee of the Board advising him that an administrative hearing would be held in connection with the status of his pest control license. The Notice had four counts: (I) alleged Mr. Wright was in violation of the

terms of a probation period imposed in 1988; (II) alleged he failed to correct substandard work on sixteen specified buildings which were found by the Plant Board to lack minimum requirements; (III) alleged that he failed to file required monthly reports of work done on certain property; and (IV) alleged he had not paid reporting and reinspection fees totalling $3,753.00. Mr. Wright had previously been placed on probation for two years by order of the Board dated December 9, 1988 based on a finding pursuant to Ark. Code Ann. § 17-30-217(1)(1987) that he "misrepresented for the purpose of defrauding the consumers of the State of Arkansas by entering into agreements to perform termite pretreatments on [twenty-five buildings] when, in fact little or no chemical application was made by Wright or his registered agents."

On May 24, 1990, an evidentiary hearing was held by the Pest Control Committee of the State Plant Board. The Committee made the following findings of fact and conclusions of law:

> (a) Melber Wright failed to correct substandard work on 16 buildings found not to meet minimum treating requirements for Termite and Other Structural Pests, so he is guilty of violating Ark. Code Ann. § 17-30-217(9)(1987).
>
> (b) Melber Wright did not file reports of work performed as required by law, so he is guilty of violating Ark. Code Ann. § 17-30-221(c), (1), (3). He did not pay reporting and reinspection fees in violation of Ark. Code Ann. § 17-30-217(6).

The Committee recommended to the Board that Mr. Wright's license not be renewed unless the fees were paid and the work was brought to compliance by July 1, 1990. They also recommended that the Board sequester A.B.C.'s bond until the fees were paid. The order specifically advised Mr. Wright of his right to appeal the Committee's action to the Full Board at its June 7, 1990, meeting by "filing a written request at the Plant Board office no later than June 2, 1990, stating his desire to appeal." No written request was filed, nor did he or his attorney appear before the full Board meeting.

At its June 7 meeting, the Board adopted the recommenda-

tions of the committee without change. On July 6, 1990, Mr. Wright filed a petition for judicial review in Pulaski County Circuit Court pursuant to the Administrative Procedure Act, Ark. Code Ann. § 25-15-212 (1992), alleging that the Plant Board acted in violation of constitutional or statutory provisions, in excess of its statutory authority, using unlawful procedure, and abusing its discretion. Mr. Wright filed a separate motion to stay enforcement of the agency's decision. The court found Mr. Wright would be irreparably harmed and entered an order granting his request for a stay of the nonrenewal of his license during the pendency of this proceeding.

The trial court affirmed the actions of the Board and found that the committee system used by it to review Mr. Wright's license was lawful, that substantial evidence supported their findings of fact made, and that the action of the Board was not arbitrary. The court provided in its order that if Mr. Wright appealed, the stay previously granted would remain in effect pending appeal.

One month after the hearing was held on the merits, Wright filed a motion asking the trial court to make findings of fact and conclusions of law pursuant to Ark. R. Civ. P. 52(a), which states, "If requested by a party, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon." A hearing was held on the motion but the court denied it and accepted an order drafted by the Plant Board pursuant to the court's directions.

The Plant Board countered that under Ark. Code Ann. § 25-15-212(h)(1)-(6)(1992) and *Whitlock* v. *G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984), the Arkansas Rules of Civil Procedure do not apply to civil actions brought under the Administrative Procedure Act. We held in *Whitlock* that the Administrative Procedure Act is an exception to the Arkansas Rules of Civil Procedure under Rule 81(a), and we have repeated this rule in more recent cases. *Sunbelt Couriers* v. *McCartney*, 303 Ark. 523, 798 S.W.2d 92 (1990); *McEuen Burial Ass'n* v. *Arkansas Burial Ass'n Bd.*, 298 Ark. 572, 769 S.W.2d 415 (1989). Based on this rule, Ark. R. Civ. P. 52(a) is inapplicable tot his judicial review, and the trial court was not bound to provide Mr. Wright with a finding of fact or conclusion

of law.

By contrast, the Plant Board did fulfill its requirements under the Administrative Procedure Act that a final decision be rendered that "shall include findings of fact and conclusions of law, separately stated." Ark. Code Ann. § 25-15-210(b)(1-2)(1992). The Pest Control Committee made specific findings of fact and conclusions of law which the Board adopted. The Pest Control Act allows adjudicatory hearings to be held by the board or an authorized committee of the board. Ark. Code Ann. § 17-30-220(a)(1987). This process had been recognized by this court in *Thomas* v. *Committee "A", Ark. State Plant Bd.*, 255 Ark. 517, 501 S.W.2d 248 (1973). The findings of the Pest Control Committee were adequate and were duly adopted by the Board.

Mr. Wright next argued that the rationale the court gave for affirming the Plant Board's decision was inadequate because the court improperly limited the scope of its review to only one of the six grounds given at Ark. Code Ann. § 25-15-212(h) (1987), that is, that it found substantial evidence to support the action taken.

Substantial evidence is one of the six bases for judicial review given by the Administrative Procedure Act:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the agency's statutory authority;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law;
>
> (5) Not supported by *substantial evidence* of record; or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h)(1992)(emphasis added).

Mr. Wright argued that the other five standards of review should have been applied. However, Mr. Wright provided no authority supporting his position or any logical reasons why these other five rationale should be applied.

The trial court's order reflected that the trial court did take three of these factors into consideration: whether supported by substantial evidence (§ 25-15-212(h)(5)), whether made upon unlawful procedure (§ 25-15-212(h)(3)), and whether there existed arbitrary and capricious procedure (§ 25-15-212(h)(6)). This was more than sufficient to satisfy the Administrative Procedure Act.

Mr. Wright's main argument was that the trial court's decision was clearly erroneous for a variety of reasons. "Clearly erroneous" is not the correct standard of review applicable here: when reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, whether there is arbitrary and capricious action, or whether the action is characterized by abuse of discretion. *In re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992); *Singleton* v. *Smith*, 289 Ark. 577, 715 S.W.2d 437 (1986); *Green* v. *Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984); *Arkansas Alcoholic Beverage Control Bd.* v. *King*, 275 Ark. 308, 629 S.W.2d 288 (1982). We have recognized that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *First Nat'l Bank* v. *Arkansas State Bank Comm'r*, 301 Ark. 1, 5, 781 S.W.2d 744, 746 (1989); *Arkansas State Hwy. Comm'n* v. *White Advertising Int'l*, 273 Ark. 364, 620 S.W.2d 280 (1981); *Arkansas Beverage Control Bd.* v. *King*, *supra*; *Gordon* v. *Cummings*, 262 Ark. 737, 561 S.W.2d 285 (1978).

To determine whether a decision is supported by substantial evidence, we review the whole record to ascertain if it is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Livingston* v. *Arkan-*

sas State Medical Bd., 288 Ark. 1, 701 S.W.2d 361 (1986); *Partlow* v. *Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d. 23 (1980). To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusions. *Beverly Enters.-Ark., Inc.* v. *Arkansas Health Servs.*, 308 Ark. 221, 824 S.W.2d 363 (1992); *Williams* v. *Scott*, 278 Ark. 453, 647 S.W.2d 115 (1983). Substantial evidence is valid, legal and persuasive evidence. *Independence Sav. & Loan Ass'n* v. *Citizens Fed. Sav. & Loan Ass'n*, 265 Ark. 203, 577 S.W.2d 390 (1979).

At the Committee hearing, the procedure and rules for regulating pest control operators were outlined. These gave a standard procedure for inspection, notice, and sanctions where the Board's rules and regulations are violated. If a Board inspector inspects a site and finds substandard pest control work, the Board sends a "Report of Substandard Termite Treatment," or pink slip, to the pest control operator, after which the operator has fifteen days to rectify the situation. The site will be reinspected, and if the work is still not done, another pink slip may be issued. Fees are charged for notice and reinspection. Testimony at the Committee hearing revealed that the fees were based on an analysis of the overall operating cost of the Pest Control Division.

In Mr. Wright's situation, there was ample evidence to support the agency's action. First, there was evidence presented at the lengthy Committee hearing regarding the substandard conditions of all sixteen buildings named in the original Notice and Order. An inspector employed by the Board testified that he inspected one house four times and had caused three pink slips to be issued as well as a letter to Mr. Wright. Similar testimony as to the other buildings followed. In most instances, three pink slips, the maximum number, were sent to Mr. Wright and at least three reinspections occurred per property, although one property had only one pink slip issued.

Secondly, the terms of the 1988 order which put Mr. Wright on probation for two years were read into the record and it was clear that this previous agreement between the Board and Mr. Wright had been violated. The two terms of his probation

were (1) that he violate no statute of the Professional Practice Act or the Rules and Regulations of the Arkansas State Plant Board and (2) that he rectify the customers' complaints included in the notice. Mr. Wright failed to abide by both these terms by violating the rules and regulations as evidenced by the numerous pink slips issued and by failing to rectify one of the substandard jobs complained of 1988. In reviewing the record of the hearing before the Committee, the hearing before the Board, and the trial, it is obvious there was sufficient evidence of Mr. Wright's misconduct to support the action of the Board.

■ We need not decide whether the Board's action was arbitrary and capricious since it automatically follows that where substantial evidence is found, a decision cannot be classified as unreasonable or arbitrary. *Independence Sav. & Loan Ass'n* v. *Citizens Fed. Sav. & Loan*, 265 Ark. 203, 211, 577 S.W.2d 390, (1979).

■ Mr. Wright makes several arguments on appeal which we are not bound to address because they were not raised before the Board. In *Alcoholic Beverage Control Div.* v. *Barnett*, 285 Ark. 189, 685 S.W.2d 511 (1985), we said it is essential to judicial review under the Arkansas Administrative Procedure Act that issues must be raised before the administrative agency appealed from or they will not be addressed by this court:

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

Alcoholic Beverage Control Div. v. *Barnett*, 285 Ark. 189, 192, 685 S.W.2d 511, 513 (1985)(quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143 (1946)). Mr. Wright was given notice of his right to appear before the full Board but declined to appear and raise these issues. *See Truck Transp., Inc.* v. *Miller Transp., Inc.*, 285 Ark. 172, 685 S.W.2d 798 (1985).

Considering the deference this court gives to administrative decisions of agencies, we find that the Board's decision to not renew Mr. Wright's license was not arbitrary or capricious and was, in fact, supported by substantial evidence. *See Edwards* v.

Arkansas Alcoholic Beverage Control, 307 Ark. 245, 819 S.W.2d 271 (1991).

For the foregoing reasons, we affirm.

STATE of Arkansas, Jefferson County Child Support Enforcement Unit for: Lisa Gaye Finley *v.* Bruce ROBINSON

91-334 842 S.W.2d 47

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Lisa A. Kelly, for appellant.

Winfred Trafford, for appellee.

ROBERT H. DUDLEY, Justice. This case began in 1989 when an unwed mother, then living in Humbolt County, California, sought assistance in obtaining child support from the father who lived in Jefferson County, Arkansas. The Family Support Division of the District Attorney's Office in Humbolt County filed a complaint on behalf of the mother and child pursuant to the Revised Uniform Reciprocal Enforcement of Support Act. The Superior Court of Humbolt County, the initiating court, determined that the unwed mother was in need of support and certified a complaint to the County Court of Jefferson County. *See* Ark. Code Ann. § 9-14-314 (1991). Paternity cases in this State have been transferred by statute from county court to chancery court; thus, the case was filed in the Chancery Court of Jefferson County. The chancellor made a finding of paternity, ordered the father to pay child support, and placed custody of the child in the mother subject to the father's right of visitation. There was no direct appeal at that time from the part of the decree involving the award of custody or visitation. Subsequently, the father filed a petition in which he alleged that he had been denied visitation, and asked that child support payments be suspended until he was allowed to visit the child. The chancellor eventually ordered that future support payments be suspended until the mother allowed the father to visit with the child. The Jefferson County Child Support Enforcement Unit, on behalf of the mother and child, appeals and argues that the receiving court, the Chancery Court of Jefferson County, did not have jurisdiction to adjudicate visitation rights, and, therefore, erred in suspending the child support payments. The argument is meritorious, and accordingly, we reverse and remand.

The purposes served by RURESA are similar to those

of the Uniform Child Custody Jurisdiction Act, or UCCJA, two of which are to avoid jurisdictional competition and conflicts, and avoid the litigation of custody decisions. *See Hogan* v. *Durgan*, 11 Ark. App. 172, 668 S.W.2d 57 (1984). RURESA did not give the Jefferson County Chancery Court jurisdiction to address the issue of visitation. Under RURESA collateral matters such as visitation cannot be raised as a defense. In *State* v. *Kerfoot*, 308 Ark. 289, 291, 823 S.W.2d 895, 896 (1992), we quoted with approval from *Todd* v. *Pochop*, 365 N.W.2d 559 (S.D. 1985) as follows:

> The very purpose of the URESA requires that it be procedurally and substantively streamlined. Interstate enforcement of support obligations will be impaired if matters of custody, visitation, or custodial parent's contempt are considered by the responding court. The introduction of such collateral issues will burden the URESA mechanism. Moreover, permitting the resolution of other family matters in a URESA proceeding may deter persons from invoking URESA.

The father responds that the Jefferson County Chancery Court did not grant visitation, instead it only suspended support payments until visitation was allowed. The argument is not well taken. Generally, a court may not do indirectly that which it is directly prohibited from doing. *Shackleford* v. *Shackleford*, 194 Ark. 381, 107 S.W.2d 344 (1937). Under RURESA the Arkansas court could not directly determine visitation. Therefore, it could not indirectly determine visitation by making payment of child support dependent upon visitation. *See Doody* v. *Sanders*, 18 Ark. App. 38, 709 S.W.2d 823 (1986).

In addition, the Jefferson County Chancery Court had personal jurisdiction over the father only. It never had personal jurisdiction over either the mother or the child, and, since there was neither a marriage nor a divorce, it did not have jurisdiction over the marital *res*. A section of RURESA, Ark. Code Ann. § 9-14-332 (1991), provides, "Participation in any proceeding under [RURESA] does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding." The general rule in a RURESA proceeding is that support and visitation orders are not interdependent. *Muller* v. *Muller*, 515 A.

2d 1291 (N.J. Sup. Ct. 1986). Accordingly, we hold that the Chancery Court of Jefferson County erred in indirectly addressing the issue of visitation. While the original order of the Jefferson County Chancery Court purporting to award custody and visitation was not appealed, it is settled that jurisdiction is always subject to question.

Two court of appeals cases, *Roark* v. *Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991) and *Arkansas Department of Human Services* v. *Cameron*, 36 Ark. App. 105, 818 S.W.2d 591 (1991), may be read to conflict with the holding of this opinion. To prevent any possible confusion, we note that the federal regulation quoted in those cases, 54 Fed. Reg. 15,761 (April 19, 1989), is not related to visitation or custody defenses, and to the limited extent that there may be some conflict, they are overruled.

Reversed and remanded for entry of orders consistent with this opinion.

DR. PEPPER BOTTLING CO. of Paragould *v.*
Don FRANTZ d/b/a Frantz Distributing

92-133 842 S.W.2d 37

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Wright, Lindsey and Jennings, for appellant.

Casey Jones, Ltd., by: *Casey Jones*; and *McHenry & Mitchell*, by: *Robert McHenry*, for appellee.

STEELE HAYS, Justice. Three points are raised by this appeal: whether a distributorship agreement between appellant Dr. Pepper Co. of Paragould, Inc. (Dr. Pepper) and appellee Don Frantz (Frantz) is subject to the Arkansas Franchise Practices Act; whether Dr. Pepper's termination of the distributorship was without good cause and in violation of statutory provisions; and whether the evidence supports damages of $100,000 awarded to Frantz. Answering those questions in the affirmative, we affirm.

On November 17, 1986, Frantz and Dr. Pepper entered into a contract entitled "Distributorship Agreement," appointing Frantz to distribute exclusively throughout some eleven Arkansas counties the beverage products franchised by Dr. Pepper. Frantz agreed to carry Dr. Pepper's entire line of products on its trucks, to refrain from selling any beverages similar to the products of Dr. Pepper, to comply with all policies of Dr. Pepper, including dress code, standards of merchandizing and the like. Frantz was to distribute beverage to retail outlets throughout the territory assigned to him at prices set by Frantz and to distribute at retail through coin-operated vending machines. No provision in the agreement obligated Frantz to maintain a particular place of business, a focal point of this dispute.

Frantz operated four trucks and two vans and rented warehouse space in Little Rock. Later, in 1989, Frantz constructed a warehouse, investing about $100,000 in the property. A representative of Dr. Pepper looked at the site and thought it "a good idea and a good investment." Frantz maintained regular hours, keeping the doors open until six or seven p.m. Frantz distributed approximately one thousand five hundred cases of beverage each week, primarily to retail outlets but some sales

were made to customers at the warehouse where products were on display.

In December 1988 Dr. Pepper wrote to Frantz stating that its products were being distributed in less than a third of the outlets of his territory, whereas he was obligated to secure and maintain regular distribution in a minimum of 65% of the outlets. Frantz was given until March 31, 1989, to correct the deficiency.

In September 1989 Frantz received a letter from Dr. Pepper informing him that because Dr. Pepper had recently acquired the 7-Up Bottling Company of Little Rock and Mountain Valley Water of Central Arkansas, "we must exercise our option to terminate your distributor agreement, effective immediately" upon thirty days notice.

Frantz brought this action against Dr. Pepper alleging the termination of the distributorship was in violation of the Arkansas Franchise Practices Act. The case was tried, Dr. Pepper moved for a directed verdict at the end of the plaintiff's proof and again at the close. Both motions were denied and the jury returned a verdict for Frantz for $100,000. Dr. Pepper then moved for a judgment notwithstanding the verdict. That, too, was denied and this appeal followed.

I

The Circuit Court Erred In Finding That There Was A Legally Sufficient Evidentiary Basis For The Jury's Finding That Frantz Was A Franchisee As That Term Is Defined By The Arkansas Franchise Act

A trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict of the jury, and the moving party is entitled to judgment as a matter of law. *Dedman* v. *Porch*, 293 Ark. 571, 739 S.W.2d 685 (1987). On appeal from the denial of a motion for a judgment notwithstanding the verdict we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf the judgment was entered. *McCuistion* v. *City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d

233 (1980).[1]

The Arkansas Franchise Practices Act [Act 355 of 1977, Ark. Code Ann. §§ 4-72-201 — 210 (1987)] provides remedies for persons whose rights as franchisees have been terminated without good cause. A franchise is defined by the act as

> a written or oral agreement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic within an exclusive or nonexclusive territory, or to sell or distribute goods or services within an exclusive or nonexclusive territory, at wholesale, retail, by lease agreement, or otherwise.

Ark. Code Ann. § 4-72-202(1).

The act applies only to a franchise

> entered into, renewed, or transferred after March 4, 1977, the performance of which contemplates or requires the franchise to establish or maintain a place of business within the State of Arkansas.

Ark. Code Ann. § 4-72-203.

"Place of business" is defined as

> a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services.

Ark. Code Ann. § 4-72-202(6).

From the foregoing excerpts, Dr. Pepper argues that the act applies only to agreements "the performance of which contemplates or requires the franchise to establish or maintain a place of business in Arkansas," that is to say, "a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods." *See* § 4-72-202(6).

Dr. Pepper relies on *Bridgman* v. *Cornwell Quality Tools*

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[1] Whether the construction of the agreement and applicability of the statutes should have been decided by the trial court, have not been raised by either party. *See Duvall* v. *Massachusetts Indemnity & Life Insurance Co.*, 295 Ark. 413, 748 S.W.2d 650 (1988).

Co., 831 F.2d 174 (8th Cir. 1987), *George R. Darche Associates* v. *Beatrice Foods Co.*, 538 F. Supp. (D.N.J.), affirmed 676 F.2d 685 (3rd Cir. 1981) and *Carlo C. Celardi* v. *Miller Brewing Co.*, 421 F. Supp. 233 (D.N.J. 1976). But those cases are neither controlling nor persuasive, given material differences. Bridgman operated entirely from a van and made no pretense of selling from a fixed location where Cornwell's products were displayed. The trial court found that neither Bridgman's van nor his home constituted a place of business and the appeals court deferred to those factual findings.

The *Darche* case has marked differences from the case before us. Darche maintained no inventory and had no authority to set prices, whereas Frantz determined the price. Darche was, in effect, simply a soliciting agent and all orders were considered simply "an offer to purchase until accepted by [Beatrice]." Products were delivered directly to the purchaser by the manufacturer and not by the soliciting agent. Darche undertook no duty to promote sales.

The *Celardi* case involved a dispute between a New Jersey beer distributor, Celardi, and Miller Brewing Company. Celardi sued Miller alleging a breach of its distributorship in violation of New Jersey's Franchise Practices Act. This act, like ours, applies only to franchises the performance of which contemplates or requires the franchisee to establish or maintain a place of business with the State of New Jersey. But, unlike our act, the New Jersey act requires a minimum level of gross sales attributable to the goods of the franchisor. More important, § 56:10 -3(f) of that act specifically excludes "a warehouse, a place of storage, a residence or a vehicle" from the definition of "place of business." Miller argued the exclusion of warehouses, etc., was indicative of a legislative intent to exclude alcoholic beverages from the coverage of the franchise act. The court rejected the contention that § 56:10 -3(f) was intended to exclude particular industries or substantial operations like Celari's from the protection of the act in these terms:

> This is especially so when one considers the strong public policy in favor of protection expressed by the act. *See Shell Oil Co.* v. *Marinello*, 63 N.J. 402, 409, 307 A.2d 598, 602 (1973), *cert. denied*, 415 U.S. 920 (1974).

Nor do we read the *Celardi* case as the appellant does to support the view that the issue of what is contemplated in terms of performance is resolved "solely by reference to the contract." Whether that is implicit in the opinion is at best debatable; it is not, however, explicit, and if the opinion seems to focus largely on the provisions of the agreement, that is doubtless influenced by the fact that the question before the court was whether a preliminary injunction should issue anticipatory to a trial.

Thus, Dr. Pepper posits the issue to be decided as not whether Frantz actually established a place of business in Arkansas where products of Dr. Pepper were displayed and sold- a premise not easily sustainable in view of the testimony and the verdict- but whether the agreement required that Frantz would display and sell Dr. Pepper products from a fixed location, or contemplated that he would do so.

We readily concede the agreement contains no specific provision relative to a fixed location, but that hardly ends the matter. The words "contemplates or requires" are modifiers of the word "performance" and they introduce a wider scope to our inquiry. Since they are paired in the disjunctive, and "contemplates" is the more encompassing of the two, that connotes greater latitude in how duties might be interpreted under the agreement. Nothing in the agreement prohibits Frantz from selling at a fixed location and, indeed, one might ask how he could be expected to supply a minimum of 65% of the retail outlets in eleven counties, including Pulaski and Jefferson, with a fleet of six vehicles handling 1,500 cases per week, without maintaining a facility of some kind. True, the agreement makes no mention of such and certainly does not require a place where goods are displayed and sold, but neither does it prohibit such a place. Frantz testified to the presence of both and we find nothing in the record suggesting that what he evidently contemplated in the performance of the agreement was ever challenged by Dr. Pepper, the author of the agreement.

In resolving to affirm, we are influenced not only by the language in our statutes, but by the fact that the legislature designed the act for the protection of the public and aired its purpose in the emergency clause:

> . . .that some franchisors have, without good cause

> and to the great prejudice and harm of the citizens of the State of Arkansas, cancelled existing franchise agreements and that other such cancellations are threatened; and that only by the immediate passage of this Act can this situation be remedied and it is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise agreements.

One abuse the act was intended to remedy is wrongful terminations. *See* 62B Am. Jur. 2d *Private Franchise Contracts* § 292 (1990). Such contracts should be liberally construed to carry out the legislative goal. *Id.* § 304. In *Bush* v. *National School Studios, Inc.*, 407 N.W.2d 883 (Wisc. 1987), the Supreme Court of Wisconsin gave a liberal construction to its newly adopted franchise act:

> In determining whether a dealership exists within the scope of a state franchise regulation, courts should not focus solely on identifying the tell-tale trappings of the traditional franchise; rather, courts should consider the overriding principle of whether the business' status is dependent upon the relationship with the grantor for its economic livelihood. If such dependency does exist, the business would be extremely vulnerable if terminated without good cause and adequate notice.

We conclude that the trial court did not err in denying the motion for judgment notwithstanding the verdict.

II

The Circuit Court Erred In Finding That There Was A Legally Sufficient Evidentiary Basis For The Jury's Finding That Frantz Sustained Damages In the Amount of $100,000

Dr. Pepper contends that recovery of damages may not rest on speculation or conjecture, *Duncan* v. *Foster*, 271 Ark. 591, 609 S.W.2d 62 (1980), and must be proven with reasonable certainty, *Traylor* v. *Huntsmen*, 253 Ark. 704, 488 S.W.2d 30 (1972). Frantz's proof of damages was provided by Dr. Ralph Scott, an economist, who placed a value of between $89,000 and $164,000 on the franchise Frantz assertedly held in central Arkansas. Dr.

Pepper faults that testimony on the ground that Frantz still has the capacity to generate income and was in fact still operating; and moreover that, Frantz's losses were overstated inasmuch as Dr. Scott included in his calculations moneys generated from products being sold by Frantz not supplied by Dr. Pepper. Finally Dr. Pepper points out that Dr. Scott valued the enterprise as of the end of 1988, when more than 90% of Frantz's sales were attributable to Dr. Pepper, which testimony ignored the operation for the three quarters of 1989 leading up to termination. Dr. Pepper urges that this analysis was too remote to support the award.

Appellee's response to the omission of Frantz's experience in 1989 is that such inclusion would have increased the amount of damages sustained, and further that testimony by Frantz was he had invested $100,000 in the acquisition of a warehouse and was damaged well in excess of $100,000 by the breach. We note, too, that Scott did some downward revision in his estimates in view of Frantz's testimony that a portion of his sales were from products other than Dr. Pepper.

We cannot say the appellant has shown us that the proof of damages was too speculative to go to the jury. The jury instructions are not abstracted, which limits our understanding of the issue and increases our dependence on the trial court. Moreover, we have recognized some latitude in this area and have not insisted on exactness of proof. *Lancaster* v. *Schilling Motors, Inc.* 299 Ark. 365, 772 S.W.2d 349 (1989). If it is reasonably certain that some loss has occurred it is enough they can be stated only proximately. *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985).

III

The Circuit Court Erred In Finding That There Was A Legally Sufficient Evidentiary Basis For The Jury's Finding That Frantz Was Terminated Without Good Cause, Without Statutory Notice, And Without An Opportunity To Cure His Deficiencies

Dr. Pepper contends there is no substantial evidence that Dr. Pepper terminated Frantz without good cause. "Good cause" is defined under the Franchise Act as including the failure

by the franchisee to comply substantially with the requirements imposed under the agreement. Dr. Pepper submits it produced overwhelming evidence of good cause to terminate. But that issue was clearly one for the jury, considering there was evidence from which the jury could readily find that termination was attributable to Dr. Pepper having acquired 7-Up Bottling Company rather than from the actions of Dr. Frantz.

For the reasons stated, the judgment is affirmed.

POTLATCH CORPORATION *v.* ARKANSAS CITY SCHOOL DISTRICT, Ronald Anderson, Curtis Gilbert and V. T. Mosby, Jr.

92-195 842 S.W.2d 32

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Friday, Eldredge and Clark, by: *James M. Saxton* and *Robert S. Shafer*, for appellant.

Gibson & Gibson, P.A., by: *Bynum Gibson*, for appellees.

DAVID NEWBERN, Justice. This is an appeal from the Circuit Court's review of the 1988 and 1989 *ad valorem* tax assessments on specialized industrial equipment used in a papermill. The mill is owned and operated by the appellant, Potlatch Corporation (Potlatch), at Cypress Bend in Desha County. The case has a complicated procedural history.

The appellee, the Arkansas City School District (School District), claimed that Potlatch was not properly reporting or assessing the value of the equipment located in its plant. The School District, as permitted by Ark. Code Ann § 26-27-317 (Repl. 1992), petitioned the Desha County Equalization Board (Board) to adjust the Potlatch valuation for the 1988 tax year. The County Assessor, Joyce Tanner had accepted Potlatch's 1988 assessment rendition document in which Potlatch stated the value of its personal property for assessment purposes at $10,557,600. That figure was based on a method of evaluation approved by Marvin Russell, a former director of the Arkansas Public Service Commission (PSC) Assessment Coordination Division (ACD). When the School District raised the issue, Ms. Tanner felt unqualified to assess the Potlatch property, and she called upon the ACD for assistance.

The Board's response to the School District's petition challenging the 1988 Potlatch assessment was to uphold the valuation rendered by Potlatch. On the date of that decision the Board was notified by the ACD that the formula utilized by Potlatch to obtain the assessment figure was too arbitrary to establish fair market value for assessment purposes. The School District filed a complaint with the PSC sitting as the State Equalization Board seeking an independent appraisal of Potlatch's personal property. The PSC dismissed the proceeding, finding that there was an

adequate remedy afforded by the appellate process, but ordered the ACD to investigate assessment practices with respect to property used in manufacturing throughout the State.

The School District then appealed the Board's decision concerning the 1988 valuation to the County Court which affirmed the decision upholding the Potlatch valuation. An appeal to the Circuit Court was then filed and docketed as CIV 88-99-2AC.

For the 1989 tax year Potlatch engaged a professional appraiser, Gerald Searle, to assist with preparation of its rendition. Ms. Tanner requested the assistance of the ACD in assessing the property. The figures in the rendition recommended by the ACD were accepted by Ms. Tanner resulting in an increase in the valuation and assessment for Potlatch from its valuation of $52,051,585 to $61,487,104.

Potlatch filed a request for adjustment with the Board which adjusted the valuation to the original figure submitted by Potlatch. The County Court affirmed that decision. An appeal to the Circuit Court was filed and docketed as CIV 89-78-2AC, and the case was consolidated with the appeal of the 1988 assessment.

The Circuit Court (1) held that the 1988 assessment was manifestly arbitrary and ordered reassessment using the method established by the ACD, (2) rejected the methodology applied by Potlatch in it's 1989 rendition, (3) found the estimate of fair market value based on the ACD's recommendation for 1989 was not in error, thereby upholding Ms. Tanner's assessment, and (4) ordered the ACD to assist Ms. Tanner in all future assessments of Potlatch's property.

Potlatch argues on appeal that the Circuit Court (1) erred in ordering its property reassessed for the 1988 tax year using the ACD method; (2) erred in rejecting the Board's adjustment of their 1989 assessment; and (3) erred in ordering the ACD to participate in all future assessments of their property. We find no error and affirm.

1. The 1988 reassessment order

a. Waiver

The differences in the method of assessment used by Potlatch from 1978 to 1988 and that recommended by the ACD and approved by the Circuit Court will be discussed below. To consider Potlatch's first argument with respect to the 1988 assessment, that of waiver, we need only state that the two methods were substantially different. Potlatch contends the School District may not argue in court in favor of a method of assessment it did not present before the Board.

In support of this waiver argument *Acme Brick Co.* v. *Missouri Pacific Railroad Co.*, 307 Ark. 363, 821 S.W.2d 7 (1991), an appeal from the Highway Commission, is cited. The Railroad Co. had filed a petition before the Commission to abandon a railroad spur. In the order granting the petition, the Commission stated that Ark. Code Ann. § 23-12-607 (1987) required it to hear and consider all petitions filed with it for the discontinuance of railroad spurs and that Ark. Code Ann. § 23-12-611 (1987) provided the standard of proof to be used in determining whether the spur track should be abandoned. The order also stated that *City of Caraway* v. *Arkansas Commerce Comm'n*, 248 Ark. 765, 453 S.W.2d 722 (1970), a case involving abandonment of an agency station, was persuasive and controlling in the matter before the Commission.

Upon receipt of the commission's order, Acme Brick Co. moved for reconsideration arguing that "[t]he standard of proof relied upon by the Commission was improper because it is the standard of proof for considering an application to discontinue an agency station, rather than abandonment of a spur. The Commissions' reliance on the standard of proof in Ark. Code Ann. 23-12-611 was legal error." Because § 23-12-611 and the *Caraway* case both involved agency stations rather than spurs, Acme Brick Co. claimed the Commission erred in relying on them to determine the standard of proof applicable to the spur petition. We held Acme Brick Co. could not complain in court about the standard of review used by the Commission having failed to inform the Commission of the correct standard.

This case differs in several significant ways. First,

Acme Brick Co. could have learned the proper standard of review through legal research. With respect to standards for determining value of property to be assessed, there is no single or "proper" assessment method to be presented. All concede that there are various ways of going about assessing the value of property. The School District's point was to require use of some method based on actual value in compliance with the Ark. Const. art. 16, § 5.

Second, the ACD had not developed a single formula prior to the 1988 assessment, therefore, there was no single, acceptable method to apply to valuation to proffer.

Finally, with respect to the 1988 assessment, the School District argued Potlatch was not fully disclosing the extent of its personal property, and that the formula it was using resulted in an assessment based upon only 10% of market value. The School District asked both the Board and the County Court to require use of a formula which would arrive at a fair market value in accordance with the Constitution. That was sufficient to apprise these entities of the specific objections raised to the Potlatch valuation.

b. The Russell formula

Next, Potlatch argues that, as the method it used in computing the 1988 figures was supported by substantial evidence in the form of the testimony of Marvin Russell, the Court was required to affirm the Board rather then engage in an assessment of property. Mr. Russell had recommended a formula which permitted Potlatch in its first year of operation to take the actual cost of the property, divide that in half and declare 20% of that figure as the taxable value, yielding a valuation equal to 10% of actual cost. This same figure was thus declared each year subject to certain adjustments as equipment changes occurred. Russell testified that this formula would give level expenses for the company, level income for the taxing unit, and would also yield more money than alternative methods. He stated on cross-examination that the 50% formula was based on the use value rather than market value of the equipment and was directly related to income producing potential.

Potlatch argues that no one testified that this formula produced a valuation unrelated to fair market value, but that is

not so. In his deposition, Larry Crane of the ACD specifically said "any way you play it, an arbitrary fifty percent would not reflect fair market value for any but that one coincidental point in time it just happened to really be that." He continued in his deposition to characterize the 50% formula on a brand new facility as ridiculous. Even Mr. Searles, Potlatch's expert, testified that the "fifty percent of original cost method employed from 1978 through 1988 is not a recognized method" and the "fifty percent method does not have any acceptance in the world of appraisal."

This defense of the 50% valuation ties in with the argument that the Circuit Court erred in substituting the ACD formula for the 1988 tax year because, Potlatch asserts, affirmance of the judgment of the Board and County Court was required if there was any substantial evidence to support it.

Tuthill v. *Arkansas County Equalization Board*, 303 Ark. 387, 797 S.W.2d 439 (1990), is cited for its description of the agency and judicial roles as follows:

> The Assessment Coordination Division of the Public Service Commission is given the power of supervision and control over the several county assessors and boards of equalization and review in order that assessments of property shall amount to true market value. Ark. Code Ann. 26-24-101 and 26-24-102 (1987). To this end, the Assessment Coordination Division annually publishes a manual to be used by county appraisers. That manual recommends the use of three methods to arrive at a true, or market, value. They are (1) comparable sales, (2) capitalization of income, (3) cost less depreciation. It is best that an assessor use two or more of the methods as a gauge of the market value. *Board of Equalization* v. *Evelyn Hills Shopping Center*, 251 Ark. 1055, 476 S.W.2d 211 (1972).
>
> Because of the separation of powers doctrine, it is not within the province of state courts to assess property. *Cook* v. *Surplus Trading Co.*, 182 Ark. 420, 31 S.W. 521 (1930). Courts can only review the assessments and reverse them and send them back to the executive department when they are clearly erroneous, manifestly excessive, or confiscatory. *St. Louis - San Francisco Ry. Co.* v. *Ark. Public Serv. Comm'n*, 227 Ark. 1066, 304 S.W.2d

> 297 (1957). We have said that we will reverse property assessments only in the "most exceptional cases." *Jim Paws Inc.* v. *Equalization Bd. of Garland County*, 289 Ark. 113, 710 S.W.2d 197 (1986). The burden of proof is on the protestant to show that the assessment is manifestly excessive or clearly erroneous or confiscatory.

Potlatch is correct in stating that it is not the province of courts of law to make assessments. That is in the hands of the assessors, the ACD, the equalization boards and finally, the County Courts. However, the review of the Circuit Court is pursuant to Ark. Code Ann. § 16-67-207 (1987) which provides "the circuit court shall proceed to try all appeals from county courts de novo as other cases at law." The record before the Circuit Court showed beyond debate that the 50% formula was not based on market value and was therefore violative of Ark. Const. art. 16, § 5, which states:

> (a) All real and tangible personal property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property for which a tax may be collected shall be taxed higher than another species of property of equal value. . . .

Clearly the formula which was the basis for the 1988 valuation was erroneous, and the Circuit Court was correct in remanding the matter for a new valuation based on application of a proper formula as recommended by the ACD.

2. The 1989 assessment

In this argument Potlatch again asserts that the Circuit Court overstepped its constitutional boundaries in rejecting the 1989 adjustment by the Board as affirmed by the County Court. Again cited is authority to the effect that the Circuit Court's *only* role is to determine that the rendition is not clearly erroneous, excessive, or confiscatory in concluding that the Court's order substitutes itself for a purely executive function.

Ms. Tanner had asked for the help of the ACD which then furnished her with a detailed proposed assessment of the Potlatch equipment in accordance with standards published in the ACD

manual for assessors of October 1988. It was her duty to follow the ACD recommendation. *See* Ark. Code Ann. § 26-24-102 (Repl. 1992); *Tuthill* v. *Arkansas County Board of Equalization, supra.* Yet the Board and the County Court rejected Ms. Tanner's assessment, substituting that proposed by Potlatch without comment. The Circuit Court reinstated Ms. Tanner's assessment. While that goes beyond merely reversing the County Court and remanding for further consideration, it is not the same as assessment of the property by the Circuit Court based upon raw data produced in evidence before it. The Court did not exercise an executive function; it merely recognized and reinstated the original executive decision by determining that the judicial and quasi judicial bodies which had reviewed it were in error.

The Circuit Court had before it testimony of ACD officials explaining the age-life method recommended to Ms. Tanner and the testimony of Mr. Searles explaining the 16-year life method upon which the 1989 assessment figure submitted by Potlatch and adopted by the Board and the County Court was based. Mr. Searles testified that his method was the one being used statewide by other paper mills. On cross-examination, he admitted he had hard (written) evidence only that it was in use by one other paper mill and that his information with respect to other paper mills had been gathered by telephone from people, some of whose names he could not remember. More important, however, the propriety of the Searles method was questioned, and the Circuit Court could well have concluded not only that the ACD method used by Ms. Tanner was a more accurate assessment tool but that the Searle method was clearly erroneous in its determination of value. The Circuit Court correctly noted evidence that the Searles method was to be used only in combination with "trending," a means of taking into account the state of the economy, a factor not being used with the 16-year life method by Mr. Searles.

Potlatch responds that the failure to include trending is irrelevant because other paper mills using the Searles 16-year life method are not using trending, thus there is uniformity. Our view is that uniformity is, of course, desirable, but it becomes irrelevant when the issue, as in this case, is not equal protection but accuracy of the assessment method to produce that which the Constitution requires, i.e., an assessment based upon the actual

value of the property being assessed.

Under these circumstances, we can hardly say the Circuit Court's determination that Potlatch had not established before the Board or the County Court that Ms. Tanner's assessment was in error was incorrect. Nor can we say that, to the extent his decision was factual, it was clearly erroneous. Ark. R. Civ. P. 52(a).

3. Participation in future assessments

Potlatch argues the Court erred in ordering the ACD to participate in future assessments of their property. Ms. Tanner clearly indicated her inability to conduct the assessment of Potlatch, and the ACD is charged by statute with the duty to assist and supervise the assessors. The order of the Circuit Court merely states an obligation which already exists. There was no error in the decision.

Affirmed.

Byron HOOPER *v.* STATE of Arkansas

CR 91-232 842 S.W.2d 850

Supreme Court of Arkansas
Opinion delivered November 23, 1992

David C. Schoen, for appellant.

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

TOM GLAZE, Justice. This is an appeal from the appellant's conviction of possession of a controlled substance and intent to deliver and conspiracy to deliver a controlled substance. The state alleged that the appellant, who resided in Dallas, Texas, was operating a drug ring in El Dorado selling crack cocaine. Appellant was sentenced as a habitual offender on the possession conviction and received a life imprisonment sentence. For the conspiracy to deliver conviction, he received a sentence of fifty years imprisonment. As his sole issue on appeal, the appellant argues that the trial court erred in admitting into evidence wire transfer record and telephone records showing transactions occuring between Dallas and El Dorado under the business record exception (A.R.E. Rule 803(6)) to the hearsay rule. We affirm.

First, we summarily dismiss the appellant's argument that the trial court erred in admitting the telephone records because the appellant failed to make a specific objection to preserve his argument on appeal. Below, the appellant objected to the admission of the telephone records on the grounds that they were not authenticated. Now, on appeal, the appellant argues that the telephone records are hearsay and do not fit under the business record hearsay exception. This court has repeatedly held that in order to preserve an issue for appellate review, the

objection below must be specific enough to apprise the trial court of the particular error about which appellant complains. *Terry* v. *State*, 309 Ark. 64, 826 S.W.2d 817 (1992). Furthermore, a party cannot change the ground of objection from the one made at trial to a different one on appeal. *Harrison* v. *State*, 303 Ark. 247, 796 S.W.2d 329 (1990).

Appellant did properly object to the admittance of the wire transfer records by arguing that they were hearsay, which the prosecution rebutted by contending that they fit under the business record exception, Rule 803(6). The business record exception to the hearsay rule has been interpreted as having seven requirements, which includes the requirement that the information be shown by the testimony of the custodian or other qualified witness. A.R.E. Rule 803(6); *Terry*, 309 Ark. 64, 826 S.W.2d 817. Here, the prosecution admitted twelve Western Union wire transfer documents through the testimony of the individuals who received or sent the wire transfers of money. Appellant argues that these individuals were not proper to lay the foundation for the business record exception.

While we may agree with the appellant's argument, the appellant has failed to show prejudice. Officer Eddie Davis testified that he had been involved as an investigator of the Byron Hooper organization. Alice Stitt, appellant's girlfriend, was arrested by the police and gave a statement about how the drug ring operated and the people involved. Officer Davis testified that Stitt told them that there was a hookup through her to get the drugs and money from El Dorado to Dallas. Communication was made to appellant through a three-way call set up by Stitt. Officer Davis testified that Stitt gave the police information about wire transfers made out of Western Union. Specifically, he stated, again with no objection, that the police department recovered two wire transfers from Katrina Daniels to Alice Stitt for $1600 and $650. Katrina Davis was connected to appellant's organization through Stitt. Again, there was no objection to Officer Davis's testimony which illustrated how the whole drug ring operated.

This court has held that where similar evidence was previously admitted without objection, the admission of later testimony on the same subject was not prejudicial. *HCA Health Services* v. *National Bank of Commerce*, 294 Ark. 525, 745

S.W.2d 120 (1988). Similarly, we have refused to find prejudicial error where the evidence erroneously admitted was merely cumulative. *See Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988); *Snell* v. *State*, 290 Ark.503, 721 S.W.2d 628 (1986). The appellant has failed to meet his burden to demonstrate prejudicial error. *Snell*, 290 Ark. 503, 721 S.W.2d 628. As this court has repeatedly held, we do not reverse for trial error in the absence of prejudice. *Prater* v. *State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

Pursuant to Ark. Sup. Ct. R. 11(f), the record has been examined, and it has been determined that there were no rulings adverse to the appellant which constituted prejudicial error. For the reasons stated above, we affirm.

Tommy ICE *v.* Burl BRAMLETT

92-599 842 S.W.2d 29

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Mays & Crutcher, P.A., by: *Arkie Byrd*, for appellant.

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

DONALD L. CORBIN, Justice. This appeal involves one of two cases consolidated for all purposes, including discovery and trial, pursuant to ARCP Rule 42(a). Both cases arose out of an automobile collision occurring shortly after noon on June 2, 1990, at the intersection of Main and Roosevelt Streets in Little Rock, Arkansas. Appellant, Tommy Ice, was a passenger in a vehicle driven by James Lee Williams. In separate actions, both appellant and Williams sued the driver of the other car, appellee Burl Bramlett. Both cases were tried together before a jury which returned verdicts for the defendant in both cases. Only appellant Ice appeals the judgment entered in accordance with the verdicts. As his sole point for reversal, appellant contends the trial court erred in excluding evidence relating to a traffic citation issued to appellee for his actions in the accident in question. We find no merit to appellant's argument and affirm the judgment.

The trial court granted appellee's motion in limine to exclude any testimony concerning whether anyone had received a traffic citation in association with the accident in question and the outcome of any such citation. Appellant contends that appellee received a citation for running the red light at the scene of the accident, that appellee pled guilty to such citation, and was placed on probation. Appellant further contends this alleged guilty plea is an admission against appellee's interest and therefore should have been admissible in the trial below. Appellant relies heavily on *Dedman* v. *Porch*, 293 Ark. 571, 575, 739 S.W.2d 685, 687 (1987), which holds that "the only proper evidence relating to a traffic violation conviction is a party's plea of guilty in open court." There was evidence from which the jury could have concluded, and apparently did so conclude, that appellee did not run a red light. Thus, argues appellant, the trial court's exclusion of appellee's alleged guilty plea was prejudicial to appellant and reversible error.

To support his claim that appellee pled guilty to the citation, appellant points to the testimony of Mr. David Ogden, Chief Probation Officer of Little Rock Municipal Court, Traffic Division. Mr. Ogden appeared in the trial court's chambers with a copy of a "probation contract" bearing the signature of one "Burl

H. Bramlett." Mr. Ogden testified to the following concerning the probation procedure used in the municipal court:

> THE WITNESS: Okay. A typical situation, they would come to the cashier's window to pay the ticket. The cashier will ask them, "How many tickets have you had? You might qualify for probation," to try and give them a break, instead of paying the ticket out right, to pay a probation fee and go on the probation contract for six months or a year, depending on —
>
> THE COURT: Is that in lieu of paying the ticket?
>
> THE WITNESS: Yes sir. It's a $50.00 probation fee in lieu of paying the fine. We keep it held in our files during the time period, either six months or a year. It does not go on the state driving record during that time period unless he violates probation during the time period.
>
> I have the defendant read the contact[sic] and I explain it to him and at the same time say, "You are pleading guilty to whatever the charge is," whether it's speeding or [a] stop sign or whatever it is, and it is a plea of guilty to go on the program. They're either found guilty at trial in Judge Watt's court itself or —
>
> THE COURT: Let's say that wasn't done in this case. *There was no — he never — he never saw Judge Watt.* [Emphasis added.]
>
> THE WITNESS: Well, I'm saying it happens one of two ways.
>
> THE COURT: Okay. Well, *it didn't happen the second way*, so let's talk about the first way. [Emphasis added.]
>
> THE WITNESS: Okay. Well, the contact[sic] says plead guilty or upon a finding of guilt. That's what I was trying to say that the contract says.
>
> THE COURT: Well, how does he plead guilty? How do you plead guilty in this thing?
>
> THE WITNESS: Well, Judge Watt lets us take this as a guilty plea —

THE COURT: What do you mean, Judge Watt lets you take a guilty plea? How does he let you take a guilty plea?

THE WITNESS: Well, if you walk up —

THE COURT: What do you do to take a guilty plea?

THE WITNESS: If you just walk up to the cashier's window and pay it, that's an admission of guilt. I mean, you're paying the ticket out right without going to court or —

. . . .

THE COURT: So you treat this the same as paying a fine as far as pleading guilty?

THE WITNESS: Yes, sir, pleading guilty to go on probation.

THE COURT: The difference is, in your mind, between paying a fine and going on probation. Is that the only difference?

THE WITNESS: As far as the guilty plea, yes, sir. You plead guilty, you pay a $50.00 probation fee, you have a chance to keep it off your record after a six-month time period. In this case, it was a six-month time period.

. . . .

THE COURT: How does the judge's signature end up on this [probation contract]?

THE WITNESS: He signs those at the beginning of the day so we can use these without disturbing him in court on each and every case. He set up this procedure —

THE COURT: It's signed before this man even came in?

THE WITNESS: Yes, sir.

THE COURT: I'm not going to allow it.

THE WITNESS: Okay.

THE COURT: If it's that easy to plead guilty and

hold a man by his statement, I don't see any difference between that and paying a ticket, and I'm not criticizing you.

THE WITNESS: I understand.

THE COURT: I'm just saying we're talking about a whole different issue of getting before a jury and saying, this man knowingly pled guilty in court, I don't think he did that.

Appellee points out that the foregoing testimony was proffered in chambers by plaintiff Williams, not by appellant. Appellee claims that because appellant did not proffer Ogden's testimony, appellant cannot now claim it was error to exclude his testimony. The record reveals that while some witnesses were called on behalf of Williams alone and other witnesses were called on behalf of appellant alone, Mr. Ogden was called on behalf of "the plaintiffs" in chambers and out of the hearing of the jury. However, whether it was Williams or appellant who actually proffered Mr. Ogden's testimony into evidence is of no consequence since "[w]e have already seen that consolidated cases must be viewed as a whole, that each plaintiff may claim the benefit of testimony introduced by others." *Derrick* v. *Rock*, 218 Ark. 339, 344-45, 236 S.W.2d 726, 729 (1951), *cited with approval in Southern Nat'l Ins. Co.* v. *Williams*, 224 Ark. 938, 277 S.W.2d 487 (1955).

On the merits of appellant's claim, appellee argues that the municipal court's probation procedure does not include a plea of guilty "in open court," and therefore is not admissible in a civil trial. Appellee also relied on *Dedman*, 293 Ark. 571, 739 S.W.2d 685, as well as Ark. Code Ann. § 27-50-804 (1987). In the alternative, appellant argues that even if we find appellee did not make a guilty plea in open court, evidence of the citation and probation should be admissible simply as a statement against interest.

Section 27-50-804 provides that "[n]o record of the forfeiture of a bond or of the conviction of any person for any violation of this subtitle shall be admissible as evidence in any court in any civil action." We have stated that a plea of guilty is an admission against interest and is therefore admissible in a civil trial.

Midwest Bus Lines, Inc. v. *Williams*, 243 Ark. 854, 422 S.W.2d 869 (1968). When interpreting the section 27-50-804's predecessor, we have held that "the only proper evidence relating to a traffic violation conviction is a party's plea of guilty in open court." *Dedman*, 293 Ark. 571, 739 S.W.2d 685.

We observe the absence of any evidence in the record indicating that appellee actually received a traffic citation or that it was his signature on the probation contract proffered into evidence. Mr. Ogden's testimony was proffered in chambers and the trial court then granted appellee's motion in limine; thus, even though appellee did testify at the close of the case, his testimony was necessarily silent regarding any traffic citation or probation. At the in-chambers discussion, there was some indication by counsel that appellee gave a deposition in which he stated that he pled guilty to a citation. However, no such deposition was proffered into evidence. There is also a lack of evidence indicating that appellee ever appeared before the municipal judge, or that he appeared in any hearing or formal activity in which the municipal court conducts business.

The record does contain the probation contract allegedly signed by appellee stating that "[h]aving plead [sic] guilty or upon a finding of guilt . . . I have been advised in open court . . . that I have been placed on unsupervised probation for a period of six months." The contract is ambiguous as to whether the person signing it pled guilty or was found guilty. This ambiguity, especially when considered with the lack of evidence indicating appellee had actually received a citation, signed the contract, and appeared before the municipal judge, renders the contract insufficient to support a finding that appellee entered a guilty plea in open court.

Therefore, due to the lack of evidence connecting appellee with the citation and probation, we hold consistently with *Dedman*, 293 Ark. 571, 739 S.W.2d 685, and section 27-50-804, that any evidence of the citation allegedly issued to appellee and any evidence of his alleged probation in municipal court was not a guilty plea made in open court nor an admission against interest and was therefore properly excluded by the trial court.

As an aside, appellant claims the trial court erroneously judged the validity of the municipal court's probationary proce-

dure. We disagree that the trial court's order had the claimed effect and state that our decision does not either.

The judgment is affirmed.

Nell OLMSTEAD *v.* Don MOODY, d/b/a/ Moody's Pharmacy

92-667 842 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Kinard, Crane & Butler, P.A., for appellant.

Atchley, Russel, Waldrop & Hlavinka, P.A., by: *Alan Harrel*, for appellee.

DONALD L. CORBIN, Justice. Appellant, Nell Olmstead, brought this action against appellee, Don Moody, for negligence. Her complaint alleged appellee was negligent in continuing to refill appellant's prescription for Prednisone, which is a steroid, for twenty-eight (28) months. Appellant alleged Mr. Moody knew, or should have known, the drug would have adverse effects on the health and well-being of appellant, and he knew the drug could not be refilled without specific authorization from a physician. Appellant also asked for punitive damages alleging appellee or his agents or employees added the code "PRN," which indicates that the prescription may be refilled without further orders from the physician, to the prescription and that the addition of that code constitutes intentional and willful conduct on the part of appellee.

A jury trial was held and the jury found both appellant and

appellee were negligent and that each of their negligence was a proximate cause of appellant's injuries. The jury further apportioned responsibility for appellant's injuries and damages fifty percent (50%) to appellant and fifty percent (50%) to appellee. Consistent with the assessment of liability, the jury awarded appellant no compensatory damages, but awarded punitive damages to appellant in the amount of twenty-seven thousand dollars ($27,000.00). Since there was no award of compensatory damages, judgment was entered for appellee, which was correct according to our decisions in this area. *See Williams* v. *Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978); *see also Hale* v. *Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992); *Bell* v. *McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988).

Appellant moved for a new trial contending the jury verdict was clearly against the preponderance of the evidence. The trial court did not rule on the motion for a new trial within thirty (30) days and it was deemed denied pursuant to operation of law. Ark. R. App. P. 4(c). On appeal, appellant contends the trial court erred in failing to grant a new trial pursuant to Ark. R. Civ. P. 59. We have jurisdiction pursuant to Ark. Sup. Ct. R. 29(1)(o).

Appellant's sole argument on appeal is that the trial judge erred in refusing to grant a new trial. The real issue underlying this argument is that the jury was wrong in its assessment of fault. *See Hodges* v. *Jet Asphalt*, 305 Ark. 466, 808 S.W.2d 775 (1991).

"[W]e do not review an apportionment of comparative negligence if fair minded men might differ about it (which is essentially the same test as that of substantial evidence)." *Johnson* v. *Cross*, 281 Ark. 146, 148, 661 S.W.2d 386, 387 (1983). In determining whether there is substantial evidence to support the verdict, we look at the evidence most favorable to the appellee, giving appellee the benefit of all reasonably permissible inferences. *Johnson* v. *Clark*, 309 Ark. 616, 832 S.W.2d 254 (1992). "Only when there is no reasonable probability that the incident occurred according to the version of the prevailing party or where fair-minded persons can only draw a contrary conclusion" will a jury verdict be disturbed. *Id.* at 618, 832 S.W.2d at 254.

Appellant argues that since the jury found appellee was

reckless when they awarded punitive damages and only found appellant was negligent, they could not possibly have attributed responsibility for appellant's injuries 50/50 since recklessness is a higher standard than negligence. Appellant is correct that recklessness is a higher standard than negligence, but what appellant fails to note is that the jury was not asked to decide whether appellant was reckless. A finding of negligence does not necessarily preclude a finding of recklessness. In the absence of an interrogatory to the jury asking the jury to state whether they found appellant was reckless, we cannot say the jury found appellant was negligent, but not reckless. The jury could have determined appellant was both negligent and reckless as they did with appellee. In this situation, a finding of 50% responsibility for appellant would have been justified.

The jury "is the sole judge of the credibility of the witnesses and of the weight and value of their evidence, and may believe or disbelieve the testimony of any one or all of the witnesses, *though such evidence be uncontradicted and unimpeached.*" *Takeya* v. *Didion*, 294 Ark. 611, 613, 745 S.W.2d 614 (1988) (emphasis theirs) (quoting *Morton* v. *American Medical Int'l, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985)). Looking at the evidence most favorable to appellee with the benefit of all reasonably permissible inferences, there was evidence appellant continued taking Prednisone for twenty-eight (28) months without consulting Dr. Williamson, who originally prescribed it for her. There was also evidence from which the jury could infer Dr. Williamson informed appellant that Prednisone was a steroid, explained the use and effect of the drug to appellant, and informed appellant she should only be taking Prednisone for fourteen (14) days and the prescription was not refillable. There was evidence that appellant had gotten a prescription from another doctor, Dr. Farmer, which she was supposed to take for only six months and had refilled that prescription for more than a year after she was supposed to have stopped using it. Appellant did not inform her family doctor, Dr. Farmer, that she was taking Prednisone for over two years even though she was taking it on a daily basis and was seeing him frequently during that time for other medical problems. Appellant had self-medicated in the past and Dr. Farmer had previously warned appellant that she should not self-medicate. This

constitutes substantial evidence from which the jury could have found appellant was fifty percent (50%) responsible for her own injuries.

Appellant also contends "there was uncontroverted, unrefuted and unchallenged evidence as to compensatory damages" and it was, therefore, error for the jury to assess appellant's damages at zero. While there was evidence appellant suffered some damages due to her extended use of steroids, appellant's own physician, Dr. Farmer, testified that many of the complaints appellant attributed to the prolonged steroid use could have occurred even in the absence of the steroid use. Appellant argues the holding of *Hale* v. *Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992), requires reversal. In *Ladd*, there was unrefuted evidence the plaintiff suffered pecuniary damage attributable to the defendant's actions. The jury found plaintiff suffered no compensatory damages, but awarded punitive damages in the amount of $7,500.00. The judge vacated the award of punitive damages and entered judgment for the defendant. We reversed for a new trial finding the verdict was not based on substantial evidence. *Ladd* is distinguishable because in *Ladd* the plaintiff's negligence was not in issue. Here, the jury found appellant and appellee equally responsible and a plaintiff is unable to recover compensatory damages when the plaintiff is equally at fault with the defendant. The jury's finding that no compensatory damages were incurred by appellant in this case, even if not technically correct, reached the correct result. The jury had properly been instructed appellant would recover nothing if the jury attributed fault equally.

The denial of the motion for a new trial was correct.

Affirmed.

C. E. WOOD *v.* Floy WHITE

92-681 842 S.W.2d 24

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Odell Pollard, P.A., by: *Margaret Meads*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, C.E. Wood, appeals a judgment of the Cleburne Circuit Court awarding appellee, Floy White, $15,000.00 compensatory damages and $15,000.00 punitive damages on her claim for assault, battery, and trespass. For reversal of the judgment entered pursuant to a unanimous jury verdict, appellant asserts four points of error in the trial, three of which have no merit. However, we find merit in appellant's first argument and therefore reverse and remand for a new trial. At least one of appellant's arguments involves a question in the law of torts; thus, our jurisdiction is pursuant to Ark. Sup. Ct. R. 29(1)(o).

Appellant and appellee own adjoining tracts of land in Greers Ferry, Arkansas. In a separate lawsuit, appellant sued

appellee to determine ownership of a particular strip of land. Appellee testified in the present suit that while the dispute on the ownership of the strip was pending, she did not even cross the strip. Once the trial court determining the dispute over the strip rendered its order stating appellee was the rightful owner of the land in question, she attempted to resume caring for the strip of property by cleaning it of debris and trash. Appellee testified to three specific altercations between her and appellant that occurred on March 11, 1989, when she attempted to haul trash from the strip down toward the lake in order to burn the trash. She stated that on those three occasions, appellant cussed her while yelling that she was on his property and he meant for her to stay off of it; appellant also came onto the strip, pried appellee's hands off of her wheelbarrow full of debris, shoved her backward, pushed her wheelbarrow over to her patio and turned it over, spilling the debris on her patio. Appellee testified that she had no way of describing her feelings on those three occasions, but that she was scared of appellant and that she was "devastated of him." She also stated that she was still scared of appellant, that she could not and did not go onto the strip of property when she knew appellant was home, and that she did not have the expectation of being able to move about freely on her property.

The present suit consists of only four witnesses, two for each side. There is the appellee and her only corroborating witness, neighbor Ruth Gadberry, against appellant and his wife. Not surprisingly, appellant and his wife have a completely different recollection of the events of March 11, 1989, than do appellee and Mrs. Gadberry. Thus, this case is an example of the proverbial "swearing match."

Appellant's first assignment of error is in the trial court's ruling excluding evidence of possible bias on the part of appellee's witness and neighbor, Ruth Gadberry. While cross-examining Mrs. Gadberry, appellant inquired whether any annoying telephone calls were made from her phone to appellant's phone. Mrs. Gadberry responded in the negative. Appellee objected to any further cross-examination concerning phone calls on the grounds that such calls were "extraneous matters." Despite appellant's response that the rule excluding extrinsic evidence of misconduct did not apply to an attempt at showing bias or prejudice, the trial court sustained appellee's objection.

Appellant was allowed to proffer the testimonies of six witnesses who were either Southwestern Bell employees or local law enforcement officers and who investigated appellant's report of an annoying phone call. The proffered evidence reveals that appellant was receiving annoying phone calls and reported this to the telephone company; that he had the phone company place a "trap" on his phone line; that on April 13, 1989, appellant received one of the annoying calls that activated the trap; that the phone company determined the trap to have "locked" Mrs. Gadberry's phone onto appellant's phone on April 13, 1989; that Mrs. Gadberry's phone did not have any devices such as a "stacked drop" or "cable pair" that would have allowed some other phone to cause hers to lock onto appellant's phone; that both Mr. and Mrs. Gadberry were home all day on April 13, 1989, but their phone was not locked onto appellant's phone when law enforcement officials investigated the complaint late in the day on April 13, 1989.

Just as he argued below, appellant argues on appeal that the foregoing evidence shows Mrs. Gadberry was biased against appellant. Mrs. Gadberry's alleged bias is particularly relevant, argues appellant, because her testimony was the only evidence appellee offered to corroborate her own testimony.

Our law is well settled that evidence of a witness' bias or prejudice is not a collateral matter, and if a witness denies or does not fully admit the facts claimed to show bias, the attacker has a right to prove those facts by extrinsic evidence. *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988). This rule of law is applied to both criminal and civil cases alike. *See* Edward W. Cleary, *McCormick on Evidence*, § 40 (3d ed. 1984).

Hostility of a witness toward a party is evidence of bias and may be shown by the fact that the witness has had a fight or quarrel with the party. *Id.* Certainly, the testimonies proffered by appellant show that someone at the Gadberry household made an annoying phone call to appellant's home. It goes without saying that annoying phone calls are usually made as a result of some animosity or hostility toward the recipient of the call. At the very least, hostility toward appellant is something the jury could reasonably infer on the part of Mrs. Gadberry or someone in her household.

The proffered testimonies were evidence of Mrs. Gadberry's possible bias or prejudice against appellant and it was error for the trial court to prevent appellant from presenting such information to the jury. Furthermore, given the fact that Mrs. Gadberry's testimony was appellee's only corroborating evidence of her claim, appellant was prejudiced by the trial court's error. We therefore reverse and remand for a new trial.

MAPLE LEAF CANVAS, INC. *v.* Michael ROGERS and Serena Rogers

92-469 842 S.W.2d 22

Supreme Court of Arkansas
Opinion delivered November 23, 1992

[redacted]

John P. Lewis, for appellant.

Sky Tapp, for appellee.

ROBERT L. BROWN, Justice. The sole issue in this case is whether the circuit court abused its discretion in entering a default judgment against the appellant, Maple Leaf Canvas, Inc. We hold that it did not, and we affirm the judgment.

The appellees, Michael Rogers and Serena Rogers, reside in Hot Springs in Garland County, and Maple Leaf does business in North Little Rock in Pulaski County. In April 1989, Maple Leaf sold a 175-foot canvas canopy to the appellees. That canopy developed problems and was replaced under warranty a year later by the manufacturer, United Textile. The second canopy then began to leak, and the appellees demanded a second replacement. When that was not forthcoming, they filed suit in Garland County on May 22, 1991. Service on Maple Leaf was attempted by certified mail, return receipt requested in North Little Rock, but the letter was not received, and service was not effected.

An attorney ad litem for Maple Leaf was appointed in Garland County. That attorney sent a certified letter, return receipt requested, restricted delivery, to Maple Leaf on June 6, 1991, advising it of the lawsuit and of the fact that a warning order was being published and enclosing a copy of the complaint and summons. The letter was addressed to Maple Leaf Canvas, Inc., c/o E. Gordon Oates, registered agent for service. The green return receipt was addressed to E. Gordon Oates, Maple Leaf Canvas, Inc. The box on the receipt entitled "Restricted Delivery" was checked. The attorney also caused a warning order to be issued and published in the *Sentinel Record* in Garland County on June 18, 1991, and June 25, 1991, warning Maple Leaf to appear in court in thirty days.

On June 18, 1991, Ron West, vice president of Maple Leaf, accepted the certified letter and signed the receipt card as the

addressee. He then delivered it that same day, unopened, to Gordon Oates, the registered agent for service of process. The unopened letter with complaint and summons languished on Oates's desk until late August 1991, when he opened it and immediately contacted counsel.

The appellees moved for default judgment, and Maple Leaf responded that excusable neglect existed for the delay since service had not been properly effected on Maple Leaf. It further urged that it had a meritorious defense to the lawsuit. No challenge to the circuit court's personal jurisdiction was mounted by Maple Leaf. The circuit court refused to find excusable neglect and awarded judgment to the appellees in the amount of $6,800.

Our standard of review for the granting or denial of a motion for default judgment is whether the trial court abused its discretion. *B & F Engineering* v. *Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992); *Cammack* v. *Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984). We have noted in our cases that default judgments are not favored in the law and that a default judgment may be a harsh and drastic result affecting the substantial rights of the parties. *CMS Jonesboro Rehabilitation, Inc.* v. *Lamb*, 306 Ark. 216, 812 S.W.2d 572 (1991); *Burns* v. *Madden*, 271 Ark. 472, 609 S.W.2d 55 (1980). We have also stated that failure to attend to business is not excusable neglect. *CMS Jonesboro Rehabilitation, Inc.* v. *Lamb, supra.*

To accomplish service by mail under Rule 4 of the Arkansas Rules of Civil Procedure, the return receipt must be signed by the addressee or the agent of the addressee. We have stated that requirements under Rule 4, being in derogation of common law, must be strictly followed. *Cole* v. *First National Bank, supra; citing Wilburn* v. *Keenan Cos.* 298 Ark. 461, 768 S.W.2d 531 (1989).

Personal jurisdiction is not at issue in this appeal because Maple Leaf does not contest it. Maple Leaf raises only the defense of excusable neglect due to the fact that the corporation's registered agent, Gordon Oates, did not sign for the letter. Thus, the question confronting us concerns the identity of the addressee — Maple Leaf or E. Gordon Oates — because the letter was sent in care of Oates. The circuit court stated at the hearing that the letter spoke for itself on this point. We conclude, as the circuit

court undoubtedly did, that Maple Leaf was the addressee. The letter was addressed to Maple Leaf, and Maple Leaf was the party defendant. In these circumstances, it is incumbent upon the entity seeking to utilize the defense of excusable neglect in order to set aside the default judgment to show that the receipt card was signed by someone other than the addressee or someone not authorized under Ark. R. Civ. P. 4(d)(5). Ron West, a vice president of Maple Leaf, signed the return receipt on the addressee line for Maple Leaf. Nothing in the record refutes Ron West's authority to accept Maple Leaf's mail. He then promptly turned the mail over to Gordon Oates, registered agent for service.

The mail sat on Oates's desk for two months. No reason for the lapse is offered. Rather, Maple Leaf contends that no prejudice resulted to the appellees and that it has a meritorious defense. Maple Leaf, however, must first satisfy the court that a threshold reason exists for denying default judgment. The reason it presents is not convincing. The failure to answer the complaint seems due more to carelessness or, as in the case of *CMS Jonesboro Rehabilitation, Inc.* v. *Lamb, supra*, a result of not attending to business.

The circuit court did not abuse its discretion, and this court will not disturb the decision of the trial court absent an abuse of discretion. *Wilburn* v. *Keenan Companies, Inc., supra.*

Affirmed.

Daniel L. MEDLOCK, et al. *v.* Timothy J. LEATHERS,
Commissioner of Revenues, et al.
City of Fayetteville, Arkansas

89-89 842 S.W.2d 428

Supreme Court of Arkansas
Opinion delivered November 23, 1992
[Rehearing denied January 11, 1993.*]

*Dudley, J., not participating.

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

Larry D. Vaught, for appellees Patricia Tedford and Pulaski County.

William E. Keadle, for appellee Commissioner of Revenues.

James M. McCord, for intervenor City of Fayetteville.

KENNETH R. MOURTON, Special Justice. This case involves the issue whether Arkansas' imposition of a gross receipts tax violates the Equal Protection Clause of the Fourteenth Amendment. We hold that no such violation occurred even though the tax applied to cable television operators and subscribers while remaining silent as to satellite subscribers and operators. The chancellor's order denying and dismissing the equal protection claim is affirmed. A finding of the statute's constitutional validity allows us to dismiss the Supremacy Clause issue.

On March 21, 1987, the Arkansas General Assembly adopted Act 188 of 1987 [Act 188], effective July 1, 1987, amending the previous statute concerning the Arkansas gross receipts tax. Act 188 added cable television to the list of services that had state and local sales taxes imposed on them. It did not, however, apply to other forms of mass media, particularly scrambled satellite television services. The appellants filed a class action on May 28, 1987, requesting that Act 188 be declared an illegal exaction discriminating among mass media.

Appellants are Daniel L. Medlock, a cable subscriber, Community Communications Company, the Arkansas Cable Television Association, Inc. on behalf of themselves and all other similarly situated taxpayers subjected to the television services sales tax. The appellees are James C. Pledger, the Commissioner of Revenues, Timothy J. Leathers and various state, county, and city officials, Pulaski County, the City of Benton, and all similarly situated counties and cities. The City of Fayetteville intervened. Appellants claimed a variety of their constitutional rights had been violated: freedom of speech; freedom of the press; equal privileges and immunities; freedom of equal protection of the laws and protection under the Supremacy Clause. These allegations centered primarily on the claim of discrimination against cable television under the First Amendment. This court origi-

nally held that the First Amendment required similar taxation of cable and satellite providers. The U.S. Supreme Court found that imposing the fee upon cable alone did not impede cable's free speech ability to act as a check on government nor did it target a small group of speakers or discriminate on content and was therefore constitutionally permissible. *Leathers* v. *Medlock*, ___ U.S. ___, 111 S. Ct. 1438 (1991). We originally found that cable and satellite businesses were similarly situated because they ended in substantially the same result — video programming. *Medlock* v. *Pledger*, 301 Ark. 483, 785 S.W.2d 202 (1990), *aff'd in part, rev'd in part, Leathers* v. *Medlock*, ___ U.S. ___, 111 S. Ct. 1438 (1991). The case has been remanded to us for consideration of the issue that we did not originally reach: whether the Equal Protection Clause required similar taxation of cable and satellite providers. We allowed the parties to address the Supremacy Clause issue during this remand.

The chancery court[1] found in favor of appellees and determined Act 188 was not an illegal exaction. After the chancellor's decision,[2] Act 188 was amended by Act 769 of 1989, effective July 1, 1989, to include "[s]ervice of cable television, community antenna television, and any and all other distribution of television, video, or radio services . . . ." Ark. Code Ann. § 26-52-301(3)(D)(i) (Repl. 1992).

I.

The Fourteenth Amendment of the U.S. Constitution provides, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In previous equal protection cases this court has determined that tax legislation often survives the rational basis test. *Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). The court stated, "[u]nder the rationality standard of review, we must presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective." *Id.* at

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[1] The Honorable Lee A. Munson, Chancellor, First Division, Pulaski County Chancery Court presided.

[2] Chancellor Munson entered an Opinion on March 10, 1989, and an Order and Judgment on March 13, 1989.

213, 655 S.W.2d at 463. Awareness of local needs and usages of funds helps the legislature form equitable distributions of tax burdens. Such knowledge and familiarity with community conditions have traditionally allowed courts to tolerate legislatively created classifications. *See generally Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983) (stating that legislatures have extremely broad latitude in creating classifications and distinctions in tax statutes); *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938) (holding that state legislatures may identify or designate a particular class to be the object of a tax so long as the state does not violate the class' rights to equal protection of the laws); *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32 (1928) (explaining that flexibility is granted to states to classify for taxation purposes); *Citizens' Tel. Co.* v. *Fuller*, 229 U.S. 322, *aff'd*, 229 U.S. 335 (1913) (reviewing numerous decisions where state legislatures were allowed to discriminate among different persons in taxation statutes).

"Inherent in the power to tax is the power to discriminate in taxation." *Leathers*, ___ U.S. at ___, 111 S. Ct. at 1446. Courts should defer to local legislative determinations as to the desirability of imposing discriminatory measures. *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). A court will not strike down a classification merely because it is underinclusive. The law must be "purely arbitrary" in its classification; thus the only classification not allowed in taxing is invidious discrimination. *Id.* If a taxation statute discriminates in favor of one class it is not determined to be arbitrary so long as the discrimination is based upon a reasonable distinction, and if there is any hypothesized set of facts to uphold a rational basis. *Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). Appellants argue that hypothesizing a rational basis, as in *Streight*, should be beyond the power of this court. We view hypothesizing a rational basis the same as conceiving a rational basis; a practice that is available to the courts without question. We point to the language of *Streight* and conclude that any rational basis for a taxation statute may be developed at any time.

> In any event, the judiciary is allowed to hypothesize and . . . reach a conceivable basis for the exemp-

> tions which [it] conclude[s] are rational, reasonably distinctive and not arbitrary. It causes us to defer to legislative purpose because there is a rational basis for the tax . . . .
>
> . . . .
>
> 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.

Streight, 280 Ark. at 214-15, 655 S.W.2d at 464.

This court will give great deference to the General Assembly in the legislation of taxation where the clear intent of the statute is to raise revenue and not to discriminate among similarly situated individuals. In a similar equal protection case involving the media, Justice Rehnquist stated, "[w]e have shown the greatest deference to state legislatures in devising their taxing schemes." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 599 (1983) (Rehnquist, J., dissenting). Even without such deference Act 188 will survive the rational basis test when we apply the intervenor's argument. Arkansas, primarily a rural state, may classify between satellite and cable because the state needs satellite television transmission in those geographic areas where cable services are not feasible. We acknowledge other conceivable rational bases for the arguments that were addressed at oral argument but we are not compelled to discuss them here. One conceivable rational basis is enough to pass the test.

In searching for any rational basis, we ask whether the created classification has a conceivable reasonable relationship to the governmental action. *Madden* v. *Kentucky*, 309 U.S. 83 (1940). Under the rational basis test, a reasonable purpose of the legislation need not be determined at the time of passage of the statute. Because broad discretion to classify has long been recognized in taxation, *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938), "the Fourteenth Amendment

was not intended to compel the State[s] to adopt an iron rule of equal taxation." *Bell's Gap R.R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890).

Because of this presumption of a tax's constitutionality, the party challenging the tax has the burden of showing that no conceivable basis could ever support it. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). We originally determined cable and satellite to be "the purveyors of a particular medium." *Medlock* v. *Pledger*, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990). That "particular medium," video programming, is the end result of both cable and satellite. Because of the characteristics of television programming the process can be divided into several classes based on transmission techniques. Cable, both basic and premium, depends upon a sophisticated transmission system requiring substantial investments by cable companies. Satellite, however, merely requires installing a satellite dish by the user, as does an antenna user installing an antenna. The sophisticated transmission system is not needed. Descrambled satellite is only different from satellite in that it requires special programming at the programming location which is usually out of state. Even though the end result of the video programming is similar, satellite and cable providers transmit their signals to viewers in different ways; therefore, a distinguishable classification at the initial stage of programming exists.

II.

Counsel for appellants, in their briefs and at oral argument, displayed a misconception of the purpose and strength of Special Justices. Although we trust this misconception is not widespread, we are compelled to address it in hopes of avoiding confusion in the future. Special Justices are an intricate and necessary part of our judicial system and shall continue to enjoy the distinguished positions they have traditionally possessed throughout our history. To say that any law created by Special Justices is some type of "special law" which does not need the public's compliance is a fallacy.

This court has numerous opinions authored by Special Justices. Due to the doctrine of *stare decisis* these cases have been upheld and applied to similar fact patterns. *Bosworth* v. *Pledger*,

305 Ark. 598, 810 S.W.2d 918, *cert. denied*, 112 S. Ct. 617 (1991) involved four Special Justices while the Court in *Streight*, 280 Ark. 206, 655 S.W.2d 459, was comprised entirely of Special Justices. In *Streight* the issue involved retirement income tax exemptions of government employees. The Justices all recused themselves because the outcome of that case affected their financial interests. Had the safety valve of Special Justices not been present, the case may well have never been litigated. *Bosworth* involved equal protection arguments on a state sales tax on telephone communication services. The decision, although written by a Special Justice, was a unanimous decision of the court. Both cases have been cited by this court and upheld even in situations where no Special Justices served.

When justices of this court find it necessary to disqualify themselves from participating in a case it is imperative that there be some safety valve that will allow the parties to continue before the court; Special Justices serve this purpose. To argue that the Special Justices are not true justices is absurd and only serves to create a myth that laws can be distinguished on varying levels of importance. For these reasons we conclude that any opinion of this court involving one or more Special Justices shall bear the same precedential value as any other.

III.

This court does not intend to favor or advocate particular lawyering tactics. We are obliged, however, to note that when counselors file briefs and appear before the court certain expectations exist. A party's argument is judged through the combination of briefs and oral arguments. There is a fundamental unfairness in not adequately and fully presenting one's position in the brief and waiting until oral argument to clarify it. Litigants are entitled to know all arguments so that they may prepare adequate responses. Requiring presentation of arguments in briefs enhances quicker resolution and more complete discussion of the issues.

Because both parties conceded the appropriate standard of review, the essential remaining issue in this case was whether the facts fit within the rational basis test. Appellees, therefore, should have submitted a more concise brief presenting conceivable bases for the statute. It is not the job of the court, but rather of attorneys

to present arguments to bolster their positions. Counsel representing appellees did not advance any possible rational bases and initially replied ambiguously when questioned by the bench at oral argument. Upon further questioning, however, he provided his examples of rational bases for Act 188's different treatment of cable and satellite. He also stated that it was a "hearing tactic" to not disclose the purpose or basis in the brief but to disclose at oral argument. We are concerned with such techniques because we often make determinations based on the disclosure in briefs and argument. These actions do not afford the opposing party any fair opportunity to respond.

Ark. Sup. Ct. R. 18(j) provides that "[i]f a case outside the brief is to be cited, the citation must be furnished opposing counsel in advance as soon as possible." This requirement and the other guidelines of Rule 18 are for the purpose of having arguments where all parties are fully prepared. Because we will not permit counsel, absent necessity or special permission, to read from books, counsel should make all responsible efforts to disclose their basic positions prior to arguments. Although the outcome of this case was not substantially affected by the actions of counsel, we find it appropriate that counsel should fully disclose and develop their respective positions in the briefs.[3]

IV.

Appellants argue that Act 188 conflicts with and is preempted by the Federal Cable Communications Policy Act of 1984 [Cable Act], codified as 47 U.S.C. §§ 521 to 559, 611 (1988 & Supp. 1990). We find this issue is without merit. Appellants argue that Act 188, by taxing cable without taxing satellite unduly discriminated against cable and thus violated the federal cable act. Appellants also state that Congress was trying to create a national policy that would deal with the problems that arise when state and local governments discriminatorily impose general taxes. There is, however, no actual conflict between the Cable Act and Act 188. When Congress defined "franchise fee" in the Cable Act, it recognized that general taxes could be imposed on

[3] Counselors will continue to have flexibility to elaborate arguments, explain positions, or answer questions even after following this procedure.

cable. 47 U.S.C. § 542(g)(2)(A) (1988). Because we have determined that Act 188 was not unduly discriminatory, the Supremacy Clause issue is without merit.

Article VI, Clause 2 provides, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the . . . laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. As Section 542(g)(2)(A) provides, "the term 'franchise fee' does not include . . . any tax . . . of general applicability" and may be imposed on cable services so long as it is not "unduly discriminatory."

In the 1941 case of *Hines* v. *Davidowitz*, the U.S. Supreme Court warned about preemption cases; "[b]ut none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In *Goldstein* v. *California*, 412 U.S. 546 (1973) the Court, in deciding whether a state law would be preempted, asked whether the state law stood as an obstacle to the accomplishment of Congress' objectives or purposes. This test was expanded in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), where the Court based preemption on four factors: whether Congress expressed a clear intent to preempt state law; whether Congress occupies the field so as to leave no room for the states to supplement; whether compliance with both the state and federal laws is impossible; and whether the state law stands as an obstacle to Congress' objective or purpose. *Id.*

When Congress passed the Cable Act, it intended to create a national policy governing cable communications while at the same time providing guidelines for state and local authority to regulate cable systems. 47 U.S.C. § 521(1), (3) (1988). Once Congress left the door open for state and local governments to regulate, it did not intend to preempt any legitimate state legislation; nor did it totally occupy the field of cable communications. It is possible to comply with both state and federal laws, likewise, the state statute does not stand as an obstacle to Congress' purpose. Act 188 fits within the area of discretion left

by the Cable Act to allow state and local communities to regulate and tax cable services as they choose. We therefore dismiss the preemption issue.

Affirmed.

Dudley, J. not participating.

Ronnie REED *v.* STATE of Arkansas

CR 92-41 840 S.W.2d 808

Supreme Court of Arkansas
Opinion delivered November 23, 1992

PER CURIAM. In this case, the court was required to issue an order on counsel, James P. Massie, to appear before us on Monday, November 2, 1992, and show cause why he should not be held in contempt. In sum, Mr. Massie failed to file a brief due on August 2, 1992, and failed to respond to the clerk's letter explaining why. In fact, no brief or response had been filed at the time the court's show cause per curiam was issued on October 19, 1992.

Mr. Massie appeared before us on November 2, 1992, and pled guilty. He filed his brief with the court on November 18, 1992.

Based on the record before us, Mr. Massie is held in contempt of this court and fined $250.00.

Shelly VOYLES *v.* Danny VOYLES

92-1148 842 S.W.2d 21

Supreme Court of Arkansas
Opinion delivered November 23, 1992

Mike J. Etoch, for appellant.

Fletcher Long, for appellee

PER CURIAM. In this civil case, the appellant's tender of the transcript was denied by our clerk because the order extending the time to file the transcript was not *entered* within the ninety-day period. *See* Ark. R. App. P. 5(b).

The trial court signed the order within the ninety-day period, but it was not *entered* within that period. Rule 4(e) of the Arkansas Rules of Appellate Procedure provides that a final "order is *entered* within the meaning of this rule when it is filed with the clerk of the court in which the claim was tried." (Emphasis supplied.)

We explained in *Finley* v. *State*, 281 Ark. 38, 661 S.W.2d 358 (1983) and *Sullivan* v. *Wickliffe*, 284 Ark. 33, 678 S.W.2d 771 (1984), that the critical factor in this type of case is when the order is *entered*, not when it is signed.

In this case the order was timely signed and filed with the judge, but not with the clerk of the court. A question has been raised about a possible conflict of the above quoted rule of appellate procedure with one of our rules of civil procedure. Ark. R. Civ. P. 5(d) provides:

> Filing with the Judge. The judge may permit papers or pleadings to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

We addressed this issue in *Sullivan* v. *Wickliffe, supra*, and explained that an order cannot be deemed *entered*, or filed with the clerk, just because it is signed by the judge and it contains a recitation that it is filed, when in fact it is not filed with the clerk. If our rules were otherwise, the prevailing party could not discover *by public record* whether the case was ended.

Motion for a rule on the clerk is denied.

Winston BRYANT, Attorney General *v.* Dr. Arthur ENGLISH, the Republican Party of Arkansas, the Democratic Party of Arkansas, and Martin Borchert *v.* Jim Guy Tucker, Lieutenant Governor

92-1284 843 S.W.2d 308

Supreme Court of Arkansas
Opinion delivered December 4, 1992

Winston Bryant, Att'y Gen., by: *Royce Griffin*, Chief Deputy Att'y Gen., for appellant.

Youngdahl, Trotter, McGowan, O'Connor & Farris, by: *Scott Trotter* and *Kimberly Salors*, for appellee Dr. Arthur English.

Karr, Hutchinson & Stubblefield, by: *Asa Hutchinson*, for appellee Republican Party of Arkansas.

Rose Law Firm, by: *Vincent Foster, Jr.* and *Webb L. Hubbell*, for appellee Democratic Party of Arkansas.

Gill, Wallace, Clayton, Flemming, Elrod & Green, by: *John P. Gill*, for appellee Martin Bochert.

L. Scott Stafford, for cross-appellant Jim Guy Tucker.

ROBERT H. DUDLEY, Justice. On November 6, 1990, Governor Bill Clinton was re-elected to the Office of Governor, and Jim Guy Tucker was elected to the Office of Lieutenant Governor. Both were elected and commissioned to four-year terms of office that commenced on January 15, 1991. On November 3, 1992, a little over twenty-one months later, Governor Clinton was elected to the Office of President of the United States of America. It is anticipated that Governor Clinton will resign from the Office of Governor before January 20, 1993, which is the day the oath of the Office of President of the United States will be administered. The result will be that a vacancy will exist in the Office of Governor, and more than twelve months will remain on the four-year term to which Governor Clinton was elected.

This suit for a declaratory judgment was filed requesting an interpretation of the various provisions of the Constitution of Arkansas regarding succession to the Office of Governor when the Governor resigns with more than twelve months remaining in the term of office. The trial court entered a judgment declaring that upon the resignation of Governor Clinton, the powers and duties of the Office of Governor, but not the office itself, will devolve upon the Lieutenant Governor for the remainder of the four-year term. The trial court also ruled that a special election to fill the office is not required and that the Lieutenant Governor is not authorized to appoint a successor to the Office of Governor. Attorney General Winston Bryant appeals from the judgment,

and Lieutenant Governor Jim Guy Tucker cross-appeals from that part of the judgment declaring that the Office of Governor does not devolve upon the Lieutenant Governor. On direct appeal, we affirm the trial court's judgment and hold that upon the resignation of a Governor, the powers and duties of the Office of Governor devolve upon the Lieutenant Governor for the remainder of the four-year term, and, on cross-appeal, we reverse and hold that the Office of Governor itself devolves upon the Lieutenant Governor.

I. Procedure

The Declaratory Judgments Act, Ark. Code Ann. §§ 16-111-101 — 16-111-111 (1987), provides that the purpose of the act is "to afford relief from uncertainty . . . with respect to . . . status," and the act is to be liberally construed to that end. The parties stipulated in the trial court that they anticipate that Governor Clinton will resign from the Office of Governor, and the trial court held that a justiciable controversy exists. We have concluded that we should decide the issue because it is a matter of significant public interest and a matter of constitutional law. *See Bennett* v. *N.A.A.C.P.*, 236 Ark. 750, 370 S.W.2d 70 (1963).

II. Background

Neither the 1836 Constitution of Arkansas nor the 1861 constitution provided for the office of Lieutenant Governor. Those constitutions placed the President of the Senate next in the line of succession for the Office of Governor, and they required a special election if the remaining term of the Governor exceeded a certain period of time. The 1864 constitution, for the first time, created the office of Lieutenant Governor and provided for a statewide election to the office. Ark. Const. of 1864, art. VI, § 19. The 1868 constitution also provided for a Lieutenant Governor and stated that if the Office of Governor became vacant, the Lieutenant Governor served during the "residue of the term." It made no provision for a special election to fill the vacancy. Ark. Const. of 1868, art. VI, § 10.

Unfortunately, the present Constitution of Arkansas, adopted in 1874, did not originally provide for the office of Lieutenant Governor. Article 6, sections 12 and 13 of the present constitution, originally placed the President of the Senate,

followed by the Speaker of the House, in the line of gubernatorial succession, but article 6, section 14 required a special election to fill a vacancy in the Office of Governor when the office was vacated more than twelve months before the expiration of the Governor's term. Article 6, section 12 of the present constitution originally provided that in the event of the "death, conviction or impeachment, failure to qualify, resignation, absence from the State or other disability of the Governor," the powers and duties of the office devolved on the President of the Senate "for the remainder of the term, or until the disability be removed, or a Governor elected and qualified." When construed with the special election procedure of article 6, section 14, the reason for each of these three limitations on the President of the Senate's period of service is obvious. Each limitation on service was tied to a different contingency. If the Governor became disabled, the President of the Senate served as Governor until the disability was removed. If the office became vacant through death, impeachment, or resignation of the Governor less than twelve months before the end of the Governor's term, the President of the Senate served "for the remainder of the term." If the vacancy in office occurred more than twelve months before the end of the Governor's term, the President of the Senate served until "a governor [was] elected and qualified" at a special election called in accordance with article 6, section 14.

Only days after his inauguration on January 18, 1907, Governor John Sebastian Little suffered a nervous breakdown. Arkansas History Commission, 1 *Annals of Arkansas 1947* 239 (Dallas T. Herndon ed., 1947) [hereinafter *Annals*]. On February 11, 1907, Governor Little wrote Senator John I. Moore, the President of the Senate, and asked him to assume the duties of Governor. Senator Moore served as acting Governor until the adjournment of the General Assembly on May 14, 1907. *Id.* at 239. He was succeeded as acting Governor by Senator X.O. Pindall, who was elected President of the Senate shortly before its adjournment. Senator Pindall served as chief executive for sixteen months from May 15, 1907, until January 11, 1909, when he was replaced by the newly elected President of the Senate, Jesse M. Martin. *Id* at 240. Senator Martin was acting Governor for three days until the inauguration of George W. Donaghey, who had been elected Governor at the general election of 1908.

Id. at 240. In sum, during the two-year period between January 15, 1907, and January 15, 1909, the affairs of Arkansas were in the hands of no less than six governors: Jeff Davis, John Sebastian Little, John I. Moore, X. O. Pindall, Jesse M. Martin, and George Donaghey. *See id.* at 233, 239-41.

The first seven months of 1913 were even more trying; they amounted to a gubernatorial succession crisis. The crisis was triggered when Governor Joe T. Robinson resigned from office following his election to the United States Senate. *Id.* at 247. W. K. Oldham was President of the Senate when Governor Robinson resigned, but because Senator Oldham was prohibited by article 5, section 18 of the constitution from serving past the end of the legislative session, the Senate elected J. M. Futrell as its President prior to adjournment on March 13, 1913. *See id.* at 251. Oldham argued that pursuant to article 6, section 12, he succeeded to the Office of Governor when Governor Robinson resigned and did not cease to be Governor when a new Senate President was elected. Futrell argued that he became Governor by virtue of his election as President of the Senate two days after Governor Robinson's resignation. *In Futrell* v. *Oldham*, 107 Ark. 386, 155 S.W. 502 (1913), this court ruled in Futrell's favor, holding that under article 6, section 12, the powers and duties of Governor devolved upon the office of the President of the Senate and not upon the individual occupying that office. In sum, during the first seven months of 1913, state government was headed by five different individuals: George Donaghey, Joe T. Robinson, W. K. Oldham, J. M. Futrell, and George W. Hays. *See Annals, supra,* at 244, 247, 251. This was labeled our "procession" of governors. Dr. David Y. Thomas, 1 *Arkansas and Its People; A History, 1541-1930* 282 (1930). The newspapers of the time spoke of the confusion. The *Arkansas Democrat* of January 31, 1913, contained an article that began, "Political complications in Arkansas are as thick as a London Fog." The February 8, 1913, *Arkansas Democrat* carried an article that contains the sentence, "Kill off the antiquated method of filling a gubernatorial vacancy."

III. Amendment 6

In February 1913, Representative Kidder introduced a House Joint Resolution for a constitutional amendment that

would create the office of Lieutenant Governor. In part, it was a replication of the provision in the 1868 constitution. The March 5, 1913, *Arkansas Democrat* wrote: "There is no sound argument against the office proposed. It fixes the status of the governor's successor and does away with a special election to fill a vacancy." On March 6, 1913, Amendment 6 to the 1874 constitution was proposed by the General Assembly. *See* 1913 Ark. Acts 1527. Amendment 6 was submitted to, and approved by, the voters at the 1914 general election. *See Combs* v. *Gray*, 170 Ark. 956, 281 S.W. 918 (1926), for additional history of the adoption.

Amendment 6, section 4 provides: "In the case of the [resignation] of the Governor, . . . the powers and duties of the office, shall devolve upon the Lieutenant Governor for the residue of the term. . . ." In interpreting constitutional amendments, we have said that a court, in order to determine the meaning and the extent of coverage of a constitutional amendment, may look to the history of the times and the condition existing at the time of the adoption of the amendment in order to ascertain the mischief to be remedied and the remedy adopted. *Huxtable* v. *State*, 181 Ark. 533, 26 S.W.2d 577 (1930). "Amendments to a constitution are not regarded as if they had been parts of the original instrument but are treated as having a force superior to the original to the extent to which they are in conflict." *Grant* v. *Hardage*, 106 Ark. 506, 509, 153 S.W. 826, 827 (1913). Repeal by implication is accomplished when a constitutional amendment takes up a whole subject anew and covers the entire subject matter of the original constitution. *McCraw* v. *Pate*, 254 Ark. 357, 494 S.W.2d 94 (1973); *Berry* v. *Gordon*, 237 Ark. 547, 376 S.W.2d 279 (1964); *Pulaski County* v. *Downer*, 10 Ark. 588 (1850). Further, a constitutional amendment is to be interpreted and understood in its most natural and obvious meaning. *Carter* v. *Cain*, 179 Ark. 79, 14 S.W.2d 250 (1929).

Amendment 6 took up a new subject matter of gubernatorial succession. The citizens wanted to prevent any more gubernatorial succession crises and sought to change the procedure previously set out in article 6. It is impossible to reconcile the natural and obvious meaning of the language of the amendment, quoted above, with the special election procedure set out originally in article 6, section 14 in the factual situation before us. If the appellant Attorney General's suggested meaning were

adopted, and we construed "residue of the term" to only mean the Lieutenant Governor takes office only until the next special election, the constitutional amendment would, in part, amount to an exercise in futility. For these reasons, we hold that amendment 6, section 4 provides that the Lieutenant Governor serves as Governor for the residue of the term and not merely until a new Governor is elected at a special election.

We do not decide whether the special election process set out in article 6 is still viable if the Lieutenant Governor becomes Governor and then vacates the office. That issue is not before us.

The trial court ruled that the "powers and duties of the Office of Governor, but not the Office of Governor" devolved upon the Lieutenant Governor. The trial court's ruling was undoubtedly based on our decision in *Futrell* v. *Oldham*, 107 Ark. 386, 155 S.W. 502 (1913), and certainly that case contains language stating that, under article 6, the President of the Senate exercised the powers of the Office of Governor, but did not actually become Governor. For several reasons, we think the holding of *Futrell* should be distinguished when the Governor resigns and his place is taken by the Lieutenant Governor under the provisions of amendment 6.

First, the framers of amendment 6 took verbatim from article 6, section 10 of the 1868 constitution the phrase "the powers and duties of the office shall devolve upon the Lieutenant Governor," and they did so without having the opportunity to read this court's opinion in *Futrell*. The House Joint Resolution proposing amendment 6 was adopted on March 6, 1913, eighteen days before this court handed down the decision in *Futrell* on March 24, 1913.

Second, in deciding *Futrell*, this court was obviously concerned that the President of the Senate had never been elected by a direct statewide vote—he had been directly elected only by the voters of a local state Senate district. The opinion provides:

> The central thought [of article 6, sections 12, 13, and 14] is, that the office of Governor is never to be filled at all except by the direct vote of the people themselves, and provision is made by the Constitution for only a temporary devolution of the duties and emoluments of the office upon

> some other functionary while a vacancy exists.

107 Ark. at 394, 155 S.W. at 505. Under amendment 6, section 2, the Lieutenant Governor is now elected by a direct statewide vote of the people at the same time and for the same term as the Governor.

An equally important distinguishing factor is that today, under amendment 6, section 2, the Lieutenant Governor is a member of the executive branch of the government, but under article 6, as interpreted in *Futrell* v. *Oldham*, the President of the Senate was a member of the legislative branch and remained such while performing the duties of governor only until an election could be called. The opinion provides:

> So, if the person discharging for the time being the duties of Governor is still President of the Senate, he cannot be Governor. He may exercise the powers of the latter office — "exercise the office of Governor," as it is otherwise expressed in another section, but he does not fill the two offices.

107 Ark. at 391, 155 S.W. at 504.

Under amendment 6 we are not faced with the same problem. In fact, allowing the Lieutenant Governor to succeed to the Office of Governor eliminates the separation of powers and the dual office-holding problems. If the Lieutenant Governor were not to assume the Office of Governor, he would act as Governor and still preside over the Senate and have the power to cast votes in the event of tie votes. This mixing of executive and legislative powers is avoided when the Lieutenant Governor assumes the Office of Governor and sheds the duties of Senate President. For these reasons, *Futrell* v. *Oldham* is distinguished.

Amendment 6, section 4 provides that if the Office of Governor becomes vacant, "the powers and duties of the office, shall devolve upon the Lieutenant Governor for the residue of the term." The next section of the amendment, section 5, provides that if the offices of both Governor and Lieutenant Governor become vacant, the President (pro tempore) of the Senate "shall act as Governor until the vacancy [is] filled." Similarly, the Speaker of the House "shall act as Governor until the vacancy be filled" if the President of the Senate becomes unable to act as

Governor. The difference in language suggests that the Lieutenant Governor, unlike the President (pro tempore) of the Senate or the Speaker of the House, does not merely act as Governor when the Governor resigns. Rather, it suggests that he becomes the Governor.

It is also of some persuasion that for nearly three-quarters of a century the executive branch has treated a lieutenant governor as governor when he filled a vacant governor's office. The first instance occurred in 1926 when Lieutenant Governor Harvey Parnell succeeded Governor John E. Martineau. *Historical Report of the Secretary of State-Arkansas* 230 (1978). It also occurred when Governor Dale Bumpers resigned from the Office of Governor and Lieutenant Governor Bob Riley was commissioned governor, as well as when Governor David Pryor resigned and Lieutenant Governor Joe Purcell was commissioned as Governor. See Commissions in Secretary of State's Office. In addition, we are persuaded that the drafters of amendment 6, and the voters who approved it, knew that article 6, section 2 would remain in place. It provides: "The supreme executive power of the State shall be vested in a chief magistrate, who shall be styled 'the Governor of the State of Arkansas.' "

Accordingly, we hold that amendment 6, section 4 provides that upon the resignation of the Governor, the Lieutenant Governor becomes "the Governor of the State of Arkansas."

One of the parties advanced the argument that amendment 29 of the Constitution of Arkansas requires the Lieutenant Governor to appoint a new governor. We summarily reject the argument and hold that amendment 6 specifically provides for filling a vacancy in the Office of Governor.

Affirmed on direct appeal and reversed on cross-appeal.

GLAZE and CORBIN, JJ., dissent in part and concur in part.

TOM GLAZE, Justice, concurring in part and dissenting in part. I concur in part and dissent in part. My disagreement with the majority court has nothing to do with its holding on the merits. In fact, I totally agree with its decision as it pertains to the merits, but disagree that this court procedurally reached the merits.

This lawsuit is a declaratory judgment action and, as such,

requires that a present actual controversy must exist. In stating this well-recognized principle, this court stated the following:

> The Declaratory Judgment Statute is applicable *only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented.* It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent or uncertain. A *declaratory judgment will not be granted* unless the danger or dilemma of the plaintiff is present, not *contingent on the happening of hypothetical future events*; the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote. (Emphasis added.)

Andres v. *First Ark. Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959); *see also Files* v. *Hill*, 268 Ark. 106, 594 S.W.2d 836 (1980); *McFarlin v. Kelly*, 246 Ark. 1237, 442 S.W.2d 183 (1969).

Justice John A. Fogelman stated the following reasons for the foregoing rule in a concurring opinion where he said:

> The declaratory judgment act is not intended to be the vehicle for advisory opinions to persons not having a justiciable controversy with their apparent adversaries by a court having no jurisdiction. It is far better, in my opinion, that important questions, particularly constitutional ones, be pounded out on the anvil of advocacy by persons whose interests are vitally real, not academic, with all interested parties before the court.

Block v. *Allen*, 241 Ark. 970, 980, 411 S.W.2d 21, 27 (1967).

Let me first point out the obvious — Governor Bill Clinton is *not* a party to this declaratory judgment action. Second, nowhere in the record before this court is it shown that the Governor has resigned or that he intends to resign his office. In an attempt to circumvent this obvious procedural defect in parties and the record, the parties appear to rely upon the Democratic Party of Arkansas's brief wherein it argues as follows:

> The fact that Governor Clinton's exact resignation date may not be known is not a bar to determining the

succession issue. Governor Clinton cannot serve both as Governor and President. Article 6, Section 11 of the Arkansas Constitution provides that no "person holding office under the authority of this State, or of the United States, shall exercise the office of Governor, except as herein provided." Governor Clinton's resignation now that he has been elected President cannot be doubted. Governor Clinton will resign no later than January 20, 1993, in order to assume the Presidency. Thus, it is assured that there will be a vacancy in the Governor's office no later than 58 days after November 23rd. The resulting vacancy in the office of Governor is hardly the hypothetical fact situation feared by the courts.

The parties to this lawsuit *cannot* stipulate or assume how a person not a party or witness in this case might act in the future; namely, that Governor Clinton will vacate the Governor's office. The majority court is wrong in allowing the parties to make such a stipulation, especially when this factual issue could have been resolved by having made the Governor a party to this action and his resignation could then have been easily confirmed. Nor was the Governor deposed or called as a witness so the resignation issue could be put to rest. Clearly, Governor Clinton has an interest in this cause since this case affects not only his duties and responsibilities as governor, but also involves the emoluments he receives from that office. Until the Governor resigns, the succession issue presented in this cause remains purely hypothetical and contingent upon his vacating the office of Governor.

In an obvious attempt to avoid the Governor's absence in this lawsuit and to cure a record failing to reflect the Governor's resignation, the Democratic Party cites Article 6, Section 11 of the Arkansas Constitution which is captioned "Incompatible Offices" and provides, "No member of Congress, or other person holding office under the authority of this State, or of the United States, shall exercise the office of Governor, except as herein provided." In citing this constitutional language, the Party concludes the Governor's resignation now that he has been elected President cannot be doubted. Of course, this is an assumption or conclusion the parties to this action are unable to make. Clearly, the above constitutional language does not mean Governor Clinton automatically resigns or vacates his office upon

being sworn in as President. In addition, such dual officeholder issues are decided in quo warranto or ouster, not declaratory judgment, proceedings.

My natural inclination is much like the majority court's and the parties in this case — that (1) the Governor likely will resign sometime prior to January 20, 1993, (2) a vacancy will then exist and (3) the succession problem will be a reality. However, to indulge in this assumption on the actual facts of this case is to ignore an entire body of law that provides this court only grants declaratory judgment relief when a *present actual controversy exists and all interested persons ar made parties.* This court's apparent willingness to address the hypothetical facts present here breaks with clear, prior precedent and, in my view, will permit parties henceforth to stipulate to future facts and events in order to obtain declaratory relief and advisory opinions. This court, instead, should require the presence of Governor Clinton in this lawsuit either as a party or a witness, so a finding as to his resignation from or vacating of office can be established. Only then will an actual controversy exist, allowing this court to decide the succession issue.

One last point — the Democratic Party, recognizing justiciability as a problem, asserts this court nevertheless can declare the law concerning the Governor-succession issue because this is a case of extreme public importance. In support of this assertion, it cites *Robinson* v. *Arkansas Game and Fish Commission*, 263 Ark. 462, 565 S.W.2d 433 (1978); *Moorman* v. *Taylor*, 227 Ark. 180, 297 S.W.2d 103 (1957); and *Rockefeller* v. *Purcell*, 245 Ark. 536, 434 S.W.2d 72 (1968). Suffice it to say, each of these cases, unlike the present case, once involved a justiciable controversy, but the actual controversy later became moot for one reason or another. Here, as already discussed, an actual controversy is yet to occur. The cases cited are simply not on point.

For the reasons above, I would reverse.

CORBIN, J., joins.

PRAIRIE IMPLEMENT CO., Inc. *v.* CIRCUIT COURT
of the Southern District of PRAIRIE COUNTY

92-678 844 S.W.2d 299

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Dick Johnston, for petitioner.

Dover & Dixon, P.A., by: *Gary B. Rogers* and *Monte D. Estes*, for respondent.

ROBERT H. DUDLEY, Justice. This petition for a writ of prohibition was filed by Prairie Implement Company, Inc., one of the codefendants below, asking us to prohibit the Circuit Court of the Southern District of Prairie County from entertaining a suit brought by Margaret McMullen. Prairie Implement argues that the writ should be issued because venue does not properly lie in the county in which the suit is pending. We deny the writ.

The law governing venue is clear. Since the adoption of our Civil Code in 1869 our statutes have defined certain local actions and directed that all other actions be brought in the county of the defendant's residence. *See* Ark. Code Ann. § 16-60-116 (1987). The separate districts of a county must be treated as separate counties. *Smith* v. *Waggoner*, 212 Ark. 345, 205 S.W.2d 465 (1947). We have said repeatedly that the purpose underlying our venue laws is to fix venue in the county of the defendant's residence unless for policy reasons, there is a statutory exception. *Atkins Pickle Co.* v. *Burrough-Uerling-Brasuell Consulting Eng'rs, Inc.*, 275 Ark. 135, 628 S.W.2d 9 (1982); *Wernimont* v. *State ex rel. Little Rock Bar Ass'n.*, 101 Ark. 210, 142 S.W. 194 (1911).

The respondent's brief mentions the fact that venue is not the same as jurisdiction, suggesting that an appeal would be the only remedy available to petitioner. Indeed, we have made this distinction *when there is a dispute of fact*. For example, in *Safeway Cab & Storage Co.* v. *Kincannon*, 192 Ark. 1019, 1021, 96 S.W.2d 7, 8 (1936), we wrote: "If petitioners preserve their objections to the jurisdiction of their persons in the trial of this cause, and an adverse verdict and judgment go against them or either of them, then, if erroneous, it may be corrected on appeal." In addition, there are many cases in which we have said that the only purpose of the writ of prohibition is to prevent a lower court from exercising a power not authorized by law when there is no other adequate remedy available. We have said a writ of prohibition is never issued to prohibit an inferior court from erroneously exercising jurisdiction, but rather is issued only where the lower court is wholly without jurisdiction, or is

proposing or threatening to act in excess of its jurisdiction. Our most recent expression of these principles can be found in *Forrest City Machine Works, Inc.* v. *Erwin*, 304 Ark. 321, 802 S.W.2d 141 (1991). A very early case, which thoroughly discusses the remedy of a writ, states that it is limited to cases in which subject-matter jurisdiction is lacking. *Williams, Ex Parte*, 4 Ark. 537 (1843).

This court understands that venue is a procedural matter, not a jurisdictional one. *Mark Twain Life Ins. Corp.* v. *Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984). This distinction is made clear in our holdings that, absent an objection, a trial court has the power to render a binding judgment even though venue was not proper. *See Gland-O-Lac* v. *Creekmore*, 230 Ark. 919, 327 S.W.2d 558 (1959). Even though lack of venue is not the same as lack of jurisdiction, we treated venue the same as jurisdiction-over-the-person for many years in determining whether a writ of prohibition should issue. Perhaps our reasoning has been based more on history than in logic.

In early years we held that if a defendant filed a motion objecting to venue or a motion to quash invalid service, and the trial court ruled against him, an appeal to this court served to enter his general appearance in the case no matter how erroneous the trial court ruling might have been. *Benjamin* v. *Birmingham*, 50 Ark. 433, 8 S.W. 183 (1887). For example, in *Waggoner* v. *Fogleman*, 53 Ark. 181, 13 S.W. 729 (1890), in a short but illustrative two-sentence opinion, we held that the judgment in the trial court was void for lack of service, but "the appellant having entered her appearance by the appeal is now in court, and no further service is required" upon remand. This unreasonable rule was severely criticized by the court in *Chapman & Dewey Lumber Co.* v. *Means*, 191 Ark. 1066, 88 S.W.2d 29 (1935), and finally overruled in *Anheuser-Busch, Inc.* v. *Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937). Perhaps in response to the harshness of such a rule, and because, with such a rule, an appeal could not afford an adequate remedy, we began to allow defendants to seek prohibition after they had objected to venue, even though it was not truly an objection to jurisdiction. Today, we continue to follow our precedent, and we will grant the writ when, on undisputed facts, a trial court erroneously finds that venue is proper. *Arkansas Bank & Trust Co.* v. *Erwin*, 300 Ark. 599, 781

S.W.2d 21 (1989); *Tucker Enterprises, Inc.* v. *Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983); *Beatty* v. *Ponder*, 278 Ark. 41, 642 S.W.2d 891 (1982); *International Harvester* v. *Brown*, 241 Ark. 452, 408 S.W.2d 504 (1966); *Monette Road Improvement Dist* v. *Dudley*, 144 Ark. 169, 222 S.W. 59 (1920). Accordingly, we will consider issuing the writ in this case.

Petitioner, Prairie Implement Company, Inc., does not maintain a place of business in the Southern District of Prairie County, nor does it have a principal office there, nor was it summoned there. The allegations of the complaint are that Margaret McMullen, in her own capacity and as the personal representative of the estate of Buddie McMullen, sued Ford Motor Credit Company, Ford Life Insurance Company, and Prairie Implement Company, Inc. She alleged that on October 19, 1989, Buddie McMullen "agreed to purchase," through an installment sales contract, a Ford tractor from Prairie Implement and that the purchase was conditioned upon Buddie McMullen's obtaining life insurance from Ford Life Insurance Company in an amount equal to the purchase price of the tractor. Prairie Implement acted as agent for Ford Life Insurance Company and took an application for the life insurance policy, and Buddie McMullen agreed to pay the premium on the credit life insurance, which was to be financed along with the purchase price of the tractor.

The complaint additionally stated that a representative of Prairie Implement later informed Buddie McMullen that the credit life application was incomplete, that more information about his health was needed, and that Buddie McMullen supplied this information. The complaint further states that on November 14, 1989, almost a month after the agreement to purchase was signed, "[E]mployees of Prairie Implement informed McMullen's son, Emil, that they had contacted Ford Credit, and that credit life coverage was in place for McMullen." The next morning, November 15, Buddie McMullen died, and his son Emil immediately notified Prairie Implement. The allegations of the complaint additionally state that in a letter dated November 14, but post-marked "November 15, 1989 p.m.," Ford Life Insurance rejected Buddie McMullen's application for credit life insurance, and, subsequently, Ford Life refused to pay any benefits to the estate of Buddie McMullen. Paragraph 9 of the

complaint states: "The refusal of Ford Life to make payment under the credit life policy constitutes a breach of contract." Paragraph 10 is as follows: "In justifiable reliance upon the misrepresentations by Prairie Implement, Ford Credit and Ford Life, and as a result of the aforesaid breach of contract," the plaintiff has been damaged in the amount of the amount due under the "installment sales contract." The plaintiff contends that the foregoing complaint states a cause of action both in contract and in tort.

All three defendants moved to dismiss for lack of venue, and, separately and additionally, Ford Life moved for summary judgment because it claimed there was no life insurance policy in effect. The trial judge, the highly regarded, but now deceased, Judge Cecil Tedder, denied the motion to dismiss in the only order entered in this case, finding that venue was proper as to Ford Life under a special venue statute involving the alleged breach of the contract of insurance because it was "the insured's residence." *See* Ark. Code Ann. § 23-79-204(a) (Repl. 1992). In the same order, the trial court concluded that, since venue was properly established for the breach of contract against one of the defendants, venue was also established for the breach of contract action against the other defendants, Ford Motor Credit Company and Prairie Implement. In addition, in the same order, the trial court granted summary judgment in favor of Ford Life and dismissed with prejudice the plaintiff's complaint against Ford Life. The record does not show that Prairie Implement presented any other motions to the trial court, or that there were any other orders.

In this petition for a writ of prohibition, the petitioner Prairie Implement argues that since venue of the contract cause of action rested entirely upon the service upon the insurance company and since that cause of action against the insurance company was dismissed with prejudice, venue was no longer proper against the other nonresident codefendants. *See Universal CIT Credit Corp.* v. *Troutt*, 235 Ark. 238, 357 S.W.2d 507 (1962); Ark. Code Ann. § 16-60-116(c) (1987). Because of that, Prairie Implement argues that it was left standing as a nonresident who had been individually sued under the contract cause of action, and venue does not lie against a nonresident in a contract cause of action. The argument may be well taken, but we do not decide the issue. While the record does show that the petitioner filed a second

objection to venue and alleged this ground, the record does not show that the argument was presented to the trial court, or that the trial court ruled on it.

The trial court, in its only ruling in this case, also held that the complaint alleges misrepresentation and that Rule 18(a) of the Arkansas Rules of Civil Procedure permits the joinder of independent multiple claims so that the tort action could be joined with the contract action against the defendants. If the contract action can no longer be maintained against the defendants, however, the misrepresentation claim could not either unless there is some independent basis for venue in Prairie County. A venue statute provides that "any action for any type of fraud" may be brought, among other locations, in the county in which the plaintiff resides. Ark. Code Ann. § 16-60-113(b) (1987).

In the petition in this court, petitioner Prairie Implement argues that plaintiff McMullen did not make sufficient factual allegations to state a cause of action for fraud. Rule 9 of the Arkansas Rules of Civil Procedure requires that "the circumstances constituting fraud . . . be stated with particularity." We have said, "The facts and circumstances constituting the fraud should be set forth. There should be some concealment, misrepresentation . . . by which another is misled, to his detriment; and these, or some of them, must be alleged and proved." *Beam Bros. Contractors* v. *Monsanto Co.*, 259 Ark. 253, 263, 532 S.W.2d 175, 180 (1976) (quoting *McIlroy* v. *Buckner*, 35 Ark. 555 (1880)). We have clearly set out the five elements that must be alleged to state a cause of action for fraud. *See Interstate Freeway Serv., Inc.* v. *Houser*, 310 Ark. 302, 306, 835 S.W.2d 872 (1992). While the argument that the complaint fails to state a cause of action for fraud may be well taken, we do not decide the issue. The record discloses that after the trial court's only ruling in this case, the petitioner filed a second objection to venue and in it for the first time pleaded that the complaint failed to state facts upon which relief can be granted. However, the record does not show that the motion was presented to the trial court, or that it was ruled upon by the trial court.

In sum, we do not decide either of petitioner's arguments for the writ because they were not raised below. We are

aware that the petitioner labels this an original action in this court, and the petitioner might argue, on rehearing, that it is not necessary in an original action to have raised the issues before the trial court when the facts are undisputed. In some original actions the argument might be valid, but not when the petition is based on lack of venue. *Monette Road Improvement Dist.* v. *Dudley*, 144 Ark. 169, 222 S.W. 59 (1920).

Petition denied.

STEPHENS PRODUCTION COMPANY, Arkla, Inc., Arkla Exploration Company, and Arkoma Production Company *v.* Mildred M. JOHNSON, Trustee of the Mildred M. Johnson Trust, Mamie J. Keifer, Rosamond Johnson, Nora House, Sara Adams Ridgway, Sunbelt Exploration Company, and Jim T. Walker

91-333 842 S.W.2d 851

Supreme Court of Arkansas
Opinion delivered December 7, 1992
[Rehearing denied January 11, 1993.*]

Smith, Stroud, McClerkin, Dunn & Nutter, by: *Hayes C. McClerkin* and *Barry A. Bryant*, for appellants.

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*Holt, C.J., and Brown, J., not participating.

Dorsey Ryan, for appellee.

Turner & Mainard, by: *Lonnie Turner*, for amicus curiae.

ROBERT H. DUDLEY, Justice. The chancellor cancelled the oil and gas leases to some of the vertical geological formations of a drilling unit. The defendant production companies appeal from the chancellor's finding that they have abandoned some of the formations, and the plaintiffs cross-appeal from the finding that the defendants have not totally abandoned the leases.

We cannot reach the merits of the case and must affirm the final order on both direct and cross-appeal for failure of the parties to comply with Rule 9(d) of the Rules of the Supreme Court and Court of Appeals. There is no abstract, by either the appellants or the cross-appellants, of the complaint, the cross-complaint, or either of the answers. An abstract of those pleadings would be helpful. There is no abstract of the chancellor's findings of fact or of the final order, and these are essential in order to understand this case. Equally critical are certain exhibits which are not abstracted or copied. The testimony of the witnesses about the exhibits is abstracted, but, without the exhibits, much of the testimony about the issues is meaningless.

It is necessary for a party to abstract the essential portions of the proceedings relied upon for appeal purposes. Otherwise, all seven members of the court would have to pass, from office to office, the one transcript and the one set of exhibits in order to examine and understand the case, and, with the number of cases submitted, that is impossible. We have no alternative other than to do as we have done in other comparable cases and affirm the decree of the chancellor. *See Hunter* v. *Williams*, 308 Ark. 276, 823 S.W.2d 894 (1992); Meyers Gen. Agency v. *Lavender*, 301 Ark. 503, 785 S.W.2d 28 (1990); *Cash* v. *Holder*, 293 Ark. 537, 739 S.W.2d 538 (1987); *Zini* v. *Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986).

Accordingly, we affirm pursuant to Rule 9(d).

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

Special Chief Justice WRIGHT and Special Justice ROSS concur.

ROBERT R. WRIGHT, Special Chief Justice, concurring. I concur in this decision with great reluctance. I concur only

because Rule 9 of the Rules of the Supreme Court and Court of Appeals has been violated. It is my view that Rule 9 should be amended to provide that as soon as the problem has been discovered, the attorney involved be given thirty days in which to correct the problem by filling a new abstract or such missing documents as may present a problem. As it exists in its present form, Rule 9 is extremely harsh to litigants and lawyers alike. It is procedural in nature, but its application is punitive. The Rule should be amended as stated to ameliorate its harshness and to prevent injustice to those litigants whom it affects.

The situation in this case was such that the justices involved had to place great reliance upon the transcripts. There were five volumes, and I read most of them totally and some in part. I also examined the legal issues, involved in a number of cases, treatises, and law review articles. I felt qualified after that to render a judgment on the merits.

It is my opinion, in that regard, that the Chancellor would have been affirmed, at least in large measure, if the merits had been reached. Under those circumstances, the application of Rule 9 would seem to make little difference in the outcome. While there was conflicting testimony and evidence, this Court adheres to the proposition that the Chancellor will be affirmed unless his holding is clearly erroneous. If for no other reason, affirmance would probably have resulted even though I did not agree with him in some respects.

One thing that I would have commented on if the case had been decided on the merits is a rule in Arkansas oil and gas law that seems not to be the better rule and, in fact, is contrary to that of some of our neighboring, oil-producing states. In Arkansas, a new lessee can obtain a second lease from the lessor and then notify the first lessee that his lease is not any good due to the failure to drill. *Byrd* v. *Bradham*, 280 Ark. 11, 655 S.W.2d 366 (1983); S. Wright, *The Arkansas Law of Oil and Gas*, 10 U. Ark. Little Rock L.J. 699, 705 (1988). The better rule is that there should be a burden on the lessor to notify the lessee that if a well is not drilled within a certain reasonable period of time, the lease will be cancelled and there will be a new lessee. E. Kuntz, J. Lowe, O. Anderson, & E. Smith, *Oil and Gas Law* 287 (1986). The effect of non-drilling would not necessarily cancel the lease,

which would still be subject to the prudent operator standard and the implied covenant of reasonable development, but requiring notice might help to prevent litigation, which should be an object of the judicial system.

JAMES A. ROSS, JR., Special Associate Justice, concurring. I concur in the results reached by the Court, but for different reasons. I would not affirm because of a failure to comply with Rule 9(d) of the Rules of the Supreme Court and Court of Appeals. However, based on the merits of the case, I would affirm the Decree of the Chancery Court of Franklin County on both direct appeal and cross-appeal.

Levonia GRAY *v.* STATE of Arkansas

CR 92-846 843 S.W.2d 315

Supreme Court of Arkansas
Opinion delivered December 7, 1992

William R. Simpson, Public Defender and *Joseph Cordi*, Deputy Public Defender, by: *Thomas B. Devine, III*, Deputy Public Defender.

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

STEELE HAYS, Justice. Appellant Levonia Gray argues in this appeal there was a lack of evidence at his bench trial to convict him of aggravated robbery, misdemeanor theft of property, and felon in possession of a firearm. Finding the evidence sufficient, we uphold the decision of the trial court.

Around 3:30 a.m. on September 11, 1991, a convenience store at 12th and Fair Park in Little Rock was robbed. The clerk described the robber as a black male, wearing a black ski mask, camouflage jacket and white pants. Two police officers, patrolling the area because of a spate of recent crimes, were parked in an alley near the store. They watched as a black male dressed in white pants and green camouflage jacket entered the convenience store and emerged moments later wearing a ski mask. He ran behind the building as they drove toward the rear of the building. There they discovered a brown Buick automobile parked in a vacant lot. An occupant, Frederick Ellis, was crouched down in the passenger's seat. He told them that he was waiting on a friend who had gone into the convenience store. He said the friend wore white pants and a green jacket. The vehicle contained papers belonging to Levonia Gray. Some distance away, between the store and the car, they found a black ski mask.

Levonia Gray was taken into custody. He told police he knew nothing of the robbery, and that a kid named Fred had spent the night in his car on the night in question. A voice lineup was conducted using six subjects and the clerk picked the voice of Levonia Gray.

Frederick Ellis testified at trial that he had been riding around with Gray when Gray parked behind the convenience store and told him to wait. After about ten minutes the police arrived but Gray never returned. Gray was convicted and sentenced as an habitual offender to a total of forty-eight years in the Department of Correction.

Levonia Gray contends the evidence is short on all counts. He submits the most telling evidence connecting him to the crime was the testimony of Frederick Ellis. But Gray maintains Ellis was an accomplice and his testimony must be disregarded under Ark. Code Ann. § 16-89-111(e)(1) (1987), providing that an accused may not be convicted of a felony on the testimony of an accomplice unless corroborated by other evidence tending to connect the accused with the crime. Gray cites those cases holding that the testimony of the accomplice must be excluded in determining whether the corroborating evidence is sufficient. *See, e.g., Henderson* v. *State*, 279 Ark. 435, 652 S.W.2d 16 (1983).

We cannot sustain the argument because the trial judge, sitting as fact finder, found that Ellis was not an accomplice, even though the police found him crouched down in the vehicle as they drove up to investigate. We cannot say on that ambiguous circumstance that Ellis was an accomplice as a matter of law. In reality it matters little how the accomplice issue is resolved, as the remaining evidence connecting Levonia Gray to the robbery was clear beyond any serious question — the clerk described the robber as a black male wearing white pants, camouflage jacket and ski mask; two officers saw a man dressed accordingly enter and leave the store headed toward the parked vehicle containing papers belonging to Levonia Gray; the ski mask was found some thirty feet from the car, as were tracks leading toward the car and then away from it; the clerk identified the voice of Levonia Gray as that of the robber and while the trial judge minimized the voice identification in his findings, he did not discount it altogether. In short, we find the evidence, though circumstantial, entirely adequate to support the conviction.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* Wayne AYRES and Jane Ayres

92-243 842 S.W.2d 853

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Robert L. Wilson, Philip N. Gowen, and *Charles Johnson,* for appellant.

Hobbs, Lewis, Mitchell, Garnett & Naramore, by: *Ronald G. Naramore,* for appellee.

DAVID NEWBERN, Justice. This case involves the Trial Court's decision to grant the appellees, Wayne and Jane Ayres, a new trial on the ground of juror misconduct. The appellant, Arkansas State Highway Commission (the Commission), argues the Trial Court lost jurisdiction by failing to rule on the motion for new trial within 30 days after it was filed, as required by Ark. R. App. P. 4(c) (1991). The Commission is correct, thus we must reverse and dismiss.

The Commission filed a complaint against the Ayreses seeking to condemn a portion of their property to build a highway. On June 27, 1991, a trial was held on the amount of compensation to be awarded for the taking. The jury returned a unanimous verdict finding the Ayreses were entitled to no compensation because the benefits of the highway exceeded any damages they might have suffered. Judgment was entered on the verdict on July 9, 1991.

The Ayreses filed a new trial motion on July 12, 1991. The Trial Court, by written order dated July 29, 1991, took the motion under advisement. A hearing on the motion was held August 19,

1991, an order granting a new trial was entered September 5, 1991, well over 30 days from the date the motion was filed.

Rule 4(c)

Rule 4(c), as amended by our Per Curiam order effective March 14, 1988, provides in part that if a trial court neither grants nor denies a new trial motion within 30 days of its filing, the motion will be deemed denied as of the 30th day. We have interpreted this provision to mean a trial court loses jurisdiction if a motion for new trial is not decided within 30 days from its filing. *Wal-Mart Stores, Inc.* v. *Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992).

The amendment deleted the language in the older version of Rule 4(c) which concerned taking a motion under advisement or setting a hearing date within 30 days, thus requiring that a motion for new trial be deemed denied if neither granted nor denied within 30 days from its filling. When counsel for the Ayreses filed his motion for new trial on July 12, 1991, Rule 4(c) did not mention taking a motion under advisement or setting a hearing date within 30 days.

The Ayreses argue that, despite the change in the Rule, when their new trial motion was filed, the law was unclear whether setting a hearing date or taking the motion under advisement within 30 days from filing would satisfy the requirements of Rule 4(c). They contend their confusion was caused by two of our opinions. The first is *Phillips* v. *Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991), which pre-dated the July 12th filing by approximately two months. In that case, there was no order deciding the new trial motion, taking it under advisement, or setting a hearing date within 30 days. Holding the Trial Court lacked jurisdiction, we wrote:

> Though Rule 4(c) was somewhat different prior to the effective date of our Per Curiam of March 14, 1988, which simplified its terms, it consistently has required the trial court to act in some form or fashion on new trial motions within thirty days of filing, and we have previously held that failure to act within that time frame results in loss of jurisdiction to grant the relief requested under the motion. We have further held that a decision by the trial court

> within the thirty days which is not entered of record fails to meet the dictates of Rule 4(c). (citations omitted).

The issue of whether taking a new trial motion under advisement or setting a hearing date within 30 days would satisfy the requirements of Rule 4(c) was not before us in the *Phillips* case. The clear implication, however, was that only a decision entered of record within 30 days will satisfy the requirements of Rule 4(c). An order taking a motion under advisement or setting a hearing date is not the equivalent of a "decision" of record.

The second opinion cited by the Ayreses is that of *Deason* v. *Farmers & Merchants Bank*, 299 Ark. 167, 771 S.W.2d 749 (1989). The Ayreses argue that in the *Deason* case we continued to discuss taking a new trial motion under advisement or setting a hearing date within 30 days even though our current Rule 4(c) had been adopted at the time of the decision. The Ayreses are in part correct in their assertions. The *Deason* case did contain references to the older version of the Rule despite the fact that the newer version was adopted over a year before the opinion was delivered. However, in 1985, when the original complaint in the *Deason* case was filed, the older version of Rule 4(c) was still in effect. The current version of Rule 4(c) was adopted approximately two and a half months before the final judgment was entered and the new trial motion was filed. On appeal, neither party raised the issue regarding the change in the Rule which had occurred after the filing of the complaint but before the entry of judgment and the filing of the motion for new trial.

We agree with the Ayreses counsel that the opinion in the *Deason* case could have been misleading and that we may have been remiss in failing to mention the Rule change despite the fact that it was not argued and might or might not have affected the outcome there. In view, however, of the clarity of the change in the Rule 4(c) and its undoubted applicability to this case, we have no choice but to reverse the Trial Court's order granting a new trial.

Reversed and dismissed.

GLAZE, J., concurs.

HAYS and CORBIN, JJ., dissent.

TOM GLAZE, Justice, concurring. I agreed with Judge Hays' dissent in *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991), but since that is now precedent, I concur in the majority court's decision.

STEELE HAYS, Justice, dissenting. I would affirm the order granting a new trial because the trial court vacated the judgment within the time permitted under ARCP Rule 60(b). My views on the inherent power of trial courts to take that action are stated in a dissenting opinion to *Phillips* v. *Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991).

CORBIN, J., joins.

DONALD L. CORBIN, Justice, dissenting. I would concur because the majority is technically correct in their analysis of the case law as it pertains to our Rule 4(c) of the Arkansas Rules of Appellate Procedure. However, I dissent because the result reached is not consistent with justice; particularly so, when considering the confusion to the members of the Bar that this court created in its effort to obtain a Rule 4(c) that is more efficient to the appellant process.

Bill HANNAH, et al. *v.* Marvin DEBOER, et al.

92-665 843 S.W.2d 800

Supreme Court of Arkansas
Opinion delivered December 7, 1992
[Rehearing denied January 19, 1993.]

John I. Purtle, for appellant.

Larry E. Graddy and *William C. Adkisson*, for appellee.

DAVID NEWBERN, Justice. The question before us is whether the Trial Court erred in declaring void an election establishing Beaverfork Fire Protection District #1. Statutes pertaining generally to creation of improvement districts require a certain form of notice to be placed on support petitions circulated for signatures of affected property owners. The appellants, Bill Hannah and others (Hannah Group) circulated petitions seeking an election to create the District without placing that notice on the petitions. Opponents of the district, Marvin Deboer and others (Deboer Group), challenged the election on that basis. The election had been called by the County Judge for December 3, 1991. The Deboer Group obtained a temporary injunction in Chancery Court on November 26, but at a hearing on November 27 the injunction was dissolved and the case transferred to the Circuit Court where the complaint was amended to claim illegal exaction and seek a writ of mandamus. The election was held, and the voters approved the District. The Circuit Court thereafter held that the election was void, and the Hannah Group has appealed.

Recognizing that there are several groups of statutory provisions dealing with improvement districts, the Circuit Court concluded that, if the general improvement district petition notice requirement applied, the Hannah Group had not met the

requirement. The circuit Court concluded further that if the general notice requirement did not apply, the specific statutes on the procedure for holding an election to determine whether a fire protection district is to be created were unconstitutional, due to lack of provision for pre-election notice and hearing at which affected property owners could voice objections. Either way, according to the Circuit Court, the election was void.

We find no need to deal with the constitutional pronouncement. We hold that even if the general statute requiring a particular form of notice applies to a petition to hold an election, as opposed to one seeking to establish a district by ordinance, the requirement became directory rather than mandatory after the election. Substantial notice was given to those who signed the petition, and we find no real prejudice, especially in view of the result of the election. We thus reverse the decision and dismiss the case.

The Circuit Court's order voiding the election and the argument of the Deboer Group before us seem to suggest that not only was there a deficiency in the notice given the petitioners but they, or perhaps affected prospective voters, were entitled to some sort of public hearing prior to the election.

1. The statutes

Title 14, Chapter 284 of Arkansas Code Annotated is entitled "Fire Protection Districts." Subchapter 1, §§ 14-284-101 through 14-284-123 (1987 and Supp. 1992), is primarily a codification of Act 183 of 1939, as amended, which provides for creation of a fire protection district by petition of a majority in value of property owners in the proposed district. We are not concerned with Subchapter 1 in this case.

Subchapter 2, §§ 14-284-201 through 14-284-224 (1987 and Supp. 1992), the one with which we are concerned, is entitled "Fire Protection Districts Outside of Cities and Towns." It consists primarily of codification of Act 35 of 1979, as amended. Section 14-284-203 (1987) provides two separate methods of establishment of such districts:

> Fire protection districts may be established to serve all or any defined portion of any county in either of the following ways:

(1) By the quorum court by ordinance enacted after notice and public hearing; or

(2) By the county court pursuant to an election of the qualified electors of the proposed district initiated, called, and conducted as provided in this subchapter.

If the district is to be established by the first of these Subchapter 2 methods, the procedure for petitioning the quorum court for an ordinance doing so is governed by § 14-284-204 (1987) which provides for publication of notice "of the adoption of the ordinance" and for "a public hearing on the ordinance."

If the district is to be established by the second Subchapter 2 method, the procedure for petitioning the county court to hold an election is governed by § 14-284-205 (1987). Subsection (a) provides that if a certain percentage of voters in a county or defined portion of a county petition for an election the county court will call the election. Subsection (b) prescribes the wording of the ballot, requiring that it state essentially, "FOR" OR "AGAINST the establishment of a fire protection district in . . . . . (county), ... (designated area), and the levy of assessed benefits on real property in the district to finance the district."

We find no statutory requirement for a public hearing prior to an election, and we have difficulty understanding the argument that one is necessary.

The Circuit Court looked to yet another Statute appearing in Chapter 86 of the Code which deals with improvement districts generally. He concluded the Hannah Group's petition should have had in it the notice provision specified in Ark. Code Ann. § 14-86-201(a) (1987) as follows:

NOTICE

YOUR SIGNATURE HEREON SHOWS THAT YOU FAVOR THE ESTABLISHMENT OF AN IMPROVEMENT DISTRICT. IF THE DISTRICT IS FORMED, YOU MAY BE CHARGED FOR THE COST OF THE IMPROVEMENTS.

Subsection (b) makes it a misdemeanor to circulate or cause to be

circulated a petition for establishment of an improvement district of "whatever nature" absent such a provision.

2. Lack of notice

The petition circulated by the Hannah Group leading to the election in which the voters approved the district did not contain the notice in the statutory form. It did, however, contain a paragraph setting out the maximum assessments which could be levied on various categories of lands in the event the voters approved establishment of the District. Assuming the Circuit Court is correct in ruling that the statutory wording was required on the petition for calling an election, the question we must decide is whether that failing was a sufficient basis to void the election. We think not.

It should be noted here that the Deboer Group expresses no fault with the ballot or the post-petition election procedures which resulted in the establishment of the District. Their complaint is about the petition which led to the election. Beneath that argument must lie the assumption that if the signers of the petition had notice they could be charged with costs of the district they would not have signed and there would have been no election; yet an election has been held in which a majority of the eligible voters have approved the District.

"The courts hold that 'the voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon and have spoken' " *Whitaker* v. *Mitchell*, 179 Ark. 993, 18 S.W.2d 1026 (1929), quoting from *Wheat* v. *Smith*, 50 Ark. 266, 7 S.W. 161 (1887). That principle is particularly applicable in this case. Anyone reading the petition before signing it would have had more information than that required by the statutory notice. The ballot was in the proper statutory form, and the Deboers Group does not complain about the ballot or the election procedures beyond the petition.

Referring to *Henard* v. *St. Francis Election Commission*, 301 Ark. 459, 784 S.W.2d 598 (1990), and *Swanberg* v. *Tart*, 300 Ark. 304, 778 S.W.2d 931 (1989), cases cited by the Hannan Group for the proposition that election laws provisions are mandatory before the election is held but only directory afterward, the Deboer Group contends it mounted its challenge

prior to the election. That may be so, but they mounted it in the wrong court. To challenge the petition they needed only follow Ark. Code Ann. § 14-86-402 (1987) and petition the clerk of the county court pointing out the problem with the petition. Instead they sought an injunction in a chancery court, resulting in the case being transferred to a circuit court which did not hold its first hearing until after the election, too late to argue that the rules were mandatory.

In *Becker* v. *McCuen*, 303 Ark. 482, 789 S.W.2d 71 (1990), we dealt with a mistaken pre-election notice publication by the Secretary of State. Although a mistake was made, the challengers did not take advantage of the proper remedy available to them but waited until the eleventh hour and asked a court to strike the matter from the ballot. The trial court declined as did we. The seeking of the wrong remedy in the wrong court in the case now before us did not preserve the mandatory nature of the election laws after the election. In addition, we fail to see the prejudice resulting from failure to follow the statutory form of notice on the petition now that a much broader representation of the people affected have spoken.

The judgment of the Circuit Court is reversed, and the case is dismissed.

Adrian Bruce TISDALE *v.* STATE of Arkansas

CR 92-570 843 S.W.2d 803

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Southern, Allen & James, by: *Faye Bancroft* and *Joann C. Quirk*, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. A Pulaski County Circuit Court jury found the appellant, Adrian Tisdale, guilty of two counts of kidnapping, one count of capital murder, and one count of criminal attempt to commit capital murder. Tisdale received sentences of life imprisonment on each kidnapping charge, life in prison without parole on the charge of capital murder and sixty

years for attempted capital murder. Tisdale appeals the convictions and raises four points for reversal. We find his contentions without merit and affirm.

Tisdale first argues there was insufficient evidence upon which the jury's verdicts of guilty could rest. We disagree and hold that there was substantial evidence to support the jury's verdicts.

On November 10, 1991, at approximately 6:00 a.m., Little Rock Police were summoned to the parking lot of Little Rock Crate and Basket Company, located on East 14th street, where a white Toyota had been found. Two men, Ira Akins and T.J. Morgan, were found inside the car, and both had been shot in the head. Morgan had suffered three gun shot wounds while Akins had suffered two. The shots killed T.J. Morgan; miraculously Akins survived.

Ira Akins was the state's star witness at trial, and it was upon his testimony that the jury returned a verdict of guilty on all charges. At trial, Akins recounted the events which transpired in the early morning hours of November 10, 1991, as follows:

At approximately 2:00 a.m. Akins exited a well known gambling house located near the Little Rock Airport. Akins walked to, entered and remained inside his girlfriends's white Toyota which was situated in front of the establishment. A few minutes later, Tisdale and another man, Anthony Johnson, exited the gambling house and approached the white Toyota. Akins let the two men inside the car. (Akins and Tisdale knew one another.) Tisdale sat behind the passenger seat, while Johnson sat directly behind Akins, who was in the driver's seat. Tisdale revealed a gun, and held it on Akins. Then, T.J. Morgan, Akins' friend, left the gambling house and entered the white Toyota, taking the unoccupied passenger's seat. T.J. Morgan was unaware that Tisdale had a gun.

Tisdale ordered Akins to drive. The four men drove around the projects in the area for approximately three-to-four hours until Tisdale told Akins to drive to Little Rock Crate and Basket Company. When the car stopped, Tisdale shot T.J. three times and Akins twice. A few days later, Tisdale was arrested after Akins identified Tisdale as the man who shot him and T.J.

Morgan.

Tisdale claims reversal of his convictions is required in that, absent Akins' own testimony, no evidence existed linking Tisdale to the shootings. Tisdale also points out the exculpating testimony of several uninterested witnesses. Further, Tisdale claims Akins could not recall the events which occurred prior to the shooting because the gunshot wounds caused Akins' to suffer retrograde amnesia. He supported this theory through expert medical and psychological testimony and by eliciting and emphasizing numerous critical contradictions in Akins' own account of the events leading up to the shooting.

Tisdale moved for a directed verdict at the close of the State's evidence and again at the close of the case, thus preserving for appeal the issue of sufficiency of the evidence. *Sanders* v. *State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

When the sufficiency of the evidence is being challenged on appeal, we review the evidence in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown* v. *State*, 309 Ark. 503, 832 S.W.2d 477 (1992). On appeal, the appellate court does not weigh evidence on one side against the other; it simply determines whether the evidence in support of the verdict is substantial. *Black* v. *State*, 306 Ark. 394, 814 S.W.2d 905 (1991). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or another. *Williams* v. *State*, 304 Ark. 509, 804 S.W.2d 346 (1991).

Unequivocal testimony identifying the appellant as the culprit is sufficient to sustain a conviction. *Luckey* v. *State*, 302 Ark. 116, 787 S.W.2d 244 (1990). Further, the uncorroborated testimony of one state's witness is sufficient to sustain a conviction. *Davis* v. *State*, 284 Ark. 557, 683 S.W.2d 926 (1985); *Meeks* v. *State*, 161 Ark. 489, 256 S.W.2d 863 (1923). Although Akins' description of the events leading up to the shooting sometimes varied drastically from statement to statement, Akins was sure of one thing—that Tisdale was in fact the person who shot him and T.J. Morgan. From this declaration he never wavered.

We affirmed the conviction in *Davis* based solely upon a store

manager's testimony that the accused was the person who had robbed the store some six years earlier. That case involved a six year old identification, while in the case at bar, the victim-witness, Akins, actually knew the accused and identification was not a problem.

The contradictory nature of both the lay and expert evidence necessarily required the jury to base its ultimate determination on the credibility of the witnesses before them. The credibility of witnesses is a fact question for the trier of fact. The trier of fact alone determines the weight to be given the evidence, and may reject or accept any part of it. *Smith* v. *State*, 308 Ark. 390, 824 S.W.2d 838 (1992). Credibility determinations will not be disturbed on appeal when there is substantial evidence to support the fact finders conclusion. *Brown* v. *State*, 309 Ark. at 506, 832 S.W.2d at 479 (1992). In keeping with these settled principles, we hold that the jury's acceptance of Akins' invariable testimony that Tisdale fired the shots, combined with acceptance of expert opinion that Akins did not suffer from retrograde amnesia, is sufficient to support the convictions.

Tisdale next argues that both kidnapping convictions are invalid, and must be set aside, in that their imposition violated Ark. Code Ann. § 5-1-110 (1987). That statute prohibits an accused from being convicted of more than one offense when the proof required to establish the greater offense necessarily includes proof of every element of another. In particular, Tisdale contends that the state used the kidnapping convictions as the underlying felonies for finding him guilty of capital felony murder of T.J. Morgan and criminal attempt to commit capital felony murder of Ira Akins.

Tisdale's contention is without merit. The state amended its earlier information charging Tisdale with capital felony murder and explicitly charged Tisdale under Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1991) with capital murder for the premeditated and deliberated killing of T.J. Morgan. Thus, Tisdale was not charged under the "capital felony murder" provision when he was tried. It is clear that no proof of an underlying felony was necessary to convict Tisdale of the capital murder of T.J. Morgan, and consequently the dictates of § 5-1-110 were not violated.

However, the state did not amend its original charge against Tisdale of criminal attempt to commit capital felony murder of Ira Akins. Still, Tisdale's contention of this charge is without merit as well. Regardless of the wording of the state's charge, the trial court actually instructed the jury that it could only find Tisdale guilty of "attempted capital murder" if the jury found Tisdale purposely engaged in conduct that constituted a substantial step in a course of conduct intended to culminate in the commission of an offense, that offense being "capital murder," which Tisdale committed, "if with the premeditated and deliberated purpose of causing the death of another person, he causes the death of another person." Tisdale never objected to this instruction at trial nor to the trial court's entrance of conviction on the kidnapping charge, and such issues raised for the first time on appeal will not be considered. *Smith* v. *State*, 310 Ark. 30, 832 S.W.2d 497 (1992); *St Clair* v. *State*, 301 Ark. 223, 783 S.W.2d 835 (1990).

Tisdale next contends that the trial court abused its discretion in allowing an expert witness for the state, Dr. Yvette Baker, to testify regarding "memory loss" test results which had not been made available to Tisdale prior to trial, in contravention of A.R.Cr.P. 17.1. While such test results were not given to Tisdale's counsel, we hold the trial judge did not abuse his discretion in allowing Dr. Baker to testify.

Judge Langston told counsel for Tisdale that the state's conduct was unacceptable and stated that if the defense requested a days continuance, a continuance would be granted. Instead of moving for a continuance, counsel studied the test results with the assistance of his expert witness, and when asked a short time later, told Judge Langston that he was ready to proceed with the testimony of Dr. Baker. Any harm done to Tisdale was apparently remedied by the short recess, and because he agreed with the trial court's solution, Tisdale cannot attack the solution on appeal. *Hughes* v. *State*, 264 Ark. 723, 727, 574 S.W.2d 888, 890 (1978).

Finally, Tisdale contends a new trial must be ordered in that (1) his counsel at trial was ineffective, and (2) other "numerous errors" committed during trial resulted in prejudice. We disagree.

Ordinarily, we do not address Rule 37 issues in a direct appeal from a judgment of conviction. *Philyaw* v. *State*, 292 Ark. 24, 728 S.W.2d 150 (1987). We have reiterated time and again that the question of effectiveness of counsel may not be raised for the first time on appeal. *Sumlin* v. *State*, 273 Ark. 185, 617 S.W.2d 372 (1981); *Knappenberger* v. *State*, 278 Ark. 382, 647 S.W.2d 417 (1983); *Haynie* v. *State*, 257 Ark. 542, 518 S.W.2d 942 (1975). However, the record here shows that during his trial, not afterwards, Tisdale requested the court to relieve Robert Scull III from being Tisdale's counsel. He based his request solely upon the fact that he wanted to call Anthony Johnson as a witness, while Scull opined that such an action would be against his best advice. The trial judge reviewed the applicable law, and denied Tisdale's motion to relieve Scull as counsel.

After conviction, Tisdale filed a pro se motion for a new trial arguing the ineffectiveness of Scull and pointing to alleged errors made by Scull, including, but not limited to the fact that Scull did not call some witnesses requested by Tisdale. Because Tisdale's only objection at trial was that Scull failed to call Anthony Johnson, then it is that contention alone which has been properly preserved for direct appeal. *Sumlin*, 273 Ark. 185, 617 S.W.2d 372.

Tisdale's contention has no merit for two distinct reasons. First, decisions to call certain witnesses and reject other potential witnesses is largely a matter of trial strategy. *Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984). Second, Scull ultimately decided to call Anthony Johnson as a witness and Johnson did testify at trial. Thus, Tisdale's objection to Scull's failure to call Anthony Johnson is therefore moot.

Tisdale next argues that "numerous errors" were committed at trial and therefore, the trial judge committed error in not granting his motion for a new trial. This contention is wholly without merit. Tisdale's post-conviction motion for a new trial was based solely upon alleged ineffectiveness of counsel. The motion fails to cite any of the occurrences now alleged to be "errors" requiring a new trial. This court will not consider arguments raised for the first time on appeal. *Smith* v. *State*, 310 Ark. 30, 832 S.W.2d 497 (1992).

Furthermore, a new trial will not be ordered because

Tisdale failed to support the alleged "errors" with citations of legal authority, and such deficient contentions are not considered on appeal. *McArthur* v. *State*, 309 Ark. 196, 830 S.W.2d 832 (1992).

Pursuant to Ark. Sup. Ct. R. 11(f), the state has made certain that all objections decided adversely to Tisdale have been abstracted and briefed. No issues of prejudicial error exist.

Affirmed.

Raymond BUSHONG and Betty Bushong *v.* The GARMAN COMPANY and The Clorox Company Continental Casualty Co., Intervenor

92-436 843 S.W.2d 807

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Murrey L. Grider and *Ponder & Jarboe*, by: *Dick Jarboe*, for appellants.

Barrett, Wheatley, Smith & Deacon, by: *John V. Phelps*, for appellee Clorox Co.

Mixon & McCauley, by: *Don Mixon*, for appellee Garman Co.

Snellgrove, Laser, Langley, & Lovett, for intervenors.

DONALD L. CORBIN, Justice. On May 12, 1988, appellant, Raymond Bushong, was cleaning a bathroom on the premises of Stewart Electric, his employer, in Jonesboro, Arkansas. Appellant was trying to remove grease from the bathroom floor and had used almost an entire gallon of undiluted Clorox without success when a co-employee, Greg Rollins, suggested he try using Vapco Brite' Alum, an air conditioner coil cleaner. Greg Rollins poured approximately one-half (1/2) a cup of the Vapco Brite' Alum on the floor directly on top of the Clorox Bleach which was already there. Vapco Brite' Alum is a product sold to refrigeration and air conditioning wholesalers to clean condenser coils and refrigeration and air conditioning units. It is intended for use by professional refrigeration and air conditioning service personnel. Neither appellant nor Greg Rollins are professional refrigeration or air conditioning service personnel, although their employer, Stewart Electric, employed such people. Neither appellant nor Greg Rollins read the labels of either the Clorox Bleach or the Vapco Brite' Alum. Appellant had never read the labels of any of the products he used in cleaning. At the time of the accident, appellant was a warehouseman who also did some cleaning for Stewart Electric and Greg Rollins was an estimator for Stewart Electric. Neither appellant nor Greg Rollins had ever used Vapco Brite' Alum before, but both were aware it was used in cleaning air conditioners. After the Vapco Brite' Alum was poured onto the floor, appellant continued to clean the floor in the bathroom, which was approximately four (4) feet by four (4) feet. Soon after, the mixture started to foam and a white fog vapor was coming up from the floor which appellant inhaled. Appellant claims the inhalation of these vapors caused him personal injury.

Appellant filed a complaint on April 5, 1990, against The Clorox Company, the manufacturer of Clorox Bleach, The

Garman Company, the manufacturer of Vapco Brite' Alum, and Greg Rollins. As to the Clorox Company and The Garman Company, appellant alleged they:

> negligently and carelessly designed, mixed, manufactured, marketed, packaged and inspected [the irrespective products] and the same combined to create a gaseous toxic cloud with the result that part of the cloud of gas was inhaled by [appellant] causing him great damages and injuries . . . .
>
> . . . expressly and impliedly warranted that [their respective products] were fit for the purpose for which they were intended. . . .
>
> . . . are absolutely or strictly liable in that they manufactured and marketed [their respective products] and failed to issue proper and necessary warnings when [they] knew or should have known that the combination of the gases created a defective condition that was unreasonably dangerous in that it could cause a toxic gas and injure a person who would in the ordinary course of his affairs be near or around the gas.

Appellant alleged Greg Rollins

> was negligent in that he failed to use that degree of care exercised by ordinary and prudent persons under the same or similar circumstances and further, he knew or ought to have known by the exercise of ordinary care that the mixing of the aforementioned two chemicals would cause a cloud of fumes which would be harmful to Plaintiff.

Continental Casualty Company, appellant's employer's insurance carrier at the time of the accident, moved to intervene pursuant to Ark. R. Civ. P. 24 and Ark. Code Ann. § 11-9-410 (1987) of the Arkansas Workers' Compensation Act. The order allowing the intervention was filed on July 25, 1990.

On October 9, 1991, appellee Clorox Company moved for summary judgment. On October 22, 1991, appellant filed an amended complaint re-alleging the same causes of action, but expanding the absolute or strict liability claim to allege:

> [t]he defendants, Garman and Clorox, are absolutely

> or strictly liable in that they manufactured and marketed the products herein and failed to issue proper and necessary warnings when the said Defendants knew or should have known the combination of the gases created a defective condition that was unreasonably dangerous in that it could cause a toxic gas and injure a person who would in the ordinary course of his affairs be near or around the gas. The Defendants are also strictly liable in tort inasmuch as both produced a defective product. The Clorox product was defective in the fact that it contained sodium hypochlorite the brite alum was defective in that it contained hydrofluoric acid. Either chemical in combination with other chemicals could release a poisonous gas and were dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge, and to the community as to its characteristics. Both products would fail to perform as safely as an ordinary consumer would expect them to perform when used in an an intended or reasonably foreseeable manner. Further the benefits of the products do not outweigh the risks of danger inherent in their design.

On November 12, 1991, appellee Garman Company also moved for summary judgment.

On November 19, 1991, the trial court found "the warnings on the labels for Clorox and Brite' Alum, the respective products of Clorox Company and Garman Company, are adequate under the facts of this case and that Raymond Bushong and Greg Rollins failed to read the labels" and for that reason granted partial summary judgment in favor of Clorox Company and Garman Company on all allegations of failure to warn and improper labeling. Summary judgment was also granted on the breach of warranty issues upon appellant's admission that they did not have a case for breach of express or implied warranties. On December 3, 1991, Clorox Company, filed a supplemental motion for summary judgment on the product defect and negligent manufacture issues. On January 8, 1992, the trial court granted the supplemental motion for summary judgment and found "all claims of plaintiffs and intervenor and all cross-claims of Greg Rollins against The Garman Company and The Clorox Company should be dismissed with prejudice." Appellant's and

intervenor's, Continental Casualty Company's, claim against Greg Rollins was dismissed without prejudice pursuant to plaintiff's oral motion in open court for a voluntary nonsuit against Greg Rollins. This appeal followed. Since this case presents questions in the law of torts, our jurisdiction is proper pursuant to Ark. Sup. Ct. R. 29(1)(o).

On appeal, appellant cites four points of error in the trial court's granting of summary judgment to appellees The Clorox Company and The Garman Company. They are (1) the warning on the labels for Clorox and Brite' Alum are not adequate as a matter of law; (2) the failure of appellant and Greg Rollins to read the labels is not dispositive of the adequacy of the warnings; (3) there are material issues of fact to be determined in this cause; and (4) the trial court erred in refusing to require separate appellee, The Garman Company, to produce a copy of the M.S.D.S. (Material Safety Data Sheet) on its product, Brite' Alum, before ruling on the motion for summary judgment.

I. ADEQUACY OF THE WARNINGS

For his first point of error, appellant alleges the trial court erred in finding the warnings on the labels for Clorox and Brite' Alum were adequate as a matter of law under the facts of this case. We need not reach this issue since we uphold the trial court's granting of summary judgment on the failure to warn and improper labeling issues based on appellant's failure to read the labels. We do note, however, that adequacy of a warning is generally a question of fact for the jury. *See First Nat'l Bk., Albuquerque* v. *Nor-Am Agric. Prod., Inc.*, 537 P.2d 682 (N.M. Ct. App. 1975) (and cases cited therein), *cert. denied; Uptain* v. *Huntington Lab, Inc.*, 685 P.2d 218 (Colo. Ct. App. 1984), *aff'd en banc* 723 P.2d 1322 (Colo. 1986).

II. FAILURE TO READ WARNINGS

For his second point of error, appellant alleges the failure of appellant and Greg Rollins to read the labels is not dispositive of the adequacy of the warnings and it was error for the trial court to grant summary judgment on this basis. We have not previously addressed this issue.

The parties have cited cases from various jurisdic-

tions which hold both that failure to read the label precludes a claim of inadequate warning and that it does not. We think the better rule is that failure to read the label does not automatically preclude a claim for inadequate warning. We find the rule applied in *Safeco Ins. Co.* v. *Baker*, 515 So. 2d 655 (La. Ct. App. 1987) particularly persuasive and we adopt the reasoning therein. *Safeco* holds the plaintiff originally has the burden of proving the warnings or instructions provided were inadequate. Once a plaintiff proves the lack of an adequate warning or instruction, a presumption arises that the user would have read and heeded adequate warnings or instructions. This presumption may be rebutted by evidence "which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances." *Safeco Ins. Co.*, 515 So. 2d 655, 657 (La. Ct. App. 1987); *See also Johnson* v. *Niagara*, 666 F.2d 1223 (8th Cir. 1981). In this case, appellant himself admitted that he had never read a label on a cleaning product during the three years he worked at Stewart Electric. Given this, we cannot say the trial court erred in finding appellant's failure to read the label precluded his claim as any warning or instruction would have been futile since appellant would not have read it.

III. NEGLIGENCE AND DEFECTIVE PRODUCT CLAIMS

Appellant's third point of error alleges it was error for the trial court to grant summary judgment on Counts V and VI, the negligent manufacture and the defective product claims. Appellant contends there were material issues of fact to be decided as to these claims and it was, therefore, improper for the trial court to grant summary judgment on these claims. In addressing this issue, there are two sub-issues which must be addressed: (1) was summary judgment proper as to the negligence claims; (2) were there material issues of fact to be decided as to the defective product claims against Clorox or Garman.

The negligent manufacture claims alleged

> Garman and Clorox, by and through their agents and employees negligently and carelessly designed, mixed, manufactured, marketed, packaged and inspected [their respective products] and the same combined to create a gaseous toxic cloud with the result that part of the cloud of

> gas was inhaled by the Plaintiff, Raymond Bushong causing him great damages and injuries as set out hereinafter.

The trial court dismissed this claim on summary judgment stating "all claims of plaintiffs and intervenor and all cross-claims of Greg Rollins against The Garman Company and The Clorox Company should be dismissed with prejudice."

As we said in *West* v. *Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991), "We sustain a trial court's ruling if it reached the right result, even though it announced the wrong reason." Summary judgment was proper, but dismissal of the claim with prejudice was not. Summary judgment should have been granted because this allegation is insufficient under Arkansas law. Arkansas is a fact pleading state and appellant's negligence claim does not state facts upon which relief can be granted. *Harvey* v. *Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). Appellant's complaint does not allege any facts which tend to prove appellees Clorox and Garman "negligently and carelessly designed, mixed, manufactured, marketed, packaged and inspected their products." As we explained in *Searle*, summary judgment based upon failure to state a claim upon which relief can be granted is different from summary judgment based upon a lack of disputed material facts, which is the failure to have a claim. *West* v. *Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608. When summary judgment is granted because of failure to state a claim, the dismissal should be without prejudice in order to afford the plaintiff-appellant a chance to plead further. *Id.* Therefore, the summary judgment for The Garman Company and The Clorox Company on the negligence issue is modified to be without prejudice.

The next sub-issue which must be addressed is whether there was any material issue of fact regarding whether Clorox or Brite' Alum was defective. Appellant alleged Clorox was defective because it contained sodium hypochlorite which, "in combination with other chemicals could release a poisonous gas and [was] dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge, and to the community as to its characteristics" and "would fail to perform as safely as an ordinary consumer would

expect [it] to perform when used in an intended or reasonably foreseeable manner [such that] the benefits of the product[] do not outweigh the risks of danger inherent in [its] design." Appellant alleged Brite' Alum was defective because it contained hydrofluoric acid, which "in combination with other chemicals could release a poisonous gas and [was] dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge, and to the community as to its characteristics" and "would fail to perform as safely as an ordinary consumer would expect [it] to perform when used in an intended or reasonably foreseeable manner [such that] the benefits of the product[] do not outweigh the risks of danger inherent in [its] design."

In order to prevail in a products liability claim, appellant must prove

> (1) The supplier is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise distributing the product;
>
> (2) The product was supplied by him in a defective condition which rendered it unreasonably dangerous; and
>
> (3) The defective condition was a proximate cause of the harm to person or to property.

Ark. Code Ann. § 4-86-102(a) (1987). " 'Defective condition' means a condition of a product that renders it unsafe for reasonable foreseeable use and consumption." Ark. Code Ann. § 16-116-102(4) (1987).

> "Unreasonably Dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses the product, assuming the ordinary knowledge of the community or of similar buyers, users, or consumers as to its characteristics, propensities, risks, dangers, and proper and improper uses, as well as any special knowledge, training, or experience possessed by the particular buyer, user, or consumer or which he or she was required to possess.

Ark. Code Ann. § 16-116-102(7) (1987).

Summary judgment is an extreme remedy which is only

proper when it is clear there are no issues of fact to be litigated. *Pinkston* v. *Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988). "Once the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact." *Anderson* v. *First Nat'l Bank*, 304 Ark. 164, 166, 801 S.W.2d 273, 274 (1990). An affidavit stating only conclusions is not sufficient. *Miskimins* v. *The City Nat'l Bank*, 248 Ark. 1195, 456 S.W.2d 673 (1970). "The response and supporting material must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 1205, 456 S.W.2d at 679.

In its motion for summary judgment and supplemental motion for summary judgment, The Clorox Company supplied the affidavits and depositions of several witnesses. None of these supporting materials contained any proof that Clorox was supplied in a defective condition which rendered it unreasonably dangerous. The Garman Company supplied interrogatories and depositions in support of its motion for summary judgment. None of the supporting material provided by Garman indicated Brite' Alum was supplied in a defective condition which rendered it unreasonably dangerous. In order to prove the existence of a material issue of fact as to the defective condition of Clorox and Brite' Alum, appellant offered the affidavits of Dr. Ronald Wise, a biochemist, and Mrs. Carolyn Wise, stating that:

> On giving my deposition on the 8th day of March, 1991, an inquiry was made as to whether or not the product, Clorox or Brite' Alum, was defective. My answer to that was no if "defective" meant whether or not the products were defectively formulated. In essence I was stating that the product as constituted did not deviate from the norm.
>
> If defective were to mean that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner then my answer would have been that it was, in fact, defective.

These affidavits are conclusory in nature and do not set forth any specific facts tending to prove either Clorox or Brite' Alum was supplied in a defective condition which rendered it unreasonably dangerous. *Miskimins*, 248 Ark. 1194, 456 S.W.2d 673. Therefore, appellant did not present proof of a material

element of his claim. Summary judgment is proper when an appellant fails to present proof of a material element of his claim. *Irvin* v. *Jones*, 310 Ark. 114, 832 S.W.2d 827 (1992). Thus, we affirm the trial court's granting of summary judgment as to the defective product claims.

IV. MATERIAL SAFETY DATA SHEET

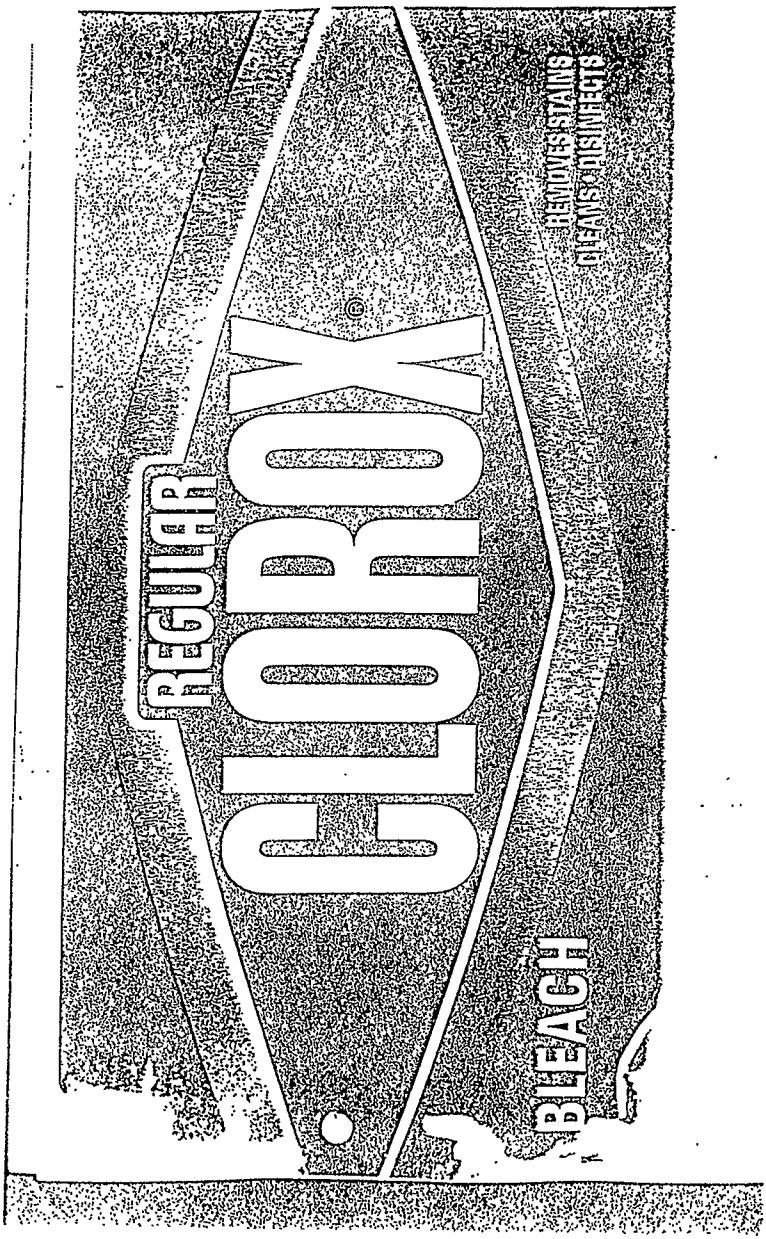
For his fourth point of error, appellant alleges it was error for the trial court to grant summary judgment before requiring appellee, The Garman Company, to produce a copy of the M.S.D.S. (Material Safety Data Sheet) on its product, Brite' Alum. Even if the M.S.D.S. had been supplied, summary judgment was properly granted as to appellant's claim against Garman. In order to withstand a summary judgment motion as to the defective product claims, appellant was required to produce proof that the product was supplied in a defective condition which rendered it unreasonably dangerous. Appellant claims he needed the M.S.D.S. to prove that Brite' Alum was supplied in a defective condition. However, since appellant failed to supply proof sufficient to prove Brite' Alum was unreasonably dangerous, Garman's summary judgment motion was properly granted. Proof that Brite' Alum was supplied in a defective condition would not cure appellant's failure to supply proof Brite' Alum was unreasonably dangerous. Appellant did not supply any proof of the

> ordinary knowledge of the community or of similar buyers, users, or consumers as to [the] characteristics, propensities, risks, dangers, and proper or improper uses, [or] any special knowledge, training or experience possessed by the particular buyer, user, or consumer or which he or she was required to possess.

As was noted previously, an affidavit stating only conclusions, but failing to set forth specific facts is insufficient to show there is a material issue of fact. *Miskimins*, 248 Ark. 1194, 456 S.W.2d 673. Since appellant failed to prove this element of his proof, he could not withstand a summary judgment motion even had the M.S.D.S. revealed chemical elements which would have allowed appellant's expert to determine the product was supplied in a defective condition.

Affirmed in part; modified in part.

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


REGULAR
CLOROX®
BLEACH
REMOVES STAINS
CLEANS & DISINFECTS

CLOROX® BLEACH *for a cleaner fresher laundry and household*

221

Your laundry needs Clorox bleach:

For the broad range of laundry problems, no other detergent additive can give a cleaner, brighter wash.

Brightens whites and removes stains Clorox bleach works with detergent to remove tough dirt and stains that detergent alone cannot

Disinfects and eliminates odors Clorox bleach disinfects and deodorizes laundry by eliminating most germs and their odors

Boosts cold water cleaning power Most detergents do not clean as well in cold or warm water. Clorox bleach gives your detergent extra cleaning power to remove stains and kill germs in cooler water

Safe for most color-fast washables Clorox bleach brightens and sanitizes colored washables. To check if a garment is bleach safe, try this

Bleach-safe test. apply one drop of a test solution (1 tablespoon Clorox bleach plus 1/4 cup water) to a hidden part of the fabric. Check all colors including trim. Let stand 1 minute. Then blot dry. No color change means the article can be safely bleached

Write for a free Clorox "Guide to Cleaner Washes" or other information on laundry or house cleaning to Clorox, PO Box 24305, Oakland, CA 94623

PATENT DES 244 308

Directions for laundry use:

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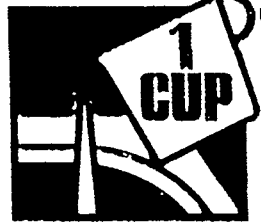
Sort laundry by color and fabric Separate whites from colors, light colors from dark ones. Avoid bleaching wool, silk, mohair, leather, spandex, non-fast colors and flame retardant cotton fabrics

Add bleach and detergent Clorox bleach may be added to the wash water before laundry is put in, or for best results dilute with a quart of water and add 5 or 6 minutes after the wash cycle has begun. Use the recommended amount of Clorox bleach as shown. For very large loads, add slightly more Clorox bleach



Regular Top Loading Automatic	1 cup
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Directions for household use:

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Clorox bleach is a highly effective deodorizer and disinfectant for your bathroom and kitchen. Clorox bleach kills such household germs as staphylococcus aureus A2/Hong Kong, Rhinovirus Type 17, and/or Adenovirus Type 7 and effectively fast bacteria on environmental surfaces

Toilet bowls Flush toilets. Pour 1/2 cup of Clorox bleach into bowl. Brush. Let stand 10 minutes, flush

Bathtubs and showers Flush drains. Clean with a solution of 3/4 cup Clorox bleach per gallon of warm sudsy water. Let stand 5 minutes. Rinse

Kitchen sinks Cover stains with 2/3 inch of water add 1/2 cup Clorox bleach. Let stand 5 minutes. Rinse

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Precautionary Statements

WARNING:

Hazards to humans and domestic animals Causes substantial but temporary eye injury. Do not get in eyes or on clothing. Harmful if swallowed. May irritate skin

Practical treatment If in eyes, remove contact lenses, rinse with plenty of water for at least 15 minutes. If swallowed, drink a glass full of water. In either case, call a physician. If contact with skin, immediately remove contaminated clothing and wash skin thoroughly with water

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Physical and chemical hazards Strong oxidizer. Flush drains before and after use. Do not use or mix with other household chemicals, such as toilet bowl cleaners, rust removers, acid or ammonia containing products. To do so will release hazardous gases. Prolonged contact with metal may cause pitting or discoloration

TM & REG. NO 5413 1

VAPCO BRITE'ALUM

- heavy foaming action penetrates deep into coil to remove and dissolve contamination.
- cleans heat exchange surface of normal dirt and soil.
- removes oxidation build-up and scale incrustations not normally affected by ordinary cleaners.
- restores original heat transfer capabilities.
- metal surfaces are left bright and smooth with a like new appearance.
- many uses besides cleaning heat exchange equipment. Use to clean aluminum air filters, copper pipe and fittings, etc. Makes an excellent all around cleaner and brightener for aluminum and copper surfaces.
- removes rust from ferrous metals...leaves no corrosive residue.
- non-flammable.

OTHER INDUSTRIAL USES

Although VAPCO BRITE'ALUM was developed specifically for air conditioning and refrigeration systems, its properties suggest many other applications. For example electronic air filters and aluminum truck trailers. Also, to clean aluminum before soldering or welding and as a remover for rust stains on concrete.

NET CONTENTS _____ GALLONS

Vapco®

Brite'Alum

FIN/COIL CLEANER and BRIGHTENER
for AIR CONDITIONING
and REFRIGERATION SYSTEMS

- RESTORES EFFICIENCY
- REDUCES POWER COSTS
- BRIGHTENS ALUMINUM and COPPER

DANGER: MAY BE FATAL IF SWALLOWED OR INHALED. CAUSES SEVERE BURNS WHICH MAY NOT BE IMMEDIATELY PAINFUL OR VISIBLE. VAPOR HARMFUL. Read carefully other cautions on side panel.

KEEP OUT OF REACH OF CHILDREN

FOR SALE TO, USE, AND STORAGE BY SERVICE PERSONS ONLY

Mfd by The GARMAN CO., Fenton, Mo 63026 U S A

DIRECTIONS

FOR USE BY QUALIFIED MAINTENANCE AND SERVICE PERSONNEL ONLY.

1. Turn system off.
2. Dilute 1 part BRITE'ALUM with 3 parts water Do not use undiluted
3. Spray directly on coil using low pressure sprayer Vapco Tank Sprayer is recommended.
4. If necessary, repeat spraying to penetrate multi coil unit
5. Rinse thoroughly with water after 3 to 5 minutes

If used on anodized surfaces, dilute 1 part BRITE'ALUM with 5 parts water and rinse immediately. BRITE'ALUM may remove anodizing BRITE'ALUM may etch windows or other glass surfaces Protect them during application or rinse immediately in case of contact Concentrate may affect galvanized or painted surfaces Do not transfer contents of bottle to another container for storage. Do not use on cooking utensils.

DANGER: Contains Hydrofluoric Acid. Avoid contact with skin, eyes, or clothing Use only with rubber gloves and protective eye wear. Avoid breathing vapors. Use only with adequate ventilation.

First Aid: Call Physician immediately.

External: Immediately wash skin with soapy water being very careful to clean under fingernails.

Internal: Drink large quantities of water Follow with egg whites or mineral oil Do not induce vomiting.

Eyes: Flush with cool water for at least 15 minutes

KEEP OUT OF REACH OF CHILDREN

ROBERT L. BROWN, Justice, dissenting. The issue in this case is whether the warning on the Clorox container about hazardous toxic gases was conspicuous enough to draw a user's attention — not whether Bushong actually read the label. If the warning on the label had been sufficiently eye-catching and had sounded some mental alarm, arguably the user would have read it. In any case, that is a question for the jury to decide. It is not a matter of law for the trial court on summary judgment. By holding as the majority does today, no matter how hidden or inconspicuous a notice of danger in the future may be, if the user fails to read a label *in toto*, he is foreclosed from recovery. I disagree that that is the law.

We have not reviewed a summary judgment couched on failure to read a warning until this case. Other jurisdictions, however, have refused to hold that failure to read a warning in and of itself is determinative of the warning's adequacy. *See, e.g., Spruill* v. *Boyle-Midway, Inc.*, 306 F.2d 79 (4th Cir. 1962); *East Penn Manufacturing Co.* v. *Pineda*, 578 A.2d 1113 (D.C. App. 1990); *Jarrell* v. *Monsanto Co.*, 528 N.E.2d 1158 (Ind. App. 2 Dist. 1988); *Shell Oil Co.* v. *Gutierrez*, 119 Ariz. 426, 581 P.2d 271 (1978).

In *East Penn Manufacturing* v. *Pineda, supra*, the issue involved an exploding battery and an injured mechanic who was an experienced user. The jury found for the mechanic, and the manufacturing company moved for judgment n.o.v. on failure-to-read grounds which the trial court denied. On appeal, the District of Columbia Court of Appeals first noted that it had previously rejected the argument that adequacy of a warning label could be resolved as a matter of law. It then went on to discuss the mechanic's failure to read the warning label on the battery, which was the size of a business card:

> In the failure to warn context, it is first necessary to distinguish between (1) failure to take adequate steps to ensure the warning was communicated to the ultimate user — issues involving the prominence and location of the label — and (2) failure to provide a warning that, if communicated to the user, would have been adequate to warn of risks — which involves the content of the warning. When the failure to warn is based upon the steps taken to communicate the warning, the fact that the plaintiff never

> read the warning is itself evidence that the label was inadequate, and should not bar recovery. *See Rhodes* v. *Interstate Battery Systems of Am.*, 722 F.2d 1517, 1519 (11th Cir. 1984). But when the cause of action is predicated on the content of the warning, as in this case, the plaintiff's own failure to read it will be contributory negligence in some jurisdictions. *Id.*

578 A.2d at 1124. Concluding that failure to read the label was ot itself fatal, the court affirmed the jury's verdict on failure to warn.

In *Shell Oil Co.* v. *Guiterrez, supra*, a supposedly empty metal drum which had contained liquid xylene exploded because of welding work done within a few feet of the "empty" drum. Two men were injured. Neither had read the warning on top of the metal drum. In affirming the jury verdict in favor of the two men, Arizona Court of Appeals said:

> That the party who is injured might not have read or heeded warning is not always sufficient to disprove the existence of a causal relationship between the injury and the defect. Adequate warning could have actuated a policy in handling "empties" which would have prevented the accident. . . .
>
> Furthermore, the adequacy of a warning label is not determined solely by reference to the words on the label but also by reference to the physical aspects of the warning, such as conspicuousness, prominence, and relative size of print. All of these physical aspects must be adequate to alert the reasonably prudent person. (Citing authority.) Here, the only label attached to the barrel was small in size, approximately 4" x 4". The jury could have determined that the physical aspects of this label were inadequate in light of the foreseeable risk of injury, and that if a larger and more conspicuous label was attached, it would have been seen, read and heeded.
>
> There was substantial evidence from which the jury could have concluded that the failure of the defendants to provide an adequate warning was a factor in producing the injuries. Cause in fact was an issue for the jury. Prosser, The Law of Torts, Sec. 41 (4th ed. 1971).

581 P.2d at 280-281.

In a third case, the Indiana appellate court reversed summary judgment which had been entered in favor of a sulphur manufacturing firm. *Jarrell* v. *Monsanto Co., supra.* There, the injured user poured two fifty pound bags of sulphur into a storage bin which then exploded and burned the user. The worker had not read the warning label on the bags that sulphur dust in air ignites easily. Using this fact as well as others, the trial court entered summary judgment. The Indiana Court of Appeals reversed and said in part:

> In this case, [the user] admitted that warning labels appeared on the bags of sulphur but claims that he did not see any such warnings and did not read the labels. However, we cannot say as a matter law that the warnings on these labels, "WARNING!," "SULPHUR DUST SUSPENDED IN AIR IGNITES EASILY!" and "Avoid creating dust in handling!," sufficiently convey to a reasonable user the nature of the danger or the extent of the potential harm.

528 N.E.2d at 1163.

Finally, in *Spruill* v. *Boyle-Midway, Inc., supra*, the Fourth Circuit Court of Appeals affirmed a jury verdict in favor of the estate of a deceased 14-month-old child who died of chemical pneumonia after ingesting a small quantity of furniture polish. The Fourth Circuit described the labelling:

> On the front part of the label appear the words "Old English Brand Red Oil Furniture Polish" in large letters; beneath this in small letters "An all purpose polish for furniture, woodwork, pianos, floors". The reverse side of the label, the background of which is white, contains the following printed matter: at the top in red letters about 1/8th of an inch in height all in capitals, "CAUTION COMBUSTIBLE MIXTURE". Immediately beneath this in red letters 1/16th of an inch high "Do not use near fire or flame"; several lines down, again in letters 1/16th of an inch in height, in brown ink, all in capitals, the word "DIRECTIONS"; then follow seven lines of directions printed in brown ink in letters about 1/32nd of an inch in

> height. On the eighth line in letters 1/16th of an inch high in brown ink appear the words "Safety Note"; following this in letters approximately 1/32nd of an inch in height:
>
> Contains refined petroleum distillates. May be harmful if swallowed, especially by children."

308 F.2d at 82. The mother of the child testified that she had read the large colored letters "CAUTION COMBUSTIBLE" but not the directions because she knew how to use furniture polish.

The court discussed the inadequacy of the warning relating to children:

> The notice here given was not printed on the label in such a manner as to assure that a user's attention would be attracted thereto. Indeed, we think one might reasonably conclude that it was placed so as to conceal it from all but the most cautious users. It is located in the midst of a body of print of the same size and color, with nothing to attract special attention to it except the words "Safety Note".
>
> Further, even if the user should happen to discover the warning it states only "contains refined petroleum distillates. May be harmful if swallowed especially by children." The first sentence could hardly be taken to convey any conception of the dangerous character of this product to the average user. The second sentence could be taken to indicate to the average person that harm is not certain but merely possible. The expert medical evidence in this case shows that "harm" will not be contingent but rather inevitable, to young and old alike. Moreover, the lst phrase of the sentence hardly conveys the thought that very small quantity of the polish is lethal to children.

306 F.2d at 86. The court then went on to conclude:

> [H]ad the warning been in a form calculated to attract the user's attention, due to its position, size, and the coloring if its lettering and had the words used therein been reasonable calculated to convey a conception of the true nature of the danger, this other might not have left the product in the presence of her child.

306 F.2d at 87.

The majority cites two cases to support its affirmance. *Safeco Ins. Co.* v. *Baker*, 515 So.2d 655 (La. Ct. App. 1987); *Johnson* v. *Niagara*, 666 F.2d 1223 (8th Cir. 1981). Both cases are distinguishable. In *Johnson*, the Eighth Circuit Court of Appeals affirmed a directed verdict in favor of the manufacturer of a punch press due to the user's failure to read the warning. *Johnson* v. *Niagara Mach. & Tool Works*, 666 F.2d 1223 (8th Cir. 1981). In affirming the district court's decision, however, the Court observed in a footnote that the district court had found that the warning on the press was conspicuous and that the case did not involve an inadequate warning. The trial court in the case before us did not make similar findings on adequacy or conspicuousness.

In *Safeco Ins. Co.*, the user had failed to install a prefabricated fireplace correctly because he did not read all the pages in an installation booklet, and a fire to the home resulted. The Louisiana Court of Appeals reversed a jury verdict in favor of the installer for fire damage to his home on causation grounds. In that case no hazardous substance was involved; nor did the appellate court have before it the issue of whether a warning label was conspicuous.

A jury should decide if the warning on the Clorox bottle was in a form calculated to attract Bushong's attention and if conspicuous, was the wording of the warning adequate. Larger letters in color or a logo indicating toxicity like a skull-and-bones might well have averted injury in this case. At least, this was a question for the jury to consider. While failure to read a label with what is arguably an inadequate warning of a hazard might have surface appeal for disposing of this case, it really does not stand up under scrutiny. I would reverse the summary judgment and remand for trial.

HOLT, C.J., and NEWBERN, J., join.

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221

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PATENT DES 264 308

Directions for laundry use:

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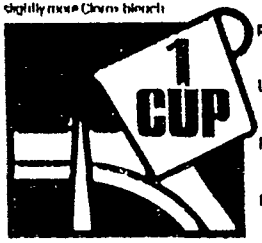

Regular Top Loading Automatic	1 cup
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Kitchen sinks Cover stains with 2/3 cup of water and 1/2 cup Clorox bleach. Let stand 5 minutes. Rinse.*

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Physical and chemical hazards Strong oxidizer. Flush drains before and after use. Do not use or mix with other household chemicals, such as toilet bowl cleaners, rust removers, acid or ammonia containing products. To do so will release hazardous gases. Prolonged contact with metal may cause pitting or discoloration

INVRG NO 5813 1

247

STATE of Arkansas *v.* Glenda LONG and Willard Kelley

CR 92-481 844 S.W.2d 302

Supreme Court of Arkansas
Opinion delivered December 7, 1992

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

No response.

DONALD L. CORBIN, Justice. Appellees, Glenda Long and Willard Kelley, were both charged by felony information with the capital murder of Willard Kelley's wife, Shirley Kelley. Willard Kelley was also charged by felony information with hindering the apprehension of evidence in his wife's murder. Both appellees were tried together by a jury. The case never reached the jury, however, because the trial court directed verdicts for appellees on all charges at the close of the state's evidence. The state has filed this appeal.

The threshold issue in this case is whether the state is permitted to appeal from the trial court's order directing verdicts for appellees. Resolution of this preliminary issue requires our construction of Ark. Sup. Ct. R. 36.10; our jurisdiction is therefore pursuant to Ark. Sup. Ct. R. 29(1)(c).

Our law is well settled that the state is not allowed to

appeal from a directed verdict acquitting the defendant when the sole issue is the sufficiency of the evidence of the defendant's guilt. *State* v. *Dixon*, 209 Ark. 155, 189 S.W.2d 787 (1945). The reasoning behind this rule is stated as follows:

> The question of the legal sufficiency of the evidence in a given case constitutes a question of law for the decision of the court, but it cannot become a precedent for application in another case because of the varying state of facts in different cases, and therefore the decision of that question, even though it be one of law, is not important in the "uniform administration of the criminal law."

Dixon at 158, 189 S.W.2d at 789.

Notwithstanding the foregoing rule as stated in *Dixon*, the state claims it should be permitted to appeal in this felony case because it has examined the transcript and determined the state was prejudiced by the trial court's commission of an error, the correction of which is essential to the uniform administration of the criminal laws of this state. Ark. R. Crim. P. 36.10(c). The asserted error the state claims requires correction is that, when deciding appellees' motions for directed verdicts due to insufficient evidence, the trial court erroneously weighed the *credibility* of the evidence rather than deciding the motions strictly on the *sufficiency* of the evidence.

In an effort to distinguish between the concepts of "sufficiency of the evidence" and "credibility of the evidence," we repeat the following analysis used by the United States Supreme Court when presented with a different, yet somewhat similar issue:

> [A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

Tibbs v. *Florida*, 457 U.S. 31, 37-38 (1982) (quoting *Tibbs* v. *State*, 397 So. 2d 1120 (1981)).

This court has previously held it was error for a trial court to direct a verdict for a defendant on the basis that the state's evidence was not believable. *State* v. *Taylor*, 180 Ark. 588, 22 S.W.2d 34 (1929). The state was permitted to appeal in *Taylor* because, similarly to the present case, the asserted error did not involve a question of the sufficiency of the evidence; rather, it involved a question of the credibility of the evidence. The *Taylor* court permitted the state to appeal reasoning that "[i]t was within the peculiar province of the jury to judge the credibility of the witness. It will also be within the province of the court to grant a new trial, upon motion of the defendant, if, in its opinion, the verdict was against the evidence." *Id.* at 591, 22 S.W.2d at 35. Therefore, we agree that when a trial court exceeds its duty to determine the sufficiency of the evidence by judging the credibility of the evidence, it commits an error that requires correction. Consistently with Ark. R. Crim. P. 36.10(c) and *Taylor*, we hold the state is entitled to an appeal in this case.

In the order entered in the present case, the trial court carefully recited the evidence presented by the state and then made conclusory comments. Based on several of those conclusory comments, we conclude the trial court erroneously weighed the credibility of the evidence instead of determining the sufficiency of the evidence. We discuss separately the recited evidence and some of the conclusory comments.

Dr. Fahmy Malak performed the autopsy on Shirley Kelley and determined her cause of death to be multiple crushing blunt trauma to the body, including the upper and lower extremities, the torso, head and neck. Dr. Malak explained he believed that while Mrs. Kelley was alive and standing, she was struck by a vehicle from the rear. Donald E. Smith, of the trace evidence section of the State Crime Laboratory, testified that hairs from the victim's head were found on two automobiles. Other evidence showed that one automobile belonged to appellee Long and that the other automobile was not connected to either appellee in any way. The trial court observed the state's theory that the jury could determine all, some, or none of Smith's findings to be accurate. However, the trial court stated it "could accept that the jury could believe all or none of Smith's testimony, but there should be a

reasonable, non-speculative basis in the record upon which a jury could believe he is correct on the hair on one vehicle and incorrect on the hair on the other. The court can find no reasonable, nonspeculative basis in this record for such distinction."

On appeal, the state argues that it was not for the trial court to decide which part of Smith's testimony the jury would find credible. We agree with this contention, for it is well established that the jury has the right to believe all or any part of a witness' testimony. *Abdullah* v. *State*, 301 Ark. 235, 783 S.W.2d 58 (1990). The foregoing is but one example of situations where the trial court erroneously invaded areas within the province of the jury.

Another example of such invasion is seen in the part of the order where the trial court points out numerous inconsistencies in various witnesses' testimonies and then concludes that the jury would have to engage in too much speculation and conjecture to find appellees guilty of the crimes charged. While it is true that a verdict cannot be supported by evidence requiring the jury's speculation of a defendant's guilt, it is also true that variances and discrepancies in the proof go to the weight or credibility of the evidence and are therefore matters for the factfinder to resolve. *Jones* v. *State*, 305 Ark. 95, 805 S.W.2d 642 (1991). Thus, when there is evidence of a defendant's guilt, even if that evidence is conflicting as it was in the present case, it is for the jury as factfinder to resolve the conflicts and inconsistencies and not for the court to resolve on a directed verdict motion.

Yet another example of the trial court's invasion of the jury's province remains to be illustrated. The trial court stated in its order that it was concerned about the importance of the requirement that circumstantial evidence be "inconsistent with any other reasonable conclusion but the guilt of the defendants." It is true that when circumstantial evidence alone is relied on as substantial evidence to support a verdict, that circumstantial evidence must indicate the accused's guilt and exclude every other reasonable hypothesis. *Black* v. *State*, 306 Ark. 394, 814 S.W.2d 905 (1991). However, the question of whether the circumstantial evidence excludes every other reasonable hypothesis is for the factfinder to determine *Id.*; *Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). Thus, while the trial court's concern

was warranted, the analyzation of the circumstantial evidence should have been left to the jury as the factfinder in the case.

The foregoing review of the trial court's order convinces us that when considering appellees' motions for directed verdicts due to insufficient evidence, the court went beyond its duty to determine the sufficiency of the evidence and erroneously engaged in a weighing of the credibility of the evidence. We can do no more than declare the error of the trial court. We cannot reverse the judgment because, as the state acknowledged at the beginning of its brief, due to the trial court's directing verdicts favorable to appellees, appellees' double jeopardy rights prevent the state from retrying them on the same charges. *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986); *Brooks* v. *State*, 308 Ark. 660, 827 S.W.2d 119 (1992); *State* v. *Taylor*, 180 Ark. 588, 22 S.W.2d 34 (1929).

Error declared.

Ida Mae ALLEN *v.* Orlando David BURTON

92-251 843 S.W.2d 821

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Huckabay, Munson, Rowlett & Tilley, P.A., for appellant.

Gary Eubanks & Associates, by: *James Gerara Schulze* and *Darryl E. Baker*, for appellee.

ROBERT L. BROWN, Justice. The appellant, Ida Mae Allen, raises three points for reversal of a verdict and judgment against her in the amount of $300,000, resulting from a vehicular collision and injury to the appellee, Orlando David Burton. None of the points has merit, and we affirm.

On March 17, 1990, Ida Mae Allen and Orlando David Burton, were traveling separately on Highway 65 near Pine Bluff. Both parties were southbound. The portion of Highway 65 involved has five lanes — two southbound, two northbound, and one center turning lane. Allen was driving a car in the inside lane a short distance behind Burton, who was driving a motorcycle in the outside lane. Allen's husband was a passenger in her car. Burton had a friend riding on the back of his motorcycle.

What happened next is disputed by the parties. According to Allen, she first observed Burton pulling into the outside lane from the shoulder of the highway. His right signal light was on, she said. Once he was in the outside lane, he did not turn off the right-turn signal, which remained on until the accident, according to Allen. She further stated that she was in the inside southbound lane behind Burton, while he was in the outside lane. As the front of her car began to come even with the front of Burton's motorcycle, he turned left directly in front of her. She applied her brakes, struck the motorcycle, and ended up in the northbound lane headed toward a ditch.

Burton's version of the incident was altogether different. He denied ever having been on the highway shoulder. Instead, he testified that he was attempting to turn into an intersection to get into the northbound lane of Highway 65 when the accident occurred:

> Well, when I put my signal light on and looked in my mirror, I saw I had time to change to the center lane, so I changed. And I was driving very slowly in this lane so I could find an intersection so I could get off and turn around and go back. And as I saw an intersection that I could turn left into, when I got ready to turn, I put my signal light on and checked my mirrors. When I got — as soon as I went into my turn to get into the turn lane, then I was just hit from my left. The car behind me just ran into me.

Burton lost his left foot and a portion of his left leg because of the accident. He filed suit against Allen. Allen, in response, pled that Burton was under the influence of alcohol and was negligent, which proximately caused his own injuries. Following a jury trial, the verdict of $300,000 was rendered.

I. AMI INSTRUCTION 902

Allen argues for her first point that AMI Instruction 902 was improperly given over her objection because it did not identify a specific purpose for which the superior vehicle could use the highway. The instruction read to the jury was as follows:

> Now, when two vehicles are traveling in the same direction, the vehicle in front has the superior right to the use of the highway [for any proper purpose] and the driver behind must use ordinary care to operate his vehicle in recognition of this superior right. Now, this does not relieve the driver of the forward vehicle of the duty to use ordinary care and to obey the rules of the road. (Brackets ours.)

Apparently, before the jury retired to reach its verdict, Allen objected to AMI 902. However, no record of the objection was made. After the jury went out, the trial court stated that counsel could make his objection for the record "just as if it had come prior to our giving it to the jury." Allen's counsel then stated the objection:

> Your Honor, the defendant objects generally and specifically [to] the court's giving AMI 902 specifically named instruction number 13 having to do with the — having to do with the superior right of the forward vehicle in that I do not think this case presents the unique set of facts that the framers of the AMIs anticipated by the use of this instruction. Specifically, we have here an alleged change of lane situation, and I do not think that the instruction as given, or even generally or otherwise was proper under the circumstances.

The trial court then asked Burton's counsel for a reply, and this colloquy ensued:

> BURTON'S COUNSEL: Your Honor, just to be sure the record is clear on Mr. Huckabay's objection, 902 goes to the giving of the instruction generally, not for the language that we inserted in the instruction or used the term "for proper purposes" rather than saying, "for purposes of turning through an intersection," over such language . . . Mr. Huckabay's objection is to

> the . . . instruction [being given] at all, not the language of the instruction.
>
> ALLEN'S COUNSEL: Your Honor, I believe what I said was what I said.
>
> BURTON'S COUNSEL: Well, I understand. . . . I just wanted to be sure that when the brief time comes —
>
> ALLEN'S COUNSEL: I have nothing more to say other than what I said. . . .
>
> BURTON'S COUNSEL: Well . . . I know what we said back in chambers, and I just wanted to be sure that —
>
> ALLEN'S COUNSEL: And I don't think my instruction violated anything we said in chambers. Now, I [am] simply telling you what I objected to, and I think it's pretty clear.

The trial court then ruled that though the proof was in conflict, there was some proof that Burton had completed a lane change and was the forward vehicle and that AMI 902 was appropriate.

■ We have held that the failure to insert a specific purpose in the bracketed portion of AMI 902 is error. *Harlan* v. *Cubro*, 250 Ark. 610, 446 S.W.2d 459 (1971). However, it is clear in this case that Allen objected to the propriety of the AMI 902 instruction under the facts of this case and not to the absence of a precise purpose set out in the AMI 902 brackets. It is further clear that she has raised the argument of lack of a precise purpose in AMI 902 for the first time on appeal. It is axiomatic that Allen was required to object distinctly and specifically to any deficiency in AMI 902 as given. Ark. R. Civ. P. 51; *see also Nichols* v. *State*, 306 Ark. 417, 815 S.W.2d 382 (1991). No such objection appears of record. Rather, Allen argued that this was a change-of-lane case, and the superior-vehicle instruction was not applicable. We have consistently held that a party cannot make a new argument on appeal. *See, e.g., Mobbs* v. *State*, 307 Ark. 505, 821 S.W.2d 769 (1991). Because the objection concerning a specific purpose in AMI 902 was not raised below, we will not consider it for the first time on appeal.

■ We note on this point that a verbatim record of Allen's

objection to AMI 902 was not made when the objection was first brought to the trial court's attention. This violates our Administrative Order No. 4, effective July 1, 1991, which states:

> Unless waived on the record by the parties, it shall be the duty of any circuit, chancery, or probate court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it.

It puts this court at a considerable disadvantage in reviewing points pertaining to unrecorded hearings, when a verbatim record is not before us. Clearly, what is recollected after the jury retires may have gaps and may be disputed by the participants.

II. ALCOHOL DEFENSE

Allen next argues three points pertaining to Burton's consumption of alcohol before the incident. The first point deals with whether she proffered an exhibit marked number seven in a timely manner. The exhibit involved is a hospital record made during Burton's hospital stay with a handwritten notation: "Pt. refused to sign blood alcohol consent form @ 1735 h. as requested by State Trooper present in room. State Trooper removed pt.'s driver's license from pt.'s wallet @ 1737 h."

As in the case of the first issue, there was no recorded hearing relating to the admissibility of Exhibit 7 until after the jury began its deliberations. Apparently, however, a pretrial hearing was held on the various exhibits and witnesses to be presented by the parties. Allen asserts that the trial court denied admission of her exhibit, over her objection, at that time. The trial court's memory of those events, which was recorded after the jury had retired, was different:

> And, at that time, five of the six documents, as I recall, were reluctantly agreed to by plaintiff's counsel that were admissible although . . . plaintiff's counsel did not waive his right to object to them if he felt [that] tactically and strategically he should do it at that time. It never dawned on me that Mr. Huckabay would not offer the sixth document for the Court's ruling at the proper time in the course [of] the trial. I did, however, indicate I felt like there was probably a more valid objection to that document

> [than to] any of the other ones. And at such time as the trial proceeded to that point when Mr. Huckabay offered the other five documents, the sixth one was not offered and has not been until this time.[1]

Allen's counsel and the trial court plainly have a disagreement over what transpired at the pretrial hearing regarding this exhibit. The trial court, however, was definite that he had not ruled on its admissibility.

A proffer of an exhibit is essential to appellant review. *See, e.g., Loyd* v. *Keathley*, 284 Ark. 391, 682 S.W.2d 739 (1985). That an exhibit must be offered into evidence before the taking of proof has concluded is self-evident. Here, the trial court stated that Exhibit 7 was neither offered as evidence nor proffered before the jury retired. The court, as a consequence, never had occasion to rule on the matter. A proffer of evidence is appropriate after the trial court has denied its admissibility. The trial court stated, though, that a denial never took place, and we give that statement credence. The Court of Appeals has stated that the trial court has great discretion as to the time when a proffer of proof may be made. *Sitz* v. *State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988). We cannot say that the trial court abused that discretion in refusing to consider the contested exhibit after the jury had retired to consider its verdict.

The second issue concerns a comment by the trial court during voir dire. Burton's counsel advised the jury panel that Burton would testify that he had consumed two beers before the accident. Counsel then inquired whether the fact that Burton had drunk any beer at all would cause any juror to decide that Burton should not prevail. Three prospective jurors indicated affirmative responses, and they were excused for cause.

Additional jury panel members were called forward and questioned about possible prejudices against persons who ride motorcycles. The trial court returned to the subject of alcohol, inquiring:

> Would the fact that some alcohol was involved [affect

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[1] The sixth document referred to by the trial court is the disputed Exhibit 7.

> your decision]? Now, nobody has indicated that there was likely to be any proof that there was a quantity of alcohol sufficient to cause any of the laws of this state to be broken or anything like that.

At that point, Allen's attorney requested a bench conference, and the proceedings were recessed. Out of the presence of the panel, he objected to the trial court's alleged comment on the evidence that there would be no evidence that Burton was intoxicated. After some conversation, the trial court suggested the plausibility of such an instruction, and Allen's attorney interrupted and said:

> That's fine. My — just wanted the Court to know I would not have done anything so bizarre as to have the jury excused for this objection, but that I thought, as I remember what the Court said, that was the reason for my objection.

By taking this position, Allen conceded that a mistrial was not warranted which precludes a claim of error on that aspect on appeal. *See Mine Creek Contractors, Inc.* v. *Grandstaff*, 300 Ark. 516, 520, 780 S.W.2d 543, 544 (1989). The remaining question then is whether it was incumbent upon Allen to pursue the remedy of a cautionary instruction which she appeared to agree to.

We think that it was. We have held that the burden is on the complaining party to request such an instruction. *See Matkin* v. *Jones*, 260 Ark. 731, 543 S.W.2d 764 (1976). It is further the complaining party's burden to assure that the instruction is given, if the party is serious about curing asserted error. Allen did not do so, although her attorney had previously requested that course of action. She cannot now complain about its absence on appeal.

For her final point relating to alcohol, Allen contends that the trial court committed error in allowing Burton's counsel to state in closing argument: "There is no competent evidence this man was intoxicated." Allen hinges her argument on the court's disallowance of Exhibit 7 relating to Burton's refusal to permit a blood test for alcohol and urges that this exhibit would have constituted competent evidence of intoxication. As we have already indicated, Allen proffered this exhibit too late.

In addition, we view the statement by Burton's counsel

as argument — not evidence. There was ample proof before the jury that Burton had consumed three or four beers and half a pint of whiskey before the accident. Burton contested these facts and argued that there was no proof that he was drunk. We do not believe that Allen's case was prejudiced by this remark in closing argument.

III. JUROR COERCION

The jury retired to deliberate at 4:58 p.m. They returned to the courtroom at 6:40 p.m. because of difficulty in reaching a verdict. Allen's attorney indicated that the judge might wish to inquire "not as to their numerical standing" but if they were deadlocked. He added that if they were, the court should give them the dynamite instruction. The trial court stated that it would not inquire about where they actually stood. When the jurors had been reseated, the court addressed them:

> Okay. I've been told by the bailiff that . . . it's been reported to him that the jury has been unable to arrive at a verdict in this matter. Without telling me how you stand in terms of for or against the defendant, could you tell me numerically if the split is six to six or nine to three — or well, not nine to three because if it was nine to three you'd have a verdict. . . . But without telling me again which side is for, can you give me an idea of where the vote seems to stand if you've taken a vote.
>
> JURY FOREMAN: Yes, sir. It is about eight to four.
>
> THE COURT: About eight to four? Okay. Ladies and gentlemen, I have previously instructed you, of course you understand that it takes only nine to arrive on a verdict. I want to make sure you understand that to start with. Sometimes I wonder if folks really understand.

The court then gave AMI 2303, the "dynamite instruction," which encourages a verdict. The court added that the jury should "give it the good ole college try" and make a reasonable effort to harmonize its views. Allen offered no objection to any of the foregoing. The jury then went back to their deliberations and returned with a verdict in Burton's favor in fairly short order at 7:12 p.m. The verdict was agreed to by nine jurors.

We have said in a criminal case that an inquiry into numerical standing, though not commendable, might be done in such a way as not to constitute error. *See Hopes* v. *State*, 294 Ark. 319, 742 S.W.2d 561 (1988), *citing Murchison* v. *State*, 153 Ark. 300, 240 S.W. 402 (1922). Here, we discern no coercive motive on the part of the trial court. Indeed, the court repeated that in reaching a verdict jurors should not give up their individual convictions. The critical factor here, though, is Allen did not follow-up on his misgivings about a request for numerical standing or object when the trial court asked for the numerical split and added its comments. An appellant may not complain on appeal of an erroneous action of a trial court, if he acquiesced in that action or failed to object. *Daniels* v. *Cravens*, 297 Ark. 388, 761 S.W.2d 942 (1988).

Affirmed.

Laquince Termel HOGAN *v.* STATE of Arkansas

92-674 843 S.W.2d 830

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Dowd, Harrelson, Moore & Giles, by: *Gene Harrelson*, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The sole issue in this appeal is whether the trial court erred in refusing to transfer five charges against the appellant Laquince Termel Hogan from circuit court to juvenile court. These charges involved the delivery of crack cocaine, the delivery of marijuana, and the possession of crack cocaine with intent to deliver. We find no error in the court's decision, and we affirm.

On December 17, 1991, Hogan was charged as an adult in circuit court with two delivery-of-marijuana offenses and two delivery-of-crack cocaine offenses arising out of events in September and December of that same year. Hogan at the time of the alleged offenses was seventeen, his date of birth being January 19, 1974. Arrest warrants were also issued on December 17, 1991, and served on Hogan at his high school. Following his arrest at the school, Hogan was charged with possession of crack cocaine with intent to deliver.

Hogan filed a motion to transfer all charges to juvenile court on January 29, 1992, on the basis that even though he was now eighteen, he had been seventeen at the time the alleged offenses were committed. Two hearings were held, one on February 4, 1992, and one on May 12, 1992. At the first hearing, Arkansas State Police Captain Hayes McWhirtor testified that when Hogan was arrested at school, he had eight or nine rocks of crack cocaine in his possession. At the second hearing, the trial court denied the motion and said that it was doing so because Hogan "had crack cocaine on him at school," and that that fact distinguished this case from *Blevins* v. *State*, 308 Ark. 613, 826, S.W.2d 265 (1992). In *Blevins*, we granted a transfer of a sixteen-year-old's case to juvenile jurisdiction where possession with intent to deliver crack cocaine was charged but no violence accompanied the charges.

Juvenile transfer matters are governed by Ark. Code

Ann. § 9-27-318(e) (Repl. 1991), which includes these 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;
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

We have held that it is not necessary to give equal weight to each factor in juvenile transfer cases and further that proof need not be introduced against the juvenile on each factor. *Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502 (1991).

There was testimony at the juvenile transfer hearing in Hogan's favor, such as no prior record, a 3.0 grade point average at school, school leadership and sports participation, plans to attend college, and the absence of violence employed in the alleged crimes. On the other hand, multiple drug charges are involved in this case, and one charge, according to Captain McWhirtor, involved possession of eight or nine rocks of crack cocaine while Hogan was on school grounds attending classes. There is, too, the fact that Hogan is now eighteen and almost nineteen. In a 1991 juvenile transfer case, this court had the following to say regarding an appellant who had turned eighteen:

> The appellant was seventeen years and seven months old at the time of the crimes, and has now reached his eighteenth birthday. A person who has reached his eighteenth birthday cannot be committed to a youth services center. Ark. Code Ann. §§ 9-27-331(a)(1) and 9-28-209(a)(1) (Supp. 1991).

Bright v. *State*, 307 Ark. 250, 252, 819 S.W.2d 7, 8 (1991). In *Bright*, we considered that circumstance to be an important factor in denying the transfer.

The fact that no commitment under juvenile jurisdiction could result from a transfer due to Hogan's age and the fact there are multiple charges of a serious nature, one of which involves possession of a significant amount of crack cocaine on school grounds, compel us to conclude that the trial court's decision was not clearly erroneous. *See Walker* v. *State*, 304 Ark. 402-A, 805 S.W.2d 80 (1991) (Supplemental Opinion).

Affirmed.

SYNERGY GAS CORPORATION *v.* Ida LINDSEY

92-598 843 S.W.2d 825

Supreme Court of Arkansas
Opinion delivered December 7, 1992

Rieves & Mayton, by: *William J. Stanley*, for appellant.

Butler Hickey & Long, by: *Phil Hickey*; and *Killough, Ford & Hunter*, by: *Robert M. Ford*, for appellee.

ROBERT L. BROWN, Justice. The appellant, Synergy Gas Corporation, argues for reversal on the basis that a reference to Synergy's liability insurance elicited from a Synergy employee by appellee Ida Lindsey's counsel was prejudicial error. We believe that the reference to insurance was prejudicial, and we reverse

and remand for a new trial.

On August 28, 1989, the appellee, Ida Lindsey, age 76, reported to Synergy employees that she smelled gas in her house, which was located west of Caldwell. That afternoon, two employees, Danny Shackleford and James Goings, were sent to her house from Forrest City to investigate. Shackleford tightened a valve, which slowed the leak. He did not go inside the house to determine whether the water heater or floor furnace pilot light were on. Nor did he advise Mrs.Lindsey to spend the night elsewhere due to potential danger.

The following morning, August 29, Shackleford accompanied by Bob Lee, Synergy's Forrest City branch manager, returned to the Lindsey home to remove gas from an unused underground butane tank. The men did not remember notifying Mrs. Lindsey of their presence. They also failed to crawl under the house to determine conditions or otherwise to ascertain whether her pilot lights were on. They did not request that she leave the house or turn off her appliances. Instead, both testified that they went directly to work on "bleeding" the tank. Lee later testified, "I had one thing on my mind and that was getting that gas out."

Lee attached 150 feet of hose to the tank and began releasing the butane in a field to the northeast of the appellee's house. After the gas had been drained, the men removed the percentage gauge from the tank. Lee then left, and Shackleford, who was certified only to transport and deliver propane and butane gas, continued the work. He poured some dishwashing detergent into the tank to "kill the vapors," and after that, he began to fill the tank with water. At that point, gas fumes started to escape, accompanied by what Shackleford described as a "roaring" or "whistling-like noise." Detecting the odor of Mercap in the tank, Shackleford cut off the water. Shackleford turned the water on again but cut it off when the noise resumed and the odor resumed. He did not, however, warn Mrs. Lindsey. Concerned, he called the branch office and spoke with Lee, who told him "not to worry about it."

After this conversation, Shackleford heard what he described as a "crackling noise" and saw a flame run out from a vent beneath the house. He was suddenly knocked back 15 to 25 feet by an explosion. He immediately contacted his office by radio,

requesting it to alert the fire department. Shackleford next went to the front door of the house and found Mrs. Lindsey, who had come to the door in response to his efforts to break it down.

Mrs. Lindsey, testimony later revealed, was thrown from her chair by the same explosion and landed on the floor. As Shackleford attempted to get her away from the house, she insisted on retrieving her purse. Shackleford went back into the burning house and got the purse. Mrs. Lindsey filed suit against Synergy and sought damages for medical expenses, mental anguish (past and future), and property damage. In addition, she asked for punitive damages. The case was tried before a jury over two days. Synergy admitted liability for the occurrence but contested compensatory damages and denied liability for mental anguish or punitive damages. The jury returned verdicts in favor of Mrs. Lindsey in the amounts $36,436.46 for compensatory damages, $20,100 for mental anguish, and $120,000 for punitive damages.

Synergy first contends that Mrs. Lindsey's counsel questioned Bob Lee, who was one of the last witnesses, in such a way as to elicit prejudicial testimony of Synergy's liability coverage. At deposition, Lee had responded to counsel's questions about assurances he had given Mrs. Lindsey's son, Bee Lindsey, about Synergy's willingness to cover the loss with the following:

> I told Bee. I said you've got nothing to worry about. They have insurance. It will be covered. That is what John Neal told me. He said she ain't got nothing to worry about. I told you what my supervisor told me.

At trial, counsel for Mrs. Lindsey called Lee as a hostile witness and challenged him on various points that were inconsistent with statements he had made in his deposition. At one point, the trial court ruled that appellee's counsel stay behind the podium and let Lee finish answering the questions after Synergy's attorney objected to the fact that counsel was badgering the witness. The following exchange occurred later in the cross-examination:

> Q. What did you tell [Bee] about it? Did you tell him you had talked with your supervisor in West Memphis?
>
> A. I told him I had called him.
>
> Q. And what did you tell [Bee]?

A. I told him that I called him and he would be out there and I guess that's it.

Q. You know what I mean. What did you tell [Bee] about the situation?

A. Well I told him the company had insurance and I was sure he didn't have anything to worry about. That it would take care of it.

Q. You told him that you spoke to your supervisor, and he said tell Mrs. Lindsey she didn't have to worry about a thing. That they would take care of everything, didn't you?

A. That's right. That's what I was told.

Testimony continued on measures that Lee ordered to be taken after the explosion to determine whether there were any broken lines or loose connections under the house and efforts to assist Mrs. Lindsey. When Mrs. Lindsey's counsel asked Lee whether Synergy continued to send her a bill, Synergy's counsel objected, and the trial court summoned all attorneys to the bench. At that time Synergy moved for a mistrial on grounds that Mrs. Lindsey's counsel had elicited a response regarding insurance coverage. Mrs. Lindsey's counsel denied that he had elicited the response and stated that the insurance had not been mentioned at Lee's deposition: "In his deposition he said tell Mrs. Lindsey that my people said we would take care of everything. I wasn't soliciting insurance. *Insurance was never mentioned to me*, and I wasn't soliciting that. Mr. Rieves knows that is what the deposition said." (Emphasis ours.) Mrs. Lindsey's counsel was not correct in light of the deposition testimony previously quoted in this opinion, which meant the trial court at this stage was misinformed. Insurance was specifically mentioned at the deposition.

The circuit court then denied the motion because he did not believe the questioning was purposeful. At the end of all testimony, Synergy's counsel renewed the motion for mistrial and pointed out to the trial court that Bob Lee had mentioned liability insurance in his deposition in connection with Mrs. Lindsey's not having anything to worry about. The trial court refused to change his ruling.

As a general rule, it is improper for either party to introduce or elicit evidence of the other party's insurance coverage. *Younts* v. *Baldor Electric Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992). The injection of insurance coverage is proper only when it is relevant to some issue in the case. *Peters* v. *Pierce*, 308 Ark. 60, 823 S.W.2d 820 (1992). The crux of the matter, then, is whether the question that prompts a reference to insurance is "relevant to an issue or is designed to skew the jury's thinking because of the presence or absence of a deep pocket." *Hacker* v. *Hall*, 296 Ark. 571, 576, 759 S.W.2d 32, 35 (1988); *see also Bull Shoals Community Hospital* v. *Partee*, 310 Ark. 98, 832 S.W.2d 829 (1991).

We have held that where there has been an intentional and deliberate reference to insurance when it was not an issue in the case and when the opposing party had not opened the door for its admission, mistrial was the proper remedy. *Vermillion* v. *Peterson*, 275 Ark. 367, 630 S.W.2d 30(1982). In that case, the attorney for one of the defendants, in closing argument, argued that the plaintiff's carrier had already paid her medical bills. The trial court refused to declare a mistrial, and we reversed on the basis that the insurance comment was intentional, irrelevant, uninvited, and prejudicial. *See also Pickard* v. *Stewart*, 253 Ark. 1063, 491 S.W.2d 46 (1973).

In *Hacker* v. *Hall, supra*, we reversed a jury verdict because of the injection of insurance into the case. There, defense counsel was questioning the plaintiff about why he had employed a lawyer so fast. The plaintiff answered: "Because the insurance company kept harassing me." Defense counsel pursued the point:

> Defense Counsel: Which one?
>
> Plaintiff: State Farm.
>
> Defense Counsel: The one from State Farm or the one with Burnham:
>
> Plaintiff: No, State Farm.

Burnham Ford was the plaintiff's employer. We concluded in *Hackler* that the reference to Burnham Ford's insurance by the defense counsel was misconduct and was one reason for granting a new trial.

On the other hand,we have also held that where the attorney poses a question with apparent sincerity and in good faith rather than in a deliberate attempt to prejudice the jury and the witness answers with a reference to insurance, an admonition by the court is ordinarily sufficient to correct the error. *Lin Manufacturing Company of Arkansas, Inc.* v. *Courson*, 246 Ark. 5, 436 S.W.2d 472 (1969).

Here, the facts are somewhat different, and they present an issue we have not considered before. The trial was solely about damages, liability having been admitted by Synergy. Mrs. Lindsey's counsel had called Bob Lee as a hostile witness and had used his deposition twice for impeachment purposes before the colloquy at issue. Her counsel knew or should have known that in response to an almost identical question at deposition, Bob Lee said: "They have insurance. It will be covered." Nevertheless, counsel forged ahead aggressively, using that deposition to impeach Lee and forcing the issue of precisely what had Lee told Mrs. Lindsey's son. Lee had been told by Synergy's attorney not to mention insurance. But counsel for the other side clearly pushed Lee into a corner.

We cannot say with absolute certainty that the appellee's counsel intentionally elicited the information about Synergy's insurance coverage. We are certain, however, that counsel trod recklessly onto dangerous ground and should have known, based on the deposition he took, the response that he would get from Lee when he pressed him for an answer. Moreover, Mrs. Lindsey's counsel incorrectly advised the trial court when the mistrial was first under discussion by stating that insurance was not mentioned in Lee's deposition.

We are mindful of the appellee's contention that Synergy is a major company with considerable assets and that this fact was brought to the jury's attention in connection with the claim for punitive damages. Nonetheless, it would place us in an untenable position to premise a decision of prejudice on the extent of the insured's means. Irrespective of a company's assets, the mention of insurance would have a profound effect on any jury. It suggests, among other things, that a third party would foot part, if not all, of the bill — especially here when the witness added that the insurance would "take care of it." That statement in itself was

misleading because liability coverage typically does not cover intentional acts leading to punitive damages.

At that point, the metaphorcal bell had rung, and the prejudice was pronounced. While each and every mention of insurance at trial may not constitute reversible error, under the circumstances of this case where appellee's counsel proceeded recklessly in eliciting an irrelevant response on liability coverage, the trial court erred in refusing to grant a mistrial. We note again in so holding that the trial court was misinformed about the reference to insurance in Lee's deposition when it first denied the motion for mistrial.

Reversed and remanded.

HAYS, J., concurs.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I respectfully disagree with the court's decision to reverse by holding that Ms. Lindsey's counsel improperly injected insurance through his cross-examination of Synergy's branch manager, Bob Lee. The majority opinion sets forth Lee's relevant deposition testimony and trial court testimony, and it is undisputed that, soon after the Lindsey house was damaged, Lee told Ms. Lindsey's son, Bee, "he had nothing to worry about, it (the damage) would be covered." True, Lee mentioned insurance at his deposition, but Synergy's attorney informed Lee not to mention insurance at the court trial. Contrary to his attorney's admonition, he mentioned insurance nonetheless. In fact, he did so, in my view, in answer to a very legitimate and relevant question posed by Lindsey's counsel.

Obviously, Lindsey's counsel wanted Lee to tell the jury that Synergy (per Lee) had told Ms. Lindsey and her son that Synergy would take care of her loss. By such a remark, Lee implied Synergy was liable for Lindsey's entire loss. Lee could have conceded that point without mentioning insurance. Lindsey clearly had every right to have the foregoing admission against interest declared before the jury even though she might not be entitled to Lee's earlier reference to insurance. Lee volunteered the reference to insurance anyway. When the reference to insurance occurs in good faith rather than in a deliberate attempt to prejudice the jury, an admonition by the court is ordinarily

sufficient to correct the error. *Lin Mfg. Co. of Arkansas* v. *Courson*, 246 Ark. 5, 436 S.W.2d 472 (1969).

Here, Synergy requested no cautionary instruction, but instead requested only a mistrial which the court denied. In my view, the trial court did not abuse its discretion since the record reflects Lindsey's counsel questioned Lee in good faith, and because Synergy — through Lee — assured Lindsey that Synergy would take care of her loss. With such assurances having been made known to the jury, Synergy would have suffered little prejudice if it had asked the trial court to inform the jurors that insurance was not relevant and to admonish them not to consider any reference to insurance in their deliberations.

For the above reasons, I would affirm.

Cassandra GREEN *v.* STATE of Arkansas

CR 92-1194 843 S.W.2d 316

Supreme Court of Arkansas
Opinion delivered December 7, 1992

William P. Mills, for appellant.

No response.

PER CURIAM. Petitioner, Cassandra Green, by her attorney, William P. Mills, has filed a motion for rule on the clerk. Her attorney admits that the record was tendered late due to an error on his part.

We find such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See*

Terry v. *State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

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

Don RILEY, Virginia Kilburn and Susan Woods, Jointly and Severally as Concerned Citizens and Registered Voters of Baxter County *v.* The BAXTER COUNTY ELECTION COMMISSION and Its Members, Thurman Wood, Chairman; Delores Friend, Secretary; and Gail Tornquist, Vice Chairman

92-659 843 S.W.2d 831

Supreme Court of Arkansas
Opinion delivered December 14, 1992

The Law Officers of Christopher O'Hara Carter, P.A., by: *Christopher O'Hara Carter*, for appellant.

Gordon Webb, Prosecuting Att'y, for appellee.

JACK HOLT, JR., Chief Justice. The issue is whether the trial court erred by ruling in favor of the appellees, the Baxter County Election Commission and its members, with reference to its 1992 apportionment of quorum court districts within the county. We hold that it did not and affirm.

The appellants, Don Riley, Virginia Kilburn, and Susan Woods, registered voters of Baxter County (hereafter "the voters"), opposed a new quorum court redistricting plan for Baxter County on the basis that it would result in discrimination since the population varied among the districts by 10.149% and this was greater than the acceptable 10% variance set out by the United States Supreme Court in *Brown* v. *Thomson*, 462 U.S. 835 (1983), and earlier precedent.

Following a hearing, the Baxter County Circuit Court held:

The Court in reviewing the law, and in listening to the

> testimony of the Defendants, finds that the Defendants have given acceptable reasons for variance from a strict 10.0% deviation the Court [sic] further finds that the Baxter County Election Commission has substantially complied with the requirements of Ark. Code Ann. § 14-14-401 and therefore the claims of the Plaintiff for non-compliance are dismissed.

The general principle underlying this case is that unit voting systems which contain varying populations are unconstitutional *per se* because they deny residents equal representation ensured by the fourteenth amendment. *Gray* v. *Sanders*, 372 U.S. 368 (1963). The overriding objective of apportionment must be substantial equality of population among the various districts. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). We have reiterated the rule that the primary consideration of reapportionment is the numerical equality of the districts, or "fair and effective representation for all citizens." *New York City Bd. of Estimate* v. *Morris*, 489 U.S. 688, 701 (1989) (citing *Reynolds* v. *Sims*, 377 U.S. 533, 565-6 (1964)). *See U.S. Dept. of Commerce* v. *Montana*, 112 S.Ct. 1415 (1992); *Taylor* v. *Clinton*, 284 Ark. 170, 680 S.W.2d 98 (1984); *Wells* v. *White*, 274 Ark. 197, 623 S.W.2d 182 (1981). Since *Baker* v. *Carr*, 369 U.S. 186 (1962), the United States Supreme Court has "consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts" and has developed and enforced the "one person, one vote" principle. *Davis* v. *Bandemer*, 478 U.S. 109, 118 (1986). Population variation among districts greater than 10% is a prima facie violation of the equal protection clause. *Brown* v. *Thomson*, 462 U.S. 835 (1983); *Connor* v. *Finch*, 431 U.S. 407 (1975); *Chapman* v. *Meier*, 420 U.S. 1 (1975); *Gaffney* v. *Cummings*, 412 U.S. 735 (1973). After such a prima facie case is established, the burden of proof shifts to the defendant to justify the variances.

Although the voters raise five points for our review, there are, in essence, only two issues before us: whether the trial court erred in finding that the Election Commission justified the variance from "the 10% rule" and whether the trial court erred in finding that the Election Commission substantially complied with our code requirements for apportionment.

I.

DID THE TRIAL COURT ERR IN FINDING THAT THE ELECTION COMMISSION JUSTIFIED THE POPULATION VARIANCE GREATER THAN 10%?

At the hearing, all parties to the case stipulated to the 10.149% variance. The trial court stated that this was a prima facie case of discrimination, and the Election Commission then proceeded to explain why the variance exceeded 10%.

There must be some "rational policy" to justify a variance over 10%. *Brown* v. *Thompson, supra.* The testimony at the hearing revealed that the Election Commission had requested and received from the Attorney General the 10% variance guidelines in setting up quorum court districts, the Commission held several meetings, and the Commission sought to keep to the old district lines as much as possible to avoid inconveniencing the voters. One Commission member testified that the overriding principle they followed was equal representation. From maps with the new Decennial Census numbers, they took the total population and divided by eleven, the number of districts to be apportioned. The districts with population already closest to that number were kept the same, and the others were slightly modified, taking geography into account, to reach parity. The end result was that two of eleven districts were over the ten percent acceptable variance by four and three voters, respectively. Thus, a systematic approach taken by the Commission reveals a rational policy of redistricting in Baxter County.

Furthermore, the 10.149% variance is only slightly over the acceptable 10% variation. Applying Arkansas law, the Federal District Court for the Eastern District of Arkansas held that a population difference of 10.9% between proposed state Senate districts in Arkansas was not a "discrepancy sufficiently significantly to justify rejecting the [Board of Apportionment's] plan . . . [which] represents official State policy." *Jeffers* v. *Clinton,* 756 F. Supp. 1195, 1201 (E.D. Ark. 1990), *aff'd* 111 S.Ct. 662 (1991).

We cannot say that the trial court erred in finding that the Commission overcame the prima facie case of discrimination.

II.

WAS THE TRIAL COURT'S FINDING THAT THE ELECTION COMMISSION SUBSTANTIALLY COMPLIED WITH THE ARK. CODE ANN. § 14-14-401—407 (1987) CLEARLY ERRONEOUS?

Subchapter 4 of Title 14, Section 14 of the Arkansas Code Annotated governs the apportionment of quorum court districts. Ark. Code Ann. § 14-14-401(a) states:

> Each county of the state shall divide its land area into convenient county quorum court districts in a manner and at times prescribed by the General Assembly.

Testimony at the hearing revealed that in drawing the new lines, the Commission started with the 1980 districts and then adjusted their boundaries with their stated goal being population equality and convenience to voters. There is no evidence that the new lines were inconvenient for any voters. *See In re Redistricting Voting Dists. of Ross Township*, 557 A.2d 59 (Pa. Commw. 1989)(redistricting approved where trial court took into account election administration, topography, voter turnout, and convenience).

Next, the number of quorum court districts is determined by a population chart found at Ark. Code Ann. § 14-14-402. In the present case, Baxter County correctly created eleven districts.

The procedure for actually apportioning quorum court districts is found at § 14-14-403, titled "Apportionment of Districts":

> (a) The county board of election commissioners in each county shall be responsible for the apportionment of the county into quorum court districts. Until otherwise changed in the method set forth in this subchapter, the districts of each county shall consist of the territory of the township established by the county board of election commissioners on or before November 3, 1975, pursuant to the provisions of Acts 1975, No. 128 [Repealed]. Thereafter, districts shall be apportioned on or before the first Monday after January 1, 1982, and each ten (10) years thereafter.

(b) All apportionments shall be based on the population of the county as of the last Federal Decennial Census, and the number of districts apportioned shall be equal to the number to which the county is entitled by law.

(c) The provisions of this subchapter shall not be construed to affect the composition of the county committees of the political parties, and the county committee of each political party shall designate the geographic area within the county from which county committeemen shall be selected.

The Election Commission complied with these requirements.

As additional requirements, § 404 orders the State Board of Apportionment to provide the Federal Decennial Census data to the county election commissions; § 405 requires county election commissions to file their plans setting forth boundaries and populations with the county clerk, and requires the plan to be published within fifteen days of that filing; and § 406 provides that a challenge of the plan may be made in the circuit court within thirty days of its publication. *See Stack* v. *Clinton*, 309 Ark. 400, 832 S.W.2d 476 (1992); *Taylor* v. *Clinton*, 284 Ark. 170, 680 S.W.2d 98 (1984); *Goldsby* v. *Brick*, 281 Ark. 58, 661 S.W.2d 368 (1983). The 1990 census data was provided and used in the redistricting, the plan was filed and published, and the voters' present challenge was brought within 30 days.

Lastly, § 407 directs the county clerk to certify the plan and transmit it to the Secretary of State if no one has challenged it within the allotted time period. This has not been done due to the present ongoing challenge.

On review, this court will not reverse a finding of fact by a trial judge unless it is clearly erroneous, and we view the evidence, and all reasonable inferences therefrom, in the light most favorable to the appellee. *Tuthill* v. *Arkansas County Equalization Bd.*, 303 Ark. 387, 797 S.W.2d 439 (1990). In so viewing the evidence, we cannot say the finding of fact that the Election Commission complied with the statutory requirements of Ark. Code Ann. § 14-14-401—407 (1987) was clearly erroneous. Ark. R. Civ. P. 52(a).

For the foregoing reasons, we affirm the trial court.

Preston WILLIAMS and Gail Williams d/b/a Vowels Print Factory *v*, Richard SPELIC and Barbara Spelic d/b/a Vowels Office Supply

92-33 844 S.W.2d 305

Supreme Court of Arkansas
Opinion delivered December 14, 1992

Lyons & Emerson, by: *Jim Lyons*, for appellant.

Dennis Zolper & Assoc., P.A., by: *Dennis Zolper*, for appellee.

ROBERT H. DUDLEY, Justice. The issue in this case is whether the buyers of a business purchased the trade name and are entitled to protect that trade name. The issue is primarily a factual one, and we affirm since the chancellor's findings of fact are not clearly erroneous.

In 1932, Mr. Vowels started a business in Jonesboro named "Vowels Printing." The printing business was apparently successful, and about twenty years later Mr. Vowels expanded the business to include the sale of office supplies. At that time, in the early 1950's, the name of the business was changed to "Vowels Printing and Office Supply." In 1984, the name was changed to "Vowels Printing and Supply." Preston Williams, whose wife Gayle is the daughter of Mr. Vowels, became involved in the business in 1984. In 1987, the Williamses began to physically separate the office supply section of the business from the printing section, and, by May, 1988, they had moved the printing part of the business across the street from the office supply business. The two sections of the business were operated as one proprietorship. They both had the same tax identification number, and if either or both sections did work for a customer, the account receivable was payable to the one business, Vowels Printing and Supply.

A real estate broker contacted the buyers, Richard and

Barbara Spelic, and asked if they would be interested in buying "Vowels." The husband, buyer Richard Spelic, knew "Vowels had an excellent reputation in town, and I thought buying Vowels would be a good opportunity for us to continue in the community and keep the Vowels' name to go on." The husband had been inside the business twice and the wife only once, when, on May 13, 1988, they signed an agreement to purchase "Vowels Office Supply." They testified that they were told that the Williamses would retain the printing business across the street, but, they were not told that the sellers would try to retain the name "Vowels." At the time of the sale, the sign on the front of the building housing the printing business across the street did not contain the name "Vowels;" it reflected only "The Printing Factory."

The sales agreement, a form with blank lines that were filled in by the real estate agent, provided a sales price of $80,000.00 with $3,000 being allocated to a covenant not to compete. Under this covenant, the sellers, the Williamses, were not to engage in the sale of office supplies for seven years, and the buyers, the Spelics, were not to engage in printing for seven years. More important, the agreement provided that the buyers paid $1,500 for goodwill and $1,500 for the business trade name. The Bill of Sale provides that the buyers purchased the "business trade name, goodwill and any and all other assets, tangible or intangible, belonging or used in connection with or otherwise pertaining to the operation of Vowels Office Supply. . . ."

At the time of the sale, the sellers had listed the office supply business in the telephone directories as "Vowels Office Supply" and had separately listed the printing business as "Vowels Printing Factory." The sellers, in contradiction of the testimony of the buyers, testified that they told the buyers of the telephone book listings.

The office supply building was being remodeled at the time of the sale, and soon after the sale was completed, a dispute arose over the cost of some of the remodeling. The buyers testified that at that time, the sellers placed a large sign on the front of their printing business that read "Vowels Print Supply" and began answering their phone by saying "Vowels." The buyers were also answering their phone by saying "Vowels." Customers, suppliers, and creditors were confused, and the sellers' mail was sometimes

delivered to the buyers and vice versa. The buyers later violated the covenant not to compete by taking a printing order for a local bank. A complaint and counterclaim was eventually filed. Ultimately, the chancellor enjoined the buyers from violating the covenant not to compete and enjoined the sellers from using the name "Vowels" in their printing business.

The chancellor's findings of fact included the following:

> [T]he name "Vowels" has . . . been an accepted and acknowledged local synonym for office supplies and/or printing. As such, "Vowels" has a special significance and meaning and to permit the continued use of the name "Vowels" in . . . [sellers'] business can only result in hopeless confusion for the general public.

The chancellor then applied Ark. Code Ann. § 4-71-113 (Repl. 1991), which provides:

> Likelihood of injury to . . . a trade name valid at common law, shall be grounds for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

■ The sellers make four assignments of error, the first of which is that the trial court erred because the parties were not in competition with each other. The argument overlooks the plain language of the statute. The statute recognizes the value of a trade name in its own right and affords protection to the owner against its unauthorized use. Neither competition nor confusion on the part of customers is required. The issue is not one of competition, but of the *likelihood* of dilution of the value of the trade name as an asset by its use by someone other than the owner.

■ The sellers' second assignment is that under the case of *Howe Scale Co.* v. *Wyckoff*, 198 U.S. 118 (1905), a family name may be used in the absence of fraud or deceit unless the exclusive right to the family name is contracted away. Again, the argument overlooks the statute. The chancellor impliedly found that the sellers sold the trade name "Vowels," that there is a likelihood of injury to it, and that proof was sufficient for the issuance of an injunction under the statute.

■ A part of the argument on this point is that the sellers

did not convey the trade name "Vowels" used in the printing business. The proof shows the buyers paid $1,500 to the sellers for the business trade name. The proof showed that the name "Vowels" had been used in Jonesboro for over fifty years, first in 1932 as "Vowels Printing," then, in the early 1950's as "Vowels Printing and Office Supply," and then, in 1984 as "Vowels Printing and Supply." There was substantial testimony, essentially undisputed testimony, from which the chancellor could find that the name "Vowels" carried a good reputation in the community in both office supplies and printing and that the name had acquired a secondary meaning to the purchasing public of quality in both office supplies and printing. The predominant word in the Vowels' trade name used for over fifty years is "Vowels." The buyers testified they were asked by the real estate agent if they wanted to buy "Vowels," that they thought they were buying "Vowels," and that the sellers never disclosed they had any intention of retaining any part of the "Vowels" trade name.

To the contrary, the sellers testified that they told the buyers they were going to use the name "Vowels Printing Factory," and, in addition, the contract provides that the buyers purchased only the name "Vowels Office Supply." The chancellor heard and observed the witnesses and found in favor of the buyers. We cannot say the finding of fact was clearly erroneous.

In his letter opinion, the chancellor wrote, "[T]he existing confusion will ultimately detract from the otherwise separate businesses of the parties, to the detriment of each," and when one considers that three years from now, or seven years from the date of the contract, both parties can compete in both of the businesses, no other conclusion could reasonably have been reached.

■ The sellers' next assignment of error is based on the law of unfair competition, and, again, the argument overlooks the statute. Contained in this assignment is a sub-argument that the chancellor erred in ruling that "the name, 'Vowels' has for many years to my personal knowledge been an accepted and acknowledged local synonym for office supplies and printing." They contend that the chancellor should not have taken judicial notice of the secondary meaning. *See* A.R.E. Rule 201. The sellers are correct. The chancellor should not have taken judicial notice of

the secondary meaning, but it is immaterial in this case because there was sufficient independent proof of the matter. Thus, the error was harmless. *See Arkansas Sav. & Loan Ass'n* v. *Mack Trucks of Ark., Inc.*, 263 Ark. 264, 566 S.W.2d 128 (1978).

The sellers' final argument of error is that the trial court erred in granting the injunction because Vowels is the maiden name of Gayle Vowels Williams. The general rule is that prohibiting an individual from using his or her true surname is to take away his identity, and courts will avoid doing that, if possible. *Societe Vinicole de Champagne* v. *Mumm*, 143 F.2d 240 (2d Cir. 1944). Here, the general rule has no application at all to seller Preston Williams, and seller Gayle Williams did not lose either her surname or her individual identity by the court's ruling. Even if she lost some part of her business name identity, we would not reverse. When a surname is used as a trade name, it risks becoming a symbol of the business and losing its individual identity. *Levitt Corp.* v. *Levitt*, 593 F.2d 463, 468 (2d Cir. 1979) (citing R. Callman, *Unfair Competition, Trademarks and Monopolies*, § 85.2 (d)(1) (3d ed. 1969)). This is especially true when the name is conveyed as goodwill, and, if confusion is likely, there must be some limitation on a seller's unrestricted use of his or her name. *Taylor Wine Co.* v. *Bully Hill Vineyards, Inc.*, 569 F.2d 731, 734 (2d Cir. 1978). In a situation in which an infringer has previously sold his business name with its goodwill, a sweeping injunction is more likely to be an appropriate remedy. *Id.* at 735. When a business purchases goodwill and a trade name, it acquires a valuable property right, and that is the right to inform the public that it possesses the experience and skill symbolized by the original concern. *Levitt Corp.* v. *Levitt*, 593 F.2d 463, 468 (2d Cir. 1979). If the public is confused, the value of the goodwill is diluted. Courts will be especially alert to foreclose attempts by a seller to "keep for himself the essential thing he sold, and also keep the price he got for it." *Guth* v. *Guth Chocolate Co.*, 224 F. 932, 934 (4th Cir. 1915), *cert. denied*, 239 U.S. 640 (1915). Thus, the chancellor could validly issue the sweeping injunction against the use of the maiden name of the sellers.

Affirmed.

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

ROBERT L. BROWN, Justice, dissenting. I cannot agree that the trade name at issue here is Vowels rather than Vowels Office Supply. What was sold by the Williamses and purchased by the Spelics was "Vowels Office Supply." The Offer and Sale Agreement reads in part as follows:

> BUSINESS TRADE NAME: Seller hereby (grants) grants (~~does not grant~~) ------ Buyer effective at the time of closing of escrow, any and all rights which the Seller may have in the trade name Vowels Office Supply.

"Vowels Office Supply" is written in by hand. The value assigned to the trade name was $1,500 out of a total purchase price of $80,000. The sale closed on May 31, 1988.

Shortly thereafter, a joint letter went out to the customers of the former Vowels Printing and Supplies. It spoke of the division of the business into two entities—Vowels Printing Factory and Vowels Office Supplies—and read in part:

> On the first of June, Vowels Printing and Supplies officially became two entities. The printing and copying services, recently relocated at 319 South Church (across the street from the blue awninged Vowels), will be known in the future as Vowels Print Factory. Preston and Gayle Williams will continue as owners and managers of the Print Factory. Barbara, Amber, Donnie, and Gina will be here, as well, to assist you in meeting all of your printing and copying needs.
>
> The office supply sales will still be located at 324 South Church and be known as Vowels Office Supplies. The new owners, Richard and Barbara Spelic, will be happy to greet all our old customers. Come in and meet them, as well as Jennifer and Carol. Jonnas will remain at Vowels Office Supplies, also, and they all are eager to serve you.

The letter had the names of the Williamses and Spelics typed at the bottom. Barbara Spelic later testified at trial that she did not approve of the letter's being sent but acknowledged that she knew of it and did not tell the Williamses not to send it. The letter, in fact, apparently was sent with bills to customers of the former Vowels Printing and Supplies which benefitted both Vowels Print

Factory and Vowels Office Supply.

A few months after the sale, the Williamses put up a sign with the name "Vowels" in tandem with The Print Factory. The Spelics did not object to this.

The Jonesboro City Directory in 1987-1988 listed both Vowels Print Factory and Vowels Office Supply with different addresses and different telephone numbers. The 1988-1989 Indian County Phone Book listed Vowels Print Factory. The Southwestern Bell Telephone Directory also listed both entries in 1988-1989 in both the white pages and yellow pages. Inexplicably, Barbara Spelic testified that she did not know whether she checked the telephone directories in 1988 to determine if Vowels Print Factory was listed separately.

The genesis for this litigation was a complaint by the Williamses in August 1989 — more than a year after the sale — contending that the Spelics violated the covenant not to compete in the Offer and Acceptance Agreement by taking a printing order from a local bank. The chancellor enjoined this violation. The Spelics never complained about confusion between Vowels Office Supply and Vowels Print Factory until it filed a counterclaim to this lawsuit by the Williamses. The chancellor, nonetheless, enjoined the Williamses from using the trade name Vowels but in doing so found that Vowels had been accepted and acknowledged as a "local synonym for office supplies and/or printing." In effect, the chancellor found that Vowels had a secondary meaning for both office supplies *and* printing.

The fact that the trade name, Vowels Office Supply, was sold is undisputed. Subsequent events, including the letter to customers, evidenced two separate entities, both of which used the name Vowels. The majority concludes, however, that the chancellor was correct in finding that there was the likelihood of injury or dilution to Vowels, a "trade name valid at common law," under the statute. *See* Ark. Code Ann. § 4-71-113 (1987). The focus at trial, however, should have been on the trade name at issue, Vowels Office Supply. It is clear that the Spelics recognized that Vowels Print Factory would continue to be associated with an independent entity based on the letter to customers which they had knowledge of. They undoubtedly also knew that both enterprises were listed in various telephone directories. Yet they

never raised a complaint until they were sued for breach of the non-compete agreement more than a year after the sale.

The chancellor expanded the scope of the trade name purchased by finding that the name Vowels had been bought for the Spelics' exclusive use. That finding impinges on the retained rights of the Williamses in Vowels Print Factory. The chancellor did not find that Vowels had a secondary meaning associated only with the office supply business. On the contrary, he found that Vowels was synonymous with both businesses, which bolsters the Williamses' argument. The statute, § 4-71-113, must be read to protect both trade names. I recognize the heavy burden inherent in holding that a chancellor's factual findings are clearly erroneous. However, I would do so in this case and reverse the chancellor's order.

HOLT, C.J., and GLAZE, J., join.

Billy Joe BARNES *v.* Anna M. BARNES

92-658 843 S.W.2d 835

Supreme Court of Arkansas
Opinion delivered December 14, 1992

John Lloyd Johnson, for appellant.

Stephen R. Cobb, for appellee.

DAVID NEWBERN, Justice. This is a paternity and child support case in which the Chancellor determined the appellant, Billy Joe Barnes, to be the natural father of Jordan Barnes and required him to pay $51 weekly child support and overdue support owed in the amount of $1,700. Barnes raises ten issues on appeal. We find no grounds for reversal and affirm the judgment.

Barnes was married to the child's mother, the appellee, Anna M. Barnes, now Anna Barnes Hicks, until they divorced in January of 1989. Two children were born during the marriage. Hicks testified that on December 24, 1989, Barnes returned from Oklahoma with their children who had been visiting their grandparents. Hicks stated Barnes stayed at her home that night so he could open presents with the children on Christmas morning. Hicks testified she and Barnes had sexual intercourse at approximately 2:00 a.m. Christmas morning. After the incident, Hicks realized she was pregnant, and the child was delivered on September 14, 1990, approximately nine months from the alleged date of conception. Hicks claimed Barnes was the child's father and stated he was the only man with whom she was sexually involved for a month and a half before and after she became pregnant.

Hicks admitted having sexual intercourse with two other men, Richard Piggott and Bob Smith, after she divorced Barnes. She testified she stopped seeing Piggott in September of 1989, and she used birth control the entire time they dated. Hicks stated she did not remember the exact dates when she had sexual intercourse with Smith. Smith later testified he had been sexually active with Hicks in 1990 and 1991. He testified, however, that he had had a vasectomy in June of 1984, implying he could not have been Jordan's father.

In January of 1991, Hicks filed a paternity suit in the Juvenile Division of Pulaski County Chancery Court, claiming Barnes was Jordan's father. The parties agreed prior to trial that a blood test would be administered to determine paternity. The agreement also provided the test would be admissible at trial. The test, which was later admitted over Barnes's objections, showed a 99.59% probability that he was the child's father. Based on the results of the blood test, coupled with Hicks's testimony regard-

ing access during the probably period of conception, the Chancellor determined Barnes to be Jordan's natural father.

1. Subject matter jurisdiction

Barnes relies on Ark. Code Ann. § 9-10-101(a)(2) (Repl. 1991) and argues the Juvenile Division of Chancery Court was without subject matter jurisdiction, and the paternity case should have been transferred to Chancery Court. He contends the Pulaski County Chancery Court had exclusive jurisdiction over the case. Section 9-10-101(a)(2) states that a chancery court has exclusive jurisdiction of paternity matters arising during the pendency of original equity proceedings. The proper interpretation of this section of the statutes is that exclusive jurisdiction will lie in a chancery court when a paternity matter arises during the pendency of an action already within its jurisdiction. This provision is simply inapplicable to the facts of this case.

The more relevant provision is Ark. Code Ann. § 9-10-101(a)(1) (Repl. 1991) which provides that a chancery court exercises concurrent jurisdiction with the juvenile division of chancery court in paternity cases. Furthermore, Ark. Code Ann. § 16-13-304(b) (Supp. 1991) states, "Notwithstanding the provisions of the Arkansas Juvenile Code of 1989, or any other enactment which might be interpreted otherwise, the chancery court *or any division of chancery court* shall have jurisdiction for all cases and matters relating to paternity." (Emphasis added). The Juvenile Court is a division of Chancery Court, each exercising concurrent jurisdiction over paternity cases. Ark. Code Ann. § 16-13-602 (Supp. 1991); *Schuh* v. *Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990).

2. Transfer of paternity case

Barnes's second point relates to the transfer of his paternity case among several Chancery and Juvenile Court Judges in the Sixth Judicial District. Barnes argues the intra-district exchange violated our holding in *Lee* v. *McNeil*, 308 Ark. 114, 823 S.W.2d 837 (1992).

The case was originally filed in the Juvenile Division of Pulaski County Chancery Court with Chancellor Joyce Williams Warren presiding and set for trial on Friday, September 27,

1991. Because the Juvenile Judges had a backlog of pending paternity cases, the other Sixth District Chancellors were assisting them in deciding these cases. Although the cases were technically not reassigned, the Chancellors assisted the Juvenile Judges by hearing their cases on Fridays on a rotation basis. The Barnes case was originally scheduled to be heard by one of the six rotating Chancellors, but due to scheduling conflicts, the case was sent back to Chancellor Warren's Court where it had been filed originally.

In the *Lee* case, three judges in the Twentieth District entered into an exchange agreement which created within the District three divisions each of chancery, circuit, and juvenile courts. The practical effect of the agreement was that a criminal case could be heard by a duly elected chancery judge. In granting a writ of mandamus to prohibit this action, we held Ark. Code Ann. § 16-14-403 (1987), which addresses the exchange of districts among circuit and chancery judges within a district. The exchange contemplated by the statute was inter-district, as opposed to intra-district.

We recognize that the exchange of paternity cases among the Sixth District Juvenile and Chancery Courts was intra-district in nature. The exchange was, however, expressly authorized by statute. Arkansas Code Ann. § 16-13-1403(b)(2) (Supp. 1991) provides:

> The circuit judges and chancery judges subject to this subsection [Sixth District] may by agreement, hold either of the circuit or chancery courts and may hear and try matters pending in any of those courts or may hear or try matters in the same court at the same time. The judges subject to this subsection may adopt such rules as they deem appropriate for the assignment of cases in the circuit and chancery courts of their district.

We therefore find the *Lee* case distinguishable. There is a substantial difference between an agreement which allows a chancellor to preside over a criminal case and an agreement which allows a chancellor to preside over a paternity case which is clearly within the jurisdiction of a chancery court.

3. Separation of powers

Barnes contends the General Assembly violated the separation of powers doctrine, Ark. Const. art, 4, § 2, by enacting Ark. Code Ann. § 9-10-108 (Supp. 1991) which governs the admissibility of blood tests in paternity cases. He relies on *State* v. *Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990), and *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986), in arguing that Section 9-10-108 impermissibly conflicts with this Court's established Rules of Evidence. The Chancellor held Barnes essentially waived his right to raise this constitutional issue because he and his former attorney agreed that the blood test would be admissible. In response to this ruling, Barnes testified his former attorney had not informed him that the test would be admitted in evidence.

The record supports the Chancellor's conclusion that by agreeing that the test would be admissible, Barnes voluntarily abandoned the right to later argue the test was inadmissible because the statute under which it was performed was unconstitutional. *See generally Bethel* v. *Bethel*, 268 Ark. 409, 597 S.W.2d 576 (1980) (stating waiver is "the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall be forever deprived of its benefits"). The agreement which was signed by Barnes' counsel specifically stated the blood test would be admissible in evidence. It shows the test was requested by Barnes who signed a form authorizing the test to be administered.

Although Barnes testified he was not informed of the details and effect of the agreement, a client is bound by the actions of his attorney upon matters concerning which the attorney is employed or held out to be the spokesman of the client. *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). General rules of agency law apply to the attorney-client relationship. *McCullock* v. *Johnson*, 307 Ark. 9, 816 S.W.2d 886 (1991); *Peterson* v. *Worthen Bank & Trust*, 296 Ark. 201, 753 S.W.2d 278 (1988); *White & Black Rivers Bridge Co.* v. *Vaughan*, 183 Ark. 450, 36 S.W.2d 672 (1931).

4. Sufficiency of the evidence

Barnes argues in his fourth point that there was insufficient evidence to establish paternity. To support his argument, Barnes

cites testimony from other witnesses who indicated they had a sexual relationship with Hicks.

In a paternity proceeding brought against a living putative father, the mother's burden of proof is a mere preponderance of the evidence, as the proceeding is civil in nature. *McFadden* v. *Griffith*, 278 Ark. 460, 647 S.W.2d 432 (1983). The statute, Ark. Code Ann. § 9-10-108(c)(2)(B) (1987), in effect at the time this cause of action arose, provided:

> If the results of the paternity tests establish a ninety-five percent (95%) or more probability of inclusion that the defendant is the natural father of the child and after corroborating testimony of the mother in regard to access during the probable period of conception, such shall constitute a prima facie case of establishment of paternity and the burden of proof shall shift to the defendant to rebut such proof.

The blood test showing a 99.59% probability that Barnes was the natural father, coupled with Hicks's testimony regarding access during the probable period of conception, gave rise to a statutory presumption of paternity. Although Hicks admitted having sexual relationships with other men, the events she admitted did not occur during the probable period of conception. The Chancellor found insufficient evidence to rebut the presumption of paternity, and we cannot say this decision was clearly erroneous. Ark. R. Civ. P. 52(a) (1992).

5. Continuance

Barnes claims the Chancellor erred by failing to grant his motion for continuance based on four reasons. For purposes of simplicity, the issues relating to the continuance will be discussed under one heading.

Barnes argues a continuance should have been granted because opposing counsel failed to respond to several discovery requests. First, he alleges Hicks's counsel failed to provide a copy of the blood test which was later introduced in response to a direct question asked in interrogation. Hicks's counsel admitted that, through oversight, he had failed to attach the blood test to his responses, but he stated Barnes had previously been furnished a copy of the test. Barnes admitted receiving a copy of the paternity

test prior to trial.

The Chancellor refused to continue the case, but allowed Barnes time to compare his copy of the blood test with the copy Hicks intended to introduce in evidence. After examining the blood test which was admitted, Barnes did not indicate how it was different from the copy which had been furnished to him. When a party cannot demonstrate how he was prejudiced by the denial of a continuance, we will not reverse. *Jones* v. *State*, 308 Ark. 555, 826 S.W.2d 233 (1992). Because Barnes was allowed to compare his furnished copy of the blood test with the test which was later introduced, and presumably the copies were identical, he cannot demonstrate sufficient prejudice from the Chancellor's failure to grant the continuance.

The second argument is that the Chancellor erred by not granting a continuance because opposing counsel failed to list the names and addresses of the expert witnesses who would testify in response to discovery requests. This argument is meritless as no expert witnesses testified at trial. The paternity test conducted by Roche Biomedical Laboratories, which had been furnished to Barnes prior to trial, was introduced through the affidavit of Dr. Lloyd Osborne who supervised the test. Barnes and his counsel were aware of Dr. Osborne as his name appeared on the copy of the report which had been furnished to them. Dr. Osborne did not testify at the trial.

Barnes next contends a continuance should have been granted to allow him time to cross-examine the expert witness who actually performed the blood test. Barnes made the request to cross-examine the expert who lived out-of-state only six business days before trial. The Chancellor rules six days was not a reasonable period of time to have someone before the Court to testify from out-of-state, and Barnes's motion for continuance was denied.

The law regarding cross-examining expert witnesses who perform blood tests in paternity cases which was in effect at the time this cause of action arose provided:

> A written report of the test results by the duly qualified expert performing the test, or by a duly qualified expert under whose supervision and direction the test and analysis

> have been performed, certified by an affidavit duly subscribed and sworn to him before a notary public, may be introduced in evidence in illegitimacy actions without calling the expert as a witness. If either party shall desire to question the expert certifying the results, the party shall have the expert subpoenaed within a reasonable time prior to trial. Ark. Code Ann. § 9-10-108(b)(2)(A) (1987).

We cannot say the Chancellor was incorrect in finding that Barnes failed to request the expert witness's appearance within a reasonable time prior to trial. Although Barnes argues he did not know the expert's name who performed the test, the report clearly indicated the test was supervised by Dr. Osborne and also provided the address of Roche Biomedical Laboratories in North Carolina. In light of Barnes's failure to comply with Section 9-10-108(b)(2)(A), we cannot say the Chancellor abused her direction by failing to grant the continuance. It is the challenging party's responsibility to have the expert subpoenaed within a reasonable time prior to trial. One cannot complain if the inability to confront or cross-examine witnesses is brought about by one's own inattention to the code requirements. *Roe* v. *State*, 304 Ark. 673, 804 S.W.2d 708 (1991).

Barnes's last argument under this heading is that the Chancellor erred by failing to grant a continuance to allow him to obtain Hicks's medical records from her obstetrician, Dr. Kemp Skokos. Barnes claims these records would conclusively prove he was not the father of the child. The Chancellor refused to grant the continuance because the subpoena duces tecum served on Dr. Skokos was not properly served. The first subpoena directing Dr. Skokos to appear at trial and bring Hicks's medical records was served by Barnes. Because Barnes was a party to the case, he could not properly serve the subpoena. Ark. R. Civ. P. 45(c) (1992). The second subpoena served on Dr. Skokos was served by Barnes's current wife the day of trial. This second subpoena was not served at least two days prior to trial, and therefore, service was untimely. Ark. R. Civ. P. 45(d) (1992). In these circumstances, we cannot say the Chancellor abused her discretion by failing to grant the continuance.

6. A.R.E. 903

Barnes argues the blood test should not have been admitted because Hicks presented no evidence regarding the authentication requirements in North Carolina, where the test was performed, as required by Ark. R. Evid. 903 (1992). Rule 903 provides, "The testimony of a subscribing witness is not necessary to authenticate a writing *unless* required by the laws of the jurisdiction whose laws govern the validity of the writing [emphasis supplied]." Barnes claims that, before an out-of-state writing is admitted, the proponent must offer proof regarding the authentication requirements in the originating state. He argues Rule 903 creates a condition precedent for admissibility of an out-of-state paternity test.

The Rule provides a subscribing witness's testimony to authenticate a writing will be unnecessary *unless* required by the laws of the originating jurisdiction. The burden of showing that the laws of the originating state require testimony from a subscribing witness for proper authentication lies with the party challenging the document. Barnes has not shown that North Carolina law requires a subscribing witness's testimony. We also note that as the paternity test was required to be notarized under 9-10-108(b)(2)(A), it was a self-authenticating document. Ark. R. Evid. 902(8) (1992). Hicks was not required to produce any extrinsic evidence of authenticity as a condition precedent to admissibility. *See Monark Boat Co.* v. *Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987).

7. Notice

Barnes alleges the Chancellor erred in finding the Attorney General was not timely notified that a constitutional question would be raised in the proceedings as required by Ark. Code Ann. § 16-111-106(b) (1987). Barnes had failed to offer any citation of authority or any convincing argument supporting this point, and we will not consider it on appeal. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

8. Telephone bill

The eighth issue relates to the Chancellor's refusal to allow Barnes's telephone bill to be admitted under Ark. R. Evid.

803(24) (1992). The telephone bill would allegedly show that Barnes made a phone call to his fiance from his home at approximately 10:00 p.m. on Christmas Eve. Barnes argued this evidence would contradict Hicks's testimony that he was at her home at the time she alleged. As Barnes could not offer a sufficient foundation to establish the telephone bill as a business record under Ark. R. Evid. 803(6) (1992), he argued it should be admitted under the catch-all exception found in Ark. R. Evid. 803(24) (1992).

The Chancellor ruled the telephone bill should be admitted, if at all, under the business records exception to the hearsay rule and refused to allow its submission under 803(24).

We have recognized that the common-law exceptions to the hearsay rule are based either upon necessity or upon some compelling reason for attaching more than average credibility to hearsay. Any new exception, such as 803(24), must have circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions. *Hill* v. *Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984). In determining trustworthiness under the residual hearsay exception in 803(24), the Chancellor must determine that (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts, and (3) the general purposes of the rules and the interests of justice will best be served by admission of the statements into evidence. *Blaylock* v. *Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987). The residual hearsay exception was intended to be used very rarely, and only in exceptional circumstances. *Ward* v. *State*, 298 Ark. 448, 770 S.W.2d 109 (1989).

Barnes failed to offer any evidence that the telephone bill had "circumstantial guarantees of trustworthiness" as required for admissibility under Rule 803(24). In these circumstances, we cannot say the Chancellor abused her discretion by refusing to allow the bill to be admitted under the residual hearsay exception. Barnes also failed to comply with Rule 803(24) by not notifying Hicks that the bill would be introduced under the Rule. A statement may not be introduced under 803(24) unless the proponent of it makes known to the adverse

party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it.

9. Child support amount

Barnes argues the Chancellor erred in setting the support amount at $51 per week. The Chancellor was presented with evidence that Barnes earned $300 per week, and that he was required by court order to pay $88 in child support for his two children born during his marriage to Hicks. The Chancellor subtracted the $88 support amount from income to arrive at a weekly take home pay of $212. She then applied the child support chart amount for one dependent and awarded $51 in support for Jordan. Barnes argues that instead of applying the chart amount required for one dependent, the Chancellor should have set support based on three dependents. By applying the chart in this manner, Barnes would only be required to pay $110 per week in support, whereas he is now required to pay $139 per week.

The child support chart should be applied to the child who is before the court. The result of applying the chart as Barnes suggests would be that the amount of support for the one child before the court is diluted. The chart is structured so that the amount of support per child decreases in proportion to the number of added dependents. *See Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991).

In adopting the chart, we specifically provided that weekly pay would be determined after deduction for "Presently paid support for other dependents by Court order." *In re: Child support Enforcement Guidelines*, 301 Ark. 627, 784 S.W.2d 589 (1990). We find no abuse of discretion.

10. Retroactive support

Barnes's final point is that the Chancellor incorrectly awarded past due child support in the amount of $1700. The Chancellor determined this amount by multiplying the minimum support amount which can be awarded under the chart ($25) by 68 weeks (the period from the child's date of birth to the date of judgment). Barnes argues this award was erroneous because there was not testimony presented on the needs of the child or his ability to pay.

In making the decision regarding retroactive support, the Chancellor recognized there was no evidence regarding Barnes's weekly take home pay during the relevant time period. Therefore, the Chancellor simply set the support at the minimum level required of an unemployed person. We find no error or abuse of discretion.

Affirmed.

Jessie ORRELL *v.* CITY OF HOT SPRINGS

92-254 844 S.W.2d 310

Supreme Court of Arkansas
Opinion delivered December 14, 1992

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, for appellant.

Neil V. Pennick, for appellee.

DAVID NEWBERN, Justice. In this case the constitutionality of an ordinance of the City of Hot Springs has been challenged as being in violation of the First Amendment guarantee of freedom of speech. The ordinance regulates "sexually oriented businesses" in Hot Springs by setting qualifications for licensing and assuring geographic disbursement within the City. The appellant, Jessie Orrell, who operates businesses which would require licenses pursuant to the ordinance, argued the ordinance (1) was unconstitutional because it did not guarantee a speedy determination of eligibility and (2) because it left so few locations for such businesses that it amounted to an unconstitutional deprivation of the right to speak or communicate.

The Trial Court held the ordinance was not unconstitu-

tional. We must reverse because we agree with Mr. Orrell's first argument.

Mr. Orrell's two establishments feature topless (nude from the waist up) female dancers. The "Bottoms Up" club, located at 415 Albert Pike, was opened sometime in January of 1990. The Centerfold Entertainment Club, located at 214 West Grand, opened sometime later. The City had adopted, in 1987, Ordinance No. 3938 (Ordinance) entitled "SEXUALLY ORIENTED BUSINESS ORDINANCE," and Orrell's businesses fall within its definition of "sexually oriented business."

Apparently there was no effort to enforce the Ordinance against either establishment, but early in 1991 Mr. Orrell learned the Hot Springs City Manager and other officials felt his establishments violated the Ordinance. He filed a complaint for injunctive relief and declaratory judgment seeking a determination whether the two establishments were "sexually oriented businesses" as defined by the Ordinance; whether they were excepted due to "grandfather" provisions; and whether the Ordinance was constitutionally defective in its scope and in the geographic limitations imposed.

A hearing was held, and it was shown that the "Bottoms Up" Club was in a location consistent with the ordinance, but the Centerfold Entertainment Center was not. The evidence also established that there were at most only four sites within the City available for location of such a business. Because of the requirement in the Ordinance for a substantial distance between these businesses it was probable, but not shown definitely, that no more than one such business could be located in each of these four areas. The Court held the ordinance was not unconstitutional and that the geographic restrictions were not unreasonable.

1. Prior restraint

The Ordinance in Section 3 requires a license for the operation of a sexually oriented business as defined in Section 2. Section 4 provides, in pertinent part:

> (a) The Administrator MUST approve the issuance of the license within 30 days after receipt of an application unless he or she finds one or more of the following to be

true:

***

(5) The premises to be used for the sexually oriented business have not been approved by the health department, fire department or the appropriate building official as being in compliance with applicable laws and Ordinances.

***

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965) the Court held that the failure to place limitations on the time within which a censorship board decision maker must make a determination of obscenity is a species of unbridled discretion which constitutes a prior restraint on the First Amendment guarantee of freedom of speech. While prior restraints are not unconstitutional *per se*, any system of prior restraint bears a heavy presumption against it's constitutional validity. *FW/PBS, Inc.* v. *City of Dallas*, 110 S.Ct. 596 (1990).

There are two evils not to be tolerated in such schemes. First, a scheme that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue a license is impermissible. *Freedman* v. *Maryland, supra*, at 59. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where procedural safeguards are inadequate to ensure prompt issuance of the license.

Three procedural safeguards are necessary to ensure expeditious decisionmaking. (1) Any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must appear available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman* v. *Maryland, supra* at 58-60.

In *FW/PBS, Inc.* v. *City of Dallas, supra*, a Dallas ordinance required issuance of a license within 30 days of receipt of an application, but it conditioned the issuance upon approval by

other municipal inspection agencies without setting a time limit for inspections by those agencies. As a result, a majority of the Court concluded that the timeliness requirement posed in the *Freedman* case had not been met. The ordinance failed to provide an effective time limitation on the licensing decision, and it also failed to provide an avenue of prompt judicial review so as to minimize suppression of speech in the event of a license denial, thus it was unconstitutional insofar as it was enforced against businesses engaged in First Amendment activity.

The Hot Springs ordinance is identical to the Dallas ordinance in that the administrator must approve the issuance of a license within 30 days *unless* the premises have not been approved by the health department, the fire department, or appropriate building officials as in compliance with other applicable laws and ordinances. This is the same defect found in the *FW/PBS* v. *City of Dallas, supra*, and from which the Supreme Court concluded that the licensing scheme lacked adequate procedural safeguards to stand constitutional muster. Thus Ordinance 3938 clearly constitutes an impermissible prior restraint on speech and must fail.

2. Alternative sites

The generally stated justification for ordinances such as the one reviewed here is that they are "content neutral" and have as their purpose the control of undesirable activities such as crime, particularly prostitution, often found near clusters of sexually oriented businesses. Their purpose is not to stifle speech but to prevent secondary effects which are subject to the police power of government.

Like the Supreme Court in *FW/PBS, Inc.* v. *City of Dallas, supra*, we find it unnecessary to reach the issue whether the ordinance was properly viewed as a content neutral time, place, and manner restriction reasonably aimed at the secondary effects arising out of sexually oriented businesses, but a brief discussion of the second argument with regard to the reasonableness of the geographic requirements is appropriate.

In *Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986), ordinances regulating sexually oriented businesses were held facially valid if they (1) were designed to serve a substantial

government interest and (2) allowed for reasonable alternative avenues of communication. The Supreme Court made it clear that content neutral time, place, and manner regulations are appropriate to control the location and proliferation of sexually oriented businesses so long as there are opportunities available within the city for the placement of these businesses.

The record presented in this case showed that there were four areas remaining in Hot Springs, after passage of the ordinance, where a sexually oriented business could have been legally located. It is not clear, however, whether these sites are actually available to the operators of such businesses. It is also unclear whether one of the sites already has a regulated business within the area and therefore may be unavailable for location of another such business.

In *Walnut Properties, Inc.* v. *City of Whittier*, 861 F.2d 1102 (9th Cir. 1988); *Alexander* v. *City of Minneapolis*, 713 F. Supp. 1296 (D. Minn. 1989); and *Alexander* v. *City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983) (*Alexander I*), identical restrictions which essentially reduced the number of such business which could legally operate to a marginal number were found to violate the First Amendment. In the *Alexander I* case the reduction would have been from sites accommodating 30 existing business to 12 relocation sites. In the *Walnut Properties* case the ordinance had identical restrictions which would permit businesses to relocate to only three sites in the City of Whittier.

While our holding in this case does not encompass this point, we recite our concern with respect to the ultimate practical effect of a law such as Ordinance 3938 for the benefit of guidance in cases which may arise in the future.

Reversed.

David MIDDLETON *v.* STATE of Arkansas

CR 92-421 842 S.W.2d 434

Supreme Court of Arkansas
Opinion delivered December 14, 1992

Laws & Murdock, P.A., for appellant.

Winston Bryant, Att'y Gen., by: *Cathy Derden*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, David Middleton, appeals from the part of a judgment of the Newton Circuit Court convicting him of "possession with intent to deliver a quantity of intoxicating beverages without having a valid license as provided in the Arkansas Alcoholic Control Act." The judgment was entered pursuant to a jury verdict which, among other things not relevant to this appeal, sentenced appellant to serve one year in

the Newton County Jail and fined him $1,000.00 for the charge in question. For reversal of the conviction, appellant asserts two points of error. Both of appellant's arguments are procedurally barred and we therefore affirm the judgment of conviction.

Appellant's first argument for reversal is that the charge for which he was convicted is not a criminal offense under the statute named in the charging instrument. The heading of the information lists a summary of the charges against appellant and among that list is the charge at issue on this appeal: "POSSESSION OF ALCOHOL WITH THE INTENT TO SALE, #3-3-205, 1 count." However, the text of the information states the charge as follows:

> *Count #10* The said defendant on the 30th day of July, 1991, in Newton County, Arkansas, did unlawfully *possess, with the intent to deliver a quantity of intoxicating beverages without having a valid license as provided by the Arkansas Alcoholic Control Act,* against the peace and dignity of the state of Arkansas. [Emphasis added.]

Count Ten obviously charges appellant with conduct in violation of the entire Alcoholic Control Act. Thus, the premise of appellant's argument, that he was charged with violating only Ark. Code Ann. § 3-3-205 (Supp. 1991), is false.

The fact that appellant's argument is based on a false premise is of no consequence to our decision on appeal because appellant has not preserved this argument for our review. Appellant did not object to the charging instrument at trial. The trial court was not apprised of the error about which appellant complains and made no ruling for our review. As this argument is raised for the first time on appeal, it is not preserved for our review. *Mays* v. *State*, 308 Ark. 39, 822 S.W.2d 846 (1992). We point out that while it is true that being convicted of a crime for which one was not charged is a violation of due process, *Hill* v. *State*, 303 Ark. 462, 798 S.W.2d 65 (1990), *Hedrick* v. *State*, 292 Ark. 411, 730 S.W.2d 488 (1987), even constitutional arguments are waived when argued for the first time on appeal. *Collins* v. *State*, 308 Ark. 536, 826 S.W.2d 231 (1992).

As his second argument for reversal, appellant asserts that if we determine the charge for which he was convicted is

indeed a crime, there is insufficient evidence to support his conviction. We have repeatedly held that in order to preserve a sufficiency of the evidence argument for appellate review, an appellant must move for a directed verdict at the close of the state's case and again at the close of all the evidence in the trial. A.R.Cr.P. Rule 36.21(b); *Shankle* v. *State*, 309 Ark. 40, 827 S.W.2d 642 (1992). The record reflects that appellant waived his right to challenge the sufficiency of the evidence by failing to make a motion for directed verdict at the close of the state's case before presenting evidence on his behalf. In addition, appellant again waived this argument when at the close of all evidence, he merely made "the usual motions." A challenge to the sufficiency of the evidence, whenever it is made, requires a specific motion to apprise the trial court of the particular point raised; a general "usual motion" such as the one made by appellant will not suffice. Rule 36.21(b) is strictly construed. *Easter* v. *State*, 306 Ark. 452, 815 S.W.2d 924 (1991). We adhere to that strict construction and do not consider the merits of appellant's challenge to the sufficiency of the evidence due to his waiver. *McArthur* v. *State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

The judgment is affirmed.

215 CLUB d/b/a Decision Point *v.* Sue DEVORE, V.O. Jones, and Glenda Samuels

92-715 843 S.W.2d 317

Supreme Court of Arkansas
Opinion delivered December 14, 1992

Davis & Assoc., P.A., by: *Charles E. Davis*, for appellant.

Stephen Lee Wood, P.A., for appellee.

ROBERT L. BROWN, Justice. The Arkansas Court of Appeals affirmed a jury verdict and judgment in a wrongful termination action in favor of the appellees/petitioners Sue Devore, V.O. Jones, and Glenda Samuels. The appellees/petitioners then moved for attorney's fees associated with their defense of this matter on appeal. The Court of Appeals certified the question of attorney's fees for work done on appeal to this court for decision under Ark. Sup. Ct. R. 29(1)(c). We deny the motion.

Statutory law now provides for a reasonable attorney's fee to be assessed in certain civil actions, including breach of contract. *See* Ark. Code Ann. § 16-22-308 (Supp. 1991). The appellees/petitioners contend that § 16-22-308 also embraces legal services rendered on appeal. We recently had occasion to address this precise issue in a per curiam opinion. *See Mosley Machinery Company, Inc.* v. *Gray Supply Company, et al*, 310 Ark. 448, 837 S.W.2d 462 (1992). In *Mosley*, we stated regarding § 16-22-308: "We have reexamined the statute and again concluded that it is not applicable to appellate courts." 310 Ark. at 449, 837 S.W.2d at 463. We further overruled court of appeals cases that conflicted with this interpretation of the statute.

We, therefore, deny the motion of appellees/petitioners for attorney's fees for services rendered in appellate court.

Motion denied.

NEWBERN, J., not participating.

IN THE MATTER OF THE ESTATE OF EVELYN WILKINSON, Deceased

92-1233 843 S.W.2d 316

Supreme Court of Arkansas
Opinion delivered December 14, 1992

Bill G. Wells, for appellant.

Murray Claycomb and *Clark W. Mason*, for appellee.

PER CURIAM. Mildred "Baby" Simmons petitions the court for a rule on the clerk. The clerk refused to file her record because it was not tendered within the time set by Ark. R. App. P. 5. She contends that her attorney had open heart surgery, and such surgery constitutes sufficient "unavoidable casualty" for us to grant the rule on the clerk. The argument is without merit.

The trial court signed the final order on February 28, 1992, and it was entered on March 9, 1991. An extension of time

was granted by the trial court, but the record was due in the clerk's office no later than seven months from the entry of the final judgment. Ark. R. App. P. 5(b). A trial court cannot extend the time for the filing of the record to a date more than seven months from the date of the entry of the judgment, except in event of a postjudgment motion under Rule 4(b), and in that case it is seven months "from the date on which a timely post judgment motion under Rule 4(b) is deemed to have been disposed of." Here, there was no postjudgment motion. The petitioner had only seven months from the entry of the final judgment. When an appellant seeks an extension of time beyond the seven months to file his or her record, his or her remedy is to file a partial record in the supreme court and seek an extension for a compelling reason, such as an unavoidable casualty. *Yent* v. *State*, 279 Ark. 268, 650 S.W.2d 577 (1983). That was not done in this case, and we decline to grant the motion. We also note that the petitioner's attorney had his open heart surgery in April of 1992, and the deadline was not until October of 1992.

In her motion the petitioner cites the case of *Pentron Corp.* v. *Delta Steel & Construction Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985), and while that case is not applicable to the case at bar because it deals with the date a record is due in the clerk's office after a posttrial motion, we take this opportunity to correct a misstatement in one of the sentences in *Pentron*. There, we stated that after a posttrial motion, the appellant has seven months "from the notice of appeal" to file the record in the clerk's office. The opinion should have stated that the appellant has seven months "from the date on which a timely postjudgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4 (c)." *See* Ark. R. App. P. 5(b).

Motion denied.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA *v.* J. Micheal STOLTZ, as Special Administrator of the Estate of J.P. Stoltz, Deceased

92-4 843 S.W.2d 842

Supreme Court of Arkansas
Opinion delivered December 21, 1992
[Rehearing denied February 22, 1993.*]

*Dudley, J., not participating.

Williams & Anderson, by: *Peter G. Kumpe* and *John E. Tull III*, for appellant.

Davidson Law Firm, by: *Charles Phillip Boyd, Jr.*, and *Brandon L. Clark*, for appellee.

JACK HOLT, JR., Chief Justice. The focus in this appeal is whether fraudulent concealment was proven by the Estate of J.P. Stoltz ("Estate") in order to toll the statute of limitations on its claim against the appellant, First Pyramid Life Insurance. We hold that the limitations period was not tolled. Thus, we reverse the finding of the trial court.

The facts leading up to this controversy are as follows. In

1975, J.P. Stoltz applied for life insurance with the appellant, First Pyramid Life Insurance ("First Pyramid"). Since Mr. Stoltz had health problems, he was heavily rated for insurance. First Pyramid felt he was a good candidate for a policy called a Flex 79 Trust. The advantage of this kind of policy is that it allows employers to provide employees with life insurance while making the premiums tax deductible. Through this, Stoltz could have his company, Polyvend, Inc., provide him with life insurance virtually tax free. In order to receive these tax benefits, however, the *owner* of the policy had to be someone other than the insured. Another problem was that at the time of Mr. Stoltz's application, Arkansas had a $50,000 statutory ceiling on the maximum life insurance that could be purchased by an employer for an employee.

To overcome this ceiling, First Pyramid arranged for the Trust to be based in Oklahoma. In this manner, Stoltz could purchase two policies totalling $2 million — one $1,950,000 policy and one $50,000 policy. Flex 79 was made the owner of the policies. The insurance application, completed by Stoltz on December 18, 1975, designated Stoltz as the insured, Flex 79 Trustee as the owners and Mr. Stoltz's estate as the beneficiaries.

In March 1976 Mr. Stoltz sought to change the beneficiary and ownership. In the required change of beneficiary forms, he named his son, James Stephen Stoltz ("Steve"), as beneficiary of both policies and owner of the larger policy. A First Pyramid employee, Elizabeth Oswald, accepted these forms. Yet, these forms were never signed by the policies' owner of record, the Flex 79 Trustee. Ms. Oswald's supervisor, Ron Mason, sent a memo in August 1976 advising Mr. Stoltz's insurance agent that the attempted policy modifications were ineffective without the Trustee's signature and that the policy should be returned to have the invalid forms removed. It is not disputed that Mr. Stoltz did nothing further after August 1976 to change the beneficiary from the estate to his son and that on his balance sheet dated October 5, 1977 (two months prior to his death), he listed the $2 million insurance as an asset and indicated that his estate was the beneficiary. Mr. Stoltz's signature is on this balance sheet.

Mr. Stoltz died on December 18, 1977. Only his son, Steve, claimed the policy proceeds. Prior to paying the claim, First

Pyramid consulted their attorney, Allan Horne. Mr. Horne concluded in a memorandum (the "Horne memorandum") that Steve Stoltz was the legal beneficiary but recommended that the proceeds be interpleaded because of uncertainties in file documentation, including the lack of the Oklahoma trustee's signature on the change of beneficiary form completed by Mr. Stoltz. At an executive meeting with First Pyramid approximately a week later, Mr. Horne concurred that paying the son without interpleader was "the best course." First Pyramid paid Steve Stoltz the entire proceeds of the policies within twenty-one days of his father's death.

Subsequently, there was a dispute with the Internal Revenue Service regarding whether the face value of the policies paid to Steve Stoltz was includable in the decedent's estate. This dispute arose because of a tax provision that dictates that if a gift is made within three years of a decedent's death, the policy is presumed to be in contemplation of death. That gift is put back into the estate for estate tax purposes. The Estate through its attorneys, Friday, Eldredge and Clark, attempted to rebut this presumption. According to Mr. Saxton, the Friday firm attorney who handled the challenge, the procedure for challenging this is to include the policy proceeds in the taxable estate and then pay the tax and file a claim for a refund.

In pursuing this refund, Mr. Saxton requested and received First Pyramid Life's file on the insurance policies at issue. In a June 27, 1983, letter to Steve Stoltz, administrator of the Stoltz estate and recipient of the insurance policy proceeds, Mr. Saxton alluded to the question of change of beneficiary raised by First Pyramid in 1977 and the Horne memorandum concerning change of beneficiary.

Eleven years after J.P. Stoltz's death, representatives of the Estate brought this action against First Pyramid for negligence, breach of contract, bad faith as well as fraudulent concealment of the proper beneficiaries of the policies.

At trial, a jury found for the plaintiff's and awarded the estate $2 million in compensatory damages and $1 million in punitive damages. The court also assessed attorney's fees for $666,666.67. The court refused to award the twelve percent statutory penalty for unpaid insurance claims.

STATUTE OF LIMITATIONS

First Pyramid Life contends that because the action is barred by the statute of limitations, the trial court erred in denying their motion for judgment notwithstanding the verdict. As we find no evidence of fraudulent concealment on the part of First Pyramid which would toll the statute of limitations, it necessarily follows that the action is barred, and the judgment must be reversed.

Representatives of J.P. Stoltz's estate did not bring this action until April 20, 1989, more than eleven years after the payment of the insurance proceeds to Steve Stoltz and J.P. Stoltz's death.

The statute of limitations on actions to recover on a life insurance policy is five years from the accrual of the cause of action. Ark. Code Ann. § 23-79-202 (1992); 16-56-111 (1987). The limitations period on torts actions is three years. Ark. Code Ann. § 16-56-105 (1987). This court has held that the action accrues upon the death of the insured:

> It is a rule of universal application in the law of insurance that a cause of action arises in favor of the designated beneficiary in a policy of insurance against the insurer upon the death of the insured unless by the terms of the contract the accrual of such cause of action is delayed or some local statute fixes a different time.

United Mutual Life Ins. Co. v. *Bransford*, 190 Ark. 783, 81 S.W.2d 17 (1935). *See also* 20A John Alan Appleman, *Insurance Law and Practice* § 11585 (1980).

Representatives of the estate contend that the statute of limitations on this action was tolled by First Pyramid's allegedly fraudulent concealment of the controversy. In response, First Pyramid denies concealment and asserts that the estate knew or should have known of the change in beneficiaries on the policies.

When the running of the limitations period is raised as a defense, the defendant has the burden of affirmatively pleading this defense. However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponder-

ance of the evidence that the statute of limitations was in fact tolled. *Cleveland* v. *Gravel Ridge Sanitary Sewer Imp. Dist. No. 213*, 274 Ark. 330, 625 S.W.2d 446 (1981); *Rasmussen* v. *Reid*, 255 Ark. 1064, 505 S.W.2d 222 (1974); *Alston* v. *Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972).

During the preliminary phases of the lawsuit below, the trial court made the following findings of fact and conclusions of law:

> The cause [of] action here asserted against the First Pyramid Life Insurance Company is the estate lost the insurance benefits by reason of the Statute of Limitations and the Company was liable in tort, a bad faith action, on the event of the payment of the proceeds.
>
> To avoid the loss of those causes of action, the plaintiff must prove either the defendant insurance company by its overt acts caused the legal right to be hidden and thereby becomes time barred; or there existed a specific legal relationship between the parties that in and of itself obligated an overt discloser [sic] of the existence of those claims. An insurer/beneficiary relationship does not seem to create that legal obligation; however on the claim of a factual cover-up, the plaintiff should have its day in Court.

(Emphasis added.)

We agree with this analysis of the issues; however, we hold that the trial court should have granted First Pyramid's motion for a judgment notwithstanding the verdict because the action was barred by the statute of limitations.

[redacted] There is simply no evidence of record that First Pyramid attempted to fraudulently conceal, "cover-up," or misrepresent to the estate the problem with determining the proper beneficiary of J.P. Stoltz's insurance policy. Even if there was evidence of fraud on the part of First Pyramid, and there is none, the statute of limitations would still have run on this claim. "Fraud does suspend the running of the statute of limitations, and the suspension remained in effect until the party having the cause of the action discovers the fraud *or should have discovered it by the exercise of reasonable diligence*." (Emphasis in original; citations omitted.) *Talbot* v. *Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988). *See also Walters* v. *Lewis*, 276 Ark. 286, 634 S.W.2d

129 (1982); *Carter* v. *Zachary*, 243 Ark. 104, 418 S.W.2d 787 (1967); *Williams* v. *Purdy*, 223 Ark. 275, 265 S.W.2d 534 (1954).

■ We have said that the "classic language on this point in Arkansas" is:

> No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively, planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud he is presumed to have had reasonable knowledge of it.

Wilson v. *GECAL*, 311 Ark. 84, 841 S.W.2d 619 (1992) (citations omitted).

■ As early as 1976, twelve years before the filing of this law suit, two of the complaining representatives of the estate, J.P. Stoltz's sister and brother-in-law, Ruth Fields and John R. Smith, were aware that J.P. Stoltz had taken out $2 million in life insurance and named his estate as beneficiary. Further, J.P. Stoltz's signed a 1976 balance sheet listed the $2 million insurance as an asset and named the estate as beneficiary. This balance sheet was made available to the beneficiaries. Armed with this information, the beneficiaries of the estate were on notice that the estate was potentially a beneficiary of the insurance policies and by the exercise of reasonable diligence, the parties could have discovered information relating to the policies and the designated beneficiaries.

There is no evidence that the beneficiaries of the estate ever requested First Pyramid's files; nor is there evidence indicating that First Pyramid tried to hide the potential problem with the insurance policies from the beneficiaries. In 1983 the attorneys who represented both the estate and Steve Stoltz requested access to the insurance company's files. First Pyramid readily turned them over. A like inquiry of First Pyramid would, in all probably, have made all files on J.P. Stoltz available to the beneficiaries as well.

The beneficiarys' ignorance of their rights does not prevent the operation of the statute of limitations. The statute is tolled only when the ignorance is produced by affirmative and fraudulent acts of concealment. *Atlanta Exploration Inc.* v. *Ethyl Corp.*, 301 Ark. 331, 784 S.W.2d 150 (1990). The acts of concealment or fraud alleged must have been committed by those invoking the benefit of the statute of limitations. *Dupree* v. *Twin City Bank*, 300 Ark. 188, 777 S.W.2d 859 (1989).

The estate obviously had notice of the original beneficiary of the policies; the fact that the beneficiaries of the estate failed to act or did not know to act on this knowledge does not toll the statute of limitations. As there was an absence of fraud or concealment on the part of First Pyramid, it was entitled to the benefit of the statute of limitations.

On cross-appeal, the appellee, Estate of J.P. Stoltz, complains that the trial court erred in denying the twelve percent statutory penalty provided by Ark. Code Ann. § 23-79-208 (1992) and prejudgment interest. Prejudgment interest is based upon an "improperly disallowed insurance claim." However, since we reverse the trial court's decision to award the proceeds of the policy to the estate, the Estate's argument for a statutory penalty and prejudgment interest has no basis.

Reversed on appeal; affirmed on cross-appeal.

DUDLEY, J., not participating.

Timothy J. LEATHERS, Commissioner of Revenues, State of Arkansas *v.* A & B DIRT MOVERS, INC.

92-505 844 S.W.2d 314

Supreme Court of Arkansas
Opinion delivered December 21, 1992
[Rehearing denied February 15, 1993.*]

*Glaze, J., would grant rehearing.

Rick L. Pruett, for appellant.

Larry E. Graddy, for appellee.

Jack East, III, for amicus curiae Associated General Contractors.

JACK HOLT, JR., Chief Justice. This case involves the question of whether the appellee, A & B Dirt Movers, Inc. ("A & B"), should incur the Arkansas Gross Receipts Sales Tax on certain of their transactions involving the hauling of dirt. We find that it should and reverse.

A & B Dirt Movers, Inc. is engaged in the business of excavation and dirt hauling. The appellant, Arkansas Department of Finance and Administration, conducted a sales tax audit of A & B covering six years and determined that certain transactions involving the transfer of title and possession of

tangible personal property such as dirt, fill material and similar items, were occurring without payment of the Arkansas Gross Receipts Tax. Mrs. Henry, an auditor with Arkansas Department of Finance and Administration, went to A & B and reviewed the actual sales invoices which were prepared according to the month of the sale. Information on the invoices included the customers' names and addresses, type of transaction, date of transaction, number of loads hauled and the cost. According to Mrs. Henry, the invoices did not indicate the owners of the dirt from the beginning of the transaction to the end. As a result of this audit, A & B Dirt Movers, Inc. was assessed tax and interest in the amount of $8,919.45. No penalty was assessed because since this was A & B's first audit, the Department of Finance and Administration assumed they were not aware of the tax. A & B disagreed with the audit contending that it was in the business of providing a nontaxable service — hauling. The company claimed that although they charged for the excavation and hauling of dirt, the dirt was actually free. After exhausting its administrative remedies, A & B filed an action in the Faulkner County Chancery Court contesting the audit determination. After a nonjury trial, the chancellor found that the transactions were not taxable, and the Commissioner of Revenues brings this appeal.

In order to be subject to the Gross Receipts Tax, the dirt hauled must be considered tangible personal property that has been sold:

> 26-52-301 Tax Levied
>
> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (1) Tangible personal property.

Ark. Code Ann. § 26-52-301(1) (1992).

The Arkansas Gross Receipts Tax Regulations, promulgated by the Department of Finance and Administration in 1987, define the term "tangible personal property" as:

> GR-3(I) The term "Tangible Personal Property" means personal property which may be seen, weighed, measured, felt, touched or is in any other manner perceptible to the

senses.

The Gross Receipts Act provides the definition of a sales:

> (3)(A) "Sale" is declared to mean the *transfer of either title or possession. . .for a valuable consideration* of tangible personal property, regardless of the manner, method, instrumentality, or device by which the transfer is accomplished.
>
> (3)(D) "Sale" shall not include the furnishing or rendering of services, except as otherwise provided in this section.

Ark. Code Ann. § 26-52-301(1) (1992) (emphasis added).

In holding that the audited transactions are not subject to the gross receipts tax, the chancellor made the following findings of fact:

> A. The primary business purpose of A & B is excavation and dirt hauling;
>
> B. The primary source of revenue of A & B is generated from the services it renders;
>
> C. The *Ferguson Monument* case directs the Court's attention to the question of whether or not A & B does anything to the dirt at any time to change its character or enhance its value. A & B does nothing to the dirt to change its character or enhance its value. As delivery doesn't enhance the value of the dirt within the meaning of *Ferguson*, it is not subject to tax;
>
> D. The Court referred to the title or name used by A & B as a factor in its decision, that name being A & B Dirt Movers, Inc.;
>
> E. The price charged by A & B for its service remained the same price to the customer even if A & B paid for and passed through the cost of the dirt;
>
> F. The *Ferguson* case is distinguished from this case because (1) Ferguson's primary purpose was that of selling a product and (2) Ferguson actually changed the form of the product prior to selling it to the customer, e.g. like changing water to ice, and A & B does not change the dirt

in any manner;

G. In viewing the transfer of dirt from A & B's property, the Court determined that (1) A & B's primary motivation in purchasing the land was not to sell the dirt; (2) A & B's purchase of its land was not similar to a merchants purchasing inventory for future sale; (3) A & B's removal of dirt from its own land would improve the land and would not depreciate the land; and (4) A & B does not charge for the dirt, only the service of hauling;

H. The Court examined the various types of transactions and concludes that A & B is generally a delivery person for the customer or an agent of the customer;

I. The court cannot distinguish between the hauling of dirt from A & B's own property versus the hauling of dirt from other property because A & B's stockholders could easily create a separate corporation that would eliminate any distinction to be made;

J. The defendant's witness testified that sales tax would or would not apply depending on whether or not A & B could prove with documented invoices the manner in which the particular transaction evolved. The Court finds no substantive distinction between (1) A & B paying for the dirt and passing the cost to the customer versus (2) the customer paying the owner of the dirt directly and therefore, finds that a transaction should not be considered to be taxable dependent upon whether or not it is supported by written invoices.

Ark. Code Ann. § 26-18-406(b)(1) (1992), provides that chancery courts are to review administrative tax decisions de novo. The statute gives the court jurisdiction to hear appeals of these tax cases once they have been adjudicated in chancery: "An appeal will lie from the chancery court to the Supreme Court of Arkansas, as in other cases provided by law." Ark. Code Ann. § 26-18-406(b)(2) (1992). As such, we review this case as we review all chancery court decisions, de novo. *See Medalist Forming Sys., Inc.* v. *Malvern Nat'l Bank*, 309 Ark. 561, 832 S.W.2d 228 (1992) ("While our review of chancery cases is de novo. . .we do not reverse findings of fact unless the chancellor's

findings are clearly erroneous.").

As this case involves a question of whether a gross receipts tax should be assessed against the taxpayer, we are deciding an issue involving the levy of a tax. Any doubts or ambiguities, in this regard, must be resolved in favor of the taxpayer. *Dunhall Pharmaceuticals, Inc.* v. *State*, 295 Ark. 483, 749 S.W.2d 666 (1988); *City of Hot Springs* v. *Vapors Theatre Rest., Inc.*, 298 Ark. 444, 769 S.W.2d 1 (1989). The agency claiming the right to collect a tax bears the burden of proving that the tax law applied to the item sought to be taxed. *Meadowbrook Country Club, supra.*

However, if the taxpayers records are not clear, this burden shifts to the taxpayer to show why he should not be taxed. Arkansas Code Annotated § 26-18-506 (1992) provides:

> (a) It is the duty of every taxpayer required to make a return of any tax due under the state tax law to keep and preserve available records as are necessary to determine the amount of tax due or to prove the accuracy of any return. . . .
>
> (d) When a taxpayer fails to preserve and maintain the records required by any state tax law, the director may, in his discretion, make an estimated assessment based upon information available to him as to this amount of tax due by the taxpayer. *The burden of proof of refuting this estimated assessment is upon the taxpayer.*
>
> (Emphasis added.)

In making his determination that the transactions at issue were not taxable, the Chancellor premised his findings on the fact that "a transaction should not be considered to be taxable dependent upon whether or not it is supported by written invoices." This underpinning is wrong as a taxpayer has a legislatively imposed responsibility to keep good tax records, and A & B failed to do so. Thus, the burden was on A & B to refute the tax.

In his findings of fact, the Chancellor refers to *Ferguson Monument* v. *Cook*, 215 Ark. 373, 220 S.W.2d 808 (1949). However, as *Ferguson* involves the issue of whether labor costs

should be included in the price of the product for taxation purposes, we do not find this case relevant and will not discuss it.

As the auditor testified, whether ownership was transferred in certain circumstances could not be determined by looking at A & B's records. The invoices reviewed in the audit contained the customer's name, address, type of transaction, loads hauled and a date. According to the auditor's testimony, she could not determine from the information on the invoices the owner of the property at the beginning and the owner at the end of the transaction.

The auditor further testified that she deleted items that she deemed taxable if A & B's owner, Mr. Nabholz, provided proof that they should be deleted. For example, if Mr. Nabholz had a contract or other documentation proving ownership of the dirt had not transferred from A & B to the customer, the auditor deleted the item. Without documentation to the contrary, the auditor assessed a tax on the transactions as sales of dirt.

To illustrate its position, A & B prepared exhibits one through six, summarizing the transactions at issue from A & B's viewpoint:

Plaintiff's Exhibit One. Material Owned By Customer and Hauled to Another Location.

CUSTOMER	DESCRIPTION	AMOUNT
Baptist Camp	Loads	$1275.00
Bernard Nabholz	24 Lds Fill Dirt	$ 660.00
Con Ark Const Co	23 Ld Fill	$ 690.00
Con Ark Const Co	1 Ld Fill Dirt	$ 30.00
Con Ark Const Co	11 Ld Fill	$ 319.00
Con Ark Const Co	2 Ld Fill	$ 58.00
Con Ark Const Co	2 Ld Fill	$ 203.00
Con Ark Const Co	22 Ld Fill	$ 638.00
Con Ark Const Co	240 Yd Fill Dirt	$ 750.00
Con Ark Const Co	3 Lds Fill	$ 87.00
Con Ark Const Co	7 Ld Fill Dirt	$ 175.00
Con Ark Const Co	8 Ld Fill	$ 200.00
Con Ark Const Co	Fill	$1276.00
Starkey Const Co	7 Ld Fill Dirt	$ 157.00
David Starkey	12 Lds Fill	$ 360.00
Bernard Naboltz	18 Lds Fill	$ 450.00
Conark	2 Lds Topsoil	$ 60.00
May Lewis	10 Lds Topsoil	$ 300.00
Ollie Hamlett	10 Lds Haul Off	$ 150.00
Ollie Hamlett	13 Lds Haul Off	$ 195.00
Ollie Hamlett	6 Lds Haul Off	$ 90.00
	TOTAL	$8123.00

Plaintiff's Exhibit Two. All Dozer Time — Only $120.00 Charged for Material.

CUSTOMER	DESCRIPTION	AMOUNT
Rich Fore	4 Lds Fill	$2155.00
	TOTAL	$2155.00

[redacted]

Plaintiff's Exhibit Three. Material Paid For — 2.00 Per Yard

CUSTOMER	DESCRIPTION	AMOUNT
Dick Enderlin	1 Ld Topsoil	$ 45.00
Ralph Strack	4 Lds Topsoil	$ 200.00
Frank Roland	2 Lds Haul	$ 80.00
Frank Roland	60 Lds Topsoil	$ 360.00
Trotter Const	14 Loads Topsoil	$ 690.00
	TOTAL	$1375.00

Plaintiff's Exhibit Four. Material Hauled From Property of A & B Movers, Inc. to Customer.

CUSTOMER	DESCRIPTION	AMOUNT
Dan Davis	4 Lds Shale	$ 120.00
S & S Const	10 Lds Shale	$ 350.00
Ken	6 Lds Fill	$ 150.00
Kent Griffin	12 Lds Shale	$ 360.00
Kent Griffin	3 20 Yd Lds	$ 90.00
Kent Griffin	6 20 Yd Lds	$ 360.00
K & D Const	9 Lds Shale	$ 400.00
K & D Const	9 Lds Shale	$ 320.00
Charles Hightower	16 Lds File	$1220.00
	TOTAL	$3370.00

Plaintiff's Exhibit Five. Material Obtained by A B Dirt Movers, Inc. Free of Charge and Delivered to Customer

CUSTOMER	DESCRIPTION	AMOUNT
Con Ark Const Co	Loads	$1650.00
Paul Bruich	Fill Dirt	$ 25.00
Gold Creek	7 Lds Fill	$ 245.00
Paul Watts	77 Lds Fill Dirt	$ 770.00
Ronnie Fowlkes	Fill Dirt	$ 165.00
Paul Watts	7 Ld Fill Dirt	$ 350.00
Edwards Const	20 Lds Fill	$ 400.00
	TOTAL	$40,072.60

Plaintiff's Exhibit Six. Material Obtained by Customer From a Third Party — Customer's Material.

CUSTOMER	DESCRIPTION	AMOUNT
Hitower	11 Lds Fill	$ 440.00
Hitower	2 Lds Fill	$ 80.00
Hitower	2 Lds Fill	$ 80.00
Hitower	2 Lds Fill	$ 80.00
Hitower	4 Lds Fill	$ 160.00
Paladino & Nash	2 Lds Topsoil	$ 70.00
	TOTAL	$73,376.00

The Commissioner conceded during the course of the appeal that the transactions reflected in exhibits one and six were not taxable under the gross receipts tax. That leaves for our consideration the transactions alluded to in exhibits two through five. At the chancery court trial, Mr. Nabholz reviewed the exhibits and discussed the source of the dirt in each. In arguing that the transactions represented in these four exhibits are subject to the Gross Receipts Tax, the Commissioner claims that pursuant to Ark. Code Ann. § 16-18-506 (1992), he may assess a tax on these transactions because A & B's records are not clear. We agree.

As the statutory definitions indicate, a sale of tangible personal property results when title of the property is exchanged for valuable consideration. There is no means to determine from the records of the transactions at issue how much of the price charged is for hauling and how much, if any, is actual consideration for the dirt. Nor do the records reflect from whom ownership of the dirt was transferred.

While it is clear that the transactions involved a service, it appears that these transactions also involved the sale of dirt. Absent adequate additional documentation or testimony from the parties involved, the gross receipts tax should have been levied against the taxpayer on these transactions. The taxpayer has the burden of refuting the reasonableness of the estimated tax assessments. *Jones* v. *Ragland* 293 Ark. 320, 737 S.W.2d 641 (1987). At the trial, A & B supported its documentation with testimony from Martin Presley, a customer of A & B, as well as from A & B's owner, Mr. Nabholz. Mr. Presley testified that he often used A & B to haul materials that he had previously

acquired. Transactions between A & B and Mr. Presley were included on exhibit six. Since exhibit six is one of the two exhibits the Commissioner of Revenues conceded during this appeal was not subject to tax, Mr. Presley's testimony is not relevant to the transactions at issue in this appeal.

During the trial, Mr. Nabholz testified to explain that the information in the exhibits pertained to transactions involving charges for hauling rather than selling dirt; however, the record is devoid of any testimony from the other parties involved in exhibits two through five, the questioned transactions, as to whether or not there was a sale of dirt. In short, we find Mr. Nabholz's testimony insufficient, standing alone, to meet the taxpayer's statutory burden in refuting the reasonableness of the assessment. To hold otherwise would be to permit a taxpayer to maintain scant records and after an unsatisfactory tax audit, avoid taxation by merely verbalizing his transactions unsupported by appropriate documentation made at the time of the transactions or by testimony from other parties to the transactions.

Accordingly, the Chancellor's ruling is reversed.

On cross appeal, A & B argues that the Chancellor erred in refusing to grant the company civil damages and attorneys fees claiming that the Commissioner of Revenue and his employees intentionally disregarded tax law. A & B relies upon Ark. Code Ann. § 26-18-809:

> 26-18-809 Civil damages for certain unauthorized collection actions.
>
> (a) IN GENERAL. If, in connection with any collection of state tax with respect to a taxpayer, any employee of the Department of Finance and Administration, Revenue Division, recklessly or intentionally disregards any provision of this title. . .such taxpayer may bring a civil action for damages against the director. . . .

As A & B has presented no evidence to prove that the Commissioner disregarded tax law, we affirm the Chancellor's decision in refusing damages and fees.

Reversed and remanded on direct appeal; affirmed on cross appeal.

GLAZE, J., dissents.

TOM GLAZE, Justice. I dissent. The primary factual issue is whether A & B Dirt Movers sold or merely hauled dirt. In issue at trial were six exhibits each listing business transactions of A & B; the exhibits are set out in the majority opinion. The state now, on appeal and for the first time, concedes exhibits one and six reflect nontaxable transactions; however, it still maintains that exhibits two through five list events that are presumable sale-of-dirt transactions and are taxable. The chancellor, however, found the transactions on *all* six exhibits involved A & B hauling services and not sale transactions.

The majority court reverses the chancellor, and in doing so, finds that the testimony and explanation of these various exhibits and transactions by Mr. Jerry Nabholz, President of A & B, were "insufficient, standing alone, to meet A & B's burden to refute the reasonableness of the state's assessment." In short, the majority simply *disbelieves* Mr. Nabholz's explanation of exhibits two through five and his version that the transactions reflected on them did not involve the sale of dirt. In reaching such a conclusion, the majority court departs from the established rule that, while the supreme court reviews chancery court cases de novo, it recognizes the superior position of the chancellor to weigh issues of credibility and therefore does not reverse unless the chancellor's findings are clearly erroneous. *McElroy* v. *Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991).

Mr. Nabholz testified that he had unneeded dirt he gave away so he could build on his land, and other witnesses, testifying on A & B's behalf, related similar narratives. In these situations, A & B merely charged for hauling free dirt to customer destinations. If believed, such testimony clearly refutes any idea that consideration was paid for the dirt hauled to the customers listed in the four exhibits still in dispute.

This court is in no position to second guess the chancellor on what are strictly factual and credibility issues. The evidence or explanations surrounding exhibits one and six were apparently accepted by the state since the state now concedes transactions listed on them are nontaxable. The chancellor found the remaining four exhibits and related testimony worthy of belief, and this court has no basis to hold otherwise. I would affirm the chancellor's findings.

Ricky ANDERSON *v.* STATE of Arkansas

CR 92-841 842 S.W.2d 855

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Burbank, Dodson, & McDonald, by: *Jack W. Barker*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was arrested for tampering with physical evidence and possession of a controlled substance. He twice confessed to both felonies and was charged and convicted of both crimes. He appeals and argues that the trial court made two erroneous rulings. We affirm the convictions as there was no reversible error.

Appellant first argues that the trial court erred in refusing to grant a mistrial following a comment by the prosecutor. We do not reach the issue because the appellant did not make an objection that would apprise the trial court of the argument he now makes. We have consistently held that an objection below must be sufficiently specific to inform the trial judge of the error complained of on appeal. *Terry* v. *State*, 304 Ark. 344, 802 S.W.2d 925 (1991).

Appellant next argues that the trial court erred in refusing to suppress both of his confessions because he was under the influence of cocaine and was unable to make a knowing and intelligent waiver of his *Miranda* rights. A court may properly conclude that the accused has waived his *Miranda* rights only if the "totality of the circumstances" reflects he possessed the requisite level of comprehension. *Moran* v. *Burbine*, 475 U.S. 412 (1986). 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, is a question of fact for the trial court. *McDougald* v. *State*, 295 Ark. 276, 748 S.W.2d 340 (1988); *Baker* v. *State*, 289 Ark. 430, 711 S.W.2d 816 (1986); *Abdullah* v. *State*, 281 Ark. 239, 663 S.W.2d 166 (1984); *Fuller* v. *State*, 278 Ark. 450, 646 S.W.2d 700 (1983); *Hunes* v. *State*, 274 Ark. 268, 623 S.W.2d 835 (1981). While we make an independent determination based on the totality of the circumstances, we will not reverse the trial court unless its determination is clearly erroneous. *Graham* v. *State*, 277 Ark. 465, 642 S.W.2d 880 (1982).

The arresting police officer testified that at the time of appellant's first confession, appellant was unsteady on his feet, slurred some of his words, and appeared to be somewhat intoxicated and possibly high on cocaine, but that he was coherent, understood the process, and understood his constitutional rights and his waiver of them. Another officer testified that appellant did not appear to be under the influence of drugs and was coherent at the time he gave the first confession. Appellant disputed the State's proof and testified at the suppression hearing that he was so high that he could not comprehend his rights or the consequences of waiving them. It is noteworthy that, on cross-examination, appellant testified that he could recall the contents of his pockets from the time of the first confession. He testified that he had a matchbox with a razor blade in it, a cigarette lighter, and sixty-five cents in change.

The evidence presented by the State was sufficient to support a finding that appellant was not seriously incapacitated and could understand and appreciate both the nature of his constitutional rights and the consequences of waiving those rights. Under the totality of the circumstances, we cannot say the trial court's finding that appellant knowingly and intelligently waived his rights was clearly erroneous. Accordingly, we affirm.

Lawrence BUTLER, Nathaniel Thomas, and James Ellison
v. STATE of Arkansas

CR 92-879 842 S.W.2d 434

Supreme Court of Arkansas
Opinion delivered December 21, 1992

McArthur & Finklestein, by: *William C. McArthur*, for appellants.

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

STEELE HAYS, Justice. Appellants purport to bring this interlocutory appeal under Rule 2(a)(6) of the Arkansas Rules of Appellate Procedure giving this court jurisdiction under Ark. Sup. Ct. R. 29(1)(k). We dismiss for lack of an appealable order.

Appellants Lawrence Butler, James Henry Ellison, and Nathaniel Thomas were charged by information in Pulaski County Circuit Court with three counts each of Capital Murder in violation of Ark. Code Ann. § 5-10-101 (1987). The information alleged that on February 19, 1992, they feloniously, with the premeditated and deliberated purpose of causing the death of another person, caused the deaths of Cyrus Lee, Sabrina Earl and Marcus Johnson. Appellants have remained incarcerated since they were arrested.

On June 22, 1992, the prosecuting attorney's office appeared ex parte before the Honorable Floyd J. Lofton, Pulaski County Circuit Judge, and orally moved that appellants submit to the extraction of pubic hair, blood and saliva. The court signed an order on that date requiring the appellants to submit to a physical examination for the collection of samples of appellants' pubic hair, blood and saliva.

On June 23, 1992, Nathaniel Thomas filed a motion to set aside the order of June 22nd alleging there had been no showing of probable cause for the intrusive search of his person and that reasonable notice of the time and place for his appearance was not given by the prosecuting attorney.

A probable cause hearing was held with all parties and their attorneys present. The prosecuting attorney's office again made an oral motion to the Honorable Chris Piazza, Circuit Judge. No witnesses were presented. The court ordered that all three appellants submit to a physical examination for the collection of samples of appellants' blood and saliva for testing and comparison with items of clothing, floor coverings, weapons, and other physical evidence secured from the scene of the homicides.

Appellants brought this interlocutory appeal by filing a Notice of Appeal on July 7, 1992. They claim that there was no showing of probable cause for the court's order.

Appellants do not challenge the trial court's authority to order the taking of body fluid samples pursuant to Ark. R. Crim.

P. 18.1(a)(vii). This rule reads in part:

> (a) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the defendant to:
>
> (vii) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;
>
> (b) Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the defendant and his counsel. . . .

Instead, appellants challenge the lack of procedure and the lack of evidence preceding the order in this case. They contend the discovery provided by the State showed no reasonable or probable cause to order the taking of body samples. They also claim the reason offered by the State at the hearing was insufficient, i.e., that the FBI had requested samples of the blood of all accused prior to its testing of the evidence.

This court has no jurisdiction to hear this interlocutory appeal. A defendant does not have any general right to an interlocutory appeal in criminal cases. The appealability of a circuit court's order is governed by Ark. R. App. P. 2(a), which requires a final judgment or decree or one which, in effect, discontinues or determines the action and prevents a judgment from which an appeal might be taken. *See Ellis* v. *State*, 302 Ark. 596, 791 S.W.2d 370 (1990). Rule 2(a) contains no provision which permits an interlocutory appeal from an order entered by a circuit court during pretrial procedures.

The State may bring an interlocutory appeal in two circumstances. Under Rule 36.10 of the Arkansas Rules of Criminal Procedure, an interlocutory appeal is allowed only when the order (1) grants a motion under Rule 16.2 to suppress seized evidence or (2) suppresses a defendant's confession. *See State* v. *Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981); *State* v. *Glenn and Hamilton*, 267 Ark. 501, 592 S.W.2d 116 (1980). In *State* v. *Stuart*, 306 Ark. 24, 810 S.W.2d 939 (1991), the court dismissed an interlocutory appeal by the State from an order suppressing

evidence because such an order was not appealable under A.R.Cr.P. Rule 36.10. No provision exists in the Rules of Criminal Procedure for such an appeal by a defendant.

In order to appeal, a defendant must first be convicted of a crime. Rule 36.1 of the Arkansas Rules of Criminal Procedure states that "any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas." The jurisdiction of the Arkansas Supreme Court is limited to appellate jurisdiction only. *Weston* v. *State*, 265 Ark. 58, 576 S.W.2d 705, *cert. denied*, 444 U.S. 965 (1979). In *Weston*, the court stated that an appeal attacking the defendant's indictment will not lie at this stage in the proceeding in the absence of a final order of the trial court settling some issue against him or finding him guilty of some offense. In the present case, the appellants have not been convicted and have no right to appeal at this point.

Appellants contend the order is comparable to a mandatory injunction, which is appealable. Ark. R. App. P. 2(a)(6). The argument is without merit. An injunction is a command by a court to a person to do or refrain from doing a particular act; it is mandatory when it commands a person to do a specific act, and prohibitory when it commands him/her to refrain from doing a specific act. *Tate* v. *Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989). In *Tate*, the court stated that in order for an injunction to be mandatory, the order must be based upon equitable grounds to justify the use of extraordinary powers of equity, such as irreparable harm and no adequate remedy at law, and the order must determine issues in the complaint, not merely aid in the determination of such issues. Also, an injunction is an equitable remedy over which a chancery court has jurisdiction. *Manitowac Remanufactuirng, Inc.* v. *Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991). Because the Pulaski County Circuit Court issued the order in a proceeding not equitable in nature, the order does not qualify as a mandatory injunction.

For the reasons stated, the appeal is dismissed.

HOLT, C. J., not participating.

Joe E. EDWARDS *v.* Nancy C. EDWARDS

92-612 843 S.W.2d 846

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Everett, Stills & Gunderson, for appellant.

Batchelor & Batchelor, by: *Fines F. Batchelor, Jr.*, for appellee.

STEELE HAYS, Justice. This dispute between brother and sister involves the construction of a deed and the will of their mother. Joe E. Edwards, appellant, and Nancy Edwards, appellee, are children of Edna Edwards, who died in December 1989. Two other children are not parties to this suit.

Edna Edwards purchased a home in Ft. Smith in April of 1988, accepting a warranty deed from the sellers "to Edna

Edwards and to Joe E. Edwards, her son, with right of survivorship." On September 28, 1988, Edna Edwards executed a will which contained a provision devising the identical property to all four of her children, "in equal shares, subject to a life estate to Nancy Carol Edwards, conditioned upon her occupying the home place and paying for taxes, insurance and repairs."

After the will was filed for probate in February 1990, Joe Edwards filed a complaint in circuit court against Nancy Edwards claiming ownership of the home by virtue of the warranty deed and alleging that Nancy was unlawfully in possession of the property. Nancy filed an answer claiming under the will. On Nancy's motion the case was transferred to chancery.

Nancy filed a counterclaim in chancery to quiet title to the property. The case was tried and the chancellor entered his decree, finding that Joe Edwards, by virtue of the deed, held the property as tenant in common with the estate of his mother, subject to the terms of her will. Joe Edwards argues that the trial court erred in finding he held the property only as a tenant in common and not as a joint tenant with right of survivorship.

The facts surrounding the execution of the warranty deed are these: Edna Edwards had concerns that her children be taken care of after she died. She had a particular concern that Nancy have a home to live in and there was testimony that she wanted Nancy to have the property in question to live in after she died. Edna had real estate holdings and also had a $65,000 CD, proceeds from her husband's life insurance. The $65,000 was used as payment on the home.

When Edna's husband died, Edna was living in a larger family home and decided to move to a smaller home in Ft. Smith. She meant for Nancy to live with her and to live in it after she died. Edna picked out the property in question, and decided to purchase it.

At the closing neither Nancy nor Joe was present. The closing was held at the real estate office of Caldwell-Banker Fleming-Lau, and in addition to Edna and the sellers, two real estate agents were present—Rosemary Jedlicka and Jan Ford. Ms. Jedlicka testified that the deed had been prepared by an abstract company and only Edna Edwards name was originally

listed as grantee. She testified that Edna requested that her son Joe be added to the deed, that Edna specifically requested that not only his name be added to the deed, but the particular words, "with right of survivorship" be included. There was other testimony from Jan Ford, suggesting there was no specific request for those words.

Ms. Jedlicka testified that she contacted the abstract office that had prepared the deed and they authorized the addition of these words. Ms. Jedlicka then typed in after Edna's name, in an obviously different type from the rest of the deed, "and Joe E. Edwards, her son, with right of survivorship." Eugene Wahl, head of the abstract firm, testified he would not have authorized such wording to create a joint tenancy.

In finding there was no joint tenancy, the chancellor specifically found that the words "with right of survivorship" were not the words of Edna Edwards, but were the words of the realtor who changed the deed. Joe Edwards does not dispute that finding, rather, he insists the language used in the deed creates a joint tenancy as a matter of law, and that the trial court erred in finding otherwise. However, for reasons to be explained, we hold that a resulting trust was created for the benefit of Nancy Edwards, rendering the wording of the deed moot.

On cross appeal, Nancy Edwards agrees that Joe Edwards had no survivorship rights in the property, but argues the chancellor erred in finding he held the property as a tenant in common with the estate of Edna Edwards. She advances two alternate theories deducible from the evidence: one, that Joe held the property as a mortgagee for Edna Edwards, and, two, that an implied trust was created for Nancy's benefit.

Under the mortgage theory, Nancy claims that Joe should be found to be a mortgagee as there was evidence he had claimed an interest in the $65,000 CD used to buy the property, and when Edna added Joe's name to the deed she intended it, in essence, as security for the use of his money. The trial court found, however, that by Joe's own admission he did not claim any interest in the $65,000, but testified unequivocally it belonged to his mother as beneficiary of life insurance proceeds.

Nancy Edwards does not dispute this finding but

merely argues there is room for another interpretation of the evidence. That however, is not the standard for review. Rather, we reverse only if it can be demonstrated that the trial court's findings are clearly against the preponderance of the evidence. Nancy Edwards has made no such showing.

The second argument, an implied trust, does have merit. The term "implied trust" encompasses both constructive trusts and various types of resulting trusts. *See* 76 Am. Jur. 2d *Trusts* §§ 159-163 (1992); W. Fratcher, V *Scott on Trusts* §§ 404 through 404.2 (1989) (describing the three types of resulting trusts) and § 462 (describing constructive trusts). *Hickman* v. *The Trust of Heath, House & Boyles*, 310 Ark. 333, 835 S.W.2d 880 (1992); *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). A constructive trust arises in favor of persons entitled to a beneficial interest against one who secured legal title either by an intentional false oral promise to hold the title for a specified purpose, or by violation of a confidential or fiduciary duty, or is guilty of any other unconscionable conduct which amounts to a constructive fraud. *Andres* v. *Andres, supra.*

A resulting trust arises where one disposes of property under circumstances which raise an inference that he/she does not intend that the putative grantee should have the beneficial interest in the property. *Scott, supra*, at § 404.1. There are different types of resulting trusts but that which concerns us here is often called a purchase money resulting trust and arises where property is purchased and the purchase price is paid by one person and at his/her direction the vendor converts the property to another person. *Id.*

The distinction between a resulting and a constructive trust is discussed in *Scott*:

> A resulting trust is to be distinguished from a constructive trust. A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, breach of a fiduciary duty, or wrongful disposition of another's property. The basis of the constructive trust is

> the unjust enrichment that would result if the person having the property were permitted to retain it. Ordinarily a constructive trust arises without regard to the intention of the person who transferred the property. On the other hand, a resulting trust arises in favor of the person who transferred the property or caused it to be transferred under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to give him the beneficial interest.

Scott, supra at § 404.2.

The theory of a resulting trust is that grantors expect something for their money, and when they pay the purchase price, but direct that the property be conveyed to a third party who is a stranger, the presumption is there has been no gift to the third party but a conveyance of the property to be held in trust for the party who paid the purchase price. G.G. Bogert and G.T. Bogert, *The Law of Trusts and Trustees*, § 454 (2nd ed. 1991). If, however, the third party stands in such relationship to the party furnishing the purchase money as to be the natural object of his/her bounty, things get more complicated, as a gift may have been intended. Bogert, *supra*, § 459.

In general, a resulting trust must be proven by clear and convincing evidence. *Festinger* v. *Kantor*, 272 Ark. 411, 616 S.W.2d 455 (1981); *Crain* v. *Keenan*, 218 Ark. 375, 236 S.W.2d 731 (1951). *See also Walker* v. *Hooker*, 282 Ark. 61, 667 S.W.2d 637 (1984). In the *Festinger* case the grantees were the wife and daughter of the purchaser, and we noted the presumption that a gift was intended. In *Jones* v. *Wright*, 230 Ark. 567, 323 S.W.2d 932 (1959), a wife paid for land, and the deed conveyed it to her and her husband. We held that the burden was on the heirs to overcome the presumption of a gift from the wife to the husband. In *First National Bank* v. *Rush*, 30 Ark. App. 272,785 S.W.2d 474 (1990), our Court of Appeals dealt with the same question and stated the presumption of gift could be overcome only by "clear and convincing proof that no such gift was intended."

While we find no Arkansas case dealing with purchase by a mother naming her son as grantee, the same principles should apply. As Bogert points out:

> Where *a mother* is the payor and a child is made the grantee, with the mother's consent, the courts have not been entirely unanimous in their application of a presumption. Most decisions, however, treat the case in the same way as where the father pays the price, and presumes a gift, whether the child be an adult or an infant. . . . Gifts from her to the children, out of mere generosity or for the purpose of distributing her estate at the end of her life, are quite natural and common. [Bogert, *supra*, § 460, pp. 360-365. (Citations omitted; emphasis in original.)]

Was the evidence in this case so clear and convincing as to overcome the presumption of a gift? We think so.

Here the evidence pointed unerringly to the conclusion that Edna Edwards did not intend for Joe to have any beneficial interest under the deed, but was to act in the role of administrator or trustee of the property in case of her death so that the property could be distributed according to her will, specifically, to her four children equally subject to a life estate to Nancy. The testimony of Joe Edwards effectively confirms that conclusion.

In sum, the total proceeds with which the real estate was purchased came from Edna Edwards; Joe furnished no part of the consideration for the purchase of the real estate in question; although Joe Edwards paid the premiums on the policy of insurance on his father's life, he made no claim whatever to that money, but acknowledged it was intended to be a resource to care for his mother, although a certificate of deposit including Joe's name was included on the CD so he could assist in taking care of his mother; Joe, the oldest of the four children, had discussed with his parents and had understood that his parents were counting on him to carry out their intent that Nancy and their brother, Jerry, have a home the rest of their lives; Joe had known at all times that his mother intended for Nancy to have the property as her home the rest of her life, yet said nothing to his mother indicating he would not see that this was done; Joe had known of the desire of his mother and her intent that the property go to Nancy for life with remainder to the four children equally at the end of her life estate. Joe testified that after the death of his mother he intended that Nancy have the property as her home the rest of her life but he changed his mind after Nancy declined certain demands he

made with regard to other matters, and after he had learned his name was on the deed.

In light of the above evidence, and the chancellor's finding that Edna Edwards did not request the survivorship phrase be added to the deed, the clear import of the testimony, including that of Joe Edwards, was that the property in question was purchased with Edna's money so Nancy would have a place to live after her mother died, i.e., a life estate; and the only reason Joe's name would have been added to the deed was to allow him to act as administrator or trustee of the property when Edna died and to carry out the wishes of his mother for Nancy's life estate.

Affirmed on direct appeal, reversed on cross appeal and remanded for further proceedings not inconsistent with this opinion.

JOHNNY'S PIZZA HOUSE, INC. *v.* Chester Paul HUNTSMAN and Sheila McCloud Huntsman

92-713 844 S.W.2d 320

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Billy J. Hubbell, for appellant.

Arnold & Streetman, by: *James A. Hamilton*, for appellees.

STEELE HAYS, Justice. The trial court dismissed this action by Johnny's Pizza House, Inc., a foreign corporation, for its failure to comply with the Wingo Act, Ark. Code Ann. § 4-27-1501 (1987). On December 10, 1984, appellees, Chester and Sheila Hunstman, executed a promissory note payable to appellant, Johnny's Pizza House, Inc., (Johnny's) for $53,002.84 at 13 1/4% interest per year on the unpaid balance. On January 30, 1991, Johnny's filed suit against the Huntsmans to collect the note. Among other things, the complaint alleged:

> The plaintiff is a Louisiana corporation which has its principal place of business in West Monroe, Louisiana, and is doing business or has done business in Ashley County, Arkansas. The defendants are individuals who

live in Ashley County.

The Huntsmans moved to dismiss Johnny's complaint because Johnny's did not have a certificate of authority to transact business in Arkansas as required by § 4-27-1501 and, as a foreign corporation doing business in Arkansas, which the complaint admitted, such a certificate is required. Further, that as a consequence of not having that certificate, it was precluded under Ark. Code Ann. § 4-27-1502 (1987) from maintaining any action in this state. On February 26, 1991, the Huntsmans filed a motion to treat their earlier motion for dismissal as one for summary judgment.

Johnny's responded to these motions and defended on the premise it was a franchisor only, and it is the franchisee who actually conducts business in Arkansas. It further stated that it applied for the certificate of authority, and argued that the trial court should not dismiss the case until the secretary of state's office decided whether to issue the certificate.

The court heard argument on the motions and took them under submission pending briefs to be submitted by both sides. Based on what was before him, the judge granted a "Summary Judgment of Dismissal." The court found that 1) the specific contract was made in Arkansas and 2) at the time it was made, Johnny's did not have a certificate of authority, and 3) because there were no issues of material fact remaining the Huntsmans were entitled to a judgment of dismissal as a matter of law.

Johnny's filed a motion to amend findings of fact and judgment, or a new trial. The primary point of this pleading was that the trial court had misinterpreted § 4-27-1502, and that as Johnny's had now obtained a certificate of authority from the secretary of state, suit could be maintained. This motion was deemed denied when the trial court failed to act on it in the prescribed time.

Before addressing Johnny's arguments, some discussion of the old and the new Wingo Acts is in order. The former act required any foreign corporation "doing business" in this state to file with the secretary of state and to obtain a certificate of authority. Ark. Stat. Ann. § 64-1201 (1987). Arkansas Stat. Ann. § 64-1202 (1987) provided two distinct penalties. The first

was pecuniary, and the second provided that any contract made in Arkansas was unenforceable by a foreign corporation if the corporation had not filed with the secretary of state and received its certificate of authority. The "new" Wingo Act is part of the "Arkansas Business Corporation Act," enacted as No. 985 in 1987, at § 4-27-101 through 4-27-1705. (§ 64-1201 and 1202 are found in their revised forms at § 4-27-1501 and 1502 respectively.) The Arkansas Business Corporation Act of 1987 is based primarily on the Model Business Corporation Act, which is a product of a committee of the American Bar Association. *See* A.C.A. Commentaries at p. 415; *Centennial Valley Ranch Management, Inc.* v. *Agri-Tech Ltd. Partnership*, 38 Ark. App. 177, 832 S.W.2d 259 (1992).

Under the new act, foreign corporations "transacting business" in this state are still required to file for a certificate of authority. Section 4-27-1501. The primary difference is that this section also lists a number of transactions that will *not* be held to be "transacting business."

The major difference for purposes of this case, however, is in the penalty section, § 4-27-1502. While a pecuniary penalty can still be imposed, the "unenforceable contract" penalty is eliminated and a milder sanction is substituted.

The new "consequences" provision merely requires that in order to maintain a suit, the foreign corporation which transacts business in this state, must first obtain a certificate of authority. Further if such a corporation does commence a proceeding without a certificate, the court may stay the proceedings until it determines whether a certificate is needed, and grant a further stay to allow the foreign corporation to obtain the certificate if it is determined that it is needed.[1] This is in sharp

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[1] § 4-27-1502. Consequences of transacting business without authority.

A. A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

B. The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

contrast to the former provision that expressly precluded any rehabilitation of the uncertified foreign corporation, and made the contract void *ab initio*. *See Worthen Bank & Trust Co.* v. *United Underwriters Sales Corp.*, 251 Ark. 454, 474 S.W.2d 899 (1971).[2]

On appeal, Johnny's has challenged the correctness of the trial court's granting of summary judgment, arguing four points for reversal. We need address only the last of these.

It appears from the order that the trial court was acting pursuant to the provisions of the old act. Its focus was on the parties having contracted in Arkansas, which fact would be neither pivotal nor conclusive under the new act. *See* § 4-27-1502;

> C. A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. It is so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.
>
> D. A foreign corporation is liable for a civil penalty of not more than five thousand dollars ($5,000) and not less than one hundred dollars ($100) if it transacts business in this state without a certificate of authority. The Secretary of State shall promulgate regulations for the calculation of the appropriate penalty. In determining the appropriate penalty, the Secretary of State shall consider the size and assets of the corporation, the total amount of business transacted by the corporation within the state and such other circumstances as the Secretary of State may institute proceedings in Pulaski county Circuit Court to recover such penalty.
>
> E. Notwithstanding subsections A. and B. of this section, the failure of a foreign corporation to obtain certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state.

[2] Also, there seems to be a little question that under the express provision in the act, that under the facts of this case, the new act would apply. *See* transition provision, § 4-27-1701 through 1706. It was stated in a recent law review article, M. Matthews, "Corporate Statutes — Which Applies?" § 13 UALRLJ 69, at 77:

> The issue is whether a nonqualifying foreign corporation which enters into a contract prior to 1988 will be able to qualify and thereafter enforce the contract. The 1987 ABCA transition provisions suggest that the pre-1988 contract will be enforceable. The relevant section provides that "[i]f a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment, if not already imposed, shall be imposed in accordance with this chapter." Arguably the harsh penalty of voiding the contract is reduced by the 1987 ABCA comply-and-enforce approach, and the penalty should therefore be imposed according to the new statute.

There is no dispute on this point by the parties.

and *see* generally, *Model Business Corporation Act*, (Supp. 1991), Selected cases, 2. Transacting business. It seems clear the former act was being applied because instead of granting a stay, the trial court dismissed the action, presumably with prejudice.

In its fourth point for reversal, Johnny's argues that the trial court erroneously applied the penalty provisions in the repealed act, and that rather than granting a "dismissal of summary judgment," the trial court should have granted a stay to permit Johnny's to obtain the certificate of authority. We sustain the argument.

Centennial Valley Ranch Management, supra, dealt with what action a trial court should take when the defense is raised under the Wingo Act that the plaintiff had not obtained a certificate as required by § 4-27-1501:

> Under the old law (Wingo Act) the nonqualifying foreign corporation was not permitted to enforce any contract made in Arkansas. But [in a law review article, M. Matthew, *Corporate Statutes - Which One Applies?*, 13 USLF 69, 677 (1990) it says that] "the commentary to the revised Model Business Corporation Action which the section is based makes clear the drafters intended a qualifying foreign corporation be able to enforce a contract simply by qualifying."

We agree. The Official Commentary to the Model Business Act on which ours is based, makes it clear that this provision is not to be used to penalize, but to encourage foreign corporations to file. The commentary does not state that the stay should be granted in all cases, but it does provide that the stay is to be liberally granted. The pertinent section of the commentary provides:

OFFICIAL COMMENT

> *The purpose of section 15.02 is to induce corporations that are required to obtain a certificate of authority but have not to qualify promptly, without imposing harsh or erratic sanctions. The Model Act rejects the provisions adopted in a few states that make unenforceable intrastate transactions by unqualified corporations or that impose punitive sanctions or forfeitures on nonqualifying*

corporations. Often the failure to qualify is a result of inadvertence or bona fide disagreement as to the scope of the provisions of section 15.01, which are necessarily imprecise; the imposition of harsh sanctions in these situations is inappropriate. Further, as a matter of state policy it is generally preferable to encourage qualification in case of doubt rather than to impose severe sanctions that may cause corporations to resist obtaining a certificate of authority in doubtful situations.

Section 15.02 closes the courts of the state to suits maintained by corporations which should have but which have not obtained a certificate of authority. However, this sanction is not a punitive one: section 15.02(e) states that the failure of the corporation to qualify does not affect the validity of corporate acts, including contracts. Thus, a contract made by a nonqualified corporation may be enforced by the corporation simply by obtaining a certificate. Further, section 15.02(c) authorizes a court to stay a proceeding to determine whether a corporation should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the corporation to do so. Thus, the corporation will not be compelled to refile a suit if the corporation qualifies to transact business within a reasonable period. *The purpose of these provisions is to encourage corporations to obtain certificates of authority and to eliminate the temptation to raise section 15.02 defenses only after applicable statutes of limitation have run.* [Our emphasis.]

Hence, the granting of a stay is in line with the stated intentions of the drafters of the code, and in accord with other jurisdictions operating under similar statutes. *See Charles* v. *Smith & Sons* v. *Lichtefeld-Massaro*, 477 N.E.2d 308 (Ind. App. 1 Dist. 1985) ("failure of a plaintiff foreign corporation to obtain a certificate. . .by the date of the filing of its complaint in Indiana merely suspends rather than bars further legal proceedings until such time as the certificate is obtained); *South Carolina Equipment, Inc.* v. *Sheedy*, 353 N.W.2d 63, 120 Wis2d 119 (Wis. App. 1984) ("Commentators and the vast majority of courts have held that when an unregistered foreign corporation commences

or defends a suit, and during the course of that suit complies with the registration of law, that act is sufficient to allow it to maintain a court action or a defense.") *Tri-Terminal Corp.* v. *CITC Industries, Inc.*, 78 A.D.2d 609, 432 N.Y.S.2d 184 (1980) (the proper procedure was for the trial court to grant a conditional stay affording the corporation the opportunity to cure the defect.)

We note, too, that the commentary implies that if a dismissal, rather than a stay, is granted, it will not be a dismissal with prejudice: "Thus, the corporation will not be compelled to refile a suit if the corporation qualifies to transact business within a reasonable period."

The appropriate action in this case would have been to grant a stay to Johnny's until it was determined whether a certificate was necessary, and if so, to further stay the proceedings until the corporation obtained the certificate. *See* § 4-27-1502(C). We recognize that Section (C) of 1502 is discretionary and, where appropriate circumstances exist, the trial court may deny the request for a stay. There was no such showing in this case. *See* e.g., *Rigid Component Systems* v. *Nebraska Component*, 202 Neb. 658, 276 N.W.2d 659 (1979).

Reversed with directions consistent with this opinion.

Ernest L. LOEWER *v.* NATIONAL BANK OF ARKANSAS

92-506 844 S.W.2d 329

Supreme Court of Arkansas
Opinion delivered December 21, 1992

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

Davidson Law Firm, by: *Brandon L. Clark*, for appellee.

DAVID NEWBERN, Justice. This case involves two competing claims to furniture, fixtures, and equipment (referred to hereafter collectively as "the equipment") used by National Bank of Arkansas (NBA). Ernest L. Loewer, the appellant, claimed ownership resulting from an assignment from one J.R. Hodges. The jury found the appellee, NBA, owned the equipment by virtue of a purchase agreement executed between it and Interstate Leasing Incorporated (Interstate), Hodges' corporation. Loewer argues (1) there was insufficient evidence to support the finding that NBA owned the equipment, (2) the Circuit Court erred by awarding NBA $50,000 in attorney's fees, and (3) the Circuit Court abused its discretion by failing to impose sanctions against NBA for discovery violations.

We hold (1) the evidence was sufficient to support the jury's verdict as to ownership, (2) there was statutory authority to award the attorney's fees, and (3) there was no abuse of discretion in the decision to decline to impose discovery sanctions. The judgment is affirmed.

NBA made two loans to Loewer. On December 19, 1984, Loewer borrowed $31,741.14 from NBA at 13.5% interest. The same day Loewer borrowed $56,054.58 also at 13.5% interest. The loans were evidenced by two promissory notes from Loewer which were made payable to NBA on demand or on March 19, 1985. Loewer received four extensions but failed to make any payments on the principal. On March 10, 1989, NBA filed suit in Pulaski County Circuit Court to collect the principal plus interest.

Loewer admitted failing to make payments under the terms of the notes but alleged he was the owner of the equipment which had been intentionally converted by NBA. Loewer claimed entitlement to set off his debt to NBA in the amount of damages suffered as a result of the conversion. NBA answered, asserting a prior ownership interest in the equipment.

To understand the conversion claim, it is necessary to examine the history of transactions involving the equipment. NBA did not want to own equipment used in banking operations because of the effect of ownership on NBA's balance sheet. If NBA leased, as opposed to owning, federal regulations would allow more loans to be made to customers. The executive vice-president of NBA, Ted Blagg, approached NBA's largest depositor, Hodges, about purchasing the equipment and leasing it back to NBA. Blagg testified he told Hodges that when the lease expired, NBA would purchase the equipment at an agreed upon price. Hodges agreed to purchase the equipment through Interstate.

The five-year lease dated December 1983 between Interstate and NBA provided for monthly rental payments of $9,394.88. Article II of the lease stated:

> This is an agreement of lease only. Nothing herein shall be construed as conveying to Lessee any right, title or interest in or to the Equipment leased hereunder, except the express interest hereunder of Lessee as a lessee to maintain possession and use of the Equipment for the full term of this lease. No options or agreements for purchase of the Equipment by Lessee or extension of the term hereof exist, nor shall any be implied, except as specifically stated in the Schedule.

The agreement provided in Article IV that when the lease expired, NBA would return the equipment to Interstate at NBA's expense. Article XX stated, "This lease contains the entire agreement between the parties with respect to the Equipment and may not be altered, modified, terminated or discharged except by a writing signed by the party against whom such alternation, modification, termination or discharge is sought."

Blagg testified that, at the same time the lease was executed, three other documents were prepared, plaintiff's exhibits six, seven, and eight. Exhibit 6 was an undated letter from Hodges to Blagg which stated:

> This letter will confirm the price at which you may purchase the residual value of the furniture, fixtures and equipment; which National Bank of Arkansas is leasing from Interstate Leasing, Inc. After due consideration, it is my opinion that the fair market value of the leased property as of December 20, 1988, is $39,845.47.

Exhibit 7 was a bill of sale indicating the grantor, Interstate, sold the equipment to the grantee, NBA, for $39,845.47. The bill of sale was executed on December 20, 1985, and signed by Hodges. Exhibit 8 was a promissory note from NBA to Interstate in the amount of $39,845.47. The note was to be paid by NBA on December 20, 1985. Although the documents do not reflect this fact, Blagg testified they were all prepared at approximately the time the lease was executed.

There was testimony that Blagg told Ron Tullos, then chief executive officer of NBA, to take the bill of sale, valuation letter, and promissory note away from NBA and bring them out five years later at the expiration of the lease. Tullos placed the documents in his personal files at his home. Copies of the original documents were accidentally found by a loan officer in a safe deposit box at NBA only a few days before trial.

On March 6, 1984, Interstate and NBA executed an addendum to the lease providing that Interstate would remove the equipment at the termination of the lease at Interstate's expense. Interstate and NBA executed the addendum despite the fact that NBA had allegedly previously agreed to purchase the equipment at the expiration of the lease. Blagg explained accountants told

NBA the addendum was necessary to make the lease an operating, versus a capital lease.

Loewer testified that in July of 1986 Hodges gave him an assignment of the NBA lease and a bill of sale to the equipment. Hodges did so to cover part of a debt he owed to Loewer. Hodges stated he did not remember signing the valuation letter, executing the prior bill of sale to NBA, or seeing the promissory note from NBA to Interstate. Hodges admitted there were discussions between himself and NBA concerning a buy out at the expiration of the lease, but that the buy out would be at a fair market value. Both Hodges and Loewer testified about the existence of the 1986 assignment and bill of sale, but we find nothing in the record to indicate these documents were introduced at trial, and they have not been abstracted for purposes of appeal.

Another party to this action was Savers Federal Savings & Loan Association (Savers). Savers loaned the purchase money which enabled Interstate to buy the equipment for NBA. Savers, therefore, had a superior right to the equipment by virtue of its purchase money lender status. NBA recognized Saver's claim to the equipment and filed a third party complaint against Savers. Savers, through its conservator FDIC, removed the entire case to United States District Court for the Eastern District of Arkansas. On June 7, 1990, the District Court granted a partial summary judgment for Savers, declaring they had a first lien on the equipment. The pending claims and counterclaims were then remanded to the Circuit Court.

As Savers threatened to foreclose, NBA purchased its judgment for $67,500. After notifying Interstate and Loewer, NBA sold the equipment to Diversified Financial Investments for $72,000.

NBA's first amended complaint and third party complaint requested (1) a monetary judgment against Loewer on the two promissory notes, (2) a judgment declaring its ownership of the equipment under the agreement, and alternatively, (3) an order setting aside the bill of sale and assignment to Loewer as a fraudulent conveyance in the event Loewer was found to have any interest in the property.

After the evidence was presented, the Trial Court granted

NBA's motion for directed verdict on Loewer's liability on the promissory notes. Loewer's counterclaim was submitted to the jury by this interrogatory: "Do you find from a preponderance of the evidence that National Bank of Arkansas and Interstate Leasing Inc. entered into an agreement whereby National Bank of Arkansas purchased the furniture, fixtures and equipment?" The jury responded "yes." The Court awarded judgment against Loewer in the amount of $130,851.21, plus $50,000 in attorney's fees, and $4,493.68 in costs. The Court then declared NBA entered into a lawful contract to purchase the equipment on December 20, 1983, and was the owner of the property free and clear of any claims by Interstate or Loewer. Loewer's conversion claim against NBA was dismissed with prejudice.

1. Substantial evidence

Loewer argues there was no substantial evidence supporting the jury finding that NBA purchased and owned the equipment as of December 1983. To support his argument, Loewer relies on the provision of the lease stating NBA had no option to purchase and the provision stating the lease constituted the entire agreement between the parties. He also contends the addendum to the lease executed in March 1984 conclusively established NBA did not own the property as of December 1983.

We will affirm a jury verdict if supported by substantial evidence. *Handy Dan Improvement Center, Inc.* v. *Peters*, 286 Ark. 102, 689 S.W.2d 551 (1985). Substantial evidence is defined as that which is of sufficient force and character that it will compel a conclusion one way or another, forcing the mind to pass beyond suspicion or conjecture. *Bank of Malvern* v. *Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991). In testing the sufficiency of the evidence on review, we need only consider that part which is most favorable to the appellee, here NBA. *Love* v. *H.F. Construction Co.*, 261 Ark. 831, 552 S.W.2d 15 (1977).

The evidence supports the conclusion that Interstate and NBA entered into a purchase agreement in December 1983. It is true that NBA and Interstate executed a lease stating it was the entire agreement between the parties and no options to purchase existed. During the same approximate time period, however, Hodges sent Blagg a valuation letter confirming the price at which the equipment would be purchased by NBA at the

expiration of the lease. A bill of sale showed Interstate transferred to NBA all its interest in the equipment, and the promissory note from NBA to Interstate evidenced NBA's financial obligation for the purchase.

A case particularly instructive on the issue presented is *Ark. Aviation Sales* v. *Carter Const.*, 250 Ark. 1007, 469 S.W.2d 118 (1971). There the lessor of an airplane, Arkansas Aviation, and the lessee, Carter Construction, entered a five-year lease which contained an option to purchase. Two weeks after the original lease was executed the parties mutually agreed to delete the purchase option for tax purposes. When the lease expired, Arkansas Aviation claimed it retained ownership of the aircraft and Carter Construction claimed it acquired ownership by virtue of the option to purchase language found in the original lease. The Chancellor found for Carter Construction and allowed parol testimony to show the parties intended for the lease to remain a lease-purchase agreement, and the option to purchase language was deleted only for tax purposes.

We affirmed, stating "parties to a written contract may, subsequent to its execution, modify it and substitute a valid oral agreement therefor." *Ferguson* v. *C.H. Triplett Co.*, 199 Ark. 546, 134 S.W.2d 538 (1939). The option continued:

> In these circumstances, we are of the view that the deletion of the lease purchase paragraph from the written contract, for tax purposes, was a proper subject for a "side agreement;" that this deletion would not affect the original agreement between the parties and is consistent with their contract; and that it is an oral or collateral agreement which "might naturally be made as a separate agreement by parties situated as were the parties to the written contract." Therefore, the trial court did not err in admitting parol testimony by the original parties to establish their "side agreement" made subsequent to the parties' written contract, and to show the scope and effect of this oral agreement.

We recognize that in the present case, the lease failed to include an option to purchase the equipment. There was evidence presented that the lease was not structured as a lease-purchase agreement for tax and regulatory purposes. Subsequent to the

execution of the lease, testimony existed that Interstate and NBA entered into a "side agreement," whereby an option to purchase the equipment was extended to NBA. This is shown by the valuation letter sent from Hodges to Blagg. The jury was presented with evidence in the form of the bill of sale and the promissory note that NBA exercised its option at the beginning of the lease. The jury thus had before it substantial evidence that the lease agreement was intended to operate as a lease-purchase agreement, and that NBA exercised its option and became the owner.

2. Attorney's fee

Loewer raises several objections to the $50,000 in attorney's fees. He first argues the amount of fees awarded should be a question for the jury to resolve, not the Trial Court. It is undisputed that the award was determined by the Court based on affidavits of NBA's counsel. We find no indication in the record that Loewer requested a hearing on the amount of fees assessed, and thus he has waived this issue on appeal. Arkansas Code Ann. § 16-22-308 (Supp. 1991) provides that in actions to recover on promissory notes, a reasonable attorney fee may be assessed by the court and collected as costs. Loewer also contends he was not given any notice or opportunity to be heard on the amount of fees assessed. As stated previously, we find nothing in the record which indicates Loewer ever requested a hearing on this issue.

Loewer also argues recoveries of attorney's fees on promissory notes are limited to 10% of the principal and interest, relying on Ark. Code Ann. § 4-56-101 (Repl. 1991). This section simply recognizes that a provision in a promissory note for the payment of a reasonable attorney's fee, not to exceed 10% of the amount of principal plus interest, may be enforceable as a contract of indemnity. We cannot interpret the Statute to limit the amount of attorney's fees which can be awarded in an action to recover on a promissory note. Arkansas Code Ann. § 16-22-308 (Supp. 1991) clearly authorizes attorney's fees to be awarded in an action such as this one.

The last objection regarding the award of attorney's fees is that the Trial Court lacked subject matter jurisdiction. To support this argument, Loewer relies on Ark. Code Ann. § 16-60-111 (1987) and argues venue was improper in Pulaski County

Circuit Court because he resided in St. Francis County.

It is important to note that venue and jurisdiction are distinct concepts. *Glad-o-Lac Co.* v. *Creekmore, Judge*, 230 Ark. 919, 327 S.W.2d 558 (1959). While jurisdiction may not be waived or created by consent of the parties, venue may be waived when a party enters an appearance. *Hargis* v. *Hargis*, 292 Ark. 487, 731 S.W.2d 198 (1987).

Although Loewer objected to venue in Pulaski County, in his answer, he asserted a permissive counterclaim under Ark. R. Civ. P. 13(b) (1992) and waived his venue objection. In *Arkansas Game & Fish Comm'n* v. *Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987), we stated, "By interposing a permissive counterclaim, a party voluntarily asks the court for affirmative relief and thus should not be allowed objections based on personal inconvenience."

3. Discovery sanctions

Loewer's last point is that the Trial Court erred by refusing to impose sanctions against NBA based on the failure to produce the valuation letter, bill of sale, and promissory note until September 16, 1991, only eight days before trial.

On May 20, 1991, the Trial Court granted Loewer's motion to compel NBA to produce all documentation regarding the equipment leased from Interstate in December 1983. NBA informed the Court that all such documentation had been produced. Shortly before trial, plaintiff's exhibits six, seven, and eight were found in a safe deposit box at NBA. A loan services officer at NBA, Brenda Burks, testified she was checking the safe deposit box for collateral on an unrelated loan and found the documents. She further stated the documents were not on the inventory list for the safe deposit box.

We will not reverse a Trial Court's decision on imposing sanctions for discovery violations unless there has been an abuse of discretion. *Davasher* v. *State*, 308 Ark. 154, 823 S.W.2d 863 (1992). There was testimony before the Trial Court that NBA had repeatedly searched for the documents without success. Tullos stated he made diligent efforts to find the documents but did not find them. There was also testimony that the documents were located accidentally in a place where they

would not normally be found. In light of the evidence that NBA officials searched for the documents prior to trial and could not find them, we cannot say the Trial Court's refusal to impose sanctions was an abuse of discretion.

Affirmed.

STATE of Arkansas *v.* Michael MILLS

CR 92-625 844 S.W.2d 324

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellant.

Jeff Rosenzweig, for appellee.

DAVID NEWBERN, Justice. The State attempts to bring an interlocutory appeal from an evidentiary ruling. During the trial

of the appellee, Michael Mills, for rape and carnal abuse Mills sought to introduce evidence that the alleged victim had falsely accused two other men of sex offenses against her. The State objected on the basis of the rape-shield law, Ark. Code Ann. § 16-42-101 (1987), which precludes admitting evidence of "prior sexual conduct" on the part of an alleged rape victim. The Trial Court overruled the objection. The issue is whether this Court has jurisdiction to hear the appeal. We lack jurisdiction, and thus the appeal must be dismissed.

At an omnibus hearing Mills offered evidence of the alleged victim's allegations against others. The alleged victim admitted making the earlier allegations and said they were true. Both of the other men accused earlier testified at the hearing and denied the incidents. The alleged victim stated she informed the police of these earlier allegations when she accused Mills, but no criminal charges were filed against the other two men.

After the hearing the Trial Court ruled that the evidence presented was not of "prior sexual conduct" as the term is used in the rape-shield law and thus it was admissible.

Jurisdiction

Subsection (a) of § 16-42-101 defines "sexual conduct" as "deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined by § 5-14-101." Subsection (b) provides that in sex offense cases, "opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct . . . is not admissible by the defendant . . . to attack the credibility of the victim, to prove consent or any other defense or for any other purpose." Subsection (c) permits a trial court to hold a hearing to determine, notwithstanding the provision of subsection (b), whether evidence of the victim's prior sexual conduct is so relevant that it should be admitted. Subsection (c)(3)(B) provides that if the prosecutor "is satisfied that the order [presumably the order of the trial court admitting the evidence] substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the State may be taken in accordance with Arkansas Rules of Criminal Procedure 36.10(a) and (c)."

The Statute provides for an appeal by the State ***only*** where a

trial court rules that the evidence proffered is of "prior sexual conduct" of the victim and then decides that the evidence should be admitted regardless of the rape-shield prohibition as it is both relevant to a fact issue and is more probative than prejudicial. If the ruling of the trial court is that the evidence is not of "prior sexual conduct," as in this case, the Statute does not apply. That was our holding in *West* v. *State*, 290 Ark. 329, 719 S.W.2d 684 (1987). The State asks that we overrule that decision, but we have been given no convincing reason to do so. It was a correct interpretation of the Statute, giving literal and obvious meaning to the words used by the General Assembly.

Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent abuse of that discretion. *Terry* v. *State*, 309 Ark. 64, 826 S.W.2d 817 (1992); *State* v. *Massery*, 302 Ark. 447, 790 S.W.2d 175 (1990). There is no basis for pretrial review of that exercise of discretion, and this is not a ruling which is subject to interlocutory appeal pursuant to Ark. R. Crim. P. 36.10(a) and (c).

When the question is whether evidence should be allowed, of prior false allegations of sex offenses by an alleged victim, a trial court finds itself in the position of having to decide a purely factual issue. If the previous allegations by the alleged victim are true, then the evidence is, in a sense, evidence of "prior sexual conduct," although it is possibly not the harmful sort of evidence at which the rape-shield law is directed. If the previous allegations are false, the evidence of them is not of "prior sexual conduct" but is evidence of prior misconduct of the alleged victim which has a direct bearing upon the alleged victim's credibility, particularly in the circumstances before the court. The Trial Court in this case voiced, several times, objection to having to conduct a "mini-trial," but it is obvious that it must be done in these circumstances.

The State rejects Mills's argument that there is no provision for an appeal where a court rules that the proffered evidence is not of "prior sexual conduct" by arguing that *all* rulings of a trial court made pursuant to the Statute should be subject to appellate review. It is argued that if a trial court erroneously finds that the evidence does not involve "prior sexual conduct" the ruling can not be corrected by appeal in the event of an acquittal. That is of

course so, but it is true of the myriad other discretionary rulings a trial court must make.

While, as a matter of policy it may be that all rulings of a trial court interpreting the rape-shield law should be subject to interlocutory review, it is clearly a policy not yet expressed or implemented in the Statute. If the ruling a trial court must make in this sort of case is special, like that prescribed in Subsection (c) and to be given special treatment, the General Assembly has not said so.

In the absence of a statutory or constitutional provision or a provision in a rule of this Court, appellate jurisdiction is lacking. *Jenkins* v. *State*, 301 Ark. 20, 781 S.W.2d 461 (1989) (jurisdiction lacking because no provision found in criminal procedure rule); *City of Little Rock* v. *Tibbett*, 301 Ark. 376, 784 S.W.2d 163 (1990) (jurisdiction lacking because no provision in constitution or rule of criminal procedure). In *Ellis* v. *State*, 302 Ark. 597, 791 S.W.2d 370 (1990), a criminal defendant sought dismissal of charges on the basis that the evidence the State proposed to introduce against him was inadmissible. The State argued, and we agreed, there was no statutory basis for jurisdiction to hear an appeal. We said:

> The state correctly points out that appeals are granted as a matter of statute. There is no right of appeal granted by the United States Constitution. *Abney* v. *United States*, 431 U.S. 651 (1977). Appealability is controlled by Ark. R. App. P. 2(a) which requires a final judgment or decree or one which, in effect, determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.

Burrow v. *State*, 301 Ark. 222, 783 S.W.2d 52 (1990), was a rape case in which the defendant wished to appeal from the Trial Court's decision, made pursuant to Subsection (c) of § 16-42-101, that he could not introduce evidence of prior sexual conduct of the victim. He argued he was being deprived of equal protection of the law because of the provision that the State could appeal but lack of a provision for appeal by the defendant. We held that the law was not unconstitutional, pointing out as a basis of the discrimination that the State could not appeal from an acquittal but that the defendant could appeal from a conviction

on the basis of error in refusing to admit the evidence. There again, the appeal was dismissed because of lack of a provision for it in the Statute.

Our rape-shield law is a product of the General Assembly, and until it sees fit to provide for interlocutory appeal by the State of a trial court's decision with respect to admitting evidence of prior false allegations made by an alleged victim, or until some other jurisdictional basis by rule or constitutional provision appears, we lack jurisdiction to hear such an appeal.

Appeal dismissed.

BROWN, J., concurs.

HAYS, GLAZE, and CORBIN, JJ., dissent.

ROBERT L. BROWN, Justice, concurring. I join the majority opinion but write to associate myself with one point made in Justice Glaze's dissenting opinion. Though the court agrees that *West* v. *State*, 290 Ark. 329, 719 S.W.2d 684 (1986) is still good law, the unfortunate statement in the opinion relating to sexual fantasies inducing some women to make false accusations about sexual attacks should be excised. The statement is archaic, and any suggestion that this court subscribes to that psychiatric point of view should be disparaged.

TOM GLAZE, Justice, dissenting. This case involves Arkansas's rape-shield statute — a statute designed to exclude a rape victim's irrelevant sexual history from being paraded before a jury. The four-member court's decision today emasculates the purpose and intent of that statute. In short, when a trial judge erroneously mislabels a victim's prior sexual conduct as merely admissible, impeachable evidence bearing on her earlier sexual allegations against others, the majority court holds the state cannot appeal that erroneous ruling to have it corrected. The majority court claims the General Assembly, in drafting and enacting this rape-shield statute, failed to provide for such an interlocutory appeal. I say this court badly misinterprets the statute, its intent, and its procedural appellate safeguards. Because of the significance of this case and its effect on future rape prosecutions, I will go into some detail why I disagree with the the majority opinion.

Michael Lloyd Mills, a Pentecostal minister, was charged with rape and carnal abuse of the prosecutrix, who was twelve to fifteen years old at the time. During this period alleged by the state, the prosecutrix attended appellee's church. Pursuant to the rape-shield statute, Ark. Code Ann. § 16-42-101 (1987), the state brings this interlocutory appeal from the trial court's pretrial hearing and ruling that the appellee could introduce evidence of the prosecutrix's prior sexual allegations against two other men and the men's denial of them.[1] At the hearing, the prosecutrix admitted making the prior sexual allegations and reasserted the veracity of those allegations. The prosecutrix stated that she had told the police about these sexual allegations, but no criminal charges were ever filed against the two men.

The appellee first contends the state cannot appeal the trial court's evidentiary ruling because, under § 16-42-101(b) of the rape-shield statute, the judge determined the men's testimony did not involve the prosecutrix's prior sexual conduct with the two men, but instead involved only false sexual allegations against them which they have denied. Appellee argues the state could *only* bring an *appeal if* the trial judge had ruled appellee's proffered evidence could be characterized as prior sexual conduct rather than false sexual accusations, but, nevertheless, the judge still allowed such evidence to be introduced under provision § 16-42-101(c) of the rape-shield statute. That provision essentially provides that notwithstanding a trial judge's finding that a defendant's proffered evidence bears on the victim's prior sexual conduct with the defendant or another person and is generally inadmissible, such evidence still may be introduced if the court determines (1) the proof is relevant to a fact in issue and (2) the probative value of the proof outweighs its inflammatory or prejudicial nature.

Appellee's and this four-member court's interpretation of provision (c) is too restrictive and fails to recognize the overall intent of the rape-shield statute to permit the state, after conferring with the victim, to obtain an appellate decision on whether the trial court correctly ruled in admitting a defendant's

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[1] One of the men was a teenager when the alleged sexual contact took place, but was twenty-one years old at the time of the pretrial hearing.

proffered evidence as (1) not being prior sexual conduct or (2) being prior sexual conduct of the victim which the trial court ruled admissible. In short, under appellee's and the majority court's view of § 16-42-101(c), particularly 101(c)(2)(B), if the trial court *erroneously* decided a defendant's proffered evidence did not concern the victim's prior sexual conduct, the *state can never* test the court's ruling by either an interlocutory appeal or for that matter, by direct appeal after an acquittal had been entered.

Provision 101(c)(2)(B) provides that, if the prosecuting attorney is satisfied that the trial court's order or ruling substantially prejudices the prosecution of the state's case, an interlocutory appeal may be taken by the state. Both the state and appellee agree the state can file an interlocutory appeal when the trial court finds the defendant's evidence includes the victim's prior sexual conduct, but the court still allows such evidence as relevant and probative under 101(c). But the state's case is also clearly prejudiced if a trial court, as in the instant case, erroneously allows the defendant's proffered testimony to impeach prior sexual allegations of the victim when that testimony actually bears on the victim's prior sexual conduct and is not relevant or otherwise admissible. In other words, if a trial court routinely but wrongly characterized evidence as not concerning the victim's prior sexual conduct, the state could never overturn the trial court's erroneous and prejudicial ruling. Such a construction works to render the interlocutory appeal provision in the rape-shield statute meaningless. In construing and harmonizing provisions (b) and (c) of the rape-shield statute, this court should conclude that a trial court's ruling under either of these provisions is subject to interlocutory appeal to test the correctness of such rulings.

The present case is a prime example of the harm that can arise if a trial court's erroneous ruling under provision (b) is allowed to stand without appellate review. In simple terms, the trial court misconstrued this court's decision in *West* v. *State*, 290 Ark. 329, 719 S.W.2d 684 (1987), and ruled two men could testify when such testimony in actuality concerns the victim's prior sexual conduct and would generally be excluded under the

rape-shield law.[2]

Because the trial judge wrongly determined that the men's testimony proffered by appellee did not concern the prosecutrix's prior sexual conduct, this court should hold the state's case was clearly prejudiced. The state thus would be entitled to challenge that erroneous ruling under § 16-42-101. In fact, such an appeal is the only way the state can correct the court's erroneous, prejudicial ruling. In my view, the General Assembly clearly intended to provide the state and rape victims with the right to appeal such rulings under the rape-shield law to assure their prior sexual conduct histories are not improperly allowed in a public trial. Because I would accept jurisdiction of this appeal, I now turn to the merits of this cause.

As already mentioned, the trial court erred in its ruling by misreading our *West* decision. And while the state argues this court should overrule this court's decision in *West*, I would point out that the facts there are significantly distinguishable from the ones now before this court. Unlike the situation here, the defense proffered that the prosecutrix in *West* would *deny* having made any prior accusations of sexual conduct involving other men. This court allowed three witnesses to testify that the alleged victim had made such prior accusations, thus permitting West to test the prosecutrix's credibility and raising possible doubt concerning her present charge against West. This court explained the prosecutrix's purported conduct was not sexual conduct as defined by law, and therefore was not excludable under the rape-shield law provisions. 290 Ark. at 340-A, 722 S.W.2d at 284 (1987). This court's holding in *West* was in accord with two out-of-state decisions it relied on where the prosecutrix in each case had made sexual accusations against other men, but later either said the allegations were lies or denied having made the allegations. *See People* v. *Hurlburt*, 166 Cal.App. 334, 333 P.2d 82, 75 A.L.R.2d 200 (1959); *People* v. *Evans*, 72 Mich. 367, 40 N.W. 473 (1888). I note that, since this court's decision in *West*, other jurisdictions have reached similar conclusions in attempting to balance the protection of the victim and the accused's right to

[2] No in camera hearing was held by the trial court to determine the admissibility of these men's testimony as being otherwise relevant and probative under § 16-42-101(c).

present a defense. *Clinehill* v. *Com.*, 368 S.E.2d 263 (Va. 1988). (The Virginia court cites nineteen jurisdictions that hold that evidence of prior false accusations is admissible to impeach the complaining witness' credibility.)

I still agree that the victim's conduct in *West*, namely, making false accusations of sexual abuse, does not fall under the protection of the rape-shield statute. But in the present case, the prosecutrix related that two men had sexually abused her, and reaffirms, even now, that those abuses occurred. Thus, the prosecutrix has not put her credibility into issue and is entitled to the protection provided under the rape-shield statute. While discussed above, I re-emphasize that portion of the rape-shield statute, Ark. Code Ann. § 16-42-101(b) (1987), that supports the state's argument and reads as follows:

> In any criminal prosecution under §§ 5-14-101 — 5-14-110, . . . opinion evidence, reputation evidence, or *evidence of specific instances of the victim's prior sexual conduct with* the defendant or *any other person is not admissible by the defendant*, either *through direct examination of any defense witness* or through cross-examination of the victim or other prosecution witness, *to attack the credibility of the victim*, to prove consent or any other defense, *or for any other purpose*. (Emphasis added.)

Under § 16-42-110(a) of the rape-shield statute, sexual conduct is defined as meaning deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined by § 5-14-101. Again, I briefly add that, while I would hold evidence of the prosecutrix's prior sexual conduct in these circumstances may be excludable under the rape-shield statute, such evidence might still be admissible under other provisions of the law. *See* Ark. Code Ann. § 16-42-101(c).

In conclusion, I wish to touch on two additional points. One, while I underscore this case is factually distinguishable from *West*, I am aware of obiter dictum in the court's opinion which reads that, if the prosecutrix admits having made prior statements involving sexual conduct with other persons but asserts them to be true, then the defense should be permitted to prove the statements are false. That situation was not before the court in *West*, nor was any authority cited in *West* to support such a

proposition. If such logic is accepted as already discussed above, little would be left of the rape-shield statute since it could be easily circumvented by a defendant's or defendant's witness's simple denial to any prior sexual conduct in which a prosecutrix may have been involved. In my view, the dictum in *West* should be overruled by this court. Second, I note this court's earlier reference to Wigmore's treatise on this topic in *West*. Wigmore, *Evidence*, § 924(a). While I recognize that Wigmore is an eminent authority on the topic of evidence, I suggest that his statement, based on Freud's teachings, that some women and young girls have fantasies about being attacked by men is archaic and prejudicial. As with any other untruths, I would recognize that the reasons why some women might make false accusations against men are often complex. In any event, whatever the reason or cause might be, the answer or explanation does not lie in Professor Wigmore's archaic statement.

For the reasons stated above, I would accept jurisdiction of this appeal and correct the trial court's evidentiary ruling as discussed above.

HAYS and CORBIN, JJ., join this dissent.

Ruben MILLER *v.* Timothy LEATHERS, Commissioner of Revenue, et al.

92-390 843 S.W.2d 850

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Oscar Stilley, for appellant.

Malcolm P. Bobo, for appellees.

TOM GLAZE, Justice. This case involves art. 5, § 38 of the Arkansas Constitution as amended by Amendment 19, which became effective in 1934. That amendment provides as follows:

> None of the rates for property, excise, privilege of personal taxes, now levied shall be increased by the General Assembly except after the approval of the qualified electors voting thereon at an election, or in case of

> emergency, by the votes of three-fourths of the members elected to each House of the General Assembly.

As can be seen, Amendment 19 requires any rate increase in the taxes then levied and enumerated in it to be approved by a vote of the people or to be passed by a three-fourths vote of the General Assembly.

Arkansas's original gross receipts tax was passed in 1941 and was not one of the taxes set out in the 1934 Amendment. The tax in issue in this lawsuit, Act 63 of 1983, increased Arkansas's sales tax from three-to-four percent, and was passed only by a majority, not a three-fourths, vote of the General Assembly.

The state contends the vote requirement of Amendment 19 does not apply to Act 63 because it increased the sales tax which was not a tax enumerated in the Amendment of 1934. The taxpayer, Mr. Ruben Miller, brings this suit asking this court to apply the Amendment 19 vote requirements to Act 63 and hold that because Act 63 did not receive a three-fourths vote, it is a nullity. His reasoning will be discussed below. Granting summary judgment, the chancellor below rejected the taxpayer's argument and upheld Act 63's constitutionality. At the same time, the chancellor denied the state's motion to impose Rule 11 sanctions against Mr. Miller. We affirm the chancellor's rulings on both points.

In challenging Act 63's validity, Mr. Miller asks us to limit our reading of Amendment 19 to say it prohibits a tax rate increase involving any tax without a vote of the people or a three-fourths vote of the General Assembly.[1] In support of this contention, he argues the Amendment's ballot title which he says omits reference to the enumerated taxes and "now levied" language contained in the text of the Amendment. In sum, Miller suggests Amendment 19 should be construed to read that all tax increases of any kind require a popular vote of the people or a three-fourths vote no matter when those increases are levied. As

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[1] Miller also cites the case of *Ferstl* v. *McCuen*, 296 Ark. 504, 758 S.W.2d 398 (1988), where a group sponsored a propsoed consitutional amendment to change Amendment 19 and the ballot title of the proposed amendment referred to Amendment 19 omitting the "now levied" terminology contained it it.

pointed out, Miller's argument ignores the "now levied" and enumerated taxes language in the text of the Amendment and overlooks the fact that the ballot title of Amendment 19 is not a part of the measure and, therefore, in no way controls the meaning of the Amendment unless the Amendment itself is ambiguous. *Plugge* v. *McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992). No ambiguity exists here.

This court has construed Amendment 19 and has done so consistent with the chancellor's holding in this case. *See Combs* v. *Glens Falls Insurance*, 237 Ark. 745, 375 S.W.2d 809 (1964); *Caldarera* v. *McCarroll*, 198 Ark. 584, 129 S.W.2d 615 (1939). In *Combs*, for example, the General Assembly enacted by simply majority vote Act 527 of 1963, which increased the privilege taxes on foreign insurance companies. This court held the 1963 Act unconstitutional because Amendment 19, adopted in 1934, provided that none of the rates for privilege taxes *then levied* shall be increased without a three-fourths vote of the General Assembly. Such a privilege tax on foreign life insurance companies was in effect in 1934, and since Act 527 of 1963 involved the tax on life insurance companies, the court held the act violated Amendment 19.

Also, in the early case of *Caldarera*, wholesale dealers of intoxicating beer brought suit contending Act 310 of 1939 violated Amendment 19 because the Act did not receive a three-fourths vote which was required since Act 310 increased a preexisting privilege tax on such wholesalers imposed by law as early as 1933. This court, however, concluded Act 310 was a different and new privilege tax from the one imposed in 1933 and therefore was constitutional since it did not increase the tax previously levied on wholesalers in 1933. Two justices concurred, explaining Act 310 of 1939 levied a tax on a new product made saleable in the state *after* Amendment 19 was adopted and therefore the 1939 tax was not within the purview of the Amendment.

In accordance with the plain language of Amendment 19 and the cases construing it, we must conclude Act 63 of 1983 challenged here does not fall within the Amendment's terms because the tax it increases is the sales tax, which is not one of the taxes enumerated in the 1934 Amendment. Further, since Act 63

increased the 1941 sales tax law which was not in effect at the time of Amendment 19's passage, the General Assembly acted within its authority to pass such an increase by a majority vote. In short, we hold Act 63 constitutional.

On cross-appeal, the state claims Miller's lawsuit was baseless and Rule 11 sanctions should have been imposed against him by the trial court. We disagree.

By the terms employed in the Federal and Arkansas Rules 11, an attorney signing a pleading, motion, or other paper on behalf of a party constitutes a certificate that (1) the attorney made a reasonable inquiry into he facts supporting the document or pleading, (2) he or she made a reasonable inquiry into the law supporting that document to ensure that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (3) the attorney did not interpose the document for any improper purpose, such as to harass or to cause unnecessary delay or needles increase int he cost of litigation. *See also Miles* v. *Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988); *Smith Intern, Inc.* v. *Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988); Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 1335, p. 58 (1990); Note, *Rule 11 in the Federal Courts — Unanswered Questions in Arkansas*, 43 Ark. L. Rev. 847, 852 (1990). When a violation of Rule 11 occurs, the Rule makes sanctions mandatory. *Miles*, 297 Ark. 274, 760 S.W.2d 868: *Crookham* v. *Crookham*, 914 F.2d 1027 (8th Cir. 1990); *O'Connell* v. *Champion Intern. Corp.*, 812 F.2d 393 (8th Cir. 1987). Whether a violation occurred is a matter for the courts to determine, and this determination involves matters of judgment and degree, and in reviewing a trial court's Rule 11 determination, we do so under an abuse of discretion standard. *Miles* v. *Southerns*, 297 Ark. 280-A, 763 S.W. 656 (1988) (supplemental opinion denying rehearing); *Crookham*, 914 F.2d 1027; *O'Connell*, 812 F.2d 393.

Here, the taxpayer, Miller, obviously made reasonable inquiry into the law, but in arguing that law below and on appeal, the courts thoroughly disagree with his construction of the applicable constitutional and statutory provisions and the precedents interpreting them. He specifically asked that this court reject the *Caldarera* decision, among other reasons, as being

inconsistent with the purpose of Amendment 19; he certainly has a right to urge such a legal argument under Rule 11. Although we disagree with Miller's arguments in these respects, our rejection does not suggest he failed to make a reasonable inquiry into the facts and law in this case. On these facts, we cannot say the trial court abused its discretion in denying the state's motion for sanctions.

We affirm both on direct appeal and cross-appeal.

Yvonne WHITENER *v.* STATE of Arkansas

CR 92-556 843 S.W.2d 853

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Paul Petty and *Robert Meurer*, for appellant.

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

ROBERT L. BROWN, Justice. The appellant, Yvonne Whitener, raises three points for reversal of her six-year conviction for delivery of marijuana. None of the points has merit, and we affirm.

The circumstances of this case evolved out of an undercover drug operation where Whitener and undercover officer David Moore of the White County and Searcy Drug Task Force first met on July 11, 1991, at Moore's apartment. At that time, Moore received a sample bag of marijuana from Whitener. Later in the evening, he went to Whitener's house where, according to his testimony, she sold him a quarter-ounce bag of marijuana for $30. That sale formed the basis of a charge for delivery of marijuana filed against her.

At trial, following testimony, Whitener requested a jury instruction on the lesser included offense of possession of marijuana, but the circuit court denied the request, giving as its reason the fact that there was no rational basis for the instruction. The jury then found Whitener guilty of delivery of a controlled substance and sentenced her to six years imprisonment. At a subsequent hearing, Whitener's attorney urged the court to sentence his client under the Alternative Service Act, but the court refused.

Whitener first argues that the circuit court erred in not giving an instruction of possession of marijuana because the evidence at trial warranted an instruction on the lesser included

offense. This court has held in the past that possession of a controlled substance is a lesser included offense of delivery of a controlled substance because one cannot deliver a controlled substance without exercising some degree of dominion, control, and management over it. *See Glover* v. *State*, 273 Ark. 376, 619 S.W.2d 629 (1981), *citing* Ark. Stat. Ann. § 41-115(15) (Repl. 1977), now codified as Ark. Code Ann. § 5-1-102(15) (1987); *see also Hill* v. *State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991).

The circuit court in this case before us, while accepting that possession is an included offense, ruled that based on the proof presented, there was no rational basis for the possession instruction. In doing so, the court referred to the apposite statute:

> (c) The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Ark. Code Ann. § 5-1-110(c) (1987). The charge and proof by the state were for the actual delivery of marijuana, and Whitener did not testify. A jury, conceivably, could have disregarded this proof, acquitted Whitener of delivery, and found her guilty of the less serious charge of possession, but any rational basis for such a verdict is not readily apparent. Where no rational basis is present, we have affirmed the circuit court's refusal to give the instruction. *See e.g., Frazier*, v. *State*, 309 Ark. 228, 828 S.W.2d 838 (1992). We cannot say that the circuit court erred in declining to instruct on mere possession.

We next turn ot Whitener's contention that the circuit court was wrong not to consider probation or suspension under the Arkansas Criminal Code or the Uniform Controlled Substance Act. The argument is meritless. In 1991, the Arkansas General Assembly enacted Act 608 to eliminate confusion surrounding sentencing alternatives in drug-related cases under the Criminal Code and the UCSA. *See Pennington* v. *State*, 305 Ark. 507, 808 S.W.2d 780 (1991) (dictum). Act 608 amended two sections of the Criminal Code — Ark. Code Ann. §§ 5-4-104 and 5-4-301 — with regard to what sentences are authorized under the Code and when suspension or probation may be appropriate. In each section, Act 608 added the following category to a list of crimes for which suspension or probation was not appropriate.

> (F) drug related offenses under the Uniform Controlled Substances Act, except to the extent that probation is otherwise permitted under that act.

Act 608 then added to this subsection: "In other cases, the court may suspend imposition of sentence or place the defendant on probation, except as otherwise specifically prohibited by statute."

It is clear that the reference to "other cases" in Act 608 where suspension or probation might be appropriate does not include drug-related offenses, except where the UCSA expressly provides for it. The UCSA does provide for probation for mere possession of marijuana, but not for delivery. *See* Ark. Code Ann. § 5-64-407 (1987). Act 608 makes it obvious that delivery of marijuana is simply not a crime where either probation or suspension is available to the circuit court for consideration as an appropriate sentence. The court correctly rejected Whitener's request.

In this same vein, Whitener argues that the circuit court found her eligible under the Alternative Service Act, now codified as Ark. Code Ann. § 16-93-501, *et seq.* (1987), but then erred in declining to follow the Act. "Eligible offender" is defined as:

> any person convicted of a felony offense other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery, and who has never been previously convicted of a felony offense, and whose interests, and the interests of the state, in the opinion of the sentencing trial court, could be better served by diversion under the provisions of this subchapter than by sentencing under other applicable penalty provisions established by law.

Ark. Code Ann. § 16-93-502(6)(A) (Supp. 1991).

Though the circuit court did find Whitener to be "eligible" under the Alternative Service Act, it is clear from the court's subsequent comments that it did not consider probation or suspension to be acceptable alternatives. The court noted that the jury has imposed the six-year sentence and that the sentence was commensurate with the crime. It added that alternative sentencing would not be "a proper disposition."

Moreover, the court never made the corollary finding that the interests of the state would in fact be better served by diversion to alternative sentencing under § 16-93-502(6)(A). Indeed, the court concluded exactly the opposite and found that the six-year sentence was "not unduly lengthy."

In sum, the court found that Whitener, though eligible, was not an appropriate candidate for alternative sentencing. Again, part of the reason for the court's ruling was the fact that Act 608 excludes probation and suspension as sentences to be considered for delivery of marijuana. There was no abuse of discretion by the circuit court. The conviction and judgment are affirmed.

Brenda CHORN *v.* STATE of Arkasnas

CR 92-1393 841 S.W.2d 627

Supreme Court of Arkansas
Opinion delivered December 21, 1992

Kearney Law Offices, for appellant.

No response.

PER CURIAM. Brenda Chorn, by her attorney, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed and that it was no fault of the appellant.

However, the motion does not state good cause for granting the motion as discussed in our per curiam issued February 5, 1979, 265 Ark. 964. If the attorney for Brenda Chorn will

concede that it was his fault that the record was not filed, or if other good cause is shown, then the motion will be granted. The present motion for rule on the clerk is denied.

Betty McKINLEY, d/b/a My Kids Day Care *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES,
Division of Family Services

92-738 844 S.W.2d 366

Supreme Court of Arkansas
Opinion delivered January 11, 1993

Jackson & Pace, by: *J. Robin Pace*, for appellant.

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

JACK HOLT, JR., Justice. This appeal is from a decision of the Child Care Facility Review Board (a division of the Arkansas Department of Human Services, hereinafter "the Board") revoking My Kids Day Care's ("My Kids") license for one year. My Kids appealed to the circuit court which affirmed the Board's decision. Because this case involves the interpretation of an administrative agency's rules and regulations, our jurisdiction is pursuant to Ark. Sup. Ct. R. 29(1)(c). As we find no error, we affirm the actions of the Board and the circuit court.

FACTS

Betty McKinley is owner and operator of My Kids Day Care in Rogers, Arkansas. The Board initially granted My Kids a provisional start-up child care license on July 16, 1986; the facility received a regular license in February 1987. For the first two years of operation, My Kids was monitored by child care specialists with the Department of Human Services. Although My Kids was found out of compliance in areas such as staff to children ratios and overcapacity, Mrs. McKinley corrected the infractions in a timely manner.

On February 7, 1989, the day care facility was extensively damaged by a fire, allegedly started by arson. After the fire, My Kids was granted a six month provisional license.

Mrs. Elaine Jenkins, Child Care Licensing Specialist for the Department of Human Services, made regular visits to monitor the day care after the fire and to check on the status of the repairs. In August of 1989, My Kids again received a provisional license. This license was to be valid through February 28, 1990.

In October 1989, Mrs. Jenkins reviewed the facility and noted several areas of noncompliance with regulations. These infractions were conveyed to Mrs. McKinley so that she could correct them prior to the next visit.

Mrs. Jenkins made multiple monitoring visits to My Kids during the first few months of 1990 to determine if Mrs. McKinley had cured the problems. During that time, My Kids

was cited ten times for not complying with the Board's rules and regulations. The most flagrant violations were in the areas of child capacity and staff/child ratios. Mrs. Jenkins told Mrs. McKinley that she needed documentation in order for the Board to complete its evaluation. Information needed included the policy on hiring and discharge of staff, procedures for reporting child abuse, health cards on staff, written record of all tornado drills, and health inspection records. Additionally, Mrs. Jenkins informed Mrs. McKinley that the facility needed to provide at least ten hours of training for all staff, smoke detectors, eliminate physical punishment for children under age three, and post the hot line number for reporting child abuse. As well, the swing set needed to be reanchored, boards, pipes, etc., needed to be removed, and baby beds needed to be replaced.

As a result of these allegations, the Board conducted an informal administrative hearing, took testimony of interested parties, and revoked My Kids' license. After this hearing, the Board made the following findings of fact:

1. Failure to maintain the required staff to child ratios and lack of supervision;

2. Use of physical punishment for children under three and the use of discipline which is not appropriate to the child's level of understanding;

3. Failure to comply with child care discipline standards;

4. Failure to maintain current child records;

5. Failure to provide well-balanced meals and nutritious snacks;

6. Failure to insure a safe outdoor play area;

7. Failure to provide adequate and approved sleeping arrangements for children;

8. Failure to provide towels for hand washing;

9. Failure to practice emergency drills with all children;

10. Failure to properly store hazardous items;

11. Failure to comply with the limit on the number of children the facility may serve. Capacity placed on the

center by the Child Care Facility Board as authorized by Ark. Code Ann. § 20-78-210 (1987).

My Kids appealed the Board's decision to the circuit court which remanded this matter to the Board for additional evidence concerning the Department of Human Services's investigation regarding the use of physical punishment and evidence concerning violations that had occurred prior to February 1990.

At both Board hearings, Mrs. Jenkins noted that the child/staff ratio and child capacity were repeatedly out of compliance. She testified that she never received the information she requested and the infractions were not corrected. The facility was licensed for six infants and eighteen preschoolers. On virtually all of her visits since the fire, Mrs. Jenkins had found the facility out of compliance because of overcapacity and insufficient staff. According to Mrs. Jenkins' testimony, the facility was also out of compliance in other areas. For example, there were never towels in the rest room. A child was found napping on the carpet with a playpen frame around him — there was no bottom in the play pen. Medicines were in an unlocked medicine cabinet in the bathroom. Ms. Ratha Turpin, child care licensing supervisor, had accompanied Ms. Jenkins on one of her visits to My Kids and confirmed Ms. Jenkins' testimony. Mr. J. R. Davenport, Child Care Licensing Specialist with the Department of Human Services, also confirmed Ms. Jenkins' testimony.

Testimony also indicated that My Kids had not followed other regulations regarding day care. For example, Thelva Bolen, a former employee of My Kids, testified that she had seen Mrs. McKinley punish the children, including the infants, with a fly swatter. Ms. Bolen also testified that the children did not get milk with their meals nor were they always served snacks. However, she did mention that she had on occasion seen the children served cookies and carrot sticks for snacks.

Another former employee, Ms. Lela Davis, echoed Ms. Bolen's testimony. Ms. Davis mentioned that there was not a program of activities for the children other than regular television watching.

Nevertheless, Ms. Aileen Leo, a part-time employee of My Kids and a parent of a My Kids' attendant, testified that her child

was well cared for by the center. Stipulations were made that other parents would testify that their children had not been spanked and were well cared for by My Kids.

After the second hearing before the Board, My Kids' license was again revoked for one year. On appeal, the circuit court affirmed the Board's administrative decision.

Although presented as twelve separate issues, the appellant's argument comes down to four concerns: did the Child Care Facility Review Board make its decision to revoke: (1) capriciously and arbitrarily; (2) without substantial evidence; (3) in reliance on an unconstitutionally vague administrative regulation; (4) without proper notice to My Kids in violation of due process? As we answer all these in the negative, the circuit court's decision to affirm the Board's decision is affirmed.

On appeal, My Kids asserts that we should reverse the Board's decision because it was made arbitrarily and capriciously as to the center's alleged failure to maintain required staff to child ratios, to properly store hazardous items, and to comply with the maximum limit on the number of children in the center.

■ An administrative decision should be reversed as arbitrary and capricious only when it is not supportable on any rational basis. *Partlow* v. *Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980). An administrative decision is not to be deemed arbitrary or capricious simply because the reviewing court would have acted differently. *See Woodyard* v. *Arkansas Diversified Ins. Co.*, 268 Ark. 94, 594 S.W.2d 13 (1980). The appellant has the burden of proving that the proof before the administrative tribunal was so nearly undisputed that fairminded persons could not reach its conclusion. "The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made." *Williams* v. *Scott*, 278 Ark. 453, 647 S.W.2d 115 (1983).

■ My Kids contends that the decision to revoke because of improper child/staff ratios and overcapacity is arbitrary and capricious because Ms. Jenkins had previously found the center out of compliance and had nevertheless always renewed the license. However, these arguments have no merit because on prior occasions, Mrs. Jenkins had informed Mrs. McKinley of the

infractions, and they had been promptly corrected. My Kids' infractions after the fire in 1989 were never corrected, according to Mrs. Jenkins.

My Kids contends that the Board acted capriciously and arbitrarily in revoking due to the center's failure to properly store hazardous materials because Mrs. McKinley was allegedly told four years earlier that the center didn't have to follow the regulation that stated that medicine must be kept under lock and key. Obviously the Board did not find this testimony persuasive; this does not render the decision arbitrary.

My Kids also contends that the decision to revoke was not based on substantial evidence. Substantial evidence means such valid, legal and persuasive evidence that a reasonable trier of fact might accept as adequate to support the conclusion reached by the agency. The appellant bears the burden of demonstrating that the proof before the agency was so clearly undisputed that fairminded individuals could not have reached the agency's conclusion. *Partlow* v. *Ark. State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980). My Kids argues that there was not substantial evidence to support the Board's finding that: physical punishment was used on children under three years, child records were not maintained, nutritious meals and snacks were not served, a safe outdoor play area was not provided, adequate and approved sleeping arrangements were not provided, towels for hand washing weren't provided, and no emergency drills were performed.

However, there was substantial evidence to support these findings. Former employees testified that nutritious meals and snacks were not consistently served and that the children slept on the floor or on mats that were not cleaned regularly. The child care specialists testified that they consistently found a lack of child records on emergency drills, no towels for hand washing, and a dangerous swingset in the play area. Although My Kids argues that these witnesses were not credible, credibility is for the Board to determine. We will not substitute our judgment for that of the Board's absent an abuse of discretion. *See Beverly Enterprises* v. *Ark. Health Services*, 308 Ark. 221, 824 S.W.2d 363 (1992).

Finally, My Kids argues that the Board's decision should be

reversed because it was based on an unconstitutionally vague regulation, and because the day care was denied due process of law because of insufficient notice of process.

Confusion on this issue arises, however, because My Kids complains of the vagueness of Minimum Licensing Requirement for Child Care Centers, Section 301, when in fact the argument contained in its brief concerns Section 102. My Kids quotes from Section 102 in its brief, yet neither Section 102 or 301 is abstracted. The state abstracted and defends Section 301 which does not appear to be in issue.

Normally, we will not consider arguments the bases of which are not abstracted. *Burgess* v. *Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985); Sup. Ct. R. 9(e)(2). However, this court can take judicial notice of regulations of state agencies which are published. *Register* v. *Oaklawn Jockey Club, Inc.*, 306 Ark. 318, 811 S.W.2d 315. *See also Webb* v. *Bishop*, 242 Ark. 320, 413 S.W.2d 862 (1967). The Minimum Licensing Requirements for Child Care Centers are available to the public in the Secretary of State's office. Although Section 102 was not abstracted by My Kids, we will, under the circumstances, take judicial notice of this regulation and consider its argument.

To avoid being vague under due process standards, a statute or regulation "must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Thompson* v. *Ark. Social Services*, 282 Ark. 369, 669 S.W.2d 878 (1984). My Kids contends that the regulation is vague because the language of the regulation does not clearly define "substantial compliance." Section 102 states:

> The following requirements contain references to two types of standards, using the words "shall" and "should." The use of the word "shall" indicates that the terms of the statement are required for a facility to be in substantial compliance. The use of the word "should" indicates that the statement is recommended but not required for substantial compliance.
>
> In determining the recommendation for a licensing or church-operated exemption, the facility shall be reviewed by a Child Care Licensing Specialist to determine that the

> facility is in substantial compliance with the requirements. Substantial Compliance means there is no omission of the *essential standards necessary to protect the health, safety, and welfare of the children and that all standards will be met within a reasonable timeframe agreed upon by the Child Care Licensing Specialist and the facility. Those essential standards which shall be met 100% are those which relate to: fire, health, safety, nutrition, staff/child ratio, and space.* Arkansas Stat. Ann. 83-921 states that licensing standards shall not include those of a religious or curriculum nature so long as the health, safety and welfare of the child is not endangered.
>
> The Child Care Licensing Specialist shall review all areas of the requirements and consider noncompliance items based on the frequency, degree, severity, number and nature of noncompliance in making the licensing recommendation.

My Kids asserts that Section 102 is vague because it is not clear exactly which compliance requirements are to be governed by a 100% standard. Specifically, it claims that the substantial compliance section in Section 102 is indefinite as it relates to maintaining staff to child ratios at the day care center. Clearly, however, Section 102 of the Minimum Licensing Requirements for Day Care Facilities indicates that in the area of staff to child ratios, substantial compliance is deemed to be 100% compliance. This is not vague. It seems that the confusion in this regulation arises when the term "substantial compliance" is applied to an area that is not defined as 100%. However, My Kids has not raised that issue. Besides, appellant has standing only to challenge sections that directly affect it. *See Thompson* v. *Arkansas Social Services*, 282 Ark. 369, 669 S.W.2d 878 (1984).

Although My Kids complains of Section 301, it never indicates in its brief that this regulation is vague in any way, so we will not consider the constitutionality of this requirement.

My Kids also claims that it was not given adequate notice that one of its infractions included failure to comply with the Board's discipline standards. However, examination of the Department of Human Services notice and attachments indicates that use of physical punishment for children is one of the

indicated infractions. The notice is sufficient.

Affirmed.

Sherman AVERY *v.* STATE of Arkansas

92-760 844 S.W.2d 364

Supreme Court of Arkansas
Opinion delivered January 11, 1993

William R. Simpson, Public Defender, by: *Kent C. Krause*, Dept'y Public Defender.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant, a juvenile, was adjudged a delinquent and placed on probation. Subsequently,

the trial court revoked appellant's probation and imposed a fine as punishment. We reverse the revocation of probation and imposition of a fine for failure to comply with the juvenile code, and remand for further proceedings.

Appellant, a fifteen-year-old, was charged in April 1990 in the Juvenile Division of Chancery Court with burglary and reckless burning. An attorney was appointed and appellant was ordered to appear for an "adjudication (D)" on November 13, 1990. "Adjudication (D)" may mean an adjudication and disposition hearing. " 'Adjudication hearing' means a hearing to determine whether the allegations in a petition are substantiated by proof." Ark. Code Ann. § 9-27-303(5) (1991). " 'Disposition hearing' means a hearing held following an adjudication hearing to determine what action will be taken in delinquency . . . cases." Ark. Code Ann. § 9-27-303(15) (1991). At the "adjudication (D)" hearing the trial court found that appellant had committed the burglary, adjudicated him to be a delinquent, and placed him on probation for one year. The probation was subject to written conditions specified by the court. *See* Ark. Code Ann. § 9-27-330(3) (1991). The reckless burning charge was dismissed.

Five months later, on April 17, 1991, the Prosecuting Attorney filed a petition to revoke probation. *See* Ark. Code Ann. § 9-27-339(b) (1991). As a result of the petition, the appellant was directed by a form order to appear for another "adjudication (D)" on September 26, 1991. He failed to appear and a warrant was issued for his arrest. He was quickly arrested and, on September 30, 1991, was released into the custody of his mother. The revocation hearing was rescheduled for December 12, 1991.

The applicable statute provides that at a revocation hearing, if the trial court finds beyond a reasonable doubt that the juvenile has violated the terms of probation, the court may: (1) extend probation; (2) impose additional conditions of probation; or (3) make any disposition that could have been made at the time probation was originally imposed. Ark. Code Ann. § 9-27-339(e) (1991). At the revocation hearing on December 12, the special judge apparently found beyond a reasonable doubt that the juvenile had violated the terms of probation, but the judge did not revoke probation and fine appellant as could have been done. *See* Ark. Code Ann. §§ 9-27-337(7), 9-2-339(e) (1991). Instead, the

special judge extended probation for an additional year, ordered appellant to stay with his mother, undergo psychological, drug, and alcohol assessment, and continue to attend the Watershed project. In addition to the foregoing adjudication, the last sentence of the form order provides: "This matter is set for Disposition/Review on the _____ day of _____, 19___ at ___ A.M./P.M." The date of March 18, 1992, and time of 9:15 were filled in by handwriting. There were no strike marks on the strike-the-wrong-word form order indicating whether the subsequent hearing on March 18 was to be for disposition or review, but that is of no real significance since the applicable statutes do not provide for a different disposition of the same petition at another hearing three months later. The special judge signed another form order styled "Order to Appear," which had a check mark in a box to notify appellant that the appellant was to appear on March 18, 1992, for "Review of compliance with Orders of this Court." " 'Order to appear' means an order issued by the court directing a person who may be subject to the court's jurisdiction to appear before the court at a date and time as set forth in the order." Ark. Code Ann. § 9-27-303(25) (1991).

The Prosecuting Attorney did not file another petition to revoke probation. No document was served on appellant indicating that a different disposition was to be considered. On March 18, appellant appeared with counsel pursuant to the "Order to appear" but, rather than having just a review, the trial court revoked probation and fined appellant.

Appellant appeals and argues that on December 12, 1991, the trial court made a "disposition" of the petition to revoke under Ark. Code. Ann. § 9-27-339(e)(1)—(2), and the trial court could not make a different disposition of the same petition three months later. The argument is meritorious.

The statute governing revocation proceedings in juvenile court is both clear and specific. Ark. Code Ann. § 9-27-339 (1991) provides that after an adjudication of delinquency, the court may place a juvenile on probation, and, after a juvenile is placed on probation, the prosecuting attorney may file a petition to revoke probation. It does not provide for revocation in any other manner. The petition for revocation must be served on the juvenile, and a revocation hearing must be set within a reasonable

time. At that hearing, "if the trial court finds beyond a reasonable doubt that the juvenile violated the terms and conditions of probation, the court may:

(1) Extend probation;

(2) Impose additional conditions of probation; or

(3) Make any disposition that could have been made at the time probation was imposed." Ark. Code Ann. § 9-27-339(e) (1991).

The trial court was authorized by the above-quoted statute to deny the petition to revoke and extend probation under subsection (1) above, as it did in this case, but it was not authorized to take that action and then, three months later, change its mind and grant the petition to revoke under subsection (3) above. After the first disposition denying revocation, the statute requires the prosecutor to file another petition for revocation and give notice to the delinquent that revocation is again being considered before probation can be revoked. If we were to construe the statute to authorize the procedure used in this case, it might well run afoul of the prohibition against double jeopardy, for it was settled by the Supreme Court in *Breed* v. *Jones*, 421 U.S. 519 (1975), that jeopardy does attach within the meaning of the Fifth Amendment, as applicable to the states under the Fourteenth Amendment, in an adjudicatory delinquency proceeding in juvenile court. Accordingly, we reverse and remand to the juvenile division of chancery court for proceedings consistent with this opinion.

X. DOTSON and Fern Dotson, Husband and Wife, and Dotson Land and Cattle Co., Inc. *v.* MADISON COUNTY, Arkansas

92-701 844 S.W.2d 371

Supreme Court of Arkansas
Opinion delivered January 11, 1993
[Rehearing denied February 15, 1993.*]

Phillip A. Moon, for appellants.

Howard Cain, Jr., for appellee.

ROBERT H. DUDLEY, Justice. This is a condemnation case. In 1986, the Arkansas State Highway Commission petitioned the County Court of Madison County and asked the County Court to condemn some property adjacent to State Highway 295 in Madison County so that some of the curves in the road could be made safer. Section 27-67-212 of the Arkansas Code Annotated of 1987 provides that the Commission may request that the county condemn land for a change in a state highway. Section 27-67-212(b) provides that if a county refuses the Commission's request, the Commission may either refuse to improve the road or file the condemnation action itself and force the county to pay for half of the cost of condemnation. Ark. Code Ann. §§ 27-67-

*Holt, C.J., not participating.

212(b); 27-67-320 (1987). Madison County acceded to the Commission's request and commenced condemnation proceedings against the appellants. The County Court of Madison County condemned a perpetual easement over some of appellants' land for highway purposes. Appellants were given notice of the order after it was entered.

Appellants filed a petition in the County Court of Madison County in which they alleged: "That said statutes in that they allow petitioners' rights to be decided without notice or hearing are unconstitutional on their face and as applied in this case, because they violate petitioners' due process rights guaranteed under both the Arkansas and United States Constitution[,]" and alternatively asked for damages. The record does not reflect what was argued to the County Court. The record reflects only that the Judge of the County Court ruled, "That Ark. Stat. Ann. §§ 76-926 and 76-928 do not violate Petitioners' due process rights under either the Arkansas or United States Constitutions." The County Court ruled that the improvements to the highway benefitted appellants' land to such an extent that no damages were due.

Appellants appealed to circuit court and apparently made a due process argument that is not in the record currently before us, and alternatively asked for damages. The trial court rejected the due process argument and set the case for trial. A jury awarded a judgment against the Commission. The Commission appealed. We held that the Commission was not the proper party defendant and reversed and remanded. *Arkansas State Highway Comm'n* v. *Dotson*, 301 Ark. 54, 781 S.W.2d 459 (1989). Upon remand, the case was again tried in circuit court. This time, a jury found that appellants were not entitled to any damages.

Appellants appeal and argue that their right to due process has been violated since the county judge, who presides over the county court and initially determines the value of the land condemned, is also the chief executive officer of the county, and accordingly, has an interest in not fully and fairly assessing the damages suffered by a landowner. In support of their argument they cite *Tumey* v. *Ohio*, 273 U.S. 510 (1920), *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), and *Gore* v. *Emerson*, 262 Ark. 463, 557 S.W.2d 880 (1977). The argument might well have

merit, but we do not reach it.

The record of the proceedings in the trial court reflects only that the appellants argued they were denied due process because they were not given notice before the condemnation proceeding was commenced. Similarly, the judgment reflects only that "issues pertaining to the constitutionality of Ark. Code Ann. § 27-67-212 and Ark. Code Ann. § 14-298-121 [are] being submitted herein to the court for proper adjudication and determination. . . ." The judgment does not reflect that the trial court ruled on these "issues," but the record discloses that the trial court ruled from the bench, "I'm going to deny your motion to declare those statutes unconstitutional again."

The record does not reflect that an argument was presented to the court that the appellants were denied due process because of the dual capacities of the county judge, or that the trial court ruled on such an argument. Generally, an appellate court in this State reverses a trial court only when that trial court has committed some prejudicial error, and if an issue was never presented to the trial court, it could not have committed error on that issue. *See Viking Ins. Co.* v. *Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992). As a general rule, plain error is not recognized by our state appellate courts, *Sturgis* v. *Lee Apparel Co.*, 304 Ark. 235, 800 S.W.2d 719 (1990), and, as we have so often said, appellate courts will not consider an argument presented for the first time on appeal. *Moorman* v. *Lynch*, 310 Ark. 525, 837 S.W.2d 886 (1992).

Affirmed.

HOLT, C. J., not participating.

Wilburn A. HENDERSON *v.* STATE of Arkansas

CR 92-579 844 S.W.2d 360

Supreme Court of Arkansas
Opinion delivered January 11, 1993

Durrett & Coleman, by: *Gerald A. Coleman* and *Therese H. Green*, for appellant.

Winston Bryant, Att'y Gen., by: *Olan W. Reeves*, Senior Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant has been tried three times for the capital murder of Willa Dean O'Neal. Appellant's first trial ended in a mistrial. In the second trial, he was convicted of capital murder and received the death penalty. We affirmed his conviction and death penalty sentence in *Henderson* v. *State*, 279 Ark. 414, 652 S.W.2d 26 (1983). Appellant then sought and received a writ of habeas corpus from the federal court. *Henderson* v. *Sargent*, 926 F.2d 706 (8th Cir. 1991). The state retried the appellant, and he was again convicted of capital murder and received the death penalty. Appellant appeals to this court from his second conviction raising seven points of error. We affirm.

At approximately 2:00 p.m. on November 24, 1981, Willa O'Neal was found murdered in the furniture store she owned with her husband. The store's cash register was found opened and money was missing. The police had the following evidence against the appellant. Appellant fled to Houston when he found out he was a murder suspect. While he was incarcerated in Houston, he gave a statement saying that, while he was in the store at the time of the shooting, Ollie Brown was the triggerman. At the crime scene, the police found a piece of paper which showed a floor plan of a rental property and the phone number for the real estate agent. Appellant had been seen with this piece of paper a few days prior to the murder and had contacted the real estate agent and set up an appointment to see the property. Further, a few days before the murder, appellant had removed a .22 caliber pistol from a pawn shop and repawned that same pistol a few days after the murder. A .22 caliber pistol was the murder weapon, but ballistic experts could not eliminate nor positively identify appellant's pistol as the murder weapon.

In his first issue, the appellant argues that the trial court

erred in denying his motion to suppress his in-custody statement. We first note that the state argues that we should dismiss this argument under the doctrine of law of the case because the appellant raised this issue in the first appeal. The doctrine of law of the case prevents an issue raised in the first appeal from being raised in the second appeal, unless the evidence materially varies between the two appeals. *Bussard* v. *State*, 300 Ark. 174, 778 S.W.2d 213 (1989). The law of the case doctrine is not applicable here, because the appellant argues for the first time that his statement should be suppressed because of mental illness.

Appellant introduced testimony from two psychiatrists that the appellant had a prior history of mental illness and was diagnosed in 1962 as being schizophrenic. The State Hospital examined the appellant in 1981, the year he gave his statement to the police, and found no indication of psychosis.

In considering a motion to suppress an in-custody statement, this court makes an independent determination of the voluntariness of a confession, but does not set aside the trial judge's finding unless it is clearly against the preponderance of the evidence. *See Wainwright* v. *State*, 302 Ark. 371, 790 S.W.2d 420 (1990). In determining whether a statement is voluntary, this court considers the following factors: age of the accused, lack of education, low intelligence, lack of advice of constitutional rights, length of detention, repeated and prolonged questioning, and the use of physical punishment. *Id.*

Applying these factors to the facts of the present case, the appellant was thirty-eight at the time of the statement. He was incarcerated for two days in the Houston jail before the Fort Smith police officers arrived to question him. Captain Larry Hammond testified that the appellant signed the rights waiver, appeared to understand his rights and told the officers he would talk without a lawyer present. Further, appellant's own witness, Dr. Showalter, testified that the appellant was not retarded and had a basic level of intelligence. Based on these factors, we cannot say that the appellant's statement was not voluntary. While the appellant's witnesses established that he had a prior history of mental illness in 1962, the State Hospital examined the appellant around the time of the murder and the giving of his statement in 1981 and found no evidence of psychosis. Appellant's own witness

admitted that, while the appellant was diagnosed as being schizophrenic in 1962, those symptoms could have "burned itself out" by the time the appellant was examined in 1981. Lastly, we note that the appellant argues that *Mauppin* v. *State*, 309 Ark. 235, 831 S.W.2d 104 (1992), is controlling on this case. In *Mauppin*, the appellant had a self-inflicted gunshot wound to his head and had undergone brain surgery. The State Hospital found that Mauppin was unaware of the charges and proceedings against him. Clearly, the facts in the present case are distinguishable from *Mauppin*.

In the second issue, the appellant argues that the trial court erred in allowing the state to introduce into evidence a prior consistent statement of a rebuttal witness. Appellant's trial strategy was to point the finger at the victim's husband, Bob O'Neal. Evidence was presented to the jury showing that Bob was the last person to see the victim alive when he returned to the store to eat lunch. The state called Clarence Wilson as a rebuttal witness. Mr. Wilson testified that he saw the victim after 1:00 p.m., and at that time the victim told him that her husband had just been there for lunch but had returned to the job site. On cross-examination, the appellant established that Mr. Wilson did not testify to this fact in the federal habeas corpus proceeding. On redirect, the trial court allowed the state to use a prior consistent statement that Mr. Wilson had told the police that when he last saw the victim she told him that her husband had just left.

Ordinarily, evidence of prior consistent statements is not admissible to bolster credibility because it is hearsay. *Todd* v. *State*, 283 Ark. 492, 678 S.W.2d 345 (1984). However, A.R.E. Rule 801(d)(1)(ii) provides for the following exemption:

> A statement is not hearsay if:
>
> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, . . .

This court has stated that when there is an express or implied charge that a witness has fabricated a statement that he is now

making under oath, it is then proper, and not hearsay, to show that he made the same statement before the motive for fabrication came into existence. *Brown* v. *State*, 262 Ark. 298, 556 S.W.2d 418 (1977). Such is the situation in the present case.

In the third issue, the appellant argues that the trial court erred in denying his motion for a continuance between the guilty and penalty phase of the trial. The jury returned with its verdict after 5:00 p.m., and the appellant's attorney requested a continuance of the penalty phase of the trial until the next morning. Appellant's attorney argued that his client was not in the frame of mind to get ready for the penalty phase of the trial. The prosecution strongly opposed the continuance noting that the alternate jurors had already been dismissed and the problem of possible juror contamination.

Appellant argues in his brief that he was prejudiced by the trial court's denial of his motion for a continuance, because the appellant did not take the witness stand. Appellant's attorney argues here that he was prejudiced because it was imperative for the jury to get an opportunity to meet him as a human being, and that if he had been given an overnight continuance he could have convinced the appellant to testify. Further, the appellant argues that when appellant's mother took the stand, she criticized the jurors for their verdict because she was upset.

Whether to grant a continuance is addressed to the sound discretion of the trial court, and this court will not reverse unless the trial court's discretion has been abused. *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987). The burden is on the appellant to show that there has been an abuse of the trial court's discretion in denying the continuance. *Id.*

Under the facts of this case, we cannot say that the trial court abused its discretion. The appellant's attorney had represented the appellant for two years. As the state argues, this is ample time to prepare for one's strategy. Further, since the appellant had already once been convicted for this murder, we fail to see how he could be so shocked and surprised at the verdict that he could not cooperate with his attorney in his defense at the penalty phase. On the other hand, appellant's choice not to testify and use that as the reason to request a continuance places him in the position to manipulate the court. This is especially true here

since appellant's attorney failed to proffer any testimony from the appellant, nor can we be sure that he would have taken the stand if he had been given a continuance.

Appellant attacks the constitutionality of the death penalty statute, Ark. Code Ann. § 5-4-603 (Supp. 1991), by arguing in his fourth point, that the statute requires a mandatory death sentence, is arbitrary and capricious and provides for no mandatory appeal. We summarily dismiss this argument by noting that this court has previously addressed and rejected these constitutional challenges to the death penalty statute. *Johnson* v. *State*, 308 Ark. 7, 823 S.W.2d 800 (1992); *Coulter* v. *State*, 304 Ark. 527, 804 S.W.2d 348 (1991).

We can also summarily dismiss the appellant's fifth and sixth points. In appellant's fifth point, he argues that he must be charged by a grand jury instead of an information. This court has repeatedly rejected this argument. *See, e.g., Ruiz* v. *State*, 299 Ark. 144, 772 S.W.2d 297 (1989). Next, the appellant argues that the trial court erred in not granting his motion to argue first and last in the penalty phase. We have held that the prosecutor has the right to close argument in the penalty phase because the state has the burden of proof. *Pickens* v. *State*, 292 Ark. 362, 730 S.W.2d 230 (1987).

In his final argument, the appellant argues that this court should set aside his death sentence upon comparative review. In conducting a comparative review of death penalty cases, this court considers the following things: 1) whether the sentence was the result of passion, prejudice, or any arbitrary factor; 2) whether the evidence supports the jury's finding of any statutory aggravating circumstances; 3) whether the evidence supports the jury's findings on the question of whether the mitigating circumstances outweigh aggravating ones; and 4) whether the sentence is excessive.

The jury found two aggravating circumstances in the present case: appellant previously committed another felony of which an element is a threat of violence to another person, created a substantial risk of death or serious physical injury to another person; and the capital murder was committed for pecuniary gain. The jury, unanimously, did not find any mitigating factors.

In applying the factors set out above, we do not find that the jury's verdict was the result of passion, prejudice or any other arbitrary factor. We find such a holding consistent with other death penalty cases, where the death penalty was given for murders committed during robberies. *See Whitmore* v. *State*, 296 Ark. 308, 756 S.W.2d 890 (1988); *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986); *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986).

For the reasons stated above, we affirm. The record has been examined 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.

CITY OF FORT SMITH et al. *v.* William TATE
(Deceased)

92-707 844 S.W.2d 356

Supreme Court of Arkansas
Opinion delivered January 11, 1993

Public Employee Claims Division, by: *Frank Gobell*, for appellants.

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

DONALD L. CORBIN, Justice. In this worker's compensation case, appellants appeal the decision of the Court of Appeals

affirming the decision of the Workers' Compensation Commission holding that appellants were responsible for the payment of the remarriage lump sum benefits under Ark. Code Ann. § 11-9-527(d)(1) (1987). *City of Fort Smith* v. *Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992). Appellants filed a petition for review with this court on June 12, 1992, which was granted on June 29, 1992. On review, we affirm the decision of the Court of Appeals. Since we find it difficult to improve on the well-reasoned opinion of the Court of Appeals, we adopt their opinion almost verbatim.

Appellee, William Tate, was killed in January of 1981 during the course of his employment with the Fort Smith Police Department. He was survived by his wife, Anita, and two minor children. The claim was accepted as compensable and appellants began paying death benefits. At the time of Tate's death, the maximum liability of an employer or its carrier in weekly benefits was $50,000.00. Appellants reached payment of the maximum amount in August of 1988. The Death and Permanent Total Disability Trust Fund (Fund) then began making the weekly benefit payment, as required by Ark. Code Ann. § 11-9-502(b)(2) (1987). On June 8, 1990, Anita remarried and requested the 104-week lump sum award provided pursuant to section 11-9-527(d)(1). It is the availability of this lump sum award that is at issue in this case.

At the hearing before the administrative law judge, appellants contended that the Fund was liable for the lump sum payment. Relying on *Death & Permanent Total Disability Trust Fund* v. *Tyson Foods, Inc.*, 304 Ark. 359, 801 S.W.2d 653 (1991), the administrative law judge concluded that appellants were responsible for payment of the lump sum benefit. In *Tyson Foods, Inc.*, we addressed whether Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976) (now codified at Ark. Code Ann. § 11-9-502(b)(1) and (2) (1987)), and Ark. Stat. Ann. § 81-1315(d) (Repl. 1976) (now codified at Ark. Code Ann. § 11-9-527(d)(1) (1987)), allowed an employer or its insurance carrier to credit the 104-week lump sum payment made pursuant to section 81-1315(d) against its statutory liability for "weekly benefits" pursuant to section 81-1310(c)(2). We said:

> Section 81-1310(c)(2) clearly places a maximum amount upon "weekly benefits" for death and permanent

> total disability for which an employer or his insurance carrier is liable; significantly, however, the section does not provide for the inclusion of any other benefits in computing the maximum amount for which the employer or his insurance carrier is liable.
>
> . . . .
>
> [A] dependent widow is entitled to weekly benefits until death or remarriage. Upon her remarriage, a widow's weekly benefits terminate, and she receives a lump sum benefit equal to 104 weeks of the compensation to which she was entitled before marriage.
>
> . . . .
>
> [T]he lump sum payment is not a weekly benefit. Therefore, [the employer or his insurance carrier] is not entitled to credit the lump sum payment against its maximum statutory liability.

Id. at 361-62, 801 S.W.2d at 655.

On appeal before the full Commission, appellants raised a new argument, contending that Anita was not qualified for the lump sum benefit because of the "limiting language" found in section 11-9-527(d)(1). That provision states:

> In the event the widow remarries before *full and complete payment* to her of the benefits provided in subsection (c) of this section, there shall be paid to her a lump sum equal to compensation for one hundred four (104) weeks, subject to the limitation set out in §§ 11-9-501—11-9-506.

(Emphasis added.) Subsection (c), to which this provision refers, sets out the amounts the beneficiaries are entitled to receive. It refers back to Ark. Code Ann. §§ 11-9-501 to -506 (1987). Section 11-9-502 specifically provided at the time of Tate's death that the employer's liability for weekly benefits ceased at $50,000.00 and that the Fund thereafter became liable for benefits.

Appellants base their contention that the Commission erred in finding them responsible for the lump sum benefit on the "before full and complete payment" language in section 11-9-

527(d)(1). Under section 11-9-502, a widow's entitlement to benefits will never end unless she dies or remarries, but the employer's liability does cease at $50,000.00. Appellants argue that since the only type of benefit that can be fully and completely paid is the employer's maximum liability for weekly benefits, the widow must remarry *before* the employer or carrier pays the full $50,000.00 in order to qualify for the lump sum benefit.

In a well-reasoned opinion, the Commission observed that the "full and complete payment" phrase does create uncertainty when considered in light of the unlimited nature of the benefits provided in section 11-9-527(c), but rejected appellants' contention that Anita was not qualified for the lump sum benefit. Based on the reasoning discussed below, the Commission determined Anita was entitled to receive the lump sum benefit and that appellants were responsible for payment of the benefit.

As did the Commission and the Court of Appeals, we find it helpful to review the history of this provision and related provisions. The provision containing the language in question was part of the original Workers' Compensation law that was passed in 1939. *See* Act of 319 of 1939, §§ 15(b) and 15(d). Under this act, a widow's weekly benefits were limited to a total sum of $7,000.00. Initiated Act No. 4 of 1948 increased this amount to $8,000.00. Initiated Act No. 1 of 1956 again increased the limit, setting it at $12,500.00. Therefore, as originally enacted, a widow's entitlement to weekly benefits was limited and "full and complete payment" of a widow's weekly benefits was possible prior to either her remarriage or death.

In 1968 the legislature eliminated the statutory limitation on the total amount of death benefits payable to the dependents of a deceased employee. In 1973, a new provision was added, limiting the employer's liability to the first $50,000.00 in weekly benefits and making the Fund liable for the weekly benefits in excess of $50,000.00. Although these new provisions were enacted, changing the nature of a widow's benefits from limited to unlimited, the "full and complete payment" language was left in the provision regarding the lump sum benefit.

The first rule in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *Arkansas Vinegar Co.* v. *Ashby*, 294 Ark.

412, 743 S.W.2d 798 (1988). Statutes relating to the same subject should be read in a harmonious manner if possible. All statutes on the same subject are *in pari materia* and must be construed together and made to stand if capable of being reconciled. *Id.* Provisions of our Workers' Compensation Act are to be construed liberally in favor of the claimant. *Id.* In interpreting a statute and attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. *Hanford Produce Co.* v. *Clemons*, 242 Ark. 240, 412 S.W.2d 828 (1967).

As pointed out by the Commission, the statutory history of the provisions in question reflects an effort to balance the need to limit the total liability of employers and carriers against the need to adequately compensate employees and their dependents. The delimitation of benefits in 1968 and the establishment of the Fund in 1973 reflects the goal of adequately compensating the widow and dependents of a deceased employee. The obvious purpose of the lump sum benefit provision upon remarriage is to lessen the disincentive to remarry that would be inherent in a flat cutoff of dependency benefits. *See* 2 Arthur Larson, *The Law of Workmen's Compensation* § 64.42 (1992). This disincentive for marriage does not cease to exist when the employer reaches his maximum liability in weekly benefits; it continues indefinitely because the widow continues to receive benefits from the Fund. Therefore, the need for the reduction of the disincentive, in the form of a lump sum payment, is still needed even after the employer reaches his maximum liability.

Significant also is the fact that the limit on an employer or its carrier's liability under section 11-9-502 applies only to weekly benefits. The employer or its carrier is still responsible for any benefits in addition to weekly compensation to which the claimant is entitled. *See, e.g., Tyson*, 304 Ark. 359, 801 S.W.2d 653. It is therefore not inconsistent with the limitations on liability found in section 11-9-502 to require the employer or its carrier to pay the lump sum benefit.

The Commission noted that although its interpretation of the statute does leave the "full and complete payment" language

without meaning under the current statutory scheme, the interpretation proposed by appellants would create a ground for termination of a widow's entitlement to receive the lump sum benefit upon remarriage that it is not evident from the language of the statute. Such a construction would be in favor of the employer and therefore violate the requirement that we liberally construe workers' compensation law in favor of the claimant. *See Ashby*, 294 Ark. 412, 743 S.W.2d 798.

We agree with the Commission's finding that allowing the widow to receive the lump sum payment at the time she is remarried, regardless of whether the employer or its carrier has reached its maximum liability in weekly benefits, is the only interpretation of the statute that is consistent with the plain language of the statute, the history of the provisions in question, and the purposes underlying these provisions. It appears that the "full and complete payment" language was inadvertently left in from a time when it had some relevance and, in light of the delimitation on a widow's weekly benefits, it is now meaningless surplusage. Although a statute should be construed to give meaning and effect to every word therein if possible, *Locke* v. *Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968), unnecessary or contradictory clauses in acts will be deleted and disregarded in order to give effect to the clear legislative intent. *See Cherry* v. *Leonard*, 189 Ark. 869, 75 S.W.2d 401 (1934), and cases cited therein.

The decision of the Commission that appellee's widow is entitled to lump sum remarriage benefit and that appellants are liable for payment of that benefit and the Court of Appeals' decision are affirmed.

Affirmed.

Stacy Lavelle BOGARD *v.* STATE of Arkansas

CR 92-960 844 S.W.2d 347

Supreme Court of Arkansas
Opinion delivered January 11, 1993

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Stacy Lavelle Bogard, age sixteen at the time, was charged with capital murder for the death by shooting of Jessie Faulkner. He was convicted of first-degree murder and sentenced to life imprisonment. On appeal, he urges that the circuit court erred in failing to suppress oral custodial statements made by him because he was unaware that unrecorded statements could be used against him as evidence. This issue has no merit, and we affirm.

On June 6, 1991, Jessie Faulkner called the North Little Rock police and reported that Bogard was harassing people in the neighborhood. Bogard was arrested but released that same night at about 8:00 p.m., and he returned to Faulkner's area. He accosted Faulkner, and, according to one witness, said that Faulkner had "snitched" on him and then shot at him with a pistol three or four times. One shot hit Faulkner in the head and a second shot struck him in the upper left back. Faulkner was found by the North Little Rock Police dead on the ground with a pocketknife in his hand.

At 4:00 a.m. the following morning, the police arrested Bogard. He was taken to the police station, accompanied by his mother, where he was read his *Miranda* rights. Both Bogard and his mother initialed each right. In addition, North Little Rock Police Detective William Kovach asked Bogard if he understood his rights, and he said that he did. Bogard and his mother then signed the waiver of rights form. Following that, he agreed to talk to police officers but would not permit the interview to be recorded. Instead, Detective Kovach and a second North Little Rock detective, Donnie Smith, took notes. He told the detectives that he shot Faulkner but did so in self-defense. A month later, Bogard told Dr. Michael J. Simon, supervising forensic psychologist at the State Hospital where he was committed for evaluation, that the state would have a difficult time proving its case because "I didn't give them no statement."

Prior to trial, Bogard moved to suppress his oral statements, contending that he did not fully understand what rights he had waived prefatory to making the statements. A hearing was held, and after the hearing the circuit court denied the motion. The trial followed, and Bogard's oral statements were introduced into evidence. The jury found him guilty of first-degree murder, and he was sentenced to life imprisonment.

The crux of Bogard's argument is that he believed that unrecorded comments to police officers could not be used against him. This, he contends, is evidence that he did not fully understand the *Miranda* warnings that what he said would be used against him. Thus, he argues that his waiver was not effective and that his oral statement should have been suppressed. The state contests this and contends that the record is clear that Bogard was

fully apprised of his rights and understood them. He chose, however, to submit to a police interview.

Statements made to law enforcement officers during custodial interrogations are admissible only after the state establishes that a defendant voluntarily, knowingly, and intelligently waived his right to counsel. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). At issue in the case before us is not whether Bogard's statements or waiver were involuntarily made, that is, coerced in some form or fashion, but rather whether the waiver was given without full comprehension of the nature of the right abandoned and the consequences of that abandonment. *See Moran* v. *Burbine*, 475 U.S. 412 (1986). Whether the defendant knowingly and intelligently waived his rights must be determined by the totality of the circumstances. *Mauppin* v. *State*, 309 Ark. 235, 831 S.W.2d 104 (1992); *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985). Our standard of review is whether the circuit court's finding that the waiver of rights was knowingly and intelligently made was clearly against the preponderance of the evidence. *Mauppin* v. *State, supra; Ryan* v. *State*, 303 Ark. 595, 798 S.W.2d 679 (1990).

We are not convinced that Bogard's stated confusion invalidates a knowing and intelligent waiver of his right to remain silent. Both Bogard and the state rely on the case of *Connecticut* v. *Barrett*, 479 U.S. 523 (1987) for their respective positions, and the facts in *Barrett* do approximate the facts in this appeal. In *Barrett*, the defendant was arrested for sexual assault and advised of his *Miranda* rights. He told police officers that he understood his rights and would not give a written statement without counsel being present. He did not object, however, to talking to officers about the incident. In his comments which followed, he admitted complicity in the crime. The trial court allowed the officers to testify about his statements, but the Connecticut Supreme Court reversed on the basis that Barrett had requested counsel and that served as an invocation of that right for all purposes.

The United States Supreme Court reversed the Connecticut Supreme Court and held that Barrett made clear to police that he was willing to talk about the crime in the face of the *Miranda* warnings. The Court stated: "*Miranda* gives the defendant a

right to choose between speech and silence, and Barrett chose to speak." 523 U.S. at 529. The Court then addressed whether the distinction that Barrett drew between oral and written statements exhibited a lack of understanding about his rights. The Court concluded that it did not:

> We also reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes. This suggestion ignores Barrett's testimony — and the finding of the trial court not questioned by the Connecticut Supreme Court — that respondent fully understood the *Miranda* warnings. These warnings, of course, made clear to Barrett that "[i]f you talk to any police officers, anything you say can and will be used against you in court." (Citing to record.) The fact that some might find Barrett's decision illogical is irrelevant, for we have never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." (Citing authority.)

479 U.S. at 530.

In this case, Bogard was fully apprised of his rights as evidenced by his initials and his mother's initials on the rights form and his signed waiver form. Police officers also testified that they believed that he understood his rights. Bogard was sixteen years old at the time and had a ninth-grade education. Moreover, he was not a newcomer to the criminal justice system, having been arrested previously and convicted of two burglaries. At some point, he did draw in his own mind a distinction between recorded and unrecorded statements and their effectiveness. This may have been illogical but, as *Connecticut* v. *Barrett, supra*, illustrates, the point is irrelevant to the issue of whether Bogard chose to speak freely or not. He clearly did, and his statement was appropriately entered into evidence.

Because life imprisonment is the sentence, Rule 11(f) of our Supreme Court Rules comes into play. That rule provides that the appellant must abstract *all* objections decided adversely to him, together with parts of the record necessary for understanding, and that the Attorney General shall assure that this occurs and

brief all points that involve error. We note that both parties failed to comply sufficiently with Rule 11(f) with regard to motions and objections made by the appellant. The record in this case, however, has been examined in accordance with Rule 11(f), and it has been determined that there were no rulings adverse to the appellant which constituted prejudicial error.

Affirmed.

IN RE ADOPTION OF K.F.H. and K.F.H.

92-183 844 S.W.2d 343

Supreme Court of Arkansas
Substituted opinion delivered February 8, 1993*

*Original opinion delivered January 11, 1993.

MacDonald & Goren, by: *Lisa J. Vogler*; and *Snellgrove, Laser, Langley & Lovett*, by: *Todd Williams*, for appellant.

Kathleen C. Boyle, and *Friday, Eldredge & Clark*, by: *Robert S. Shafer*, for appellee.

ROBERT L. BROWN, Justice. This case involves the adoption of two children, K.F.H. and K.F.H., without the consent of their natural mother the appellant. The probate judge granted the adoption and terminated the parental rights of the appellant. The appellant raises three points on appeal. The points raised are without merit, and we affirm the judgment of the probate judge.

There are two appellees, the natural father and his wife, the adoptive mother. The natural father, who lives in Jonesboro, hired a Michigan lawyer to locate a surrogate mother to bear him a child. He was then put in contact with the appellant. On February 17, 1986, the appellant contracted with the natural father to be artificially inseminated with his sperm and to bear him a child whom he and his wife would subsequently adopt. In June of 1986, the appellant became pregnant but miscarried. Afterwards, she was artificially inseminated numerous times in December 1986 and January 1987 with the appellee's sperm and became pregnant again in January of 1987, this time with twins.

During the pregnancy, the appellant decided that she wanted to keep the children she was carrying and filed a complaint in Michigan on August 19, 1989, to void the surrogate parenting contract as contrary to public policy. The appellees then filed a complaint, also in Michigan, asserting that one of the appellees was the natural father of the children and praying for their adoption by the other appellee in accordance with the agreement. Twins, K.F.H. and K.F.H., were born to the appellant on September 4, 1987, in Michigan.

On April 21, 1988, an order was entered by the Michigan circuit court voiding the surrogate parenting contract on public policy grounds. A second order was entered, also on April 21, 1988, stating that the natural father would have legal and physical custody of the twins, that the appellant would be permitted visitation, that the appellant must pay $28.00 per week for child support which the court abated in light of her anticipated visitation expenses, and that the appellees must send the appellant periodic reports on the children.

The appellant moved from Michigan to Ohio sometime in April of 1990. On September 18, 1990, jurisdiction of this matter was transferred from the Michigan circuit court to the Craighead County Chancery Court. On November 1, 1990, the appellees filed a petition in the Craighead County Probate Court for the wife of the natural father to adopt the twins. In that petition, they contended that one of the appellees was the biological father and that the appellant's consent was not required because she had failed, without justifiable cause, to communicate with the children for at least a year. On July 19, 1991, the probate judge granted the petition for adoption and found that the appellant's consent was not required due to failure to communicate with her children as alleged. He further found that it was in the children's best interest that the natural father's wife adopt them.

I. CHOICE OF LAW

Under Arkansas law, parental consent is not required of the non-custodial parent if that parent fails significantly and without justifiable cause to communicate with the child for a period of at least one year. Ark. Code Ann. § 9-9-207(a)(2) (1987).

The appellant first contends that because this case originated in Michigan that state's laws applied up to the point when jurisdiction of the case was transferred to Arkansas on September 18, 1990. Michigan statutory law provided at the time that the consent of a non-custodial parent could be waived if the non-custodial parent had failed or neglected to provide regular and substantial support for a period of two years, or had the ability to but failed to regularly or substantially communicate with the child for a period of two years. According to the appellant, Arkansas's one-year requirement could only apply for the period accruing after the case was transferred to this state on

September 18, 1990.

The focal point for this issue is the date when the adoption petition was filed — November 1, 1990. By that date, the Craighead County Probate Court clearly had jurisdiction of the cause. We have held that the one-year period after which a parent may lose the right to consent must accrue before filing the adoption petition and that the filing of the petition is the cutoff date. *Dixon* v. *Dixon*, 286 Ark. 128, 689 S.W.2d 556 (1985). We have further held that the one-year requirement applies to any one-year period between the date of birth and date the petition for adoption was filed and is not limited to the year immediately preceding the filing of the adoption petition. *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). And we have applied the one-year period against a nonresident parent who failed to support his child significantly for a year and thereby lost the right to consent. *Henson* v. *Money*, 273 Ark. 203, 617 S.W.2d 367 (1981).

Here, we are presented with a novel circumstance in that jurisdiction of the case was transferred to Arkansas shortly before the adoption petition was filed. The probate judge, however, was presented with no clear and cogent reason not to apply Arkansas law to this cause other than the fact that the case had only been in Arkansas for a month and a half. It is elementary that the laws of the forum state typically are applied to its cases and controversies. We hold that there was no error in the application of Arkansas law to circumstances occurring prior to the transfer of jurisdiction.

The appellant contends for the first time on appeal that her due process rights were violated because of lack of notice that she stood to lose her parental rights by the retrospective application of Arkansas law to a time when the Michigan circuit court still had jurisdiction. It does not appear, though, that the appellant raised this constitutional argument before the probate judge. Merely arguing that Arkansas law should not apply until after the court obtained jurisdiction, as the appellant did before the probate judge, did not alert the judge to the constitutional arguments now presented. This court will not consider any argument raised for the first time on appeal, even a constitutional argument. *Arkansas County* v. *Burris*, 308 Ark. 490, 825 S.W.2d

590 (1992).

II. WAIVER OF CONSENT

For her second point, the appellant urges that she did not fail to communicate with her children for a year, and even if this court concludes that she did, this lapse was justifiable under § 9-9-207(a)(2).

Statutes for the adoption of children are strictly construed and applied. *Swaffar* v. *Swaffar*, 309 Ark. 73, 827 S.W.2d 140 (1992). We have placed a heavy burden of proof on one wishing to adopt a child without the consent of a parent and that burden is by clear and convincing evidence. *In the Matter of the Adoption of Glover*, 288 Ark. 59, 702 S.W.2d 12 (1986); *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979). The question we must now answer on appeal is whether the probate judge's finding of lack of parental contact without justification was clearly erroneous. *See Anderson* v. *Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992).

The record reveals that the appellant's last visit with her children was on March 20, 1989, and no contact was had with them until she mailed birthday cards on September 27, 1990. That represents a period of a year and one-half when there was no communication between the appellant and the twins. The appellant insists that a letter she wrote dated March 8, 1990, to Ms. Evelyn Green, the appointed friend of the Michigan court, requesting visitation of the children, and a progress report sent from the appellees to her concerning the children made in April 1990 qualify as communication with the children. The argument though is specious. Communication with Ms. Green or the appellees did not constitute communication with the children. The fact of the matter is there was no contact with the children for more than a year.

We are left then with the pivotal question of whether the failure to communicate was without justifiable cause under the statute. We do not believe that the probate judge clearly erred in finding no justification. Failure to communicate without justifiable cause means a failure that is voluntary, willful, arbitrary, and without adequate excuse. *Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986); *Roberts* v. *Swim*, 268 Ark.

917, 597 S.W.2d 840 (Ark. App. 1980).

The appellant presents several reasons why her lack of communication with the twins was justified. She points to her relationship with the appellees, which, she stated, had been adversarial since the birth of the twins, and to the age of the twins, which made it impossible for her to communicate with them without the cooperation of the appellees. She also states that she sent letters and cards to the twins which they never received. And, she maintains that she tried to arrange for a visit with the children in March of 1990. Lastly, she claims that financial problems and her pregnancy prevented her from traveling.

In his findings, the probate judge highlighted the frustration that Evelyn Green had in maintaining contact with the appellant and in arranging her visits with the children:

> Ms. Green continued trying to arrange visits for respondent (appellant) and was unable to make any arrangements. In fact, during part of this time respondent refused to give her her home address and when she finally met with Ms. Green she informed her she was pregnant.
>
> . . .
>
> It must be noted that during all of the time Ms. Green was seeking to arrange visitation with these children, the appellees cooperated fully and completely in order to facilitate respondent's court ordered visitation with the children. It appears to this Court that Ms. Green complied fully and completely with the Michigan Court Orders and did everything within her power to help respondent in arranging these periods of visitation with the children. It appears that she was frustrated in her attempts to carry out the Orders of the Court due to respondent's actions and not due to any reluctance on the part of petitioners (the appellees) to assist with the visitation or any refusal on the part of Ms. Green to comply with the Orders of the Court. Respondent testified that she was unable to exercise some visitation periods scheduled by Ms. Green due to lack of finances required for travel. She also admitted, however, that during the period of time from the entry of the Order in 1988 until her last visitation with these children in March, 1989, she had engaged in relationships with at

> least two men, one relationship resulting in the birth of three children and her later marriage to that man just prior to the hearing in this case. At one point she candidly admitted that she did not furnish Ms. Green her address because the man she was living with did not want his address given to third parties. During the time in question respondent made no effort to communicate with these children in any manner other than the visitations which have already been discussed.

The record supports the probate judge's findings. In addition, though the appellant argues on appeal that she sent cards and presents to the children during the relevant eighteen-month period, this is not reflected in the record. What the record does reflect is that during this time period the appellant had a job, received money from a student grant and loan to attend college, and was paid for an article on surrogate motherhood. She also made several trips out of state, including a trip to Florida in May 1990 with her other children.

We view the issue of justifiable cause as factual but one that largely is determined on the basis of the credibility of the witnesses. This court gives great weight to a trial judge's personal observations when the welfare of young children is involved. *In re Adoption of Perkins/Pollnow*, 300 Ark. 390, 779 S.W.2d 531 (1989); *see also In the Matter of the Adoption of J.L.T.*, 31 Ark. App. 85, 788 S.W.2d 494 (1990). The probate judge found that proof of the appellant's disregard of the children for more than a year was clear and convincing. We cannot say that the evidence is to the contrary.

III. RELEVANCY OF WITNESSES

For her last point, the appellant argues that it was error to admit the testimony of Evelyn Green and Mr. Emmett Presley, a teacher at Arkansas State University in the field of social work who was asked to oversee the appellant's visits with the twins in Jonesboro. Ms. Green testified to communication problems with the appellant, her indecisiveness, and her move from Michigan to Ohio without notice. Mr. Presley testified that a male friend accompanied the appellant on one visitation. According to the appellant, both witnesses' testimony was prejudicial and irrelevant.

We disagree. First, their testimony was especially relevant to the question of arranging the appellant's visits with the twins and to how the visits actually transpired since both people were directly involved in that process. A trial court's ruling on the relevancy of evidence will not be reversed absent an abuse of discretion. *Farmers Bank* v. *Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990). Here, we discern no such abuse.

Secondly, we note that while the probate judge conceded that all of the Green/Presley testimony might not be relevant, he added that he could separate any chaff from the wheat. Even if some chaff was admitted into evidence, we have held that in a bench trial the trial judge is capable of evaluating the evidence, and the judgment will stand unless all of the competent evidence is insufficient to support the judgment or the incompetent evidence induced as essential finding that would not otherwise have been made. *See Rich Mountain Elec. Coop.* v. *Revels*, 311 Ark. 1, 841 S.W.2d 151 (1992); *Butler* v. *Dowdy*, 304 Ark. 481, 803 S.W.2d 534 (1991). We hold that neither circumstance exists in this case.

Affirmed.

Brenton R. PIERCY *v.* WAL-MART STORES, INC.

92-717 844 S.W.2d 337

Supreme Court of Arkansas
Opinion delivered January 11, 1993
[Supplemental Opinion on Denial of Rehearing February 22, 1993.*]

*Dudley, J., not participating.

[redacted]

Sam Sexton III, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Robert W. Bishop*, for appellee.

ROBERT L. BROWN, Justice. The appellant, Brenton R. Piercy, raises multiple points for reversal of a jury verdict in favor of the appellee, Wal-Mart Stores, Inc. The points for reversal are meritless, and we affirm.

On October 10, 1988, Piercy claimed that he tripped on a bulge which was several inches high in an unsecured rug-mat at the entrance of a Wal-Mart store in Fort Smith. The mat, he testified, had been pushed up against a door through which customers passed in single file to enter the store. Because his father was directly in front of him, Piercy asserted, he could not see the mat and consequently tripped on it and fell on his left knee. He did not immediately report the injury because at first he did not believe that he had been injured. That night, he went to work and later testified that his leg hurt during his shift. He stated that

he thought he had suffered a hamstring injury.

The pain became progressively worse, and on October 19, 1988, Piercy went to see his regular physician, Dr. Ronald P. Robinson, who referred him to Dr. Stephen A. Heim, an orthopedic surgeon. Dr. Heim fitted Piercy with a full-length cast that covered the back of his leg. At this point, he had still not notified Wal-Mart of his injury.

When his leg did not improve, Piercy returned to Dr. Heim, who changed the cast and placed his leg in a brace. He remained in the brace for about two weeks, and his leg showed no sign of improvement. During this period, he testified that he "was in considerable pain" and was unable to walk on the leg and therefore was confined to a wheelchair. On November 7, 1988, Piercy went to see Dr. Douglas W. Parker, Jr., a second orthopedic surgeon, who examined him for five successive days. On the fifth day, Dr. Parker evaluated the leg and returned Piercy to his regular physician, Dr. Robinson, due to the infection. Dr. Robinson then called in a surgeon, a Dr. Hunton, who promptly sent him to St. Edward Mercy Medical Center in Ft. Smith to have his leg drained.

An operation was performed on Piercy's leg, and he remained in the hospital for eighteen days, spending part of that time in the intensive-care unit. He testified that, when he was dismissed, the "leg was not any better," and he required physical therapy. Six to eight weeks later, he was able to get up and walk with the assistance of a walker. From that, he progressed to crutches and, eventually, a cane, which he used for about a year-and-one-half. He stated that he still experiences pain and has a limp.

Piercy sued Wal-Mart for damages on grounds that the mat at the entrance had been negligently maintained and that this caused the accident. At trial, Wal-Mart denied any knowledge of the accident prior to a report by Piercy's father and presented proof that Piercy suffered from diabetes and had a history of various infections. Two days following a jury verdict in favor of Wal-Mart, Piercy's attorney made a shopping trip to the Wal-Mart store in question and observed that the mats at the entrance had been taped down. Piercy then moved for a new trial, asserting that the taping of the mats constituted newly discovered evidence.

The circuit court denied the motion.

I. FAILURE TO GRANT NEW TRIAL MOTION

At trial, Wal-Mart presented considerable testimony on its internal safety procedures. As part of this defense, Wal-Mart's store manager, Roger Trover, responded to a question on direct examination about taping the entrance mats down:

> Well, actually, from a safety standpoint, from my perception, that would cause more of a risk than if they weren't taped down, because the tape could roll up or it could come unstuck or whatever, and represent more of a trip hazard than the mat, itself, would.

Because two days after the trial the mats were taped down at the store entrance, Piercy wants to use this information to impeach Wal-Mart personnel and urges that the circuit court abused its discretion in refusing a new trial based on newly discovered evidence.

We do not agree. Rule 59(a)(7) of the Arkansas Rules of Civil Procedure states that a new trial may be granted because of "newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. . ." A new trial based on newly discovered evidence, however, is not a favored remedy. *National Bank of Commerce* v. *Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1991). Whether to grant a motion for new trial based on newly discovered evidence is within the sound discretion of the trial court, whose decision will not be reversed absent an abuse of that discretion. *Liggett* v. *Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987). When a trial court denies a motion for a new trial, the test is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable inferences permissible under the proof. *Isbell* v. *Ed Ball Const. Co.*, 310 Ark. 81, 833 S.W.2d 370 (1992); *Scott* v. *McClain*, 296 Ark. 527, 758 S.W.2d 409 (1988).

We have held that in a hearing on a motion for a new trial based on newly discovered evidence, the burden is on the movant to establish that he could not with reasonable diligence have discovered and produced the evidence at the time of the trial, that the evidence is not merely impeaching or cumulative, and

that the additional testimony would probably have changed the result of the trial. *See Rogers* v. *Frank Lyon Co.*, 253 Ark. 856, 489 S.W.2d 506 (1973); *see also E.E.O.C.* v. *Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986); *Chemical Delinting Co.* v. *Jackson*, 193 F.2d 123 (5th Cir. 1951); 6A *Moore's Federal Practice*, § 59.08[3], pp. 59-103 - 59-104 (1987); 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2808, p. 60 (1973).

Using these standards, the proof in question before us fails primarily for one reason. Piercy admits that he wants to use the new evidence to "totally impeach Wal-Mart's manager." The fact that new information has been discovered which might merely impeach or otherwise test the credibility of a witness is not a sufficient reason to warrant a new trial. There was no abuse of discretion in the circuit court's ruling.

II. THE 'GOLDEN RULE.'

During Wal-Mart's closing argument, the defense counsel stated:

> All of [us] have a duty of care for our own safety, ordinary care. You can't just ignore the fact that you're approaching a curb or you're approaching some steps or you're approaching a doorway, that has a rug on the other side of it. You can't ignore that. You're duty bound to watch out where you're going and not be tripping and so forth. Now, the same standard of care applies to me as it does to Wal-Mart, and to you as it does to Wal-Mart. Now, what if somebody comes in your home and you've got a rug, there, a throw rug, we call them, at the door, maybe you've got an entryway through your garage or patio or whatever, and you've got a throw rug, there, for them to clean off their feet, before they come in on the good carpet. If some fellow comes in there and —

At that point, Piercy's attorney interrupted and urged that this violated the golden rule doctrine:

> Judge, this violates what is called the Golden Rule. He's trying to put the Jury into Wal-Mart's position, and that is not allowed in (the) province of law.

Following additional statements by counsel at a sidebar

conference, the court admonished the jury:

> Ladies and Gentlemen, the attorneys can draw what they feel are reasonable inferences from the testimony; what they say is not evidence, what they say is merely argument, how they interpret the evidence. You should remember the facts as you remember them. The attorneys have the right to try to persuade you to be — to go their way, but it's ultimately up to you as to what you believe to be the facts or don't believe to be the facts.

There was no objection by Piercy's attorney to this admonishment.

We question whether Piercy actually objected formally to Wal-Mart's closing argument, though he did voice his misgivings about it. Furthermore, Piercy did not object at all to the court's admonition to the jury. But, in addition to these procedural lapses, we do not believe that reversible error occurred. We have previously defined the golden rule doctrine:

> A golden rule argument suggests to jurors that they place themselves in the position of a party. (Citation omitted.) An example of such an argument is, "Would you take $15,000 for your father's life?" (Citation omitted.) Or, conversely, "How would you like to have $15,000 taken out of your pocket?"

Smith v. *Pettit*, 300 Ark. 245, 248, 778 S.W.2d 616, 618 (1989). Based on this definition, Wal-Mart's counsel was perilously close to consummating a golden rule argument when Piercy's counsel cut him off.

A comment apposite to this case appears in one of our previous cases:

> We have recognized the impropriety of a golden-rule argument such as counsel's urging the jurors to award what they themselves would take for the life of their father or husband or wife. (Citation omitted.) Here, however, the argument was cut off after counsel had merely said that he thought the jurors were going to have to put themselves in the plaintiff's shoes. That bare remark falls decidedly short of being reversible error.

Collection Consultants, Inc. v. *Bemel*, 274 Ark. 223, 226, 623 S.W.2d 518, 520 (1981).

Similarly, in the present case, counsel for Piercy halted Wal-Mart's allusion to the jurors' personal experiences in midstream. As in *Bemel*, the argument of Wal-Mart's attorney falls short of reversible error.

III. ORDER OF TRIAL

Piercy further claims that the circuit court allowed Wal-Mart to present its case-in-chief during Piercy's own case-in-chief and that this action violated Ark. Code Ann. § 16-64-110 (1987), which governs the order of trial. The issue arose when Wal-Mart requested, after the noon recess, that the circuit court allow it to recall Piercy for several additional questions on cross-examination while Piercy was still putting on his case. Piercy's counsel objected to this, and the circuit court overruled the objection.

Trial courts are endowed with authority to exercise reasonable control over the order of interrogating witnesses. Ark. R. Evid. 611(a). We have held that Rule 611(a) vests considerable discretion in the trial court in the regulation of the mode and order of interrogating the witnesses and presenting evidence. *Freeman* v. *Anderson*, 279 Ark. 282, 285, 651 S.W.2d 450, 452 (1983). In *Freeman*, we found no abuse of discretion when the trial court allowed a police officer to return to the witness stand after having been excused and released from the witness rule so that he could testify about his qualifications to estimate the repair cost to an automobile. The same holds true in this case. There was no abuse of discretion.

IV. HEARSAY OPINION

Piercy contends that he was required to testify that one of his physicians, a Dr. Holmes, told him in 1989 that he should not have any trouble walking on the injured leg. He urges that the admission of this hearsay was a blatant violation of Ark. R. Evid. 801 and that there is no applicable exception under Ark. R. Evid. 803.

Wal-Mart counters that the purpose of the question about Dr. Holmes's evaluation related to Piercy's *motive* for seeking a

second opinion before the trial from Dr. Douglas Parker, whom he had not seen in two-and-one-half years. Dr. Holmes had told Piercy that he should not have difficulty walking on the leg "later on." Piercy then sought a second opinion, which he testified to on cross-examination:

> Q: Now, did your going back to Dr. Parker in 1991, did that have anything to do with this lawsuit being set for trial?
>
> A: Yes, sir, it did.
>
> Q: So, because this lawsuit was set for trial, you went back to see Dr. Parker?
>
> A: Yes, sir, my attorney requested that I get another leg evaluation.

The circuit court did not err in overruling Piercy's objection on hearsay grounds. The fact that Dr. Holmes advised Piercy that he would be able to walk on the leg was offered on cross-examination to prove why Piercy sought a second opinion from Dr. Parker prior to trial. As such, it was not offered, according to Wal-Mart, to prove that Piercy could walk in the future, but rather to show why he went to Dr. Parker. Statements proving motive are not excluded by the hearsay rule. Ark. R. Evid. 803(3); *see also Tandy Corp.* v. *Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984). This ruling was discretionary with the circuit court, and that discretion was not abused.

V. RESPONSES TO INTERROGATORIES

Piercy also contends that the circuit court erred in not allowing him to introduce certain responses to interrogatories by Wal-Mart. Piercy's Interrogatory 5 asked whether any persons had slipped on mats at the Wal-Mart store in question over the past five years and Interrogatory 11 asked if any persons had fallen on mats at any Wal-Mart stores. Wal-Mart responded to both interrogatories by objecting to them as overly broad, burdensome, irrelevant, and not likely to lead to admissible evidence. Piercy sought to present these objections to the jury, and Wal-Mart objected on relevancy grounds. The circuit court sustained Wal-Mart's objection.

We observe no abuse of discretion in the court's ruling. Piercy would have us believe that Wal-Mart's objections to these

interrogatories was an admission of sorts but cites us to no authority supporting his position. We do not agree. Wal-Mart was perfectly within its rights to object to any interrogatory. If the objection was unreasonable or without basis, then Piercy's remedy was to move to compel a response.

Piercy is correct that, under Ark. R. Civ. P. 33, *answers* to interrogatories may be used to the extent permitted by the rules of evidence. However, objections to interrogatories are not answers. The circuit court correctly sustained Wal-Mart's objection at trial.

Piercy further attempted to introduce into evidence answers to other interrogatories such as answers to Interrogatories 19 and 20 relating to the positioning and cleaning of the mats at the store entrance. Answers to interrogatories are hearsay and generally are inadmissible as part of a party's case-in-chief. *See Hunter* v. *McDaniel Bros. Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981). Nevertheless, such answers may be admissible to impeach the answering party. Here, however, no attempt was made by Piercy to impeach Wal-Mart personnel at trial. The circuit court correctly refused to allow the answers to Piercy's interrogatories into evidence.

VI. ADDITIONAL MEDICAL TREATMENT

For his sixth point, Piercy argues that evidence was admitted of twelve instances of his hospitalization, before and after the Wal-Mart accident, and that this was prejudicial and irrelevant. He cites us to the following principle:

> [W]hen a defendant's negligence aggravates, or brings into activity, a dormant or diseased condition or one to which the injured person is predisposed, the defendant is liable to the injured person for the full amount of the damages which ensue, notwithstanding such diseased or weakened condition.

Owen v. *Dix*, 210 Ark. 562, 196 S.W.2d 913, 915 (1946).

This is a correct statement of the law. However, the issue here, unlike the *Dix* case, is whether the twelve hospitalizations were at all relevant to the trial. The circuit court found that they were, and we cannot say that this ruling was error.

Piercy had a preexisting diabetic condition, and Wal-Mart argues that a diabetic condition for which Piercy was hospitalized correlates directly with poor eyesight due to cataracts and Piercy's resulting fall. It further contends that Piercy had been hospitalized for various infectious conditions such as cellulitis, and this evidences a susceptibility to infection such as that which afflicted Piercy's leg. Certainly, medical history which relates to the cause of an alleged accident or to resulting injury is relevant information for the jury to assess.

Rulings on the relevancy of evidence are discretionary with the trial court and are not to be reversed absent an abuse of discretion. *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). Given the apparent relevance of the medical records, it is difficult to conclude that the court abused its discretion.

VII. SPECULATIVE QUESTIONING

Piercy was asked on direct examination: ". . .[I]f that carpet, that piece of rug, had been flat at Wal-Mart that day, would you have tripped over it?" Wal-Mart promptly objected to the "speculation," and the court sustained the objection and added that it was interested only in knowing what the facts were.

We do not agree with Piercy that he could answer this question as a lay expert under Ark. R. Evid. 701. Rule 701 provides for opinion testimony rationally based on the perception of the witness. In this case, Piercy testified that the mat was not flat but had been pushed up to the door. Hence, the question was hypothetical and did not pertain to the circumstances which, Piercy contended, caused the accident.

While allowing Piercy to testify that he would not have tripped over a flat mat seems relatively innocuous to us, we cannot say that the circuit court's disallowance of this testimony was error or an abuse of discretion. Had Piercy responded negatively to the question, instead of being helpful to the jury, this would have fallen more readily into the category of a meaningless assertion. *See Felty* v. *State*, 306 Ark. 634, 816 S.W.2d 872 (1991).

Affirmed.

DUDLEY, J., not participating.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
FEBRUARY 22, 1993

Sam Sexton III, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Robert W. Bishop*, for appellee.

ROBERT L. BROWN, Justice. Petitioner Brenton R. Piercy raises several points on rehearing. The petition is denied but additional comment on the use of answers to interrogatories at trial is required.

We stated in our opinion that answers to interrogatories are generally inadmissible as hearsay in a party's case-in-chief, though they may be used for impeachment purposes, and we cited *Hunter* v. *McDaniel Bros. Constr. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981) for the proposition. That statement is only partially correct. Answers to interrogatories may qualify as admissions by a party-opponent which are not hearsay, as

defined, and therefore may constitute substantive evidence and be admissible in a party's case-in-chief. Ark. R. Evid. 801 (d)(2). If an objection to such answers is raised on foundational or other grounds, it then becomes a matter for the trial court's discretion. Answers to interrogatories are also admissible for consideration in summary judgment proceedings. Ark. R. Civ. P. 56(c).

In the present case, the circuit court denied admission of all answers to interrogatories as part of Piercy's case-in-chief on grounds of irrelevancy. On appeal, Piercy contends that answers to interrogatories 19 and 20 were relevant and constituted admissions under Rule 801 (d)(2). That precise rule of evidence was not argued to the circuit court; nor were the two answers to interrogatories 19 and 20 specifically brought to the court's attention. Moreover, Wal-Mart's store manager, Roger Trover, who verified the answers, was called as a witness by Piercy. However, no attempt was made by Piercy to impeach Trover with the answers. Under the circumstances, the circuit court did not abuse its discretion in refusing to admit the answers to interrogatories into evidence.

DUDLEY, J., not participating.

Ripple Wayne SUTTON *v.* STATE of Arkansas

CR 92-347 844 S.W.2d 350

Supreme Court of Arkansas
Opinion delivered January 11, 1993

Val P. Price, for appellant.

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

ROBERT L. BROWN, Justice. The appellant, Ripple Wayne Sutton, raises numerous issues on appeal. One of these issues has merit — the circuit court's failure to sever the charge for a felon in possession of a weapon for trial purposes. We reverse on that point and remand for a new trial.

On August 13, 1990, Lyle Boliou was murdered. His body was found in a pickup truck parked by an offshoot of the St. Francis River near Paragould. He had three gunshot wounds to the back of the head. On December 10, 1990, Sutton was arrested on a felon/firearm charge, the firearm being a .22 caliber pistol. Sutton had been convicted of grand larceny in 1974. Six months later, on May 6, 1991, he was arrested for the murder of Boliou

and subsequently charged with first-degree murder. At the time, Kathy Riggsbee, who was an eyewitness to the shooting and who had been charged with hindering the apprehension of Sutton, was also under suspicion as an accomplice to the murder. She told investigating authorities that Sutton was the culprit.

The two charges, felon/firearm and first-degree murder, were then consolidated for trial. On August 19, 1991, which was a week before trial, Sutton orally moved the trial court to sever the two charges so that the murder charge could be tried first. Sutton's counsel advised the court that he would be filing a written motion before trial. He did so on the day of the trial, August 26, 1991, and the motion was denied. The court's stated reason for denying the motion was that the two offenses joined were part of a single scheme and plan, which eliminated grounds for severance under Ark. R. Crim. P. 22.2(a). Sutton further moved in limine to exclude cross-examination on his felony conviction because it was more than ten years old. That motion, too, was denied.

The trial took place over three days. A certified copy of Sutton's 1974 conviction for grand larceny was introduced as part of the state's case-in-chief. No additional objection was made to the felony conviction at time of introduction. At the end of the trial, the jury was instructed that the conviction could only be considered for credibility purposes. Sutton was convicted on both charges and sentenced to life imprisonment on the murder charge and six years on the weapon charge, with the sentences to be served consecutively.

I. JOINDER OF THE FELON/FIREARM CHARGE

In the last year and a half, we have examined the prejudicial impact that occurs when a felon/firearm charge is combined with a murder charge for trial on two occasions. *Sullinger* v. *State*, 310 Ark. 690, 840 S.W.2d 797 (1992); *Ferrell* v. *State*, 305 Ark. 511, 810 S.W.2d 297 (1991). In each instance, we affirmed the conviction and judgment, though we held that the trial court had erred in failing to sever the charges for trial. We did so, based on what amounted to a harmless error analysis. Though there was error, we held that the error was not prejudicial to the defendant because of the existence of one or more overriding factors, including: (1) the overwhelming evidence of guilt; (2) cross-

examination of the defendant on the prior conviction; and (3) a limiting instruction to the jury.

In both *Sullinger* and *Ferrell*, we scrutinized the circumstances of the case in light of these factors and concluded that the joinder error was harmless, primarily due to overwhelming evidence of guilt and the fact that the defendant would have taken the stand in any event and been cross-examined about his felony conviction.

The state now urges us either to affirm Sutton's conviction using the *Sullinger* and *Ferrell* analysis or on the basis of *McEwen* v. *State*, 302 Ark. 454, 790 S.W.2d 432 (1990). In *McEwen*, a felon/firearm charge and aggravated robbery charge were tried together and convictions for both resulted. Prejudice was argued on appeal due to the joinder, and we rejected the argument on the basis that severance was a matter discretionary with the trial judge. We noted that the judge's discretion was not abused by the ruling in *McEwen* because it was premised on the fact that the same gun was used in both offenses and that severance would have meant two trials and a duplicative effort. We also observed in that case that the prior felony conviction could have been brought out on cross-examination and, thus, no prejudice resulted from the joinder.

■ We first consider in the case at hand whether Sutton's motion to sever the murder and felon/firearm charges and his motion in limine to exclude the prior felony conviction preserved the issue for appeal without a further objection made at trial. We have held that raising an objection by pretrial motion without a corollary objection at trial is sufficient to preserve the issue for appeal, but failure to object at trial precludes the party from relying on anything disclosed at trial which was not brought out at the pretrial hearing. *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980), *cert. denied* 450 U.S. 1043 (1981) (pre-trial motion to suppress lineup identification which was denied preserved the issue without additional objection at trial); *see also Ward* v. *State*, 272 Ark. 99, 612 S.W.2d 118 (1981) (when a motion in limine is overruled, no further objection is needed). Here, Sutton moved to sever the charges and moved in limine on the prior conviction. Under these circumstances, an additional objection to the felony conviction at trial was not necessary.

In examining the approach taken to the joinder issue in other jurisdictions, we observe a wide range of solutions. Some jurisdictions have balanced judicial efficiency against prejudice to the defendant and denial of a fair trial under the Due Process Clause and held in favor of severance. *See, e.g., State* v. *Cook*, 673 S.W.2d 469 (Mo. App. 1984). The District of Columbia Court of Appeals, while noting that joinder may not always be an abuse of discretion, has held that a high level of care is necessary to avoid prejudice when a felon/firearm charge is joined for trial. *U.S.* v. *Dockery*, 955 F.2d 50 (D.C. Cir. 1992); *but see United States* v. *Daniels*, 770 F.2d 1111 (D.C. Cir. 1985) (district court did not abuse its discretion in denying severance). The D.C. Circuit in *Dockery* stated:

> The primary concern is that prior crimes evidence "weigh[s] too much with the jury and . . . overpersuade[s] them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

955 F.2d at 53; *quoting Michelson* v. *United States*, 335 U.S. 469, 476 (1948). The D.C. Circuit concluded that the defendant was prejudiced and looked to factors such as the government's refusal to admit the prior conviction by stipulation rather than proof and the absence of a cautionary instruction on inferences to be drawn from the conviction as reasons for reversal.

The Ninth Circuit Court of Appeals had held in a case where evidence was sparse on the primary charge of murder and a cautionary instruction on the prior felony was not given until the end of a three-day trial that the defendant was manifestly prejudiced. *United States* v. *Lewis*, 787 F.2d 1318 (9th Cir. 1986). Though the Ninth Circuit did not dwell on this point, the defendant also did not take the stand; thus, the prior felony would not have been otherwise admissible.

Similarly, the Kentucky Supreme Court has held that failure of the trial court to sever a felon/firearm charge for trial was prejudicial error. *Hubbard* v. *Commonwealth*, 633 S.W.2d 67 (Ky. 1982). In a dissenting opinion, it was noted that the defendant had not testified at trial. He was, therefore, not subject to cross-examination on his felony record.

Other state appellate courts have also held that prejudice results from joinder and introduction of a felony record at trial where otherwise the felony conviction would have been inadmissible. *See, e.g., Elerson* v. *State*, 732 P.2d 192 (Alaska App. 1987). In addition, the Georgia Court of Appeals, though it did not reach the merits due to the appellant's assertion of a new ground attacking joinder on appeal, observed that a felon/firearm offense is not an included offense of armed robbery and may be an existing offense before and after the commission of armed robbery. *Coleman* v. *State*, 163 Ga. App. 173, 293 S.E.2d 395 (1982).

It is clear from this authority that foreign jurisdictions have engaged in the same analysis as we have in assessing prejudicial error in these cases. Turning to the merits in the case before us, the evidence for conviction is much weaker than the evidence presented by the state in either *Sullinger* or *Ferrell*. The eyewitness testimony is from a witness, Kathy Riggsbee, who was under suspicion as an accomplice and who was charged with hindering apprehension. Moreover, the prior conviction sustaining the felon/firearm charge — grand larceny — was more than ten years old and could not have been used for impeachment purposes under Ark. R. Evid. 609(b).

Where a felon/firearm charge is tried with a second felony, the jury is confronted at the opening of the trial with the stark and highly significant fact that the defendant is a convicted felon. The felon/firearm charge generally has no relevance to the second charge being tried and serves only to sully the defendant in the minds of the jurors. In the present case, the previous conviction occurred in 1974 and was for grand larceny. It had no probative value in Sutton's trial for the murder of Lyle Boliou. At the end of the trial, the jury was instructed that a prior conviction could only be used to assess credibility and not as evidence against the accused. However, we are of the opinion that this general instruction did little, if anything, to offset the effect of the criminal record.

The state argues that Sutton, in fact, did commit the felon/firearm offense at the same time he purportedly shot Boliou on August 13, 1990. In other words, he was a convicted felon illegally in possession of a firearm at that moment. Hence, so the

argument continues, the two offenses were part of a single scheme or plan under Ark. R. Crim. P. 22.2(a) at the time the trigger was pulled. We are mindful that at least one other jurisdiction had adopted this point of view. *See State* v. *Illig*, 237 Neb. 598, 467 N.W.2d 375 (1992). However, we are not convinced by this argument for two reasons. First, the prejudice caused by evidence of a prior conviction in the state's case is great. Secondly, we do not believe that an ongoing violation of a felon's possession of a firearm should be telescoped into one moment in time in order to enhance the prosecutor's case on a second, more serious charge.

We are disinclined, as are other jurisdictions, to conclude that joinder of a felon/firearm charge with a second felony charge constitutes prejudice by that fact alone in all instances. *See, e.g., United States* v. *Daniels, supra.* However, we agree with the Ninth Circuit Court of Appeals "that the danger that the jury's perception of the defendant will be adversely affected is so strong as to create a presumption favoring severance." 787 F.2d at 1322.

Further, we do not believe that the circumstances in this case are sufficient to overcome that presumption of prejudice. The evidence of guilt was weak, and the prior felony was inadmissible for purposes of impeachment. In addition, the error was not cured by the instruction on the prior conviction and credibility at the end of the trial. Sutton, accordingly, was prejudiced by the joinder and is entitled to a new trial.

We, therefore, hold that the trial of the felon/firearm charge with the murder charge was prejudicial error and that the circuit court abused its discretion in denying the motion to sever. Because *McEwen* v. *State, supra*, is inconsistent with our holding in this case, we overrule it.

Sutton makes numerous other assertions of error, and we address those that may arise on retrial.

II. IMPEACHMENT

Kathy Riggsbee testified that Boliou was killed during the day. Lieutenant Sam Poe of the Greene County Sheriff's Department testified that he was never able to ascertain the Boliou was seen alive at 9:00 p.m. on the day of the murder. Sutton claims that had he been able to pursue cross-examination of Lieutenant Poe about his conversation with a waitress at the Red Onion Bar,

Poe would have been forced to admit that the woman told him she had seen Boliou at the bar at about 9:00 p.m. on that day. He argues that this cross-examination was necessary to impeach Lieutenant Poe's earlier testimony on that point.

Sutton, however, was attempting to impeach Lieutenant Poe with another officer's field notes on what was a collateral matter which, as the trial court correctly ruled, was improper. A witness cannot be impeached by extrinsic evidence on a collateral matter. *See Teas* v. *State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988). Sutton could easily have called the waitress as a witness on this point and, in fact, did so. There was no prejudice to Sutton. The trial court did not abuse its discretion in its ruling.

III. OFFER OF IMMUNITY

Sutton next argues that an agreement was made with law enforcement officers not to charge him with a felon/firearm offense if he gave a statement. Because he gave the statement, the failure to honor that agreement, according to Sutton, should void the felon/firearm charge. In support of his argument, he cites us to *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982), where we held that a confession induced by promises of immunity may be involuntary.

Sutton, however, has pursued the wrong remedy, as the trial court appropriately noted in denying the motion. His motion filed on August 26, 1991, the day of the trial, prayed that the felon/firearm charge be dropped rather than that the statement be ruled inadmissible. His remedy for an involuntary confession, however, was to have the statement suppressed. *Cf. Davis* v. *State, supra.* The trial court further observed that only prosecutors, not law enforcement officers, can drop charges, and that Sutton's attorney knew that. The evidence that Sutton possessed the pistol was ample apart from his statement. We cannot say that the trial court erred in its ruling on this point. *See Patterson* v. *State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

IV. MISCELLANEOUS

There was no error in three other points raised by Sutton. The trial court properly refused to allow the testimony of the waitress of the Red Onion Bar regarding the name of the man

who was with Boliou at the bar on either August 13 or August 14, 1990, between 6:30 and 7:00 p.m. The report of that name was hearsay. Moreover, by the description of the man from the waitress, it was clear to the jury that the man was not Sutton. Hence, there was no prejudice to the appellant.

At trial, Ruth Boliou, the widow of the victim, was called by Sutton as a witness, and she invoked the Fifth Amendment against self-incrimination. Sutton advances the theory that Mrs. Boliou should have had an attorney appointed for her which would have enabled him to question her about her husband's death. The theory has no merit. Mrs. Boliou was under suspicion by the authorities for the murder of her husband, according to her testimony. She was perfectly within her rights to seek Fifth Amendment protection. Sutton, in addition, offers no authority for why counsel must be appointed for Mrs. Boliou under these circumstances. *See Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

There is, finally, Sutton's argument that the trial court should have admitted into evidence a letter by Riggsbee's attorney to the prosecutor which, Sutton contends, was in the nature of a plea bargain for her hindering-apprehension charge. Alternatively, Sutton argues that he should have been allowed to use the letter to impeach Riggsbee's testimony that she had no deal with the state.

Sutton correctly maintains that Ark. R. Evid. 410 provides that evidence of an offer to plead guilty is not admissible against the person making the offer and that here the offer of proof is not made against that person. Nevertheless, the letter was clearly hearsay and was proffered to prove the truth of the assertions made in the letter. Refusing its admission into evidence as part of Sutton's case was appropriate.

Whether the letter should have been allowed for impeachment purposes against Riggsbee is a different matter. Kathy Riggsbee denied that she had entered into an agreement with the state. Sutton's counsel then tried to impeach her with her attorney's letter. The letter read in part: "If she cooperates with authorities, I would think a nolo plea and a probationary sentence would be generous to the prosecution." Had the letter indicated that a plea bargain agreement had actually been struck, it might

well have been admissible for impeachment purposes. *See Henderson* v. *State*, 279 Ark. 435, 652 S.W.2d 16 (1983). Here, though, the letter from Riggsbee's counsel suggests little more than an effort to explore the potential for a negotiated plea. The trial court correctly ruled that the letter did not rise to the level of an agreement. We have upheld a trial court's ruling that when a plea agreement has been withdrawn, a witness may not be questioned about it. *See Smith* v. *State*, 310 Ark. 247, 837 S.W.2d 279 (1992). Similarly, in this case the letter did not evidence a consummated agreement or, indeed, a firm offer. We can observe no prejudice to Sutton emanating from the trial court's ruling on this point.

Reversed and remanded.

HAYS and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. I respectfully dissent. In *Ruiz & Van Denton* v. *State*, 273 Ark. 94, 617 S.W.2d 6 (1981), this court held that where criminal offenses constitute one criminal episode and when a series of acts are committed, that is enough to give the state a right to join them in a single information. *See also* ARCP Rule 21.1(b). The majority relies on Rule 22.2(a), which gives a defendant the absolute right of severance when the offenses have been joined *solely* on the ground that they are of the same or similar character. Here, the state's reason for joining Sutton's murder and felon/firearm charges was Sutton used a handgun to kill his victim, so much of the proof in proving both charges is the same. *See Brown* v. *State*, 304 Ark. 98, 800 S.W.2d 424 (1990).

Finally, the majority court seems concerned Sutton is wrongly prejudiced by his 1974 theft conviction being revealed to the jury in the same trial in which he is being tried for murder. Of course, under A.R.E. Rule 609(b), such conviction could not ordinarily have been used against him in his murder case. However, in the circumstances presented, Sutton, as a convicted felon, used a gun to commit murder. As a consequence, the felon/firearm violation is a current offense which makes his sixteen-year-old theft conviction relevant. I do not believe this is the type prejudice our severance rules protect against.

The trial court had discretion in my view to deny Sutton's

severance motion, and on the record provided this court in review, I cannot say the court abused its discretion.

HAYS, J., joins this dissent.

Phillip G. KELLETT *v.* STATE of Arkansas

CR 92-1426 843 S.W.2d 318

Supreme Court of Arkansas
Opinion delivered January 11, 1993

Harold W. Madden, for appellant.

No response.

PER CURIAM. Appellant, Phillip G. Kellett, by his attorney has filed for a rule on the clerk.

His attorney, Harold W. Madden, admits that the failure to file the record in time was 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.

Robert Earl TUCKER, Jr. *v.* STATE of Arkansas

CR 92-1252 844 S.W.2d 335

Supreme Court of Arkansas
Opinion delivered January 11, 1993

Maxie Kizer, for appellant.

No response.

PER CURIAM. Robert Earl Tucker has filed a motion for rule on the Clerk contending it was error for the Clerk to refuse to docket his appeal from a burglary conviction. The Clerk properly declined the appeal because Tucker's notice of appeal was untimely. If we were simply to deny the motion, Tucker's counsel could then seek a belated appeal. Rather than require that additional procedure, we choose to treat the motion now before us as one for belated appeal and to grant it.

Tucker was convicted of burglary and sentenced as an habitual offender on July 21, 1992. He filed his notice of appeal July 23, 1992. Judgment was not entered, however, until July 24, 1992. Tucker filed a second notice of appeal on September 8, 1992. The Clerk correctly refused to lodge the transcript with this Court. The first notice was ineffective because it was premature. *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992). The second notice was more than 30 days after entry of the judgment and thus too late. Ark. R. App. P. 4(a).

Our decision in the *Kelly* case overruled the holding in *State*

v. *Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1992), which was to the effect that a notice of appeal filed prior to entry of judgment is to be treated as being filed when judgment is entered.

If this were a case in which the attorney had, by inadvertence, failed to file a timely notice of appeal, we would grant the rule and forward the attorney's name to the Committee on Professional Conduct under the authority of *Harkness* v. *State*, 264 Ark. 561, 572 S.W.2d 835 (1978). This is not such a case.

In *Harkness* v. *State, supra*, we pointed out that if we did not grant a belated appeal in a case where a lawyer had inadvertently missed the 90-day deadline for docketing the record in a criminal case with this Court, the defendant would be able to obtain a new trial or belated appeal on the basis of ineffective assistance of counsel. In civil cases we routinely deny such motions, as there is no Sixth Amendment consideration.

In a per curiam order subsequent to the *Harkness* decision we outlined the procedure to govern in criminal cases when the appeal was untimely without good reason. We said we would take the practical measure of allowing the appeal to be filed and would forward the name of the inadvertent counsel to the Committee on Professional Conduct. Here is the last paragraph of that per curiam order:

> The controlling rule provides: "The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, *when a good reason for the omission is shown by affidavit*." (Italics supplied.) Rules of Criminal Procedure, Rule 36.9. The purpose of the exception, to take care of hardship cases, is being disregarded, in that counsel tender out-of-time transcripts without a good reason for the delay. In order to put the responsibility where it belongs, on the shoulders of the lawyer who is at fault, hereafter when no good cause for the error is shown, the court will publish a per curiam order allowing the appeal, giving the name of the lawyer, and stating why no good reason has been shown for the omission. A copy of the order will be sent to the court's Committee on Professional Conduct, to be kept in its files for the Committee's information if any complaint of any

kind should later be filed against that lawyer.

In this case there is, as Ark. R. Crim. P. 36.9 requires, a "good reason" for the failure to file the appeal. There has been some justifiable confusion about whether our decision in the *Kelly* case, which was civil in nature, applies to criminal appeals as well. This is not a case of inadvertence to which the *Harkness* decision and our explanatory per curiam order apply. Treating the motion as one for belated appeal pursuant to Rule 36.9, we find good reason to grant the motion.

Motion for belated appeal granted.

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

ROBERT L. BROWN, Justice, dissenting. Our procedures are defective when we make a sweeping rule change in an opinion and expect compliance from lawyers before any possibility of notice of that change has gotten out to the legal community. The effect is akin to mandating compliance with a rule before its promulgation.

In this case, Tucker was convicted on July 21, 1992. He filed his notice of appeal two days later on July 23, 1992. Judgment was not entered, however, until July 24, 1992. Eleven days prior to entry of judgment, we held in an unrelated case that this violated Appellate Rule 4 because the notice of appeal was filed before entry of judgment. *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992).

Kelly, however, was a civil case which overruled a criminal case, *State* v. *Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1991), on this point. Thus, the import of *Kelly* was that it interpreted an appellate rule to apply to criminal appeals when we had not done so as recently as nine months previously in *Joshua*.

The *Kelly* decision had not had time to appear in the Arkansas Advance Reports when the Tucker facts occurred, because the Tucker notice of appeal and judgment took place within ten or eleven days of that decision. In sum, we made a significant change in appellate procedure affecting *criminal* appeals. We did so in a *civil* case. And there was no notice of change to the bar at the time of the Tucker facts.

Now in this per curiam order, we apply a Band-Aid solution

and say that we will treat this motion for rule on the clerk as a motion for belated appeal even though no affidavit of good reason accompanied the motion as required by Ark. R. Crim. P. 36.9. What we should do with a major *rule* change — even one embodied in an opinion such as in *Kelly* — is publish a per curiam order with an effective date for the rule so that notice is assured to be given to the bar and attorney error thereafter has some basis in reality.

I would grant the motion for rule on the clerk.

HOLT, C.J., joins.

WESTARK CHRISTIAN ACTION COUNCIL *v.* Mark STODOLA

92-1034 843 S.W.2d 318

Supreme Court of Arkansas
Opinion delivered January 12, 1993

DeLay Law Firm, by: *R. Gunner DeLay*, for appellant.

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

PER CURIAM. On May 1, 1992, a hearing was held on the motion of the appellant, Westark Christian Action Council (Westark), that a special prosecutor be appointed to investigate a charge that Dr. Joycelyn Elders, a state employee, had been guilty of improper political practices in violation of Ark. Code Ann. § 7-1-103(2)(B) (Supp. 1991). The motion was denied on

May 26, 1992. A notice of appeal was filed, and the record was filed with this Court September 11, 1992.

On January 4, 1993, Westark filed its motion asking for expedited hearing of its appeal because, if Dr. Elders is to be charged, the charge must be filed before January 18, 1993, or the statute of limitations will have run. The motion brought the case for the first time to the attention of this Court.

In view of the fact that this Court could not possibly set a briefing schedule, do the necessary research, conduct the necessary conferences, and reach a decision between now and January 18, 1993, the motion is denied.

J.D. FISHER *v.* Gerald JONES, Jones Olds-GMC-Buick, Inc., Mercedes-Benz of North America, Inc. and Mercedes-Benz Credit Corporation

92-763 844 S.W.2d 954

Supreme Court of Arkansas
Opinion delivered January 19, 1993
[Rehearing denied February 22, 1993.*]

*Newbern, J., not participating.

[redacted]

Raymond C. Smith, P.A., for appellant.

Davis, Cox & Wright, by: *Wm. Jackson Butt II* and *Tim E. Howell*, for appellee Mercedes-Benz Credit Corp.

Ball & Mourton, by: *E.J. Ball* and *Andy E. Adams*, for appellee Gerald Jones and Jones Olds-GMC-Buick, Inc.

ROBERT H. DUDLEY, Justice. The plaintiff, J.D. Fisher, filed

a multi-count suit in chancery court against ten defendants. The chancellor transferred to circuit court the counts that sought remedies at law. Those law counts were against four of the defendants and are the counts involved in this appeal. The chancellor tried the equitable counts against the other six defendants and, after a trial on the merits, ruled in favor of those defendants. The plaintiff appealed, and we affirmed. *Fisher* v. *Jones*, 306 Ark. 577, 816 S.W.2d 865 (1991). Subsequently, the four defendants with counts remaining against them in circuit court filed motions for summary judgment. The circuit court granted the motions, and the plaintiff appeals. We affirm, mainly because the primary issue is precluded by the prior holding.

J.D. Fisher, the plaintiff-appellant, was one of three principal owners of Fisher Buick, Inc., which held the Mercedes Benz franchise in Fayetteville for several years before February 26, 1986. On that date, Fisher Buick entered into a contract to sell the dealership to Kelly Hill and others with the consideration to be paid in monthly installments. The contract restricted Hill from reselling the franchise or the other property without the prior approval of Fisher Buick, and further gave Fisher Buick the right of first refusal to repurchase the franchise and other assets. It also provided that Mercedes Benz of North America (MBNA) had to approve any sale of the dealership made before the purchase price was paid in full. A copy of the contract was provided to MBNA's agents in its Houston, Texas zone office. An agent for MBNA, at its Houston office, told plaintiff that he saw no reason why the franchise would not be re-awarded to plaintiff if Hill went out of business. However, the agents at the Houston zone office did not have authority to bind MBNA to a contractual agreement for the granting of a franchise, and plaintiff knew they had no such authority.

In May 1986, Hill was awarded the Mercedes Benz franchise in Fayetteville. At that same time, Fisher Buick dissolved its corporate charter.

Hill financed his inventory of Mercedes Benz automobiles through the Mercedes Benz Credit Corporation (MBCC). Hill, who apparently was undercapitalized, sold automobiles but failed to reimburse MBCC. By the end of October 1989, Hill had closed the dealership and vacated the premises. MBNA terminated the

franchise in November 1989.

In October 1989, defendant Gerald Jones saw that the Mercedes Benz dealership had gone out of business and called MBNA to see about obtaining the franchise. MBNA advised Jones that he needed to contact Hill. Jones did so and began negotiating with Hill in the latter part of October 1989. The negotiations resulted in the execution of a franchise sales agreement between Hill and Jones Olds-GMC-Buick, Inc., dated October 28, 1989. The agreement was supplemented on November 3, 1989, to address a settlement of Hill's debts to MBNA and MBCC. Hill neither informed plaintiff of the pending sale nor offered him first refusal.

Plaintiff learned of the pending sale and, on October 31, filed two suits in the Chancery Court of Washington County. The first was against Kelly Hill, Thelma Hill, Hill Investment Co., Hill Motor Cars, Inc., Hill Motor Cars II, Inc., and McIlroy Bank and Trust Company, the escrow agent-bank into which Hill was supposed to make the monthly installment payments. The second complaint was against Gerald Jones, Jones Olds-GMC-Buick, MBNA, and MBCC. The two chancery court suits were consolidated, but the law counts, which were contained in the second complaint and form the basis of this appeal, were transferred to circuit court. The chancellor heard the equitable counts and ruled in favor of the defendants remaining in chancery court. The plaintiff appealed, and we affirmed. *Fisher* v. *Jones*, 306 Ark. 577, 816 S.W.2d 865 (1991). Following the affirmance of the chancery case, the circuit court counts remained pending against four of the defendants. Those four defendants filed motions for summary judgments. The circuit court granted summary judgment in favor of each of the defendants, and the plaintiff appeals. We affirm.

The first assignment of error involves the summary judgment in favor of Gerald Jones and Jones Olds-GMC-Buick. The plaintiff alleged that Jones and Jones Olds-GMC-Buick tortiously interfered with his contractual relations or business expectancy. The circuit court ruled that there were no genuine issues of material fact involving two of the elements of this tort. That ruling was eminently correct.

In *Walt Bennett Ford* v. *Pulaski County Special*

School District, 274 Ark. 208, 214, 624 S.W.2d 426, 429 (1981), we set out the elements of the tort as follows:

> The basic elements going into the prima facie establishment of the tort are (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Plaintiff could not establish that a material issue of fact existed about element one above; that is, plaintiff could not show that there was a material dispute about the existence of a valid contract. He was prevented from doing so by the doctrine of collateral estoppel, or issue preclusion, because, in the first appeal, we affirmed the chancellors' ruling that plaintiff did not have a contract with MBNA to re-award him the franchise. *Fisher* v. *Jones*, 306 Ark. at 582, 816 S.W.2d at 868.

Collateral estoppel, or issue preclusion, requires four elements before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *East Texas Motor Freight Lines, Inc.* v. *Freeman*, 289 Ark. 539, 543, 713 S.W.2d 456, 459 (1986). All four elements are met in this case, and, since we previously held that there was no contract with MBNA, the issue is precluded from being relitigated.

While the claim of tortious interference with a contractual relationship is claim precluded by collateral estoppel, the claim of tortious interference with a business expectancy might not be so precluded. However, we need not decide whether the business expectancy was certain enough to give rise to such a cause of action in this case, because, even if it were, the plaintiff could not show any dispute of material fact involving element two, or knowledge of the expectancy of business on the part of the interferer. Jones attached an affidavit to his motion for summary judgment in which he stated that he had no knowledge of the 1986

agreement between Hill and plaintiff before he entered the contract with Hill on October 28, 1991. Plaintiff did not counter Jones affidavit in any manner. Other evidence corroborates Jones's statement. Plaintiff only showed that on October 31, 1989, plaintiff's attorney sent a letter to Jones. This was after the date of the contract, and the contents of the attorney's letter were not disclosed. Jones testified that he received the letter from plaintiff's counsel before he executed an addendum on November 3, 1989, but he testified that the contract between Hill and himself was complete and that the addendum was related to negotiations conducted with MBCC and MBNA on October 30, 1989, which, again, was before he was aware of a possible business expectancy on the part of plaintiff. In sum, plaintiff did not show any dispute of material fact involving defendant Jones's lack of knowledge that he was interfering with plaintiff's reasonable expectation of a business relationship. Accordingly, the trial court correctly granted summary judgment in favor of defendant Jones.

The plaintiff argues that collateral estoppel should not be applied, and the issue of tortious interference should not be precluded because Jones was not a party to the first appeal. At one time, mutuality was a requirement of res judicata or claim preclusion, and also of collateral estoppel or issue preclusion. *See, e.g., Restatement of Judgments* § 93 (1942); *see also Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111 (1911). While still a requirement of res judicata, the requirement of mutuality has been abandoned by most jurisdictions for collateral estoppel. 18 Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure* § 4464 (1981); Stuart Johnson, Note, *North Carolina Abandons the Mutuality Requirement for Defensive Collateral Estoppel*, 66 N.C. L. Rev. 801 (1988). The case at bar deals with the defensive use of collateral estoppel. The U.S. Supreme Court first approved the defensive use of collateral estoppel in *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). While the offensive use of collateral estoppel has also been approved, it is more controversial, and not at issue in this case. (The Supreme Court approved the offensive use of collateral estoppel in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979)). Other state supreme courts have abandoned the mutuality requirement for the defensive use of

collateral estoppel. *See, e.g., Silva* v. *State*, 745 P.2d 380 (N.M. 1987); *Thomas M. McInnis & Assocs., Inc.* v. *Hall*, 349 S.E.2d 552 (N.C. 1986); *Black Hills Jewelry Mfg. Co.* v. *Felco Jewel Indus.*, 336 N.W.2d 153 (S.D. 1983). In the present case, plaintiff chose to file his case against all of the defendants in chancery court and requested that the legal counts against four of the parties be transferred to circuit court, which they were. The chancery case was fully litigated and involved some of the same issues in the circuit court counts. We have no hesitancy in holding that mutuality of parties or privity in the chancery case and its appeal is not required for the defensive use of collateral estoppel in the circuit court case.

The next assignment of error involves the summary judgment in favor of MBNA. Plaintiff pleaded MBNA was liable for damages for breach of contract. A part of our holding in the first appeal was concerned with this claim: "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." *Fisher* v. *Jones*, 306 Ark. at 582, 816 S.W.2d at 868. The trial court held that plaintiff's claim of MBNA's breach of contract was barred by the doctrine of res judicata.

In *Bailey* v. *Harris Brake Fire Protection District*, 287 Ark. 268, 269, 697 S.W.2d 916, 917 (1985), we set out the elements of res judicata as follows:

> (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies.

All of the elements are met with regard to plaintiff's breach of contract claim, and the chancellor was thus correct in concluding this claim was barred by res judicata.

Plaintiff also pleaded that MBNA was also liable for tortious interference with contractual relations. No mention of interference with business expectancy is made in this assignment. Initially, since MBNA is one of the parties to the alleged contract with plaintiff, it is difficult to understand how MBNA could be

the interferer in the contract. In the chancery suit, the chancellor ruled that the plaintiff failed to meet his burden of proving the existence of a contract requiring MBNA to re-award the franchise to him. The chancellor additionally found that MBNA agents in the Houston office lacked the authority to bind MBNA to such a contract and that plaintiff was aware of this lack of authority. In affirming the chancellor we held the evidence supported the chancellor's decision that no express or implied contract existed between plaintiff and MBNA. That issue was precluded from further litigation in the counts that remained in circuit court. Thus, plaintiff was precluded from establishing the first element of the tort of interference with contractual relations.

Plaintiff's final assignment of error is that the trial court erred in granting summary judgment in favor of MBCC because there are material facts in dispute involving his claim that it tortiously interfered with his right of first refusal in his contract with Hill. MBCC repossessed the car inventory from the dealership for resale in a commercially reasonable manner. The trial court ruled that even if MBCC had somehow interfered with plaintiff's right of first refusal with Hill, plaintiff could not prove any damages because MBNA was under no contractual obligation to re-award its franchise to plaintiff, and the trial court also ruled that because Hill owed MBCC about $600,000.00, MBCC had a right to lawfully protect its interest.

For an interference to be actionable, it must be improper. *Walt Bennett Ford* v. *Pulaski County Special Sch. Dist.*, 274 Ark. 208, 214-A, 624 S.W.2d 426, 429 (1981) (supplemental opinion on denial of rehearing). The *Restatement (Second) of Torts* sets out the factors in determining when interference is improper as follows:

> *Factors in Determining Whether Interference is Improper.*
>
> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct;

(b) the actor's motive;

(c) the interests of the other with which the actor's conduct interferes;

(d) the interests sought to be advanced by the actor;

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;

(f) the proximity or remoteness of the actor's conduct to the interference; and

(g) the relations between the parties.

Restatement (Second) of Torts § 767 (1979). The trial court also considered section 769 of the *Restatement*, which provides:

Actor Having Financial Interest in Business of Person Induced

One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he

(a) does not employ wrongful means and

(b) acts to protect his interest from being prejudiced by the relation.

As a second ground of the summary judgment in favor of MBCC, the trial court considered MBCC's financial interest in the business and correctly concluded that there simply was no proof of an improper interference by MBCC.

Affirmed.

NEWBERN, J., not participating.

Robert L. HASHA, Jim McDonald, Marlene Ray, Andre Miller, J.D. Gosnell, and Bradley L. Lewis, Individually and on Behalf of All Other Persons Similarly Situated *v.* CITY OF FAYETTEVILLE, Arkansas and Arvest Trust Company, National Association

92-578 845 S.W.2d 500

Supreme Court of Arkansas
Opinion delivered January 19, 1993
[Supplemental Opinion on Denial of Rehearing March 9, 1993*]

*Hays and Glaze, JJ., dissent.

Lisle Law Firm, for appellant.

Friday, Eldredge & Clark, by: *Larry W. Burks*, and *Jeffrey H. Moore*, for appellee Arvest Trust Co., N.A.

Jerry E. Rose, City Att'y, for appellee City of Fayetteville.

ROBERT H. DUDLEY, Justice. This is a illegal exaction suit. The taxpayers allege that a primary purpose of the tax has failed and that an injunction should be issued against its continued collection. The chancellor denied relief. We hold that the tax constitutes an illegal exaction and reverse and remand with instructions.

The constitutional provisions and statutes that are applicable to this case are as follows. Article 12, section 3 of the Constitution of Arkansas, in the material part, provides: "The General Assembly shall provide, by general laws, for the organization of cities . . . and restrict their power of taxation . . . so as to prevent the abuse of such power." Article 12, section 4 begins: "No municipal corporation shall be authorized to pass any law contrary to the general laws of the state. . . ." A basic premise, to which we have long adhered, is that a municipal corporation has no inherent power to levy taxes, but can levy only such taxes as are authorized by law. *Vance* v. *City of Little Rock*, 30 Ark. 435 (1875). Article 16, section 11, in pertinent part, provides: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same. . . ."

Act 25 of 1981, extraordinary session, authorized cities to adopt a local sales and use tax upon approval by the voters. The act provides that the tax can be abolished either by vote of the city council or by vote of the qualified voters of the city acting in accordance with the initiative procedures of Amendment 7. 1981 Ark. Acts 25 § 2(f). The emergency clause of the act provided that the tax was for city "services." This tax was

referred to as the cities' "operating penny" tax since it could be "used by the city for any purpose for which the city's general funds may be used." *Id.* § 7. Section 2(d) of the act provided that the voters of the city must approve or reject the tax and that:

> The ballot title to be used at such election shall be substantially in the following form:
>
> "FOR adoption of one percent (1%) local sales and use tax within (name of city)."
>
> "AGAINST adoption of a one percent (1%) local sales and use tax within (name of city)."

Act 25 of 1981, summarized above, was amended by Act 726 of 1983 to authorize cities, after a public vote, to pledge tax collections from the "operating penny" to finance capital improvements. *See* Ark. Code Ann. §§ 26-75-201 — 26-75-223 (1987 & Supp. 1991). Thus, the "operating penny" is no longer limited to providing services, but can now be converted to pay for capital improvements, and, when the tax is imposed for capital improvements, the right to an immediate repeal by initiative is lost since the tax cannot be abolished until the bonds or leases are paid in full. Ark. Code Ann. § 26-75-210 (1987).

Amendment 62 to the Constitution of Arkansas was approved at the November 1984 general election. It is entitled "Local Capital Improvement Bonds" and repealed Amendments 13, 17, 25, and 49. Section 1(a) of Amendment 62 authorizes municipalities to issue bonds, upon approval by the voters, for capital improvements of a public nature and authorizes an ad valorem tax to repay the capital improvement bonds. The same section, 1(a), permits other taxes to be used to repay capital improvement bonds if authorized by the General Assembly.

As legislation implementing Amendment 62, the General Assembly enacted Act 871 of 1985. This act does not repeal Act 25 of 1981, the "operating penny" statute; rather, it recognizes the continuation of Act 25 of 1981 in sections 9(g), 9(h), 9(k), and 10(d). Codified at Ark. Code Ann. §§ 14-164-332(b), 333(2)(a), 336(c), 337(c)(1) (1987 & Supp. 1991). Section 9 of Act 871 of 1985, Ark. Code Ann. § 14-164-327 (1987), authorizes a municipality to adopt a new one cent "bond

penny" local sales and use tax to retire capital improvement bonds. Section 10 of Act 871, entitled "Pledge of Existing Sales and Use Tax," provides that a city, after approval by the voters, can pledge all or a portion of a pre-existing sales tax to retire capital improvement bonds. Ark. Code Ann. § 14-164-337(c)(1) (Supp. 1991). In 1988, by Act 25, the General Assembly amended Ark. Code Ann. § 14-164-338 to provide that a city, as an alternative to issuing capital improvement bonds, can construct pay-as-you-go capital improvements by levying a "bond penny" for up to twelve months when that penny, over a twelve-month period, will be sufficient to construct the improvement.

In this case, the City of Fayetteville sought to assist the Fayetteville School District in a school construction project. In November of 1987, the City asked the Attorney General if it could contribute any part of a city "operating penny" sales and use tax to the Fayetteville School District. The Attorney General responded that Arkansas statutes "prohibit the City from contributing local sales tax revenue to the schools." The Attorney General said the City might construct school facilities and rent them back to the school district. In April of 1988, the Attorney General again informed the City that it could not contribute a part of a local sales tax revenue to the local school district.

In October 1988, in spite of the Attorney General's opinion, the City of Fayetteville, by ordinance 3381, levied a one-cent sales and use tax, subject to approval by the City's voters at the November 1988, general election. The ordinance, in the material parts, provides:

> *Section 2.* A special election be, and the same is hereby called to be held in the City on the 8th day of November, 1988, at which election there will be submitted to the electors of the City the questions of (a) levying a local sales and use tax at the rate of one percent (1%), and (b) issuing capital improvement revenue bonds secured by a pledge of a portion of the City's 1% local sales and use tax, if approved, to finance the acquisition, construction, reconstruction and equipping of educational facilities for the Fayetteville School District.
>
> *Section 3.* The questions shall be placed on the

ballot for the election in substantially the following form:

FOR	adoption of a 1% local sales and use tax within the City to be levied and collected to a maximum of $25.00 on each single transaction for a period of 20 years.
AGAINST	adoption of a 1% local sales and use tax within the City to be levied and collected to a maximum of $25.00 on each single transaction for a period of 20 years.

Collection of the 1% local sales and use tax will not commence until collection of the City's existing 1% local sales and use tax shall have ceased. It is proposed that proceeds from the tax be used to finance a capital improvement program and economic development program (capital facilities) for the City.

FOR	the issuance of revenue bonds secured by a pledge of a portion of the City's 1% local sales and use tax, if approved, to finance the acquisition, construction, reconstruction and equipping of $10,000,000.00 in educational facilities for the Fayetteville School District.
AGAINST	the issuance of revenue bonds secured by a pledge of a portion of the City's 1% local sales and use tax, if approved, to finance the acquisition, construction, reconstruction and equipping of $10,000,000.00 in educational facilities for the Fayetteville School District.

The proposals were submitted to the voters on ballot forms prepared in compliance with the ordinance. The proposals appeared next to each other on the ballots with a line between them. The $10,000,000.00 educational facilities construction program passed by 8,556 to 4,084 votes, or better than two to one, but the tax was approved by a vote of only 7,643 to 5,260.

After the election, the City was again advised, this time by three different bond counsel, that the City had no authority to construct or finance local school district projects with the sales tax funds. A fourth bond counsel advised that the City might

implement the tax, construct the school facilities, and lease them to the school district. There was some discussion among city officials of a "friendly suit" to test the issue, but that was never pursued, and the City's primary bond counsel wrote:

> [W]e do not believe that it would be advisable for the City to seek a declaratory judgment as to the validity of bonds of the City secured by sales and use tax revenues for educational facilities for the Fayetteville School District. The law on a number of the points mentioned above is substantially against a favorable outcome, so that, although it is always possible that the validity of such bonds would be upheld, it seems probable that it would not.

Two years later the city desired to issue bonds to construct eleven other capital improvement projects. Section 14-164-337(b)(2)(A) of the Arkansas Code Annotated of 1987 provides that when the subsequent issuance of bonds is submitted to the voters, the ballot "[s]hall not resubmit the levy of the tax." In accordance with that provision, the City, in 1990, by ordinance 3480, submitted to the voters only the question of the issuance of capital improvement bonds for eleven other separate projects. The ballot title also provided:

> In addition, such proceeds may be pledged to secure the retirement of not to exceed $10,000,000 of educational facilities bonds of the City approved by the electors of the City at an election held on November 8, 1988.

On May 29, 1990, the city voters voted in favor of the issuance of capital improvement bonds for the eleven separate projects and the schools. On July 17, 1990, after voter approval of the eleven capital projects and the schools, the City Board of Directors passed resolution 116-90, which acknowledged that its legal counsel had informed the City that it could not issue sales tax bonds to construct or finance school district projects, and that the only way it could assist the school district was to authorize "the City Manager to seek to escrow $1,000,000 a year plus interest from the General Fund, non-regular fee and tax revenues over a ten-year period to assist the school board in school construction projects." In sum, in May 1990, the City publicly disclosed that no money from the sales tax would be applied to the

Fayetteville School District and that the City Manager was authorized to "seek" to take money from the City's non-regular general fund revenues for the schools.

On October 15, 1990, the City issued $33,019,000 in sales and use tax capital improvement bonds for the eleven capital improvement projects. Each month, after the sales and use tax funds are collected by the State, the funds are remitted to the bond trustee, intervenor Arvest Trust Company, N.A. The trustee then applies the amounts necessary for the retirement of the outstanding capital improvement bonds, retains a small amount as authorized in the trust indenture, and remits the rest to the city. The City then applies the money it receives to pay-as-you-go capital improvement projects.

On June 20, 1991, within a year after the City's resolution formally acknowledged that the proposal to issue sales tax bonds to construct or finance buildings for the local school district was illegal, the taxpayers filed this action. The Fayetteville School District and Arvest Trust Company, N.A. were allowed to intervene. As an affirmative defense, Arvest pleaded that the trial court was without jurisdiction to hear the case because this is an election contest and, as such, is barred by the statute of limitations, and also that the suit is barred by the doctrine of estoppel.

The chancellor rejected intervenor Arvest's affirmative defense of lack of jurisdiction because of limitations and held that it had jurisdiction. The chancellor reached the merits of the case and ruled that the voters, at the 1988 general election, approved the adoption of the sales and use tax for a period of twenty years, and that approval was given separately from the proposed issuance of $10,000,000 worth of bonds to construct facilities for the Fayetteville School District. The chancellor also ruled that the "operating penny" tax was validly enacted pursuant to authority found in Act 25 of 1981, and could be used "for any purpose for which the City's general fund may be used," the $33,019,000 in bonds issued in 1990 for the eleven separate capital improvement projects were validly issued under authority of Act 871 of 1985, Ark. Code Ann. § 14-164-337(a) (1987), and the current pay-as-you-go projects were validly financed pursuant to Act 25 of 1988, Ark. Code Ann. § 16-164-338 (Supp. 1991). The taxpayers filed a notice of appeal.

Arvest Trust Company, N.A., one of the appellees, argues that we must dismiss the appeal because the suit was an election contest, but it was not filed within 20 days of the election certification. *See* Ark. Code Ann. § 7-5-801(d) (1987). As stated, the trial court ruled against Arvest on this argument, and Arvest did not file a notice of cross-appeal. A notice of cross-appeal is necessary when an appellee seeks something more than it received in the lower court. *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979). Ordinarily, this failure to file a notice of cross-appeal would end the matter, but since Arvest does not seek any relief it did not receive in the lower court, we address the matter and hold that it is without merit.

An election contest may be generally described as an action to contest the certification of the vote on an issue. *See McClendon* v. *McKeown*, 230 Ark. 521, 323 S.W.2d 542 (1989); Ark. Code Ann. § 7-5-801 (1987). Here, the taxpayers do not contest the vote or the certification of the vote. Rather, as a part of their case, they plead that the tax was passed and certified, and that subsequently the purpose for the tax failed. Such a suit fits within the definition of a suit to prevent an illegal exaction. *Hartwick* v. *Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989). Article 16, section 13 of the Constitution of Arkansas confers upon any citizen the right to institute a suit to protect against an illegal exaction. Accordingly, we decline to dismiss this as the appeal of an election contest, and we reach the merits of the taxpayer's appeal.

Arvest additionally contends the suit is barred by the doctrine of estoppel. Clearly, in the proper case a taxpayer may be estopped from questioning the validity of a tax. In *Lawrence County* v. *Townsend*, 202 Ark. 887, 154 S.W.2d 4 (1941), we held that the taxpayer was estopped to contest the validity of a bond issue when proper notice of the levy of the tax was given, the taxes were levied and collected from the taxpayer for eleven years, those taxes were pledged and paid on bonds for the same eleven year period, and there was no failure of purpose of the bond issue. That is not the case before us. Here, the tax itself is at issue, and the suit was filed within one year after it was publicly known that the principal purpose of the tax had failed. Thus, the doctrine of estoppel is not applicable.

In their appeal on the merits, the taxpayers assign five rulings as error. Those five assignments involve a number of subpoints beginning with the argument that Act 25 of 1981 is either repealed or unconstitutional and running through the chancellor's construction of Act 25 of 1988, Ark. Code Ann. § 14-164-338 (Supp. 1991). Three of the assignments of error are closely related and involve the trial court's ruling that the tax is valid even through the voters approved the tax at the same time they approved issuing $10,000,000 in bonds for the Fayetteville School District. We treat those three closely related assignments together. It is not necessary for us to reach the other issues.

The vote to adopt the sales and use tax for twenty years, with its concomitant waiver of the right of initiative during that period, was inextricably linked to the vote to issue $10,000,000 in bonds to construct facilities for the Fayetteville School District. The chancellor found that the voters voted separately on these two issues since there was a line between them on the ballot form, but the fact that there was a line between them is only on the periphery of the issue. From the beginning, the city clearly tied the two issues together. Section 2 of the ordinance calling the election provides:

> A special election be, and the same is hereby called to be held in the City on the 8th day of November 1988, at which election there will be submitted to the electors of the City the questions of (a) levying a local sales and use tax at the rate of the one percent (1%), and (b) issuing capital improvement revenue bonds secured by a pledge of a portion of the City's 1% local sales and use tax, if approved, to finance the acquisition, construction, reconstruction and equipping of educational facilities for the Fayetteville School District.

The two proposals were then submitted next to each other on the same ballot form with a line drawn between them. A voter who wished to vote for the issuance of the $10,000,000 in bonds for the school district knew that he or she was required to also vote in favor of the tax because, without the tax, the bonds could not be issued. It is abundantly clear that the proposal for the issuance of the bonds for the construction of the school facilities was popular with the voters. In fact, that proposal received a two to one

favorable vote, 8,556 to 4,084. Those voters who wanted the school construction had only one choice—to vote for both the issuance of the school bonds and the twenty-year sales and use tax. There was a natural relationship between them. The two proposals were part of the same plan. They were united. If it were not for the proposed bond issue, the tax would have been only an "operating penny" tax subject to public initiative throughout its levy, and not a "bond penny" levied for twenty years.

Arvest contends that the chancellor's ruling that the two proposals were completely separate should be affirmed because the last sentence of the sales tax proposal on the 1988 ballot provided: "It is proposed that the proceeds from the tax be used to finance a capital improvement program and economic development program (capital facilities) for the City." The argument is without merit because the proposed $10,000,000 school bond issue was to be a part of the capital improvement program, and, if anything, this sentence would lead a voter to think the two proposals were linked. It is obvious that the City also thought the school bond issue was a part of its "capital improvement program" because its ordinance placing the "issuance of capital improvement bonds" on the ballot in 1990 stated:

> The retirement of the bonds shall be secured by a pledge of all of the proceeds of such tax or such portion of such proceeds as shall be determined by the City to be adequate to obtain satisfactory ratings or insurance on the bonds. In addition, such proceeds may be pledged to secure the retirement of not to exceed $10,000,000 of educational facilities bonds of the City approved by the electors of the City at an election held on November 8, 1988.

The vote on the tax and the vote on the school district bonds were inextricably linked, and the school district bonds were, at the least, a primary purpose of the tax. Three years after the favorable vote on the two proposals, the City admitted that the proceeds from the tax could not be used to issue the $10,000,000 in school bonds. An illegal exaction occurs when the purpose of a tax cannot be accomplished and the government retains the tax funds. *Hartwick* v. *Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989). We hold that an illegal exaction occurred when a primary purpose of the tax could not be accomplished and

the collection of the tax was continued.

Because we hold the tax constitutes an illegal exaction, we reverse the ruling of the trial court and remand for the chancellor to enjoin further collection of the tax. In addition, the chancellor is instructed to conduct a hearing to award an attorney's fee, *see* Ark. Code Ann. § 26-35-902 (1987), and to determine whether the City or the trustee now has any funds that rightfully belong to the taxpayers. If it develops that there are such funds, the chancellor should determine their disposition. The general rule is that funds which have been acquired through an illegal exaction are to be returned pro rata to the various taxpayers who initially paid them, but this case involves funds collected through a sales tax, and it is probable that the proof will show that it is impossible to determine, with any degree of economic certainty, who paid the taxes. Thus, it is probable that the funds, if any, cannot be refunded to the initial payers, and the chancellor must hold a hearing to determine how the funds are to be disposed. *See City of Jacksonville* v. *Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990).

Reversed and remanded with instructions.

HAYS, GLAZE, and CORBIN, JJ., dissent.

TOM GLAZE, Justice, dissenting. The lengthy and complex majority opinion boils down to the following simple issue: Did the citizens and voters of Fayetteville understand they were levying and pledging one penny of the city's existing local sales and use tax for a capital improvement program? Four members of this court answer, "No," and effectively set aside two Fayetteville elections where the voters of that city authorized a penny tax for such purposes. The trial judge and three members of this court say, "Yes, the Fayetteville voters did approve a tax for a capital improvements program." You, as an interested reader, can decide for yourself merely by reading the two ballots that were presented to the Fayetteville electors at elections held on November 8, 1988, and May 29, 1990.

The first ballot giving Fayetteville voters an opportunity to vote for or against such a one penny sales and use tax for capital improvements was printed on the Washington County General Election Ballot on November 8, 1988, and in pertinent part reads as follows:

DEFENDANT'S EXHIBIT 7

OFFICIAL BALLOT

GENERAL ELECTION

WASHINGTON COUNTY, ARKANSAS

NOVEMBER 8, 1988

Placing an "X" in the square opposite the person for whom you wish to vote

President and Vice President of the United States (Vote for One) [Text omitted.]	Proposed Constitutional Amendment No. 4 [Text omitted.]	Fayetteville Director (Vote for One) [Text omitted.]
	Referred Question [Text omitted.]	An Ordinance City of Fayetteville An ordinance providing that the City of Fayetteville will not use or promote the use of herbicides in public places in the city.
	Proposed Initiated Act 1 [Text omitted.]	For adoption of a 1% local sales and use tax within the city to be levied and collected to a maximum of $25.00 on each single transaction for a period of 20 years. ☐ Against adoption of a 1% local sales and use

Vote on Amendments and Questions by Placing an "X" in the Square Opposite the Amendments and Question Either For or Against.

[Text omitted.]

tax within the city to be levied and collected to a maximum of $25.00 on each single transaction for a period of 20 years. Collection of the 1% local sales and use tax will not commence until collection of the City's existing 1% local sales and use tax shall have ceased. It is proposed that proceeds from the tax be used to finance a capital improvement program and economic development program (capital facilities) for the city. ☐

For the issuance of revenue bonds secured by a pledge of a portion of the city's 1% local sales and use tax, if approved, to finance the acquisition, construction, reconstruction and equipping of $10,000,000 in educational facilities for the Fayetteville School District. ☐

Against the issuance of revenue bonds secured by a pledge of a portion of the city's 1% local sales and use tax, if approved, to finance the acquisition, construction, reconstruction and equipping of $10,000,000 in education facilities for the Fayetteville School District. ☐

As can be seen, all questions on the 1988 ballot were separated from each other by printed lines. The same is true regarding the sales and use tax and capital improvement question and the question pertaining to the school district bonds. The Fayetteville voter could separately vote for or against either of the two questions — the sales tax and capital projects question or the school bonds question. Instead, they voted for both, 60% in favor of the tax and city's capital improvements program and 68% in favor of the Fayetteville School District's educational facilities program.

Because the issuance of the bonds for school facilities was a primary purpose, the majority court suggests that the inclusion of the school bonds question on the 1988 ballot misled the Fayetteville voters into passing the city's sales tax and capital improvements program. Such a suggestion is clearly not supported by the record. No such finding was made by the trial court, nor was evidence submitted to support that finding.

The city improvement project was made a part of the sales and use tax question, and that being so, the city improvement program was clearly the primary purpose of any sales taxes approved by the Fayetteville voters. Nonetheless, to avoid any argument that the voters could have been misled as to the purpose of any approved tax, the city placed its capital improvements program before the voters once again and this time in unmistakable detail. The following ballot was before the Fayetteville voters at a May 29, 1990 election:

OFFICIAL BALLOT CAPITAL IMPROVEMENT BONDS

A CITY OF FAYETTEVILLE, B ARKANSAS C MAY 29, 1990

INSTRUCTIONS TO VOTER

1. To vote you must blacken the Oval ( ) completely next to "FOR" or "AGAINST" in each question.
2. Use only the pencil provided.
3. After voting, deposit ballot in ballot box.

There is hereby submitted to the qualified electors of the City of Fayetteville, Arkansas, pursuant to Ordinance No. 3480 of the City. The issuance of capital improvement bonds under Amendment No. 62 to the Arkansas Constitution, as implemented by Act 871 of 1985, as amended, in the principal amount set forth in each question below, for the purpose of financing, with any other available funds, the costs of acquiring, constructing, reconstructing, improving, renovating, expanding and equipping capital improvements for the City as described in the respective question below and related costs of issuance, such improvements including (i) streets and bridges, (ii) water transmission and distribution facilities, (iii) drainage improvements, (iv) solid waste collection, disposal, compacting and recycling facilities, (v) public parks and playgrounds, (vi) police equipment, apparatus and facilities, (vii) firefighting vehicles, equipment, apparatus and facilities, (viii) emergency medical service vehicles, equipment and facilities, (ix) the City Youth Center swimming pool and related facilities, (x) parking facilities for the Dickson Street area and (xi) maintenance and storage buildings and facilities. The City has levied a one percent (1%) local sales and use tax within the City pursuant to Ordinance No. 3361, adopted on October 4, 1985, to be levied and collected to a maximum of $25.00 on each single transaction. The retirement of the bonds shall be secured by a pledge of all of the proceeds of such tax or such portion of such proceeds as shall be determined by the City to be adequate to obtain satisfactory ratings or insurance on the bonds. In addition, such proceeds may be pledged to secure the retirement of not to exceed $10,000,000 of educational facilities bonds of the City approved by the electors of the City at an election held on November 8, 1988. In the event that the electors shall approve only a portion of the bonds proposed to be issued, there shall only be issued bonds for the purposes approved by the electors. The bonds that are approved may be combined into one or more issues of bonds, which may be issued at one time or in series from time to time.

QUESTION ONE

A bond issue in principal amount not to exceed $12,325,000 for the purpose of acquiring, constructing, reconstructing and improving City streets and bridges.

FOR

AGAINST

QUESTION TWO

A bond issue in principal amount not to exceed $11,615,000 for the purpose of acquiring, constructing and equipping water transmission and distribution facilities.

FOR

AGAINST

QUESTION THREE

A bond issue in principal amount not to exceed $1,773,000 for the purpose of acquiring, constructing and reconstructing drainage improvements.

FOR

AGAINST

QUESTION FOUR

A bond issue in principal amount not to exceed $1,179,000 for the purpose of acquiring, constructing and equipping solid waste collection, disposal, compacting and recycling facilities.

FOR

AGAINST

QUESTION FIVE

A bond issue in principal amount not to exceed $561,000 for the purpose of acquiring, constructing and equipping public parks and playgrounds.

FOR

AGAINST

QUESTION SIX

A bond issue in principal amount not to exceed $213,000 for the purpose of acquiring, constructing and equipping police equipment, apparatus and facilities.

FOR

AGAINST

QUESTION SEVEN

A bond issue in principal amount not to exceed $1,697,000 for the purpose of acquiring, constructing and equipping firefighting vehicles, equipment, apparatus and facilities.

FOR

AGAINST

QUESTION EIGHT

A bond issue in principal amount not to exceed $69,000 for the purpose of acquiring, constructing and equipping emergency medical service vehicles, equipment and facilities.

FOR

AGAINST

QUESTION NINE

A bond issue in principal amount not to exceed $998,000 for the purpose of expanding and renovating the City Youth Center swimming pool and related facilities.

FOR

AGAINST

QUESTION TEN

A bond issue in principal amount not to exceed $2,013,000 for the purpose of acquiring, constructing and equipping parking facilities for the Dickson Street area.

FOR

AGAINST

QUESTION ELEVEN

A bond issue in principal amount not to exceed $575,000 for the purpose of acquiring, constructing and equipping City maintenance and storage facilities and buildings.

FOR

AGAINST

In order to retire the bonds, the City shall pledge all of the proceeds its one percent (1%) local sales and use tax previously approved by the electors of the City or such portion of such proceeds as shall be determined by the City to be adequate to obtain satisfactory ratings or insurance on the bonds.

DEFENDANT'S EXHIBIT

A B BF9 C 017

As stated above, the city listed the foregoing menu of capital improvements, totaling more than $33 million, to assure the city voters that their one penny sales tax would be utilized for such city improvements, if approved. Obviously, if the voters thought they had been in any misled by their earlier 1988 ballot, they could have voted against any or all of the capital improvements offered them on the May 29, 1990 ballot.[1] They did not.

While the parties in this appeal argue a number of issues, the majority opinion reverses the trial court only because the majority court suggests the vote on the tax and the vote on the school district bonds were inextricably linked, and the issuance of school district bonds was a primary purpose of the tax. The court then concludes the school bonds are illegal, and because they are invalid, the sales tax and capital project purposes must also fail. The majority court further suggests the city admits the tax proceeds cannot be used to issue the school bonds approved at the 1988 election.

Again, the sales tax involved here had a two-fold purpose in 1988 — city improvements and school construction — and clearly the capital improvement purpose was primary and approved by the voters, not once, but twice. If any doubt clouded the 1988 vote, Fayetteville voters removed those doubts when they unmistakably approved those city capital projects in 1990.

Finally, I do not read the city's argument on appeal to admit the sales and use tax proceeds cannot be utilized to issue the $10 million in school bonds. However, even if such school bonds would be invalid and could not be issued (which I am inclined to believe), that conclusion under the facts of this case does not defeat the sales tax and city capital improvement bonds approved by the Fayetteville voters.

We do Fayetteville voters a real disservice by assuming, without proof, that they did not know what they were doing when casting their ballots at the 1988 and 1990 elections. This case does

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[1] If both the city improvements program and school district construction project failed to obtain voter approval or failed for other legal cause, the tax approved by the voters could not be collected and use for any other purpose, and the taxpayers are then entitled to a refund. *Hartwick* v. *Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989).

not involve a city government that, by intention or deed, exercised bad faith or misled the electorate into approving a sales tax and issuance of bonds without first having an intelligible vote on such questions. The voters are entitled to the city projects they approved even though the school district projects may prove invalid. Accordingly, I would affirm the trial court's decision.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
MARCH 9, 1993

847 S.W.2d 41

John Lile, for appellant.

Friday, Eldredge & Clark, by: *Larry W. Burks* and *Jeffrey H. Moore*, for appellee Arvest trust Company.

Jerry E. Rose, Fayetteville City Attorney, for appellee.

ROBERT H. DUDLEY, Justice. On petition for rehearing, the City of Fayetteville and Arvest Trust Company, N.A., contend in separate petitions that the majority opinion contains both factual and legal errors. The facts stated in the majority opinion are correct, and we need not discuss the facts.

The petitions also allege that the majority opinion contains a legal error because it misapplies the case of *Hartwick* v. *Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989). The facts in *Hartwick* were that, in 1975, the citizens of North Little Rock approved an ad valorem tax sufficient to pay the principal and interest on $2,605,000 in bonds issued for the construction of public improvements. The election was called, and the bonds were issued pursuant to Amendment 13 to the Constitution of Arkansas, which has now been repealed by Amendment 62. The city ordinance calling for the election and the ballot title both

specifically proposed the construction of a drainage canal as a part of the public improvements.

The City commenced construction of all the improvements except the canal, which was to be constructed with the assistance of the federal government. At that time, 1976, the City placed $700,000 of the bond proceeds in a special account for the City's share of the cost of the canal. The interest earned was to remain in the account.

The other improvements were completed, but several years later, the United States Army Corps of Engineers determined that the canal was not feasible and the United States would not share in the cost of construction. In 1987, twelve years after the collection of the tax had commenced, the City sought to use the $700,000 principal, plus the $1,100,000 in accrued interest, for the construction of curbs and gutters and published an ordinance to that effect. Some taxpayers filed suit that same year, 1987, and sought a refund of the $1,800,000 in principal and interest.

The taxpayers did not seek to stop the collection of the tax for perhaps either of two reasons. First, after so many years, the bond issue may have been paid in full and the tax collections may have ceased. The opinion does not expressly state that such was the case, but the opinion clearly implies that it was the case because it provides: "The *Bell* opinion was almost directly on point with respect to the present case when it stated: '[W]e have held that the taxpayers, in instances of *bond surpluses accumulating as a result of the retirement of the original bond issue*, are entitled to a refund.' " *Id.* at 509, 780 S.W.2d at 534 (emphasis supplied). Second, even if the bond issue had not been paid in full at the time the taxpayers filed the suit for the refund, they may well have determined that they would be estopped from contesting the tax after so many years. *See Lawrence County* v. *Townsend*, 202 Ark. 887, 154 S.W.2d 4 (1941). After a trial on the merits, the chancellor ruled that an illegal exaction had occurred and ordered a refund. We affirmed and held that an illegal exaction occurs when the purpose of a tax cannot be accomplished and the government retains the tax funds. In the case at bar, we correctly cited *Hartwick* for the proposition that an illegal exaction occurs when a primary purpose for a tax cannot be accomplished.

In this case, the City of Fayetteville inextricably linked the vote on the tax with the bonds to be issued to finance buildings for the local school district. The school district bonds were a primary

purpose of the tax. The City decided not to issue bonds to construct or finance buildings for the local school district. The taxpayers filed this suit to enjoin the future collection of the tax within the same year that the City made it known that it would not issue bonds to construct or finance buildings for the local school district. The taxpayers filed this suit to enjoin the future collection of the tax. We held the injunction should issue.

The petitioners for rehearing contend the holding is inconsistent with *Hartwick* v. *Thorne* because, they contend, under that case we should have only enjoined the collection of that portion of the sales tax which would have been required to pay the estimated debt service on the bonds to have financed the school buildings. The argument is without merit for a number of reasons, but the primary one is that *Hartwick* v. *Thorne* simply does not contain a holding about when an injunction against a tax should or should not issue. The taxpayers in *Hartwick* v. *Thorne* did not ask for an injunction against further collection of the tax, the trial court did not rule on such an issue, and we made no holding on such an issue. The opinion in that case discussed a remedy in light of a "surplus accumulating as a result of the retirement of the original bond issue."

In the case at bar, the vote for or against the tax was inextricably linked to the bonds to finance buildings for the local school district. Those who voted in favor of the tax solely or primarily in order to finance or construct buildings for the local school district were misled. Soon after they discovered that they had been misled, they filed this suit to enjoin further collection of the tax. They are entitled to such relief. *See Arkansas-Missouri Power Co.* v. *City of Rector*, 214 Ark. 649, 217 S.W.2d 335 (1949). This is not a case involving a surplus accumulating as a result of the original bond issue.

Petition for rehearing denied.

HAYS and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. The majority tries to distinguish *Hartwick* by *surmising* that the bond issue there *may* have been paid in full and the tax collections *may* have ceased by the time the taxpayers brought suit to obtain a refund for the one purpose, a drainage canal, which had not been constructed because it became infeasible. Even if the majority court's guesswork in reading this assumption into the *Hartwick* opinion were true, it fails to answer the issue here. Nor is an answer to the issue here found in the majority's recital that *Hartwick* stands for

the proposition that an illegal exaction occurs when a primary purpose of a tax cannot be accomplished.

Here, the trial court made no finding that Fayetteville voters were misled and to the contrary, it spelled out in its order that the ballot contained twenty-two separate issues and the voters voted separately on each one. Yet, the majority *in this appeal makes the finding of fact* that the Fayetteville voters were misled. The court mentions *no* evidence to support its finding because there is no such evidence. Again, I suggest the Fayetteville voters read and understood the ballots which separately reflected each construction project issue and the exact amount each project would cost. If any project failed — as was the situation in *Hartwick* — the taxpayers would be effectually refunded that amount. If the monies were already collected, the funds would be remitted. If such funds had not yet been collected, then the court would enjoin collection of that portion of the sales tax required to pay the debt service on the failed project. In any event, like in *Hartwick*, this court's decision finding the $10 million construction of education facilities illegal should not impair the other improvement projects, especially where, as here, the voters separately voted and approved each issue. The court should limit its holding to enjoining the collection of that portion of taxes required to pay the debt service on the $10 million improvement project for the school district.

Although Justices Hays and Newbern took a more expansive view than did the majority in *Hartwick*, I think the concerns they expressed in their dissent are worth repeating here. Therein, they expressed their beliefs that North Little Rock should still be allowed to use the funds that the voters approved for the canal project for the other purposes stated in the ballot title. My colleagues Hays and Newbern wisely expressed their fear that the *Hartwick* decision might be misapplied in the future. They stated the following:

> [W]e find nothing at all wrong with using the $700,000 plus the accumulated interest for street improvements in the Rose City area which would presumably have benefitted from the canal. Such a holding would not mean that a city government could hoodwink voters by intentionally promising that which it had no intention of delivering. Again, that is not an issue in this case, and [we] fear the

> precedent we will set by returning the bond money to the taxpayers instead of allowing it to be used for a purpose stated in the ballot title will haunt us. While the disappointment of those who hoped for the construction of the canal is understandable, [we] conclude that the city's proposed use of the bond money for one of the purposes stated in the ballot title does not constitute an illegal exaction.

This court has in the present case misapplied the *Hartwick* holding in a manner I find worse than Justices Hays and Newbern predicted. We should correct our error now, not later, by granting the appellees' petitions for rehearing.

HAYS, J., joins this opinion.

Keith CARLE *v.* David BURNETT, Circuit Judge

92-322 845 S.W.2d 7

Supreme Court of Arkansas
Opinion delivered January 19, 1993

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Cathy Derden*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. This is an appeal from a judgment finding appellant Keith Carle to be in contempt of the Craighead Circuit Court. Carle, an attorney and sole practitioner in Jonesboro, was sentenced to ninety days in jail for a willful refusal to proceed to trial in the case of *Helen Cater* v. *Lee Cater*. Carle contends the trial judge erred in three respects: in refusing to recognize substantive error in the order being defied, in sentencing him under its inherent power after trying him under a statutory definition of contempt, and in imposing an excessive punishment. Finding merit only in the third point, we modify the punishment imposed and otherwise affirm the judgment appealed from.

Keith Carle represented Lee Cater in a divorce suit with Helen Cater. While that suit was pending Mrs. Cater was subjected to a beating for which she accused Lee Cater. Cater denied the accusation and claimed to have been elsewhere at the time. Mrs. Cater filed suit for damages and on her complaint

criminal charges for assault and battery were brought against Lee Cater.

The civil suit was called for trial in January of 1991 while the criminal case was pending. The suit was passed on motion of the defendant and reset for trial in April. Cater again moved for a continuance, which was denied, but the case was reset for October 21 due to a crowded docket.

On September 24 Cater again moved for a continuance on multiple grounds: his assets were frozen as a result of the divorce case, a key witness was unavailable, a possible conflict because of other cases existed; Cater also asked that Judge David Burnett recuse. Judge Burnett refused to recuse and denied the motion to continue.

On October 18 Cater again moved for a continuance and the motion was heard. Carle argued that the criminal case was scheduled for the same week and that a key witness was unable to attend trial. Judge Burnett determined from the prosecutor that the criminal case could be scheduled so as not to conflict and that the witness could testify by video deposition or her testimony from the criminal trial could be transcribed and introduced. The motion was again denied.

On October 21 with the trial judge, opposing counsel, litigants and a jury panel present and prepared to try the case of *Cater* v. *Cater*, Mr. Carle delivered a notice of his withdrawal as counsel for Lee Cater and refused to proceed.

After satisfying himself that Carle's position was adamant and that he was aware of the consequences, Judge Burnett continued the case, cited Mr. Carle for contempt and recused from the contempt proceedings. Judge Harold Erwin was designated to conduct the contempt proceedings which were tried on December 31 after a pretrial hearing on December 23. At the close of the trial Judge Erwin found Keith Carle to be in contempt of court and sentenced him to ninety days in jail. This appeal followed.

Before taking up the arguments, we mention that in an appeal of a case of criminal contempt, we view the record in the light most favorable to the decision of the trial judge and sustain that decision if it is supported by substantial evidence. *Atkinson*

v. *Lofton*, 311 Ark. 56, 842 S.W.2d 425 (1992).

The Order

As in the trial court, Carle argues that his constitutional and statutory rights were impinged by Judge Erwin's refusal to consider in defense of the contempt charge that Judge Burnett abused his discretion in ordering him to proceed with trial on October 21. Carle cites Ark. Code Ann. § 5-1-111(c) (1987) as requiring a charge to the jury that reasonable doubt on the issue of defense requires acquittal and defines "a defense" as any matter involving an excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to introduce supporting evidence.

Appellee's brief excepts to that contention, pointing out that Judge Erwin made a finding that Judge Burnett did not abuse his discretion in denying a continuance and ordering the trial to proceed as scheduled. But we need to resolve that rather ambiguous issue, as we think the law is long settled- where the failure or refusal to abide by an order of the court is the issue, we do not look behind the order to determine whether the order is valid. In *Meeks* v. *State*, 80 Ark. 579, 98 S.W. 378 (1906), we upheld the contempt, refusing at the same time to review the underlying order:

> The court had jurisdiction to render such a decree, and the fact that it was erroneous would not excuse disobedience on the part of those who were bound by its terms until reversed. Nor does the fact that the decree has been appealed from excuse disobedience until the same has been superseded in a manner provided by law. The appeal alone does not stay proceedings under the decree, and as long as the decree remains in force its terms must be obeyed.

That rule was adhered to in *Whorton* v. *Hawkins*, 135 Ark. 507, 205 S.W.2d 91 (1918) and the principle itself was recently underwritten by the Supreme Court in *United States* v. *Rylander*, 460 U.S. 752 (1983):

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis

> of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

Carle contends that we have looked beneath the order on occasion and recognized substantive error as a defense in contempt proceedings, naming *Atkinson* v. *Lofton*, 311 Ark. 56, 842 S.W.2d 425 (1992); *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *Norton* v. *Taylor*, 299 Ark. 218, 772 S.W.2d 316 (1989) and *Lessenberry* v. *Adkisson*, 255 Ark. 285, 499 S.W.2d 835 (1973). But while it might be possible to read one or more of those cases as an exception to the rule, they are to no avail in this case for reasons that should be readily apparent. The underlying setting of those cases was contempt, but beyond that the similarities begin to fade. In *Atkinson*, the attorney did not defy an order of the court, he was held in contempt simply for asking for a continuance. In *Lessenberry*, we held the attorney was within his right in refusing to represent a client whom he had never agreed to represent and who had proposed a fictitious defense to drug charges. Moreover, the opinion places particular emphasis on the fact that the attorney's refusal did not interfere with the orderly conduct of the court's business.

In *Arnold* v. *Kemp, supra,* as in *Lessenberry, supra,* and *Atkinson, supra,* the actions by the attorneys did not interfere with the orderly conduct of the court's business. Beyond that, the attorneys were challenging on constitutional grounds the fee limitation in criminal cases by the only means available, risking contempt- a challenge this court ultimately sustained.

In *Norton* v. *Taylor, supra,* the attorney was held in contempt for refusing to represent a nonindigent defendant in a probation revocation proceeding as ordered by the circuit court. We held the court was without authority to order the attorney to provide legal services to a nonindigent defendant under the circumstances presented. Unlike Carle, Norton had not undertaken to represent the defendant, nor were his actions disruptive of the court's docket.

In sum, what distinguishes these cases, we believe, from the case at bar, is legitimate and successful challenges to the

validity of a court order, in contrast to a refusal to comply with an order which was clearly within the court's jurisdiction and power, i.e., the denial of a motion to defer the trial of a case.

Inherent Power

Keith Carle maintains that it was error for the trial court to try him under the contempt statute [Ark. Code Ann. § 16-10-108 (1987)] and sentence him under the inherent power of the court. The statute reads:

> (a) Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others:
>
> (3) Willful disobedience of any process or order lawfully issued or made by it;
>
> (b)(1) Punishments for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court. However, the fines shall in no case exceed the sum of fifty dollars ($50.00), nor the imprisonment ten (10) days.

The standard regarding the inherent power of the court is included in Article 7, Section 26 of the Arkansas Constitution. This provision states:

> The General Assembly shall have power to regulate by law the punishment of contempt not committed in the presence or hearing of the courts, or in disobedience of process.

Carle's argument that he was informed of the offense with which he was charged at the pre-trial hearing and then convicted of another version of which he was not informed is incorrect. At the pre-trial hearing, Carle requested that he be informed of the charges against him. The trial court responded that it would be proceeding under Ark. Code Ann. § 16-10-108(a)(3) and under the court's inherent powers to punish a direct contempt. As to the range of punishment, Carle insisted the court was bound by the statutory limit. The trial judge disagreed but stated that he would work within the range of penalties used

for Class A misdemeanors. Therefore, the appellant was given notice of the offense as required in *Fitzhugh* v. *State*, 296 Ark. 137, 752 S.W.2d 275 (1988).

At the contempt hearing, Carle again attempted to persuade the court that his conduct did not fall under the inherent power of the court. The court rejected the argument, stating, "The court is not going to abandon its inherent powers doctrine, right." (TR. 47.)

The power to punish for contempt is inherent in courts and they may go beyond the powers given by statute. *See Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992); *Edwards* v. *Jameson*, 284 Ark. 60, 679 S.W.2d 195 (1984). We have interpreted Ark. Code Ann. § 16-10-108(a)(3) and held that it is not a limitation on the power of the court to impose punishment for disobedience of process. *Yarbrough* v. *Yarbrough*, 295 Ark. 211, 748 S.W.2d 123 (1988).

The implied powers doctrine clearly applies here. This was a direct contempt in the "presence and hearing" of the judge. Although Carle's behavior would not qualify as "disorderly, contemptuous or insolent" due to his demeanor, he still chose to disregard a lawful order of the court.

Also, conduct was in "disobedience of process" even though Carle argues that the order did not constitute process because it was not in writing. In *Arkansas Department of Human Services* v. *Clark*, 305 Ark. 561, 810 S.W.2d 331 (1991), the court stated that process in the sense of the statutes is a comprehensive term which includes all writs, rules, orders, executions, warrants, or mandates issued during the progress of an action. Even though the court's order was verbal, Carle's conduct still constituted disobedience of process.

Therefore, Carle's actions in disobeying the court's order fell within the inherent powers of the court to punish for contempt and the court was not bound by the limitations set out in the contempt statute.

The Punishment

Keith Carle contends the sentence of ninety days in jail is excessive in light of all the facts and circumstances. He submits

that because his sincerity and lack of motive for personal gain are not questioned the sentence is wholly disproportionate to the offense. We agree that the punishment is unduly harsh.

Our power to modify punishment imposed for contempt has been recognized in numerous cases: *Page* v. *State*, 266 Ark. 398, 583 S.W.2d 70 (1979); *Dennison* v. *Mobley, Chancellor,* 257 Ark. 216, 515 S.W.2d 215 (1974); *Morrow* v. *Roberts, Judge,* 250 Ark. 822, 467 S.W.2d 393 (1971); *Garner and Rosen* v. *Amsler, Judge,* 238 Ark. 34, 377 S.W.2d 872 (1964); *Fossom* v. *State*, 216 Ark. 31, 224 S.W.2d 44 (1949); *Smith* v. *State*, 28 Ark. App. 56, 770 S.W.2d 205 (1989). In *Garner*, we modified sentences of ten and five days in jail imposed on two attorneys who claimed without basis in fact that a petit jury was "stacked" against their client. Writing for the court, Justice George Rose Smith noted that the principal justification for contempt lies in the need for upholding public confidence in the majesty of the law and in the integrity of the judicial system and "when we have found these ends will be met despite a reduction or even a remission of a jail sentence for contempt it has been our practice to modify the judgment." With that said, the sentences were reduced to two days in jail.

While we view the offending conduct in this case with the utmost gravity, we are not persuaded it was prompted by other than a misguided belief that his client's interest required it, however ill conceived that may have been. It has not been shown that this conduct, or anything similar, is repetitive and it seems unlikely there will be a recurrence. Therefore, we believe a punishment of five days in jail and a fine of $500 to be sufficient and in keeping with our prior rulings in such matters. See the cases cited above. With that modification, the order appealed from is

Affirmed.

Randy Dean LEACH *v.* STATE of Arkansas

CR 92-639 845 S.W.2d 11

Supreme Court of Arkansas
Opinion delivered January 19, 1993
[Rehearing denied March 29, 1993.]

Callis L. Childs, for appellant.

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

STEELE HAYS, Justice. This appeal is before us on a petition to review a decision by the Court of Appeals, *Leach* v. *State*, 38 Ark. App. 117, 831 S.W.2d 615 (1992). Petitioner, Randy Leach, was convicted of conspiracy to commit aggravated robbery of a Wal-Mart courier and received a six-year sentence and a $5,000 fine. The conspiracy charge was interrelated with two other conspiracies, for which Leach and two others were charged. These latter conspiracies were tried separately. The Court of Appeals reversed the judgment of conviction, finding merit in two points of error. Leach petitioned for rehearing on two additional points but the petition was denied. We granted review and the case is now before us on the two points rejected by the Court of Appeals.

In the first of those, Leach argued that the trial court erred in admitting his confession because it was the result of a threat. The substance of the prosecutor's remarks to Leach just prior to his confession is not disputed, that the state had enough evidence to charge him for capital murder but would refrain if Leach could give evidence sufficient to clear himself of the capital murder charge and would tell what he knew concerning the two co-conspirators. Leach was given the *Miranda* warnings and advised that if he admitted to any crime while giving a statement about his co-conspirators, that information could be used against him.

Leach signed the waiver of rights form and gave the police information implicating his co-conspirators in various offenses. He also gave the police information sufficient to clear himself of the murder charge but which implicated him in less serious offenses. Leach was ultimately charged on one of these lesser crimes.

At the suppression hearing the prosecutor offered proof that at the time he spoke to Leach, he did have probable cause to indict him on the murder charge based on statements given by one of the co-conspirators, and this fact is not contested. The trial court held Leach's statement admissible and it was used at trial on the conspiracy charge of this case.

Relying on *Tippit* v. *State*, 285 Ark. 294, 686 S.W.2d 420 (1985), the Court of Appeals held the statement was voluntary. In *Tippit*, the defendant gave a statement in exchange for a promise of leniency, which was kept, and we stated:

> Under the facts and circumstances of this case, when considered in their totality, we think the trial court was correct in admitting the statement. The appellant struck a bargain which was closely related to a plea bargain and both sides kept their promise. Most likely the deal was a wise one for the appellant. In any event we can find no prejudicial error.

Leach argues the trial court was wrong because the facts in this case are distinguishable from *Tippit*. In *Tippit* it was the defendant who had proposed the bargain, whereas here the state initiated the proposal. Leach notes that in *Williams* v. *State*, 281 Ark. 91, 663 S.W.2d 700 (1983), cited in *Tippit*, we emphasized that in determining voluntariness an important factor is whether the defendant or the state initiates the proposal. Further, Leach argues that here police used a threat, whereas in *Tippit* it was a promise that induced the statement.

[redacted] While in *Williams* we did observe that the defendant's initiation of the proposal was a critical factor, it was to show a that it changed the nature of the proposal as excluding the possibility of outside coercion. That was not to imply that a defendant's initiation was a necessary prerequisite to finding a confession voluntary. In fact, we reiterated that no single factor was

determinative but it was the totality of the circumstances that was significant.

As to the contention that the prosecutor's statement constituted a threat rather than a promise, an arguable premise at best, we find no significance in such distinction. Our research has turned up nothing to indicate that a threat is more odious per se than a promise. Rather, the real issue concerning statements made through hope *or* fear is based on broader considerations of voluntariness in light of the particular inducement, whatever its nature. *See* John W. Strong, *McCormick on Evidence* § 147 (4th ed. 1992); 1 W. LaFave *Criminal Procedures* § 6.1, § 6.2 (1984).

Consequently, what we have said in previous cases holds true here. We will examine all of the circumstances to determine whether a statement was voluntary, and if a promise or threat was made, we will look first to the police conduct and then to the vulnerability of the defendant. *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982). And if a promise was made that was permissible and was kept, those are circumstances to consider in determining whether the statement was voluntary. *See Tippit, supra;* and *Williams, supra;* and *Tippit* v. *Lockhart*, 859 F.2d 595 (8th Cir. 1988).[1]

From that preface, we turn to the specifics of this case. Randy Leach was a policeman for the Conway police department and had been working in that capacity some nine years. Recently he had been engaged in narcotics and undercover assignments.

Leach was not incarcerated prior to his statement being taken, nor formally arrested or charged. In fact he was called at his home to come to the station to discuss "some matters," which he did. When he arrived he spoke with the prosecutor for approximately three minutes, during which the prosecutor made his proposal. The taking of Leach's statement followed, lasting less than forty-five minutes.

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[1] This was an appeal from a denial of a writ of habeas corpus of *Tippit* v. *State*, 285 Ark. 294, 686 S.W.2d 420 (1985), which appellant has attempted to distinguish. The Eighth Circuit held that a promise to a defendant which was kept by the prosecutor, was just one of the circumstances to consider in the totality of circumstances, and there was no discussion of who had initiated the bargain or whether it was a promise or a threat.

While the state did suggest the proposal, it was made, not by the police but by the official authorized to bring criminal charges. *See Williams, supra.* The state offered proof that there was a basis in fact for the prosecutor to charge Leach with capital murder, and when Leach was forthcoming with information, the prosecution kept its end of the bargain.

We see nothing fundamentally wrong in the prosecutor advising Leach what was within his power to do under the circumstances, *see LaFave, supra* at 447. While this may have prompted Leach's confession, it can hardly be argued that this was a fundamentally unfair inducement. *See McCormack, supra* at 568. Nor can we say that Leach's will, given his experiences and background, was in any way overborne.

Nor is it certain Leach's statement was induced by the prosecutor's proposal. Leach testified the prosecutor wanted information on the co-conspirators, and was not pressing for self-incriminating information. Leach could have misled his interrogators about his own involvement and still given incriminating statements about the others. But he decided, evidently, to tell the truth. The bargain was not for a confession in exchange for a lighter sentence, but for information along with the exculpatory information in exchange for going free. If anything, Leach's confession was gratuitous. It must be noted that Leach has not contended at any time that his confession was false.

As his second point, Leach argued to the Court of Appeals it was error for the trial court to deny individual sequestered voir dire. The Court of Appeals responded:

> Before trial, the court denied [Leach's] request for individual sequestered void dire. [Leach] argues that he was thereby inhibited from asking prospective jurors questions about their knowledge of related criminal litigation, and urges us to adopt § 3.4(a) of the Standards Relating to Fair Trial and Free Press promulgated by the American Bar Association Project on Standards of Criminal Justice. That section provides:
>
> > (a) Method of examination. Whenever there is believed to be a *significant possibility that individual talesmen will be ineligible* to serve *because of exposure*

> *to potentially prejudicial material*, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not have cast aside any preconception he might have. [Our emphasis.]
>
> [Leach] concedes that the decision to grant or deny sequestered individual voir dire is left to the discretion of the trial court. *Burnett* v. *State*, 287 Ark. 158, 697 S.W.2d 95 (1985). He also concedes that reversal will not lie absent a showing of prejudice. *See e.g. Logan* v. *State*, 300 Ark. 35, 776 S.W.2d 341 (1989). Because here, as in *Logan*, the record does not reflect the requisite prejudice, [Leach] urges us to adopt the ABA standard and overrule the supreme court's decisions in *Logan; Hefferman* v. *State*, 278 Ark. 325, 645 S.W.2d 666 (1983); and other supreme court cases stating the same principle. Despite [Leach's] contention to the contrary, we lack the authority to overrule decisions of the Arkansas Supreme Court. *Huckabee* v. *State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990). It will be for the circuit court to decide whether, on retrial, sequestered voir dire is necessary.

First, we find it unnecessary to overrule any previous decisions in order to approve of the ABA Standard § 3.4(a). None of the cases Leach cites, *Logan* v. *State, supra; Hefferman* v. State, supra; and *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983), are incompatible with that standard. None of those cases require that actual prejudice be demonstrated to show an abuse of discretion. At most, we stated that no actual prejudice was in fact demonstrated, but we did not state that it was required. In none of those cases was the question posed whether individual sequestered voir dire be granted on the basis of potential prejudice only.

Leach asks us to adopt the ABA Standard, but we

believe that is unnecessary. The Standard merely recognizes that at some point pretrial publicity can be sufficiently pervasive that individual sequestered voir dire would be mandated because of the likelihood that individual venirepersons have been exposed to prejudicial information. Nothing we have said in past cases would preclude any trial court from taking such an approach, if it hasn't already done so.[2]

In the case before us it is not necessary to review the trial court's action, as we find no evidence that Leach was prejudiced. He argues he was limited in his questioning for fear of eliciting prejudicial information and was therefore not able to question prospective jurors individually or as a group to determine "what they knew about the charge against him." Without that information Leach contends he was reduced to "shooting in the dark" in exercising his peremptory challenges.

We find no basis for this claim. The record reveals that counsel did in fact ask the jury a number of times what they knew about the case. He asked the question en masse and then called on individuals who had their hands raised and received more detailed information as to what these individuals knew or had heard about the defendant. We find nothing prejudicial in these answers and Leach advances nothing additional in that regard.

On remand, should the question arise again the trial court is free to decide, in its discretion, whether there is sufficient showing of potential prejudice to warrant individual sequestered voir dire.

We affirm the decision of the Court of Appeals.

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[2] *See, e.g., United States* v. *Liddy*, 509 F.2d 428 (D.C. Cir. 1974); *United States* v. *Brown*, 540 F.2d 364 (8th Cir. 1976).

Brenda WISDOM *v.* Jocie Ellen McBRIDE

92-773 845 S.W.2d 6

Supreme Court of Arkansas
Opinion delivered January 19, 1993

Murphy, Post, Thompson, Arnold & Skinner, by: *Tom Thompson* and *J. T. Skinner*.

Harkey, Walmsley & Blankenship, by: *Tim Weaver*, for appellee.

STEELE HAYS, Justice. By this appeal we are asked to decide one issue: did the probate court abuse its discretion in the appointment of an administratrix.

Russell Merriman was killed in a motor vehicle collision on April 3, 1991. His mother, Brenda Wisdom, appellant, promptly filed a petition in Independence County probate court asking that she be appointed administratrix of the estate. A day later, Jocie McBride, the deceased's paternal grandmother, appellee, also filed a petition in the same court asking to be named administratrix. Her petition was supported by five other family members: a brother, a sister, the father and two half-sisters. A hearing was held and the trial court found that Jocie Ellen McBride should be appointed as administratrix. Ms. Wisdom appeals from that order.

The governing statute in this case, and the one relied on by the trial court, is Ark. Code Ann. § 28-48-101 (1987), which provides:

> (a) Domiciliary letters testamentary or of general administration may be granted to one or more of the natural or corporate persons mentioned in this section who are not disqualified, in the following order of priority:
>
> (1) To the executor or executors nominated in the will;
>
> (2) To the surviving spouse, or his or her nominee, upon petition filed during a period of thirty days after the death of the decedent.
>
> (3) *To one or more of the persons entitled to a distributive share of the estate, or his or her nominee, as the court in its discretion may determine. . . .* [Our emphasis.]

Wisdom was qualified in the first instance to serve because she was one of the persons entitled to a distributive share under the statute. McBride was also qualified to serve in the first instance because even though she was not entitled to a distributive share, she had been nominated by persons who were. The trial court pointed this out and found both applicants qualified, explaining that in such cases he simply took a vote of the distributees and granted letters on the basis of the most votes. In that light Ms. McBride easily won, 5-1.

Ms. Wisdom's argument is made in two steps. First, she argues that all distributees' votes should not be equal but should be counted in the order of priority listed in the tables of descent at Ark. Code Ann. § 28-9-214 (1987). Under that statute, she maintains that she and Ms. McBride had a tie vote.

Ms. Wisdom then argues that the facts supported a finding that she would have been the appropriate choice. She cites testimony as to the reasons various distributees gave for preferring Ms. McBride as administratrix. She notes that her background included some business experience, i.e., receptionist, cashier and interviewer for a marketing research company, and made her more qualified, that she was only forty-three, whereas McBride was sixty-four and had worked for twenty-two years on an assembly line.

As to the argument that the trial court should weigh votes in

the order of descent as prescribed in another statute, Wisdom offers no authority and we find nothing in § 28-48-101 suggesting that method is intended. Section 28-48-101 is quite clear in its direction to the court on appointment: ". . .To one or more of the persons entitled to a distributive share. . . ." Nothing in that statute sustains Wisdom's argument.

Even if we were to follow Ms. Wisdom's reasoning in applying the descent statute, we would still affirm. If the trial court were to find a tie-vote at the first level of priority, it would be logical to proceed to the next level to break the tie, which would still favor Ms. McBride.

The decision on the appointment of an administrator is within the discretion of the trial court, *Knight* v. *Worthen Bank and Trust*, 233 Ark. 465, 345 S.W.2d 361 (1961), and no abuse of discretion has been shown.

Affirmed.

Jeremiah HOLLAND *v.* STATE of Arkansas

92-804 844 S.W.2d 943

Supreme Court of Arkansas
Opinion delivered January 19, 1993

Karen R. Baker, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Jeremiah Holland, the appellant, is charged with first degree murder in Searcy County Circuit Court. His motion to transfer to Juvenile Court was denied, and he has brought this interlocutory appeal. Holland argues the evidence he presented with respect to his mental immaturity and his prospects for rehabilitation in the juvenile system, as opposed to what he would face if convicted as an adult, warranted the transfer. We affirm the Trial Court's decision not to transfer the case.

Holland was charged in Searcy County Circuit Court with killing his ten-year-old cousin, Sheera Fruitt. The Trial Court was presented with evidence that Fruitt was strangled with an electrical cord, and her body, which was weighted with large rocks, was recovered from a pond near the home where she lived with her mother and Holland.

At a hearing on the transfer motion the Trial Court was presented with two psychiatric reports from the State Hospital indicating Holland suffered from a conduct disorder and alcohol abuse. A clinical psychologist who examined Holland testified that his mental maturity was less than his chronological age, which was 17 at the time of the examination (16 at the time the offense was committed), and that while Holland's intelligence was normal, he did not function normally in social situations. The psychologist also testified Holland's prospects for rehabilitation were better in the juvenile system. The State introduced no evidence but asked the Court to take judicial notice of the psychological reports and the facts and circumstances surrounding the offense charged. The Trial Court denied the motion without stating reasons.

Arkansas Code Ann. § 9-27-318(e) (Repl. 1991) sets out the guidelines for determining when an offense should be transferred from Circuit to Juvenile Court, and it provides:

> 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.

Cobbins v. *State*, 306 Ark. 447, 816 S.W.2d 161 (1991).

Subsection (f) of the statute requires a "finding by clear and convincing evidence that a juvenile should be tried as an adult." We have, however, recognized that the serious and violent nature of an offense is a sufficient basis for trying a juvenile as an adult. *Wicker* v. *State*, 310 Ark. 580, 839 S.W.2d 186 (1992); *Slay* v. *State*, 309 Ark. 507, 832 S.W.2d 217 (1992); *Vickers* v. *State*, 307 Ark. 298, 819 S.W.2d 13 (1991). While the record does not demonstrate the consideration given by the Trial Court to the evidence Holland presented, we have held there is no requirement that every element mentioned in the statute be given equal weight. *See, e.g., Cobbins* v. *State, supra; Pennington* v. *State*, 305 Ark. 312, 807 S.W.2d 660 (1991). In view of the most serious and violent nature of the offense charged in this case, we cannot say the Circuit Court's decision to retain jurisdiction was clearly erroneous or clearly against the preponderance of the evidence. *See Bradley* v. *State*, 306 Ark. 621, 816 S.W.2d 605 (1991).

Affirmed.

CITY OF SPRINGDALE, Arkansas, a Municipal Corporation, and Jeffery Lee Reeves *v.* The Incorporated TOWN OF BETHEL HEIGHTS

92-737 845 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered January 19, 1993

Jeff C. Harper, Springdale City Att'y, for appellant City of Springdale. *Cypert, Crouch, Clark & Harwell*, by: *James E. Crouch*, for appellant Reeves.

Richard S. Hardwicke, Bethel Heights City Att'y, for appellee.

TOM GLAZE, Justice. In this annexation case, the Town Council of Bethel Heights, pursuant to Ark. Code Ann. § 14-40-301 to -303 (1987), passed Ordinance No. 42, which submitted to the town's voters the question of annexing seven separate tracts of land. After the election on November 6, 1991, the Benton County Election Commission tabulated votes and certified all tracts had been approved except tract four, which the voters rejected by twelve votes. The Commission later discovered that only one or two (or less than ten) voters in precinct Washington A were qualified to vote on the tract four annexation question, so it invalidated the votes from that precinct, leaving 52 votes for annexation and 33 against. The Commission then certified this final tally, but later mistakenly filed the original certification with the Secretary of State's office showing tract four's annexation had failed.

On May 16, 1991, and after the Benton County Election Commission tabulated and certified Bethel Heights' annexation election, Jeffery Lee Reeves, who owns property in the disputed tract four described above, petitioned pursuant to Ark. Code Ann. § 14-40-401 (1987) to have his property annexed to the City of Springdale. The Benton County Circuit Court subsequently entered an order granting Reeves' petition. However, Bethel Heights then intervened requesting the annexation order be set aside based on the grounds that Bethel Heights had already annexed tract four. The City of Springdale, claiming an interest in the property, was also allowed to intervene.

The Benton County Circuit Court later set aside its earlier order and denied Reeves' petition, finding the disputed tract four had already been annexed to Bethel Heights, and the court further held it could find no authority which allowed one city to annex a tract of land which belongs to another city at the time of the proposed annexation. While the trial court recognized Reeves' and Springdale's arguments that irregularities occurred in Bethel Heights' annexation of the disputed tract, it concluded such irregularity claims were barred by applicable limitation statutes. We agree and therefore affirm.

In this appeal, Reeves and the City of Springdale raise

several points for reversal, first, questioning the passage and validity of Ordinance No. 42 which submitted the annexation of tract four and the other tracts to the voters of Bethel Heights; second, arguing various other procedural reasons why Bethel Heights' annexation should be invalidated; and third, contending Bethel Heights' entry into the Springdale annexation proceeding was too late because no protest or objection was filed before the Benton County Circuit Court had entered its first order allowing annexation of Reeves' property. Most of the appellants' arguments are procedurally barred so we will discuss the limitation issue first.

Appellants complain Bethel Heights council's passage of its annexing ordinance No. 42 was defective because the council or its members failed to meet or violated certain by-laws and statutory requirements when adopting that ordinance. It is unnecessary to undertake a full discussion of each of appellants' arguments in this respect because they are procedurally barred under § 14-40-304 which is controlling and provides as follows:

> (a) If it is alleged that the area proposed to be annexed does not conform to the requirements and standards prescribed in § 14-40-302, *a legal action may be filed in the circuit court of the county where the lands lie, within thirty (30) days after the election*, to nullify the election and to prohibit further proceedings pursuant to the election.
>
> (b) In any such action filed in the circuit court of the county where the lands lie, *the court shall have jurisdiction and the authority to determine whether the procedures outlined in this subchapter have been complied with and whether the municipality has used the proper standards outlined in § 14-40-302 in determining the lands to be annexed.* (Emphasis added.)

It is undisputed that no one filed suit under the foregoing provision to challenge the procedures followed by Bethel Heights in calling its annexation election. Clearly, the Benton County Circuit Court had the jurisdiction and authority to consider and decide such issues under § 14-40-304(b) above if a complaining party had filed suit within thirty days of the November 6, 1991 election. Since neither appellants nor others

did so, appellants' attempt now to raise such an issue in this collateral proceeding must fail.

Appellants also offer the argument that § 14-40-303(b)(B)(i) required Bethel Heights to file a description and map of the annexed area and the correct election results with the county clerk and Secretary of State and the Town's failure to have filed such matters with the Secretary of State tolled the thirty-day requirement to bring suit under § 14-40-304 above. Such argument, however, ignores the language in paragraph (B)(ii) of the same provision that a municipality's annexation shall be effective thirty days following its filing the description and map of the annexed property with only the county clerk. Here, Bethel Heights undisputably filed a description and map with the county clerk, therefore making appellants' tolling argument meritless. Concerning appellants' argument that Bethel Heights had failed to file the correct election returns with the Secretary of State, we note that nothing in § 14-40-303 requires the filing of such returns with the Secretary of State. We would further mention that while such election returns are required to be certified by the election commission, that was done in this case. *See* Ark. Code Ann. § 7-5-801 (1987).[1]

Appellants further argue that Bethel Heights failed to file a timely objection in this proceeding and the circuit court's first annexation order entered in this cause should prevail. In reviewing the record, we find appellant Reeves did object to Bethel Heights' intervention, alleging the Town was barred by laches. In his same pleading, Reeves also alleged that the City of Springdale must be made a party and that Reeves had not previously been made aware of Bethel Heights having annexed his property. Of course, Springdale was made a party below and remains one in this appeal. However, the laches issue was not tried below, nor did the trial court rule on the issues. Appellants had an obligation to develop and to obtain a ruling on this matter below. We will not consider such matters raised for the first time

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[1] We note that § 14-40-304 sets out the procedure to challenge the municipality's failure to comply with the annexation requirements and § 7-5-801 establishes the procedure to contest the election returns, e.g., whether the county election commission properly deducted the Washington A precinct returns. Both of these provisions were met and the limitations provision under each has run.

on appeal. *Gatlin* v. *Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991). Regarding Reeves' failure of notice issue contained in his response below, we note this question, too, was not presented to, or at least not ruled on, by the trial court. In any event, appellants do not assert this issue as one of their points for reversal. Based upon our review of the record, we conclude the trial court properly proceeded in this cause when it set aside its earlier annexation order and denied Reeves' petition for annexation.

Finally, we are met with appellants' argument which is somewhat related to their charge Bethel Heights was too late in challenging the circuit court's first annexation order. Here, however, they suggest that regardless of the validity of Bethel Heights' prior annexation of tract four and Reeves' property therein, the law does not prohibit Reeves from voluntarily annexing the same land into the City of Springdale. As pointed out earlier, the circuit court held it could find no authority for allowing one city to annex to itself a tract of land already belonging to another city. We, too, find no such authority and appellants offer none. Certainly, the statutory provisions relied on by appellants do not specifically authorize one city to annex another's land. Their failure to cite any authority in support of this argument merits its dismissal. *McElroy* v. *Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991).

SOUTH COUNTY, INC. *v.* FIRST WESTERN LOAN CO. & John Taylor Hampton

92-357 845 S.W.2d 3

Supreme Court of Arkansas
Opinion delivered January 19, 1993

Stephen M. Sharum and *Mark E. Ford*, for appellant.

Karr & Hutchinson, by: *Michael Stubblefield* and *William H. Sutton* and *William A. Waddell, Jr.*, for appellees.

TOM GLAZE, Justice. Appellant, South County Inc., was formed in July 1985, to develop the South County Project. The South County Project was to be a mixed-use development in Greenwood, Arkansas. Appellant alleges that the appellees, First Western Loan Company and John Hampton, an officer of First Western, represented in January 1986, that they would provide the financing for the development. Appellant argues that relying on this representation, it expended a lot of time and money to further the development of the project. In July of 1986, the appellees advised the appellant that they would not fund the development of the project. Appellant was unable to obtain other financing, and the project failed. The appellees contend that they never issued a loan commitment and contend that First Western's role was to help assemble the loan package and take the package to potential investors.

In July of 1988, appellant filed suit against the appellees alleging a tort action for negligent misrepresentation and constructive fraud. Appellant also alleged a cause of action for breach of contract against First Western. Appellant sought recovery for its damages as well as punitive damages. Uerling & Associates, a creditor of the appellant, filed a motion to intervene and a complaint in intervention on November 4, 1988. In this motion, Uerling contended that the appellant was indebted to it for engineering and surveying services conducted on the project in the amount of $46,210.69. On November 8, 1988, Uerling's motion was granted without objection.

The appellees subsequently filed a motion for summary judgment. The trial court granted a partial summary judgment on October 9, 1991, on the tort causes of action and claim for

punitive damages against appellees First Western and John Hampton. This completely eliminated appellee John Hampton from the lawsuit but left alive the appellant's contract cause of action against First Western. In the order granting partial summary judgment, the trial judge stated that under ARCP Rule 54(b) there was no just reason for delay of the appeal of this decision. However, no mention was made of Uerling's complaint in intervention. Appellant took a voluntary dismissal without prejudice of the breach of contract action against First Western, which was filed on October 31, 1991. Again, there was no dismissal of Uerling's complaint in intervention.

Appellant appeals from the trial court's granting of the appellees' motion for a summary judgment on the tort cause of action.

Appellees first question whether appellant has complied with ARCP Rule 54(b). If appellees are correct, this court does not have jurisdiction and is prevented from reaching the merits of the appeal. We find the appellees' contention has merit, therefore we must dismiss this appeal.

In its attempt to comply with Rule 54(b), the trial court made the following a part of its order granting appellees' partial summary judgment:

> The Plaintiff represents to the Court and the Court so finds that the granting of Partial Summary Judgment on the issues of negligent misrepresentation, constructive fraud and punitive damages substantially limits the claim of the Plaintiffs against First Western Loan Company and completely eliminates the separate Defendant, John Taylor Hampton, from the litigation of this cause of action. Because of the expense of litigation required to be expended by the Plaintiff, including expert witness fees, and since the Plaintiff has represented to the Court that an appeal of the Partial Summary Judgment against John Taylor Hampton will be appealed in any event, to prevent piecemeal appeals and duplicative litigation if this decision is reversed on appeal, this Court finds, pursuant to Arkansas Rules of Civil Procedure, Rule 54 (b) that there is no just reason for delay of the appeal of this decision. The Court expressly directs entry of the Summary Judgment as

> stated hereinabove and the Court further expressly authorizes and determines that it would be in the best interest of all parties that an appeal to this judgment be permitted by the Plaintiff and Defendants for the efficient administration of justice and to prevent duplicative trials and appeals.

The trial judge's assessment makes no mention of the intervenor-Uerling's claim. Nor does the record reflect what has happened to that claim. We have held that it is not enough to dismiss some of the parties, the trial court's order must cover all the parties and all the claims in order to be an appealable order. *Smith* v. *Leonard*, 310 Ark. 782, 840 S.W.2d 167 (1992). In *Fratesi* v. *Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984), this court found the trial court failed to grant a summary judgment in the whole case, and therefore the court was in no position to predict what evidence will be presented at trial relevant to all claims for relief sought by the appellants. The *Fratesi* court concluded that if it allowed the interlocutory appeal on one issue and subsequent errors occurred during the trial on the remaining issues, the case could be appealed a second time, resulting in two appeals where one would suffice. Here, Uerling's claim is still pending below, and another appeal involving that matter could possibly be required regardless of how we decide appellant's present appeal.[1] Of even more importance, it appears the trial judge never considered Uerling's claim when finding some likelihood of hardship or injustice existed which would be alleviated by an immediate appeal. *See Arkhola Sand & Gravel Co.* v. *Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987). As we said in *Hutchinson*, our role on appeal is not to reweigh the equities or reassess the facts, but to make sure that the conclusions derived from those weighings and assessments are judiciously sound and supported by the record. While we commend the trial court's efforts to present a record and order with specific facts to support its permitting a Rule 54(b) appeal, we conclude the trial court's order falls short because it altogether omits any reference to or consideration of the Uerling claim.

BROWN, J., dissents and would decide the case on the merits.

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[1] Some mention of Uerling's claim and its status was offered in oral argument, but because such matters are not a part of the record, we cannot consider them in this appeal.

Sonya HOWARD and Morgan Cole *v.*
CITY OF FORT SMITH

92-362 845 S.W.2d 497

Supreme Court of Arkansas
Opinion delivered January 19, 1993

Oscar Stilley, for appellants.

Daily, West, Core, Coffman & Canfield, by: *Jerry L. Canfield*, for appellee.

DONALD L. CORBIN, Justice. Appellants and representative plaintiffs below, Sonya Howard and Morgan Cole, appeal an order of the Sebastian Chancery Court dismissing with prejudice their complaint against appellee, the City of Fort Smith. We find no error and affirm.

Appellants' complaint asserted a class action claim challenging the city's collection of the occupation tax authorized by Ark. Code Ann. § 26-77-102 (1987). Appellants moved for summary judgment stating the only issues to be determined were whether the proration provisions of the city's occupation license and tax ordinance violated the Equal Protection and Due Process Clauses of the Arkansas and United States Constitutions. Appellee responded to appellants' motion by agreeing there was no genuine issue of material fact and asking for summary judgment in its favor. Appellee's response included an affidavit of the city's tax collection supervisor.

The parties waived both a hearing on the motions and the

right to present any further evidence and requested the chancellor to decide the matter on the record before him. The chancellor wrote a well-reasoned order finding that the proration provisions of the ordinance did not violate appellants' rights of equal protection and due process. The chancellor denied appellants' motion for summary judgment and dismissed their complaint with prejudice. On appeal, appellants assert as error the chancellor's findings that neither their equal protection nor their due process rights were violated by the ordinance.

Fort Smith Ordinance No. 3230, as amended by Fort Smith Ordinance No 8-90, establishes the city's occupation license and the procedure for the collection of the accompanying tax. The tax is $150.00 per year for professionals and $75.00 per year for other persons engaged in any trade, business, or vocation. The tax year is from April 1 to March 31. However, as a benefit to the taxpayer, the city allows the tax to be paid in two installments due April 1 and October 1.

The "proration provision" of Ordinance 3230 challenged in this appeal provides that:

> Fractional parts of the *last* half of the tax year shall be charged on a pro rata basis from the date of issuance of the license and date of payment of tax to the last day of March, provided that no license shall be issued or tax paid for less than one-fourth of the annual license fee or tax amount. [Emphasis added.]

Fort Smith, Ark. Ordinance No. 3230, § 5 (January 7, 1975). The ordinance does not provide for proration of the tax for licenses issued in the first half of the tax year.

Appellants argue the ordinance is constitutionally defective because it only allows for proration of the tax in the latter half of the tax year. Appellants contend that the proration provision results in the disparate treatment of similarly situated taxpayers. Specifically, appellants' claim that persons purchasing a license on any date between April 1 and September 31 are denied equal protection of the laws and due process because they must pay the full amount of the tax for the respective period while those persons purchasing a license on any date between October 1 and March 31 must only pay an amount of tax prorated to the

respective time remaining in the latter half of the tax year, subject to the one-fourth limitation as quoted above.

Appellee responds with the argument that the difference in treatment for proration purposes is rationally related to the objective of administrative efficiency. Bill Hon, appellee's collection supervisor, stated in his affidavit that, based on his experience, it would be inefficient to collect the tax on a non-uniform tax year with each taxpayer having a different individual tax year. Hon also stated in his affidavit that the options provided in Section 5 of Ordinance 3230 for the issuance and payment of the annual license and tax in six-month periods and for the proration of the tax during the second half of the annual tax year are equally and uniformly applied to all taxpayers.

EQUAL PROTECTION

With respect to the equal protection claim, appellants contend Ordinance 3230 treats similarly situated taxpayers differently and therefore does not provide all taxpayers with equal protection of the laws. We disagree with the contention that the taxpayers receiving dissimilar treatment are similarly situated.

Regardless of any asserted disparate treatment, the rational basis test is the analysis applicable to an equal protection challenge of tax legislation. *Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). "Under the rationality standard of review, we must presume the legislation is constitutional, i.e., that it is rationally related to achieving a legitimate governmental objective." *Id.* at 213, 655 S.W.2d at 463. The United States Supreme Court has stated that the power to discriminate in taxation is inherent in the power to tax, *Leathers* v. *Medlock*, ____ U.S. ____, 111 S. Ct. 1438 (1991), and that courts should defer to local legislative determinations as to the desirability of imposing discriminatory measures. *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). Governing bodies have always been given wide discretion in selecting the subjects of taxation, particularly in the area of occupational taxes. *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938). Thus, in order for an appellate court to strike down a classification made by taxation legislation, the classification must be purely arbitrary and the discrimination must be invidious. *Dukes*, 427 U.S. 297.

Applying the foregoing rules of law, we have very recently stated that "[i]f a taxation statute discriminates in favor of one class it is not determined to be arbitrary so long as the discrimination is based upon a reasonable distinction, and if there is any hypothesized set of facts to uphold a rational basis." *Medlock* v. *Leathers*, 311 Ark. 175, 179, 842 S.W.2d 428, (1992). In the present case, the taxation legislation classifies taxpayers only according to the date on which they purchase their licenses. All taxpayers purchasing licenses on the same date are treated similarly. To achieve the objective of efficiency, the establishment of a uniform tax year is certainly rational. In addition, it is rational for the city to conclude that those persons purchasing licenses for the first time in the first half of the tax year will receive a reasonable value for their tax dollar through their receipt of a license valid for more than half the year and therefore should not be allowed proration. Those persons purchasing licenses for the first time in the latter half of the tax year will be receiving a license valid for less than half of the tax year; thus, it is rational for the city to conclude that these purchasers would not receive a reasonable value for their tax dollar unless the tax was prorated.

In short, we disagree with appellants' contention that those taxpayers purchasing licenses in the first half of the tax year are similarly situated to those taxpayers purchasing licenses in the second half of the tax year. The latter group is not receiving a license valid for more than half a year; thus, the city could rationally conclude that they are entitled to proration of the tax. Any difference in the treatment of the taxpayers is based on a rational distinction, is not arbitrary, and does not result in invidious discrimination.

As the party attacking the taxation legislation, it is appellant's burden to negate very conceivable basis which might support it. *Madden* v. *Kentucky*, 309 U.S. 83 (1940). The chancellor determined that appellants had not met their burden of negating the efficiency theory advanced by appellee. We agree with the chancellor. Appellants have not met their burden of showing the lack of a rational basis for the ordinance.

DUE PROCESS

With respect to taxation legislation, the due process analysis is the same as the equal protection analysis. *See Johnson* v. *Sunray Services, Inc.*, 306 Ark. 497, 816 S.W.2d 582 (1991). The chancellor likewise concluded that appellants had not met their burden of proving any due process violation. We agree with the chancellor.

The judgment is affirmed.

BROWN, J., concurs with the result.

STATE of Arkansas *v.* Jerry POST, David Wyatt, Independence County Judge; Orville Arms, Paul Buchanan, Bill Cash, Jim Darmstaedter, Bobby Galloway, Sue Hurley, Jim Kemp, Conway Lawrence, Earvin Moser, Joe Walls, Tom Ed Woodruff, Quorum Court Members Comprising the Quorum Court of Independence County

92-787 845 S.W.2d 487

Supreme Court of Arkansas
Opinion delivered January 19, 1993
[Rehearing denied February 22, 1993.]

Winston Bryant, Att'y Gen., by: *Kyle R. Wilson*, Asst. Att'y Gen., for appellant.

Adams & Nichols, by: *Donald J. Adams* and *Tom Allen*, for appellee Oscar Jones.

Skokos, Coleman, & Rainwater, P.A., by: *Michael R. Rainwater*, for appellee Independence County.

DONALD L. CORBIN, Justice. Oscar Jones and Jerry Post were appointed counsel for William Thomas Reager, an indigent charged with capital murder. As a result of their representation, Mr. Reager was found not guilty and the charges were dismissed. This appeal concerns the allocation of responsibility for Mr. Jones' fees and expenses between the state and Independence County. Mr. Post's fees and expenses are not before us because the county failed to appeal in a timely manner. In response to Mr. Jones' Motion for Certification of Attorney's Fees and Expenses, Special Judge Watson Villines certified an award to Mr. Jones of $22,986.00 in attorney's fees as just compensation and $602.85 for reimbursable expenses. The propriety of the award has not been challenged. Judge Villines also determined that the county was liable for payment of $450.00 of Mr. Jones' award and the state was liable for the remainder under Ark. Code Ann. § 16-92-108 (1987) and § 14-20-102 (Supp. 1991). On appeal, the state argues that under Ark. Code Ann. § 14-20-102, the county is responsible for payment of all indigent defense fees. Alternatively, the state argues that the state should, at most, be required to pay six hundred and fifty dollars ($650.00) under Ark. Code Ann. § 16-92-108. According to the state, our decision in *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), made the meaning and application of section 16-92-108(c) ambiguous and we should therefore interpret section 16-92-108 in accordance with the intent of the legislature. The state contends that it has been the longstanding practice of the legislature to require the counties to bear the burden of financing the administration of criminal justice in the state. According to the state, by enacting

section 16-92-108 the legislative intent was for the state to assist the counties, leaving primary financial responsibility with the counties, in cases where the indigent was charged with capital murder or murder in the first degree, but even then the intent was not for the state to ever pay more than six hundred and fifty dollars ($650.00) in any one case.

This case requires us to interpret section 16-92-108, and section 14-20-102. Our jurisdiction is therefore proper pursuant to Ark. Sup. Ct. R. 29(1)(c).

Section 16-92-108 provides:

> (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 to 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)(1) The amount allowed for investigation expenses shall not exceed one hundred dollars ($100), and the amount of the attorney's fee shall be not less than twenty-five dollars ($25.00) nor more than three hundred fifty dollars ($350.00).
>
> (2) The amount of attorney's fees for attorneys who defend indigents accused of capital murder or murder in the first degree shall be not more than one thousand dollars ($1,000).
>
> (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.
>
> (c)(1) Upon being furnished an order of the court fixing the fees, the quorum court of the county in which the indigent was charged shall appropriate from the county general fund adequate funds to pay the fees, not to exceed the amount of three hundred fifty dollars ($350) for the attorney's fees nor one hundred dollars ($100) for investi-

gation expenses, and the county treasurer shall disburse the fees to the appointed attorney.

(2) The balance not paid by the counties shall be paid by the state from the Trial Expense Assistance Fund created by § 16-92-109.

(d) An attorney shall not be so appointed by a court if the attorney certifies to the court, in writing, that he or she has not attended or taken a prescribed course in criminal law in an accredited school of law within twenty-five (25) years prior to the date of appointment, that the attorney does not hold himself or herself out to the public as a criminal lawyer, and that he or she does not regularly engage in the practice of criminal law.

Section 14-20-102 provides:

(a)(1) The quorum court of any county included within the judicial districts of the State of Arkansas, by appropriate county legislation, may provide for the creation of a fund to be used for the purpose of paying reasonable and necessary costs incurred in the defense of indigent persons accused of criminal offenses and in the defense of indigent persons against whom involuntary commitment procedures for insanity or alcoholism have been brought, and for representation in civil and criminal matters of persons deemed incompetent by the court due to minority or mental incapacity, which have been brought in any circuit courts, chancery courts, juvenile courts, probate courts, city or county division of municipal courts including, but not limited to, investigative expenses, expert witness fees, and legal fees.

(2) Any municipal body in a county where the quorum court has not created such a fund applicable to the city division of the municipal court may provide for the creation of a fund to be used in the city division of the municipal court.

(3) Where there are adequate unappropriated moneys in this fund, the quorum court may also provide for the use of the funds for the purpose of defraying the cost of the juvenile division of chancery court.

(4) Where there are adequate unappropriated moneys in this fund, the quorum court may also provide for the use of the funds for the purpose of defraying the cost of the medical and dental costs incurred by the county for indigent defendants incarcerated in the county jail.

(b)(1) [As amended by Acts 1991, No. 1003, § 1.] Any quorum court desiring to establish such a fund shall have the authority to provide for the payment of a fee, not to exceed the sum of five dollars ($5.00), to be taxed as costs in each matter, civil or criminal, filed in any circuit, chancery, probate, city or county division municipal court within the county. However, no such fees shall be taxed as costs in any action filed in any small claims court.

(2) The quorum court is authorized to supplement the fund by additional appropriations from the county general fund, and expenditures from such fund shall be made in the manner and amounts prescribed by the quorum court desiring to enact such legislation.

(c) The provisions of § 16-92-108 and other laws relating to the amount of attorney fees and costs that may be paid in the defense of indigents charged with criminal offenses and in the defense of persons against whom involuntary commitment proceedings are sought for insanity or alcoholism shall not be applicable in any county in which the quorum court establishes a fund under this section and levies additional costs or fees to finance such fund.

(d) In any county where a public defender commission has been established under §§ 16-87-101 — 16-87-111, the amount to be paid for attorney fees, investigative costs, and other costs under subdivision (a)(1) of this section shall be determined in a manner prescribed by the quorum court acting with the advisory resolution of the public defender commission.

(e) The provisions of this section and § 16-92-108 relating to the amount or payment of attorney fees and costs that may be paid in the defense of persons against whom involuntary commitment proceedings are sought for

> insanity or alcoholism shall not be applicable in any instance in which the State of Arkansas, acting through its administrative agencies, departments, or divisions, provides for payment of attorney fees or costs which would otherwise be paid by the county.

We find that we must first address the effect of our decision in *Arnold* v. *Kemp* on section 16-92-108 before we can decide whether Independence County is liable for payment of the attorney fees since it has established an Indigent Defense Fund pursuant to section 14-20-102.

In *Kemp*, we declared the fee caps contained in section 16-92-108 unconstitutional. Prior to *Kemp*, section 16-92-108(b) provided that investigation expenses could "not exceed one hundred dollars ($100)" and attorney's fees were limited to "not less than twenty-five dollars ($25.00) nor more than three hundred fifty dollars ($350)", except in cases where the defendant was accused of capital murder or murder in the first degree, where the attorney's fees was limited to "not more than one thousand dollars ($1,000)." We did not address the provisions of section 16-92-108 concerning responsibility for payment of the fees in *Kemp*. Under section 16-92-108(c)(1), the county is required to pay up to three hundred and fifty dollars ($350.00) for attorneys fees and one hundred dollars ($100.00) for investigation expenses out of its county general fund. The balance is paid by the state from the Trial Expense Assistance Fund. Ark. Code Ann. § 16-92-108(c)(2). "[I]t is well settled that where a statute or code provision is unconstitutional in part, the valid portion of the act will be sustained if complete in itself and capable of execution in accordance with apparent legislative intent." *Hutton* v. *Savage*, 298 Ark. 256, 266, 769 S.W.2d 394, 399 (1989). In *Kemp*, we indicated that only the fee cap sections of section 16-92-108 were unconstitutional. The other sections were not affected by our decision. After further consideration, we find that our decision in *Kemp* that the fee caps contained in section 16-92-108 are unconstitutional requires us to invalidate the entire statute because the sections of the statute are not severable. It was clearly the intent of the legislature to enact the statute as a whole. The sections of the statute are interwoven and the entire statute revolved around the fee caps. *Wenderoth* v. *City of Ft. Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971). Our decision in *Kemp* eliminat-

ing the fee caps contained in the statute requires us to invalidate the entire statute because the fee caps were an integral part of the system set out by the legislature in the statute to allocate responsibility between the county and the state for payment of defense attorney fees.

Since we find that section 16-92-108 must be invalidated, we next turn to section 14-20-102 to see whether it provides any guidance. Independence County has established a fund pursuant to section 14-20-102 to help pay for the costs incurred in the defense of indigent persons. Because Independence County has established a fund, the state contends it is not responsible for payment of any of the attorney's fees or investigation costs at issue in this case. Section 14-20-102(a) authorizes a county to establish an Indigents' Defense Fund. Section 14-20-102(b) governs how an Indigents' Defense Fund is to be funded and how expenditures are to be made once such a fund is established. Section 14-20-102(b) provides:

> (b)(1) Any quorum court desiring to establish such a fund shall have the authority to provide for the payment of a fee, not to exceed the sum of five dollars ($5.00), to be taxed as costs in each matter, civil or criminal, filed in any circuit, chancery, probate, city or county division municipal court within the county. However, no such fees shall be taxed as costs in any action filed in any small claims court.
>
> (2) The quorum court is authorized to supplement the fund by additional appropriations from the county general fund, and expenditures from such fund shall be made in the manner and amounts prescribed by the quorum court desiring to enact such legislation.

Therefore, according to section 14-20-102(b)(2), we look to see what procedure the Quorum Court of Independence County has established for making expenditures from its funds to determine if Independence County must pay the fees and expenses at issue. The Quorum Court of Independence County enacted Ordinance No. 419-86, which established Independence County's Indigents' Defense Costs Fund. This Ordinance contains the funding and expenditure procedures for the Indigents' Defense Fund. This Ordinance provides:

SECTION 1. Under the provisions of Act 695 of the 1983 Arkansas Legislative Session, there is hereby authorized an *Indigents' Defense Costs Fund* which will be used to defray the allowable costs incurred in the defense and trial of indigents in this county and for indigents in this County against whom involuntary commitments for insanity or alcoholism are sought.

SECTION 2. A. Effective on passage and approval of this Ordinance, the Chancery, Circuit and Probate Clerks are hereby authorized and directed to add the sum of Five Dollars ($5.00) to the filing fees and costs for all cases, civil or criminal, filed in these Courts.

B. Fees so collected are to be paid to the Independence County Treasurer by the twenty-fifth day of the following month and the Treasurer will create and maintain an account with these fees which will be entitled the *Indigents' Defense Costs Fund.*

C. All payments out of the *Indigents' Defense Costs Fund* will be for the payment of indigent expenses to include, but not limited to, attorney's fees, expert witnesses fees, investigation and other reasonably necessary costs incurred in the defense and trial of indigent persons in any Court in which the fees listed above are collectable.

SECTION 3. A. Attorneys appointed to represent indigents are required to keep an accurate, detailed accounting of the amount of time and nature of their services and their expenses for each case with expenses being defined as meaning any expenditure other than witness fees and investigator fees.

B. Prior to obtaining the services of any investigator or expert witness, the attorney will secure the written approval of their services and fees from the Court in which the matter is pending.

C. At the conclusion of the case involving the indigent, or at such other times as shall be appropriate, the attorney will submit his time and expense schedule along with the expenses incurred by any expert witness or investigator to the Court hearing the matter.

SECTION 4. A. The amount allowed for investigation expenses and for expert witness fees together shall not exceed One Hundred Dollars ($100.00) and the amount of the attorney's fees and expenses shall not be less than Twenty-Five Dollars ($25.00) nor more than Three Hundred and Fifty Dollars ($350.00), based upon the experience of the attorney and the time and effort devoted and the expenses incurred by him in the preparation and trial of the indigent.

B. In any event, no more than Four Hundred and Fifty Dollars ($450.00) for all fees and expenses and costs shall be paid from the *Indigents' Defense Costs Fund*, for any single indigent on any one (1) case pending against such indigent person.

C. No costs incurred prior to the passage of this ordinance shall be paid from the *Indigents' Defense Costs Fund*.

SECTION 5. Upon being presented with such schedule as set out in Section 3(C) above, the Court shall determine the amount of fee and expenses to be paid to the attorney and an amount for a reasonable and adequate investigation of charges made against the indigent and a reasonable amount for expert witness fee, and issue an order for the payment thereof.

SECTION 6. Upon being furnished with copy of the Court's order for payment of the aforementioned fees and expenses, the County Judge shall review the order and, subject to his approval, the County Treasurer shall disburse such fees to the appropriate parties.

The provisions of the fund limit the amounts that may be paid for any single indigent on any one (1) case to four hundred and fifty dollars ($450.00). This limitation is invalid under our decision in *Kemp*. The provisions of Independence County Ordinance No. 419-86 concerning the payment of attorney's fees and costs for indigent defendants are substantially similar to the provisions providing for payment of indigent defense fees and costs contained in section 16-92-108. The fee caps contained in Independence County Ordinance No. 419-86 are an integral part

of the Ordinance just as the fees caps contained in Ark. Code Ann. § 16-92-108 were an integral part of that statute. Having previously determined that the invalidation of the fee caps in section 16-92-108 by *Kemp* required that we invalidate the entire statute since the fee caps were an integral part of the statute and were not severable, we must similarly determine that our invalidation of the fee caps contained in Independence County Ordinance No. 419-86 requires us to invalidate the entire ordinance.

This leaves us with no provisions requiring the county to pay defense attorney fees of counsel appointed to defend indigent defendants. In the absence of statutory requirements we must look to the Constitution of the United States and the State of Arkansas to determine who is responsible for payment of indigent defense fees in Arkansas. The United States Constitution mandates that states appoint counsel for indigent defendants. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The Constitution of the State of Arkansas requires the court to appoint counsel for indigent defendants. *Therman* v. *State*, 205 Ark. 376, 168 S.W.2d 833 (1943); Ark. Const. art. II, § 10. While attorneys in Arkansas have been appointed to defend indigent defendants since our current constitution was adopted in 1874, they were not compensated for their services to indigent defendants until 1953. *Mears* v. *Hall*, 263 Ark. 827, 569 S.W.2d 91 (1978). At that time, the legislature delegated the responsibility of payment of indigent defense fees to the counties by statute. *See* Ark. Stat. Ann. § 43-2415, -2416 (Repl. 1964). Since that time, several statutes have been enacted by the legislature requiring the counties to pay indigent defense fees. It was not until 1985 that the legislature placed partial responsibility for payment of indigent defense fees on the state. Ark. Code Ann. § 16-92-108. But, now that we have determined that our decision in *Kemp* requires us to invalidate section 16-92-108 and Independence County's Indigents' Defense Costs Fund, there remains no statutory authority for placing the payment of Mr. Jones' fees on the county. However, we have recently held that appointment of counsel in criminal cases results in a taking of the appointed counsel's property for which he must be justly compensated, so even though there exists no statutory authority for awarding attorneys fees and expenses to counsel who represent indigent defendants, it is constitutionally required. *Kemp*, 306 Ark. 294,

813 S.W.2d 770. As we have recognized before, the "statute imposes a burden upon the count[y] to pay fees to attorneys representing indigents which the count[y] would not be responsible for otherwise." *State* v. *Conley*, 270 Ark. 139, 141, 603 S.W.2d 415, 416 (1980). Payment of fees to attorneys representing indigents is a responsibility of the state which the legislature had delegated to the counties by statute. Since there no longer is a statute delegating this duty to Independence County, the state is responsible for payment of Mr. Jones' fees and expenses.

The portion of the trial court's order assessing responsibility for the payment of $450.00 of Mr. Jones' award to the county and the remainder to the state is modified to place full responsibility for payment of the award to Mr. Jones on the state.

Affirmed as modified and remanded for further proceedings consistent with this opinion.

HOLT, C.J. and BROWN, J., concur.

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

ROBERT L. BROWN, Justice, concurring. Though I agree with the majority that the responsibility for payment of legal fees in this capital murder case rests with the state, I do not agree that this court struck down the fee cap statute, Ark. Code Ann. § 16-92-108 (1987), as unconstitutional on its face in *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991). On the contrary, in *Kemp* we held: "[W]e must find that section 16-92-108 does not pass constitutional muster, *as applied*." 306 Ark. at 304, 813 S.W.2d at 776. (Emphasis added.)

The fee cap statute is also unconstitutional as applied to the facts of the present case for the same reasons as those set forth in *Arnold* v. *Kemp, supra*. And the Independence County Ordinance adopted pursuant to Ark. Code Ann. § 14-20-102 (Supp. 1991) is inoperable in this case because it contemplates payment of capped legal fees under § 16-92-108. In the absence of clear direction from the General Assembly as to which political entity, state or county, is liable for legal fees under these circumstances, I turn to the State Constitution for guidance.

There is no question that the crime committed in this instance is a crime against the state and that the right to counsel is

provided by the State Constitution in Article 2, Section 10, as interpreted, and not because of some conferment of rights by Independence County. With that right goes a price tag. I would assess payment of the price for legal services against the State of Arkansas because that is where the right has its origin, and there is no effective legislative pronouncement to the contrary.

HOLT, C.J., joins.

ROBERT H. DUDLEY, Justice, dissenting. We have granted "expedited appeal" status to this significant case. The issue is whether the State or a county has the burden of financing the indigent criminal defense system at the trial court level. The plurality and concurring opinions hold that the State is the governmental entity to bear the burden. While that result might be desirable, it does not comport with our law, and, accordingly, I dissent.

William Thomas Reager, an indigent, was charged with capital felony murder in the Circuit Court of Independence County. The Circuit Court appointed Jerry Post and Oscar Jones as counsel for the accused. The attorneys devoted a considerable amount of time to the case and, under the fee cap provisions of Ark. Code Ann. § 16-92-108 (1987), would have been entitled to a fee of only $1,000.00 each, plus reimbursement of up to $100.00 for expenses. However, during the time they were preparing the defense, this court decided the case of *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), in which we held that "[u]nder the circumstances of this case, the expense and fee 'caps' contained in section 16-92-108 [are] unconstitutional." *Id.* at 295, 813 S.W.2d at 771.

Conclusive evidence showed that Reager was not guilty of the crime, and the charge ultimately was dismissed. Each of the attorneys petitioned the circuit court to certify the amount of his fee to the County Court of Independence County. On hearing Post's petition, the circuit court certified to the county court an attorney's fee of $40,385.29 and directed the county to pay the amount certified. The County paid Post's fee in full, and his fee is not at issue. On hearing Jones's petition, the circuit court ruled that Jones was entitled to a fee of $22,986.00 and to $602.85 as reimbursement for expenses. Unlike its ruling on Post's petition, the circuit court ruled on this petition that Independence County

would be liable for only $450.00 of the attorney's fee and expenses and that the State would be liable for the remaining $23,138.85. At that point in the proceeding, the Attorney General was given notice and was allowed to intervene. The Attorney General petitioned the court to modify its ruling, but the circuit court refused to do so. The Attorney General, on behalf of the State, appeals. The primary issue is whether a county or the State must pay the attorney's fee and expenses for the defense of an indigent in a criminal case.

The plurality opinion holds that the responsibility for payment of the attorney's fee and expenses is for the State to bear, but the reasoning for that conclusion is not clear. The crux of the holding is in the last half of the penultimate paragraph, which provides:

> [T]here remains no statutory authority for placing the payment of Mr. Jones' fee on the county. However, we have recently held that appointment of counsel in criminal cases results in a taking of the appointed counsel's property for which he must be justly compensated, so even though there exists no statutory authority for awarding attorneys fees and expenses to counsel who represent indigent defendants, it is constitutionally required. *Kemp*, 306 Ark. 294, 813 S.W.2d 770. As we have recognized before, the "statute imposes a burden upon the count[y] to pay fees to attorneys representing indigents which the count[y] would not be responsible for otherwise." *State* v. *Conley*, 270 Ark. 139, 141, 603 S.W.2d 415, 416 (1980). Payment of fees to attorneys representing indigents is a responsibility of the state which the legislature had delegated to the counties by statute. Since there is no statute delegating this duty to Independence County, the state is responsible for payment of Mr. Jones' fee and expenses.

The plurality opinion simply says there is a statutory void, and, therefore, the expense must fall on the State. There is no reasoning. The plurality opinion could just as well have provided that there is a statutory void, and, therefore, the expense must fall on the county. However, there are sound reasons for a different holding in this case, and those are found in constitutional provisions and the doctrine of the inherent power of courts.

The Constitution of the United States mandates that counsel be appointed for indigent defendants. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Article 2, section 10 of the Constitution of the State of Arkansas provides that an accused has the right to "be heard by himself and his counsel," and Article 2, section 8 provides that no person may "be deprived of life, liberty or property, without due process of law." It is beyond question that the federal and state Constitutions together mandate that an indigent defendant cannot be tried for a felony or serious misdemeanor without assistance of counsel. If some governmental entity does not provide counsel for an indigent defendant, the state may not try that person for the commission of a crime.

The plurality opinion seems to imply that the state constitution provides the State will pay counsel for an indigent defendant. No citation of authority is given, and this court has previously said there was no such provision. Our most recent statement on this subject was in 1980, and we wrote: "At common law there were no provisions for payment for those attorneys appointed to defend indigents. *See also, Pickens* v. *State*, 301 Ark. 244, 783 S.W.2d 341 (1990). Neither the state nor the federal Constitutions make provisions for payment of attorneys in such cases." *State* v. *Ruiz & Van Denton*, 269 Ark. 331, 333, 602 S.W.2d 625, 626 (1980). In sum, there is no constitutional provision that mandates that the State must pay the fee of an attorney representing an indigent defendant.

Neither the state nor the federal Constitution contemplates a person being discharged from the commission of a crime solely because he or she is indigent. It seems unassailable that both the federal and state Constitutions contemplate that the trial court will provide counsel for an indigent defendant, but neither provides the manner of payment. Since there is no provision for the payment of attorney's fee, the trial court must exercise its inherent power to order such payment.

In *Abbott* v. *Spencer*, 302 Ark. 396, 790 S.W.2d 171 (1990), we discussed the doctrine of inherent power of the court as follows:

> The doctrine, in summary, is that the constitution mandates that there be three separate but equal branches of government, and therefore, inherent in the constitution is

> the principle that when one of the other branches of government fails to fund a court that court has the power to order those acts done which are necessary and essential for the court to operate.

Id. at 398, 790 S.W.2d at 172.

In *Turner, Ex Parte*, 40 Ark. 548 (1883), we discussed the requirement that a county supply a court house for the circuit court, and wrote:

> If no court-house, or an insecure one, is provided, the Circuit Court by virtue of that inherent authority which all Courts of record possess, might cause convenient apartments to be procured elsewhere in the town for the time being, the expense of which could be certified down to the County Court and payment ordered of the incidental expense of holding Court.

Id. at 551.

In other cases we have said that a court has the inherent power to command an orderly, efficient, and effective administration of justice, *Burns* v. *State*, 300 Ark. 469, 780 S.W.2d 23 (1989); to punish for contempt in the court's presence, *Gatlin* v. *Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991); to adopt rules of evidence, *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986); to order remittitur, *Martin* v. *Rieger*, 289 Ark. 292, 711 S.W.2d 776 (1986); to modify a judgment within ninety days, *Blissard Management & Realty, Inc.* v. *Kremer*, 284 Ark. 136, 680 S.W.2d 694 (1984); to deal with insanity matters incidental to criminal law, *Schock* v. *Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981); to award alimony during period when controlling statute was unconstitutional, *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W.2d 21 (1980); to make rules of procedure, *Miller* v. *State*, 262 Ark. 223, 555 S.W.2d 563 (1977); to appoint a special prosecutor when the prosecuting attorney is implicated in a crime, *Weems & Owen* v. *Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974); to make rules for the guidance of court clerks, *Christy* v. *Speer*, 210 Ark. 756, 197 S.W.2d 466 (1946); to disbar an attorney, *Hurst* v. *Bar Rules Committee*, 202 Ark. 1101, 155 S.W. 697 (1941); and to direct the selection and summoning of a petit jury at a special term, *Norrid* v. *State*, 188 Ark. 32, 63

S.W.2d 526 (1933). In the absence of a statute providing for payment of a court-appointed attorney, the trial court would have the inherent authority to order, as a necessary expense of court, that a reasonable fee be paid the attorney.

The inherent power of a court is to be exercised in a conservative manner and only in those areas that are vital for the proper functioning of a court. *Turner, Ex Parte*, 40 Ark. 548 (1883). A court should look to legislation for guidance, when possible, in the manner of exercising inherent power.

The state constitution, and statutes providing for courts, lead one to the conclusion that the trial court, pursuant to its inherent power, should have ordered the county to pay the attorney's fee. Under the Arkansas Constitution, judicial officers, as one department of state government, are state constitutional officers and, as such, are to be paid by the State. *Cotham* v. *Coffman*, 111 Ark. 108, 163 S.W. 1183 (1914); Ark. Const. art. 19, § 11 (as amended by Amendment 43). Prosecuting Attorneys are constitutional state officers acting in a quasi-judicial capacity and likewise are to be paid by the State. *Smith* v. *Page*, 192 Ark. 342, 91 S.W.2d 281 (1936). The remuneration of all other circuit court officers and employees is controlled by statute and has traditionally been paid by the counties. In 1981, court reporters of circuit and chancery courts were made state employees, *see* Ark. Code Ann. § 16-13-501 (1987), but, under the applicable statutes, all others remain county employees. The deputy prosecuting attorney is a county employee, *see, e.g.*, Ark. Code Ann. § 16-21-2004 (1987); the public defender is a county employee, *see* Ark. Code Ann. § 16-87-107 (Supp. 1991); the circuit clerk is a county employee, Ark. Code Ann. § 14-14-1204 (Supp. 1991); the sheriff or bailiff is a county employee, *see, e.g.*, Ark. Code Ann. § 16-13-1413 (Supp. 1991); the circuit court's secretary is a county employee, *see, e.g.*, Ark. Code Ann. § 16-13-1411 (Supp. 1991); the circuit court's probation officer is a county employee, *see, e.g.*, Ark. Code Ann. § 16-13-1412 (Supp. 1991); the circuit court's field investigator is a county employee, *see, e.g.*, Ark. Code Ann. § 16-13-1418 (1987); the circuit court's case coordinator is a county employee, *see, e.g.*, Ark. Code Ann. § 16-13-1409 (Supp. 1991); the circuit court's law clerk is a county employee, *see, e.g.*, Ark. Code Ann. § 16-13-1410 (Supp. 1991).

The courthouse, which is just that, a building where the circuit court is housed, must be provided by the county. *See* Ark. Code Ann. § 14-19-108 (1987). The county also pays for the utilities necessary for the courtroom and for the books and stationery for the circuit judge. Ark. Code Ann. § 16-10-123 (1987). In addition, the county is responsible for holding all prisoners before trial. Ark. Code Ann. § 12-41-509 (1987).

The statutes applying to the payment of attorneys' fees are equally clear. Until the middle of this century attorneys were required by case law to represent indigent defendants without remuneration. In 1953, the General Assembly modified that policy and, by Act 276 of 1953, provided that when a circuit court appointed an attorney to defend an indigent defendant, the circuit judge could order the *county* to pay not less than $25.00, nor more than $250.00, for the attorney's services. The next legislation, Act. 246 of 1977, Ark. Code Ann. § 16-92-108 (a), (b)(1), (3), and (c)(1) (1987), raised the amount of attorneys' fees that could be paid by the *county*. These are the "fee cap" statutes.

Act 24 of 1979, Ark. Code Ann. § 16-92-109 (1987) as now amended, allows a county to apply to the state for *reimbursement* of certain costs incurred by the county in conducting felony trials. The purpose of the statute is primarily to *reimburse* counties for witness and juror fees and mileage, but *expressly exempted from reimbursement are "salaries and expenses" of "court appointed attorneys."* Ark. Code Ann. § 16-92-109 (a)(2) (1987). There is not now, nor has there ever been, a statute that provides that the State shall pay the salaries and expenses of court-appointed attorneys. Rather, the "fee cap" statutes provided that the county would pay those salaries and expenses, and Ark. Code Ann. § 14-20-102 (1987) provides that a county may "provide for the creation of a fund to be used for the sole purpose of paying reasonable and necessary costs incurred in the defense of indigent persons accused of criminal offenses" by assessing $5.00 court costs in each civil and criminal case filed in the county. If the county does not wish to pay court-appointed attorneys on an individual attorney basis, it can create and fund the office of public defender. Ark. Code Ann. § 16-87-102, 107 (1987 & Supp. 1991).

The above cited statutes together provide that the county shall bear the cost of holding circuit court, except for the salaries of the judiciary and quasi-judiciary employees, and the salary of the court reporter. This is because "[c]ounties are civil divisions of the State, for political and judicial purposes, and are its auxiliaries and instrumentalities in the administration of its government." *Cole* v. *White County*, 32 Ark. 45, 51 (1877).

The case of *St. Francis County* v. *Cummings*, 55 Ark. 419, 18 S.W. 461 (1892), provides guidance in how the inherent power should be exercised in the case at bar. In that case a decomposed body was found, and the county coroner asked a physician named Cummings to conduct a post mortem examination in order to determine the cause of death. The doctor conducted the examination and submitted a claim of $125 to the county for services. Just as in the case at bar, there was no statute authorizing the county to pay such a claim, and the county court therefore disallowed the claim. The doctor appealed to circuit court, and that court ordered the claim paid. The county appealed to this court, and we affirmed the circuit court even though no statute specifically required the county to allow the claim. In language that fits the case at bar, we wrote, "*As a rule the counties are responsible for the expenses of the administration of the criminal laws. Both justice and policy demand an adherence to the rule. . . .*" *Id.* at 422, 18 S.W. at 461 (emphasis added).

Another case also provides some guidance in how the inherent authority should be exercised. In *Jefferson County* v. *Hudson*, 22 Ark. 595 (1861), the sheriff was required to summon witnesses to appear before the grand jury, and he asked for fees for so doing. (At that time county officers were on a fee system.) No statute provided for such fees. The dispute ultimately reached this court, and we wrote:

> The fees for summoning witnesses to appear before the grand jury, not being taxable costs in any particular criminal case, are part of the public expense of carrying on the Circuit Court, like the expense of furnishing fuel, stationery, &c., &c., and are payable out of the county treasury; and upon a fair construction of sections 30, 31, 32, 33, 34, *chap. 50, Gould's Digest*, we think it is the province of the Circuit Court, in which the expenses occur,

> to audit and adjust the accounts of the sheriff and clerk therefor, and to certify them to the County Court for allowance, and that the County Court has no authority to reject or reduce a claim so authenticated for such expenses.

Id. at 600.

It may be that the General Assembly ought to enact a statute placing the burden on the State for paying attorneys' fees for indigent defendants, but, until it chooses such course, it seems clear that under the inherent power of the trial court, the trial court should order the county to pay the uncapped fee. This reasoning comports with the facts that a majority of counties have already established public defender programs, and are currently paying for them, and the fact that a smaller number of counties, such as Independence County, now collect court fees to pay attorneys for defending indigent defendants. Yet, under the plurality and concurring opinions, the counties are not liable for the fees of attorneys who defend indigents. I dissent.

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

Kendall DILLON *v.* STATE of Arkansas

CR 92-58 844 S.W.2d 944

Supreme Court of Arkansas
Opinion delivered January 19, 1993

[redacted]

Harold W. Madden and *Tom F. Donovan*, for appellant.

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

ROBERT L. BROWN, Justice. The appellant, Kendall Dillon, raises sixteen points in his appeal from a conviction for rape and a sentence of thirty-three years. Three points concern prosecutorial misconduct in the cross-examination of two defense witnesses and of Dillon himself. We agree that the cumulative effect of statements made by the prosecutor in the cross-examination was prejudicial to Dillon and denied him a fair trial. We, therefore, reverse and remand the case for a new trial.

FACTS

On November 19, 1990, Kendall Dillon, who at the time was a Pulaski County Deputy Sheriff, was charged with the crime of rape. The charge resulted from an incident that occurred at about 5:00 a.m. on October 10, 1990, when Dillon, who was in his patrol car, stopped Tammy Falcone, an employee of the Checkmate Club, near McCain Mall in North Little Rock. According to Falcone's testimony, Dillon called in her license and tag numbers and informed her that a warrant had been issued for her arrest for hot checks. He instructed her to follow him to her car. She obeyed, and followed him to Sherwood, where they parked in a lot near Kiehl Avenue. Dillon ordered her into his car and then drove her to a secluded gravel road.

Falcone offered Dillon her tip money if he would let her go, but he replied that he wanted her, not her money. She told him that she wanted to go home to her children, but Dillon began playing with her hair, kissing her, fondling her breasts, and

inserting his fingers in her vagina. Falcone testified that she feared she would die if she attempted to get away. When a car passed by, Dillon stopped. He then returned her to her car and warned her not to tell anyone.

Two days later, on October 12, 1990, Dillon stopped Brenda Kaup, according to her testimony at trial, and instructed her to raise her brassiere and pull down her pants and panties while she sat in his patrol car. No criminal charges were filed in connection with that incident, but Kaup sued Dillon in federal district court. Kaup's testimony was admitted at Dillon's trial.

Dillon was convicted and sentenced after a three-day trial.

I. PROSECUTORIAL MISCONDUCT

Dillon points to several instances of prejudicial statements made by the prosecutor at trial, none of which was supported by proof.

The first was in the form of a question on cross-examination to Lieutenant Mike Adams of the Pulaski County Sheriff's Department under whom Dillon worked:

> PROSECUTOR: Were you aware of any complaints against Mr. Dillon about his treatment of women, particularly threatening to plant drugs on them in exchange for sex?
>
> DEFENSE COUNSEL: Your Honor, I object to that characterization; it is a leading statement.
>
> THE COURT: Don't lead your witness, Ms. Ferrell. You may rephrase the question.
>
> DEFENSE COUNSEL: Your Honor, may I approach the bench?
>
> THE COURT: Please do.
>
> (THEREUPON, counsel for the State and counsel for the Defense approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)
>
> DEFENSE COUNSEL: Your Honor, that question was leading. The allegation was made from specific acts, and I would —

THE COURT: I sustained your objection to the leading.

DEFENSE COUNSEL: And it was rude of Ms. Ferrell because of the specific act that was implied.

PROSECUTOR: He opened the door by saying that he did a good job and how he arrested these women in performance of his duties is relevant to how he would do his job.

DEFENSE COUNSEL: Not to that kind of question, Your Honor. He didn't open any door, and I do move for a mistrial.

THE COURT: Denied.

DEFENSE COUNSEL: And I ask for the Court to instruct the jury. The question was improper and they're to disregard it.

THE COURT: I'm not going to over-emphasize it, but . . . I'm going to sustain your objection to the leading question.

Without any proof to support the insinuation, the prosecutor forged the distinct impression in the minds of the jurors that complaints against Dillon existed for threatening to plant drugs on women in exchange for sex.

The second improper comment occurred in the prosecutor's cross-examination of Chief Deputy Jerry Bradley of the Faulkner County Sheriff's Department:

PROSECUTOR: Well, were you aware of whether — Were you aware that the defendant resigned from the Conway Police Force?

BRADLEY: Yes.

PROSECUTOR: So you are aware of why he resigned from the Conway Police Force?

BRADLEY: I have no direct knowledge of why he resigned.

PROSECUTOR: You have no direct knowledge?

BRADLEY: No.

PROSECUTOR: You have no direct knowledge, but you are aware that it's because he forced sex on —

DEFENSE COUNSEL: Your Honor, I want to object to her making any statement of —

THE COURT: Now, just a minute. If he doesn't know why, doesn't have any direct knowledge of it, then that's it.

PROSECUTOR: Are you also aware that he resigned from the Morrilton Police Force?

BRADLEY: Yes, Ma'am.

PROSECUTOR: So you're aware of why he resigned there, as well, aren't you?

BRADLEY: No.

PROSECUTOR: And are you aware —

BRADLEY: I have no direct knowledge of why he resigned from any department. He also worked for Mayflower at one time, but I —

PROSECUTOR: And you know he resigned from Mayflower?

BRADLEY: Yes.

PROSECUTOR: And you know he resigned from UCA?

BRADLEY: I'm sorry. I don't ever remember him working for UCA.

PROSECUTOR: As a security at UCA?

BRADLEY: No, I don't. I don't remember that.

PROSECUTOR: So you're aware that he resigned from Mayflower, that he resigned from Conway, he resigned from Morrilton, and now you're aware that he resigned from the Pulaski County Sheriff's Department. Is that correct?

BRADLEY: I didn't know he had resigned from Pulaski County. I didn't know what his involvement there was.

PROSECUTOR: And are you aware that these were all forced resignations?

DEFENSE COUNSEL: Your Honor, I want to object to that. And at this time, Your Honor, may I approach the bench?

(THEREUPON, counsel for the State and counsel for the Defense approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

DEFENSE COUNSEL: Your Honor, the witness has testified that he had no direct knowledge. She is asking, "Are you aware that he was forced to resign?" He's already said he had no direct knowledge. At this time, I'd move for a mistrial. She has prejudiced us before this jury —

THE COURT: But —

DEFENSE COUNSEL: — and it's totally prejudicial, after he said that he had no direct knowledge of it.

THE COURT: How much more do you want him to say about it?

PROSECUTOR: I elicited of him — but this is my last question of this witness.

DEFENSE COUNSEL: It's one too many, Your Honor.

THE COURT: I'm not going to order a mistrial at this point, but don't do that any more.

PROSECUTOR: Okay, no, Your Honor.

THE COURT: You're that close to it.

PROSECUTOR: I don't dare.

DEFENSE COUNSEL: And, Your Honor, at this time, we'd ask —

THE COURT: Your motion is denied.

DEFENSE COUNSEL: But — Now, I understand that, but I have one more, and I ask that the jury be instructed to disregard that question.

(THEN, in the hearing of the jury.)

THE COURT: All right. Ladies and gentlemen of the jury, you'll disregard that last question which was asked by Ms. Ferrell. Let's move along. Any other questions of Chief Deputy Bradley?

PROSECUTOR: No, Your Honor.

Here, the prosecutor adroitly presented a mandated resignation due to "forced sex" in Faulkner County and then suggested "forced resignations" or suspensions in four other law enforcement agencies, including the Pulaski County Sheriff's Department and one security position at the University of Central Arkansas. Again, no proof was presented by the state to substantiate these implications of the most serious order. It is evident that the trial judge was alarmed by this strategy, and he told the prosecutor that she was "that close" to a mistrial.

The prosecutor next cross-examined Dillon on his suspensions from various law enforcement agencies:

PROSECUTOR: And you testified on direct that you've been a police officer with the Pulaski County Sheriff's Department for seven and a half years. Right?

APPELLANT: Yes.

PROSECUTOR: And that you left the Narcotics Division when you were promoted. Correct?

APPELLANT: Yes.

PROSECUTOR: But during that seven and a half years, that wasn't the first time you were suspended, was it?

APPELLANT: No.

PROSECUTOR: You'd been suspended before for taking a woman to —

DEFENSE COUNSEL: Your Honor, I want to object.

. . . .

THE COURT: You may ask him if he has been suspended and then ask him what for. If it goes to truthfulness, I'll allow it.

PROSECUTOR: Okay.

(THEN, in the hearing of the jury.)

PROSECUTOR: Have you been suspended before?

APPELLANT: Yes.

PROSECUTOR: What was it for?

DEFENSE COUNSEL: Your Honor, at this time, I'd like to state that unless it has do with truthfulness or untruthfulness, I would object to the question.

THE COURT: Well, you see, I don't know.

DEFENSE COUNSEL: Well, then no proper foundation has been laid for the question.

THE COURT: Overruled. Go ahead.

PROSECUTOR: What was it for?

APPELLANT: I'd have to refer to the letter of suspension. I believe it was for not remaining quiet in school and misuse of a department vehicle.

PROSECUTOR: Misuse of a department vehicle? What did you misuse it for?

DEFENSE COUNSEL: Your Honor, I object. That has nothing to do with truthfulness or untruthfulness.

(THEREUPON, counsel for the State and counsel for the Defense approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

THE COURT: Do you have proof as to what he's been suspended for?

PROSECUTOR: Yes, I do.

THE COURT: Well, ask him those specific questions that deal with truthfulness or untruthfulness, and using a vehicle improperly would not go to that. I'll just give you a little hint.

PROSECUTOR: Okay.

In an *in camera* conference with trial counsel, the prosecutor indicated that she wished to ask two more questions about alleged prevarications by Dillon but did not intend to back up the questions with witnesses. A discussion then followed:

THE COURT: Aren't those questions sort of like do you still beat your wife?

PROSECUTOR: Your Honor, they are prior incidences of —

THE COURT: (Interposing) Well, that is fine if you can back those up and prove them, then that is proper, but just to ask them and have no proof of it is not only improper, it is not fair. Is that the only two other questions you have left?

PROSECUTOR: Yes.

THE COURT: Okay. Let's don't ask those. And you can go back and finish up with something else if you like.

PROSECUTOR: Okay.

When error accumulates in a criminal case, this court has recognized that the impact may be prejudicial, and we have reversed a decision by the trial court. *Harris* v. *State*, 264 Ark. 391, 572 S.W.2d 389 (1978). We considered a motion to suppress a search warrant in *Harris* and concluded that the warrant should have been suppressed as defective. The municipal court did not adequately specify on the warrant the place to be searched. Also, the judicial officer made no finding whether it was a daytime or nighttime search (the warrant may have been served as early as 5:00 a.m.), and no receipt for the items seized was given the defendant. The trial court noted "pretty much of a total disregard for the rules" but refused to find prejudice. We reversed due to the "accumulation of error," saying:

> It might be that alone the discrepancies in this case would not amount to prejudicial error. However, when considered together, we must conclude that the almost total disregard for the Rules cannot be ignored. What it all comes down to is where do we draw the line? We draw the line here. The State has not demonstrated that a reasonably good faith effort was made to comply with the Rules. The evidence is, in fact, to the contrary.

264 Ark. at 395, 572 S.W.2d at 391.

A second case from a foreign jurisdiction approximates the case at bar and offers additional justification for reversal. *See State* v. *Soares*, 815 P.2d 428 (Hawaii 1991). The offense at issue in *Soares* was the robbery of a convenience store. The appellants were convicted and, on appeal, urged prosecutorial misconduct. The Hawaii Supreme Court agreed and reversed and remanded, giving as part of its reasoning the following:

> We have repeatedly stated that "[t]he duty of the prosecution is to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused." [Citing authority.] In this case, the record contains numerous examples of the prosecutor's disregard for appellants' right to a fair trial. For example, during jury selection, the prosecutor asked a prospective juror her feelings about someone who did something wrong but did not have adequate counselling in his or her "formative years." After Soares' counsel objected and asked the court to instruct the prospective jurors not to infer from any of the attorneys' questions that anyone had done anything wrong, the prosecutor remarked, "if nobody has done anything wrong, we wouldn't be here."
>
> Further examples of the prosecutor's misconduct include the prosecutor's repeated attempts to introduce evidence previously excluded by motion in limine, numerous "speaking objections," and leading questions.
>
> Although no single instance of prosecutorial misconduct substantially prejudiced appellants' right to a fair trial, we find that the cumulative weight of the prosecutor's

> improper conduct was so prejudicial as to deny appellants a fair trial. [Citing authority.]

815 P.2d at 430-431.

In the present case, the prosecutor crafted a mosaic of a defendant who 1) had planted drugs on women in exchange for sex; 2) had resigned from the Conway Police Department because he had forced sex on someone; 3) had been forced to resign from four other law enforcement agencies and one security job, apparently for the same reason; and 4) had been suspended from the Pulaski County Sheriff's Department for "taking a woman," the implication in light of the charge and the other insinuations being that the woman was taken for sex.

As in *Soares*, the prosecutor's accumulated remarks in this case combined to deny Dillon a fair trial. One comment built on the next until the jury could readily have believed that Dillon had been fired repeatedly from law enforcement positions because he forced sex on women. Yet the prosecutor offered no evidence that any one of these accusations was true. The net result was guilt by insinuation.

■ We cannot say that the prosecutor's comments, overly zealous as they were, did not taint the jury's decision and, indeed, we conclude exactly to the contrary. Our system of criminal justice is founded on the twin cornerstones of fairness and proof beyond a reasonable doubt. Here, the appellant was subjected to an onslaught of accusations which he had no way of defending against because the accusations were unsubstantiated. The prejudice to his case was palpable.

II. POINTS ON RETRIAL

There are several points that may well reoccur in a second trial.

On cross-examination, the State was allowed to use a transcript to inquire into whether Dillon had told the truth while testifying under oath in a court proceeding on October 26, 1984. In the earlier trial, the appellant declared that he had not made any specific promises to the defendant in that case; later, however, a tape was played in which it was clear that he had indeed made promises.

The appellant contends that this cross-examination violated A.R.E. 608(b), which bans, in general terms, proof of "[s]pecific instances of the conduct of a witness" by extrinsic evidence. But the Rule leaves to the court's discretion the decision whether to permit inquiry concerning those instances that concern a witness's "character for truthfulness or untruthfulness."

Reference to a transcript of a prior proceeding involving the witness for the purpose of impeaching that same witness in the current trial is not the kind of extrinsic evidence prohibited by Rule 608(b). *See* 1 J.W. Strong, *McCormick on Evidence*, § 41, at p. 141 (4th Ed. 1992). We have also held that the credibility of a witness may be attacked, under Rule 608, under the following conditions: "1) the question must be asked in good faith, 2) the probative value must outweigh its prejudicial effect, and 3) the prior conduct must relate to the witness'[s] truthfulness." *Mackey* v. *State*, 279 Ark. 307, 316, 651 S.W.2d 82, 86 (1983).

Here, the prosecutor merely inquired into the past episode, and nothing in the record suggests that the question was not asked in good faith. The probative value of the query was high, given the critical need for the jury to evaluate the credibility of Dillon versus that of Tammy Falcone. No prejudice resulted to Dillon because the question elicited nothing about other sexual offenses. The point of the inquiry on cross-examination was to explore Dillon's propensity for truthfulness. Accordingly, the questioning was permissible.

Dillon also objected to the testimony of Lieutenant Mike Adams concerning what Dillon told him about what happened when he pulled Falcone over to run a "warrant check." This was improper, the appellant urges, because he had not received his *Miranda* warnings. However, at the time Dillon spoke with Adams, he was not "in custody" or "under arrest." Hence, the *Miranda* requirement was not operative. *Shelton* v. *State*, 287 Ark. 322, 699 S.W.2d 728 (1985). Moreover, the appellant never sought a *Denno* hearing prior to trial as provided for by Ark. Code Ann. § 16-89-107(b)(1) (1987).

The circuit court allowed Brenda Kaup, Dillon's purported victim on October 12, 1990, to testify under A.R.E. 404(b) because her testimony was evidence that Dillon followed a

particular plan, or *modus operandi*, with Tammy Falcone. Dillon's plan, as revealed by Kaup's testimony, was consistent with the circumstances depicted in Falcone's testimony. According to the respective testimony, both women were unaccompanied when they were pulled over. Both women were accused of crossing the center line, and both were ordered to get into the patrol car. Both women had family out of town: Falcone's husband was in Saudi Arabia, and Kaup's family lived out of state. In Kaup's case, she stated that Dillon threatened to take her in for DWI but said perhaps he could work something out. At that point he obliged her to expose herself to him under the pretext of searching for drugs. He then released her and followed her to her babysitter's house.

We have held that *modus operandi* evidence is admissible in rape cases to prove a common plan. *Tarkington* v. *State*, 250 Ark. 972, 469 S.W.2d 93 (1971). This situation fits squarely within that holding.

Finally, "serious physical injury" is not an element of the crime of rape, and the circuit court correctly refused the appellant's proffered modified version of AMCI 1803.

Reversed and remanded.

HAYS, GLAZE, and CORBIN, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. Today, this court has determined that three improper questions by the prosecution amounts to prosecutorial misconduct and results in accumulation of error necessitating reversal. This, in spite of the fact that accumulation of error was not raised by appellant as a ground for reversal. Let us examine and discuss the sequence of the objections to the issues raised within the framework of this three day trial.

The first instance of alleged prosecutorial misconduct arose early in the trial when the prosecutor asked Lt. Mike Adams "[w]ere you aware of any complaints against Mr. Dillon about his treatment of women, particularly threatening, to plant drugs on them in exchange for sex?" This was the prosecution's first attempt to elicit testimony from a witnesses about improper behavior by appellant toward other women. Appellant objected to the question on the basis it was leading and asked for a mistrial.

The court sustained appellant's objection, but denied his motion for a mistrial. Upon denial of his motion for a mistrial, appellant asked that the jury be admonished to ignore the question. The court refused to instruct the jury to disregard the question saying "I'm not going to over-emphasize it, but . . . I'm going to sustain your objection to the leading question." Appellant contends a mistrial should have been granted, but if a mistrial was not necessary, the trial court should have admonished the jury to disregard the question. Appellee argues appellant suffered no prejudice because the witness never answered the question and the instruction by the court at the end of the trial to the jury that "arguments, statements and remarks made by attorneys are not evidence and are to be disregarded if they have no basis in the evidence" cured any possible prejudice.

We have stated many times that the trial court has wide latitude of discretion in granting or denying a motion for mistrial and we will not reverse the decision of the trial court except for an abuse of discretion or manifest prejudice to the complaining party. *Strawhacker* v. *State*, 304 Ark. 726, 804 S.W.2d 720 (1991). I fail to find that the trial court abused its discretion in failing to grant a mistrial nor do I believe the denial of a mistrial resulted in manifest prejudice to appellant. The question was never answered by the witness and there was, therefore, no evidence before the jury about appellant threatening to plant drugs on women in exchange for sex. *See Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988).

However, the refusal of the trial court to admonish the jury to disregard the question is a separate issue. Trial courts have wide discretion in evidentiary questions. *Hubbard* v. *State*, 306 Ark. 153, 812 S.W.2d 107 (1991). In denying appellant's requested admonition, the trial court said "I'm not going to over-emphasize it, but . . . I'm going to sustain your objection to the leading question." While the requested admonishment should undoubtedly have been given, the failure to give the admonishment is not reversible error in this instance. We have held that it may be proper not to give an instruction because it may call undue attention to the evidence. *Kellensworth* v. *State*, 275 Ark. 252, 631 S.W.2d 1 (1982). Additionally, appellant objected at trial only on the basis the question was leading, not that the question was prejudicial. *Bussard*, 295 Ark. 72, 747 S.W.2d 71. The

question was not answered, the trial court sustained the objection, and appellant did not inform the trial court that he wanted the admonition because the question was prejudicial. This was also the prosecuting attorney's first attempt to elicit this improper information. Under these circumstances, I cannot say the trial court abused its discretion in not giving the requested admonition to the jury.

On cross-examination, the prosecutor asked Chief Deputy Jerry Bradley whether he was aware why appellant had resigned from the Conway Police Force. The witness replied he had no direct knowledge of why he resigned. The prosecutor then asked "[y]ou have no direct knowledge, but you are aware that it's because he forced sex on—" at which point appellant objected. The trial court sustained the objection. The prosecutor then continued to question the witness about whether he knew if appellant had resigned from other police departments and whether he knew the reasons for these resignations. The witness admitted knowing appellant had resigned from two other police departments, but did not know the reasons and did not know of appellant's resignation from yet two other police departments. The prosecutor's last question to the witness was "[a]nd are you aware that these were all forced resignations?" Appellant objected to this question, a bench conference was held where appellant moved for a mistrial, which was denied, but the prosecutor was reprimanded and instructed not to "do that anymore. . . . You're that close to it." Appellant then asked for and received an instruction to the jury to disregard the question.

Appellant argues the entire line of questioning was improper and prejudicial because it put appellant in the position of defending other sexual crimes or acts other than the one at hand. At trial, appellant did not object on this basis and only objected on the basis that the witness had no direct knowledge of the reason for appellant's resignation and asking the witness about the reason prejudiced appellant. Since appellant did not argue that the entire line of questioning was improper below, we should not consider this argument on appeal. *Bussard*, 295 Ark. 72, 747 S.W.2d 71.

In any case, a mistrial is only to be granted where any possible prejudice cannot be removed by an admonition to the

jury. *Porter* v. *State*, 308 Ark. 137, 823 S.W.2d 846 (1992). Additionally, "we have held, with rare exceptions, that an admonition to the jury to disregard improper, and even prejudicial matters cures such mistakes." *Lackey* v. *State*, 283 Ark. 150, 154, 671 S.W.2d 757, 759 (1984) (Hays, J., dissenting). The trial court has wide latitude of discretion in granting or denying a motion for mistrial and we do not reverse the decision of the trial court except for an abuse of discretion or manifest prejudice to the complaining party. *Strawhacker* v. *State*, 304 Ark. 726, 804 S.W.2d 720 (1991). I fail to see an abuse of discretion or manifest prejudice in this instance.

Appellant objected to the prosecution asking appellant about his prior suspension from the Pulaski County Sheriff's Department on the basis that it did not go to truthfulness and no foundation had been laid. On appeal, appellant argues the failure of the prosecutor "to demonstrate that the 'bad acts' about which she inquired were probative of truthfulness" prior to asking the question constituted prejudicial error. The following sets out the prosecution's conduct and appellant's objections in this area:

> [PROSECUTION]: [Y]ou testified on direct that you've been a police officer with the Pulaski County Sheriff's Department for seven and a half years. Right?
>
> [APPELLANT]: Yes.
>
> . . . .
>
> [PROSECUTION]: But during that seven and a half years, that wasn't the first time you were suspended, was it?
>
> [APPELLANT]: No.
>
> [PROSECUTION]: You'd been suspended before for taking a woman to —
>
> [APPELLANT'S COUNSEL]: Your Honor, I want to object.
>
> (THEREUPON, counsel for the State and counsel for the Defense approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)
>
> [APPELLANT'S COUNSEL]: Your Honor, she

may ask him if he was suspended, but she may not bring up this other. It has nothing to do with truthfulness or untruthfulness

. . . .

which is what those rules require before she could do any cross examining about this.

[PROSECUTION]: Your Honor, under the Rule, it says we can cross examine him about acting as a police officer for seven and a half years. If he feels it's not relevant to this case, we can contribute this to the witness' credibility. In opening he said, I will prove it because he has worked for long standing as a police officer. That's an exact quote from the opening statements, I believe. It places his own character into issue seven and a half years later, when we —

THE COURT: You may ask him if he has been suspended and then ask him what for. If it goes to truthfulness, I'll allow it.

[PROSECUTION]: Okay.

(THEN, in the hearing of the jury.)

[PROSECUTION] CONTINUING: Have you been suspended before?

[APPELLANT]: Yes.

[PROSECUTION]: What was it for?

[APPELLANT'S ATTORNEY]: Your Honor, at this time, I'd like to state that unless it has [to] do with truthfulness or untruthfulness, I would object to the question.

THE COURT: Well, you see, I don't know.

[APPELLANT'S ATTORNEY]: Well, then no proper foundation has been laid for the question.

THE COURT: Overruled. Go ahead.

[PROSECUTION] CONTINUING: What was it for?

[APPELLANT]: I'd have to refer to the letter of suspension. I believe it was for not remaining quiet in school and misuse of a department vehicle.

[PROSECUTION]: Misuse of a department vehicle? What did you misuse it for?

[APPELLANT'S COUNSEL]: Your Honor, I object. That has nothing to do with truthfulness or untruthfulness.

(THEREUPON, counsel for the State and counsel for the Defense approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

THE COURT: Do you have proof as to what he's been suspended for?

[PROSECUTION]: Yes, I do.

THE COURT: Well, ask him those specific questions that deal with truthfulness or untruthfulness, and using a vehicle improperly would not go to that. I'll just give you a little hint.

. . . .

(THEN, in the hearing of the jury.)

[PROSECUTION]: Your Honor, may we approach?

THE COURT: Do you think we could work some of these things out if we'd take about a ten minute break so that you don't have to continue coming up, back and forth? The jury and I would like to get through with this trial sometime. Let's take about a ten minute break, ladies and gentlemen, and be back at five after 2:00.

(THEREUPON, Court was in recess until 2:05 p.m. during which time the following proceedings took place, in chambers:)

THE COURT: All right. Let's see if we can work out what you want to ask so that you don't have to have every question you ask have an objection to it and coming up to the bench.

[PROSECUTION]: Yes, Your Honor, I will be glad to do that. I have two more questions. One is, do you remember telling Lisa Craig Short's parents that you did not know where she was when, in fact, she was in your hotel room?

THE COURT: How are you going to prove that . . . if he says no? Aren't you stuck with that then and are you going to bring the girl and her parents in to testify to that?

[PROSECUTION]: No, Your Honor. First of all, I don't believe he has opened the door on direct examination for me to do that. I do have the material from the Conway Police Department that details it, Ms. Craig's statements. Also, Ms. Craig is in the audience, but I would not call her as a witness.

THE COURT: Then you propose to ask that question? Are you going to object to that?

[APPELLANT'S ATTORNEY]: When she asks it, Your Honor, I will make a motion for a mistrial.

THE COURT: I probably will grant it if you ask that question. All right. What is your next question?

[PROSECUTION]: The other question will probably be in the same vein. I just want to make sure, did he instruct a twelve year old to deceive her parents as to where she was.

THE COURT: Aren't those questions sort of like do you still beat your wife?

[PROSECUTION]: Your Honor, they are prior incidences of —

THE COURT: (Interposing) Well, that is fine if you can back those up and prove them, then that is proper, but just to ask them and have no proof of it is not only improper, it is not fair. Is that the only two other questions you have left?

[PROSECUTION]: Yes.

THE COURT: Okay. Let's don't ask those.

On appeal, appellant argues the failure of the prosecutor "to demonstrate that the 'bad acts' about which she inquired were probative of truthfulness" before she asked appellant why he had been suspended constituted prejudicial error. Questions about specific instances of a witness's prior conduct are permissible on cross-examination if they relate to truthfulness. Ark. R. Evid. 608(b).

> In interpreting Rule 608 we have adopted a three-fold test of admissibility: 1) the question must be asked in good faith, 2) the probative value must outweigh its prejudicial effect, and 3) the prior conduct must relate to the witness' truthfulness.

Mackey v. *State*, 279 Ark. 307, 315-16, 651 S.W.2d 82, 86 (1983). This entire colloquy indicates that the prosecutor did not ask the question in good faith. The trial judge told the prosecutor she could ask those questions which related to truthfulness. The prosecutor knew the prior instances of bad conduct by appellant which she was attempting to introduce did not relate to appellant's truthfulness. With this knowledge, she asked the improper questions. It is error to ask questions which are not probative of truthfulness. *Divanovich* v. *State*, 271 Ark. 104, 607 S.W.2d 383 (1980). However, we do not reverse for error without a showing of prejudice. *Hamm* v. *State*, 304 Ark. 214, 800 S.W.2d 711 (1990). Appellant contends it is "clear" he was prejudiced. I do not agree. The question whether appellant was "suspended for taking a woman to —" was not answered. Appellant's objection to the question was sustained. Appellant did not ask for an admonition to the jury to disregard the question. Since appellant did not request an admonition, which would have cured any potential prejudice, he cannot now complain that he was prejudiced by the question being asked. Appellant's answer that he was suspended for "not remaining quiet in school and misuse of a department vehicle" is not prejudicial. It is not probative of truthfulness, as the trial judge noted, but it does not prejudice appellant. Since there has not been a showing of prejudice, I would not reverse.

The majority cites as authority for its decision *Harris* v. *State*, 264 Ark. 391, 572 S.W.2d 389 (1978), in which we found a motion to suppress a search warrant was erroneously denied. We concluded that even though none of the errors in the search

warrant, standing alone, would require suppression, the pervasiveness of the errors contained in the search warrant necessitated suppression. The *Harris* case is simply not applicable to the case at bar. The majority also relies on *State* v. *Soares*, 815 P.2d 428 (Hawaii 1991), which was reversed because of numerous instances of prosecutorial misconduct, none of which, standing alone would have required reversal. There, the prosecutorial misconduct began during voir dire and permeated the trial. This Hawaiian case does not "approximate[] the case at bar" as the majority concludes. The case at bar involved only three instances of a prosecutor attempting to elicit improper testimony from the witnesses over a three day trial. While I agree with the majority that the prosecutor was overzealous and this conduct was improper, I think it falls short of prosecutorial misconduct.

In closing, I note that the cases in which we have reversed for cumulative error involved much more egregious instances of improper conduct and the issue of cumulative error was specifically raised on appeal. In *Alexander* v. *Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986), we reversed where there were 28 objections by appellant to leading questions, appellee was admonished repeatedly by the trial judge and the objections were repeatedly sustained, but appellee's conduct was not stopped. Appellant in *Chapman* even asked that the testimony be stricken because of the excessive use of leading questions, but the trial judge determined that striking the testimony was too harsh a sanction. In *Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633 (1988), we said ten instances of leading questions during a lengthy trial with an evident attempt by counsel for the state to comply with the judge's directive to avoid leading questions did not require reversal. In this case, there were only three instances of improper questions presented for our consideration during a three day trial, there is no indication the trial judge was unable to control the prosecutor's actions, and the issue of cumulative error was not raised by appellant either below or on appeal.

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

Odessa YOUNG *v.* Larry JOHNSON

92-691 845 S.W.2d 509

Supreme Court of Arkansas
Opinion delivered January 19, 1993

[redacted]

Gary Eubanks & Associates, by: *James Gerard Schulze* and *Hugh F. Spinks*, for appellant.

Thompson, Hendrix, Harvey, Johnson & Mitchell, by: *Michael G. McLaren, L. Mitchell Glasgow*, and *Roderick Runnells*, for appellee.

ROBERT L. BROWN, Justice. Appellant Odessa Young raises as her sole issue on appeal that the circuit court erred in submitting the issue of her alleged contributory negligence to the jury because there was no evidence of her negligence presented at trial. We agree that prejudicial error was committed, and we reverse the judgment and remand the matter for a new trial.

On February 13, 1989, Odessa Young was driving her 1982 Lincoln Town Car south on Ferris Mountain Road, a single-lane road near Fordyce in Dallas County. It had been raining, and there were puddles on the road. The time was about 9:40 p.m. A friend, John Allen, was a passenger in her car. At the same time, Larry Johnson was driving a U-haul truck north on the same road. Shortly after Young rounded a curve in the road, she and Johnson collided. Johnson described the accident in these terms:

> Well, I turned in and like they said it had been raining, and was real muddy and slushy and I never recognized the headlights on their car. As I approached the curve, right before I approached the curve I was smoking a cigarette. I had just lit the cigarette and I dropped it and looked down to pick the cigarette up and bang, I had run into them folks car.

Young sustained back and neck injuries and was taken to the Dallas County Hospital where she remained for four days. Allen was also taken to that hospital where he was treated for injuries to his right knee and hip. Young's car burned and was a total loss.

Young and Allen subsequently filed a negligence action against Johnson, and Johnson alleged contributory negligence on the part of Young. The case was tried before a jury. Young testified that he medical bills came to $13,279.69. She further testified that her car was worth about $8,000 before the accident and was a total loss.

Kyle Smith, who was then employed by the Dallas County Sheriff's Department, testified for Young and Allen that he prepared the accident report. He stated that Young's car was damaged on the left front side and that the left front bumper of Johnson's truck was also damaged. He further testified that Ferris Mountain Road is a one-lane road but is wide enough for two vehicles.

John Allen testified that he and Young were traveling down the hill when they collided with Johnson's truck. He said that when Young saw the headlights from Johnson's truck, she slowed down and pulled over to the right side of the road as far as she could. Allen stated they were in a ditch when Johnson hit them.

Young testified that when she saw Johnson's lights in the

distance, she slowed down and got to her side of the road. She said that she was on her side of the road when Johnson hit her. She stated that the cause of the accident was Johnson's driving on her side of the road.

Larry Johnson testified, as quoted above, that he was looking for a cigarette which he had dropped when he hit Young's car. He said that he did not see Young's car until he hit it.

After Johnson testified, Young and Allen moved for a directed verdict on the issue of Young's contributory negligence. They argued that there was no proof that Young had been negligent; therefore, there was no issue of her negligence to submit to the jury. The defense countered that there was some proof that Young was negligent because she testified that she saw Johnson's headlights when he was some distance away. The circuit court conceded that proof of negligence on Young's part was "very slim" but nevertheless denied plaintiffs' motion for directed verdict.

The circuit court then instructed the jury on the law and included AMI 206 to the effect that the defendant Johnson was contending that the plaintiff Young was negligent, and he had the burden of proof on this point. The court also gave AMI 305 on the duty of both parties to exercise ordinary care and AMI 2109 on the comparative negligence of the parties. Closing arguments ensued, and after the jury retired to reach its verdict, counsel for Young and Allen made a record on their objections to the three AMI instructions on grounds that the instructions submitted the issue of Young's contributory negligence to the jury. The circuit court overruled the objection and stated that there was "some evidence, however small, of the negligence of Ms. Young" for the jury to consider.

The jury returned a general verdict in favor of Young and Allen, awarding Young $7,500.00 and Allen $1,000.00, although Allen had only claimed $600 in medical expenses. Young then filed a motion for a new trial, contending that it was error to instruct the jury on her contributory negligence and that the award of $7,500.00 was contrary to the preponderance of the evidence. The motion for a new trial was not ruled on within thirty days of filing, and, accordingly, was deemed denied. Young filed a timely notice of appeal from both the judgment and the denial of

her motion for a new trial.

Odessa Young's primary argument on appeal is that the circuit court erred in not directing a verdict in her favor regarding her negligence. She also alludes to the court's instructions relating to her negligence and the claimed prejudice that resulted. Young, however, did not object to the instructions given until after the jury had retired. Objections to instructions must be made either before or at the time the jury instructions are given. *Parker* v. *State*, 302 Ark. 509, 790 S.W.2d 894 (1990). Waiting to object until after the jury has been instructed on the law and has retired is untimely, for it gives the circuit court no opportunity to react to the instructions at issue or to amend them. *See Sims* v. *State*, 286 Ark. 476, 695 S.W.2d 376 (1985). Because the objections were untimely, we will not consider the disputed instructions. Young's failure to object to the comparative fault instructions, however, is not essential for our consideration of the court's denial of her motion for directed verdict.

In general, we have been extremely reluctant to affirm a directed verdict on behalf of the plaintiff. On two occasions, we have quoted with approval the following statement from the Eighth Circuit Court of Appeals which describes our rationale against directing verdicts in the plaintiff's favor:

> Thus, no matter how strong the evidence of a party, who has the burden of establishing negligence and proximate cause as facts, may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise.

United States Fire Ins. Co. v. *Milner Hotels*, 253 F.2d 542, 547 (8th Cir. 1958); *quoted with approval Morton* v. *American Med. Int'l, Inc.*, 286 Ark. 88, 90, 689 S.W.2d 535, 537 (1985); *Spink* v. *Mourton*, 235 Ark. 919, 922, 362 S.W.2d 665, 667 (1962). Thus, we are loath to direct a verdict in favor of the party who has the burden of proof because the jury may disbelieve the credibility of such proof.

Here, however, that is not the case. With respect to Young's negligence, the defendant Johnson had the burden of

proof. *See* AMI 206; *see also Hill Constr. Co.* v. *Bragg*, 291 Ark. 382, 725 S.W.2d 538 (1987). If he did not satisfy the burden, a directed verdict in favor of Young was appropriate. *See Kinco, Inc.* v. *Schueck*, 283 Ark. 72, 671 S.W.2d 178 (1984). In *Kinco*, we stated the test for a trial court's ruling on a motion for directed verdict:

> The test for the trial court in ruling on a motion for a directed verdict by either party is to take that view of the evidence that is most favorable to the non-moving party and give it its highest probative value, taking into account all reasonable inferences deducible from it; after viewing the evidence in this manner, the trial court should: (1) grant the motion only if the evidence is so insubstantial as to require that a jury verdict for the non-moving party be set aside, or (2) deny the motion if there is substantial evidence to support a jury verdict for the non-moving party. *Farm Bur. Mut. Ins. Co.* v. *Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Id.*

291 Ark. at 283, 671 S.W.2d at 180-181; *see also Williams* v. *Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987).

In the case before us, the circuit court denied Young's motion for directed verdict. Under the test cited in *Kinco*, we first view the evidence of Young's negligence, if any, and give it its highest probative value. The question then becomes: was there substantial evidence of Young's negligence to support denial of the motion? or, alternatively, should the court have granted the motion because of the insubstantial evidence? We conclude that the circuit court was in error and that the motion should have been granted.

Johnson did not see Young's vehicle. He had dropped a cigarette, and when he looked up, he crashed into Young's car. Allen and Young testified that when she saw Johnson's headlights, she slowed down and moved as far to the right as possible. Allen said that Young was in the ditch when Johnson hit her. Investigator Kyle Smith testified that the left front side of Young's car was damaged and the left front bumper of Johnson's

truck had been hit, which supports the testimony that Young's car had pulled over to the right.

Johnson argues that there was evidence that enabled the jury to make the determination it did because of photographs of the road referred to by investigator Kyle Smith. But unlike the situation in *East Texas Motor Freight Lines, Inc.* v. *Dennis*, 214 Ark. 87, 215 S.W.2d 145 (1948), where truck tracks crossing the center line were the issue, there is no hint from Smith's presentation that the photographs supported Young's negligence.

In sum, the evidence indicates that Young took reasonable precautions by pulling over to the right when she saw Johnson's headlights. The jury, of course, was free to disbelieve the testimony of Young and Allen. But even giving the remaining evidence presented, such as Larry Johnson's testimony, its highest probative value, there is nothing to suggest Young's negligence. We hold that any conclusion that Young was negligent under these facts is highly speculative and conjectural and, thus, not substantial. *See Williams* v. *Smart, supra*; *Kinco, Inc.* v. *Schueck Steel, Inc., supra.*

The circuit court, therefore, erred in not directing the jury to enter a verdict for Young on the issue of her negligence. Our holding, though, does not equate to a directed verdict in favor of Young on the issue of Johnson's negligence. For Young to prevail, it was still essential for her to present her case on Johnson's fault to the jury for its consideration, and the jury was then free to believe or disbelieve the proof presented. Conceivably, based on that proof the jury could have 1) found Johnson negligent and awarded Young damages; 2) found Johnson negligent and refused Young a damage award; or 3) found Johnson not negligent and entered a defendant's verdict.

It could reasonably be contended that though the circuit court might have erred in refusing to direct a verdict on Young's negligence, this error was cured by the jury's verdict for Young. We cannot say, though, that the court's refusal to take Young's negligence from the jury did not have a prejudicial impact on the damages awarded to her. *Cf. Little Rock Elec. Contrs., Inc.* v. *Okonite Co.*, 294 Ark. 399, 744 S.W.2d 381 (1988). In *Okonite*, a general verdict was returned, and we could not determine whether the error in giving a comparative fault

instruction was harmless. As in *Okonite*, here the jury returned a general verdict. From the verdict form, we cannot say that the failure to direct a verdict on Young's negligence was harmless.

We, accordingly, hold that the circuit court erred in not granting a directed verdict in favor of Young on the issue of her negligence, and we remand for a new trial.

Reversed and remanded.

HAYS, GLAZE, and CORBIN, JJ., dissent.

TOM GLAZE, Justice, dissenting. Plaintiff-appellant obtained a general jury verdict in the amount of $7,500, but she moved for a new trial on grounds that (1) there was no evidence of negligence on her part and (2) the jury assessed too small a recovery. After plaintiff's motion was deemed denied, she filed this appeal where she argues the trial court erred in submitting the question of her comparative negligence to the jury.

On appeal, plaintiff does not argue the motion for new trial. Instead, she argues that the defendant failed to present substantial evidence to support his defense below that plaintiff was at fault, and as a consequence, the trial court erred in overruling plaintiff's motion for directed verdict and in instructing the jury on plaintiff's comparative negligence. She suggests this error caused the jury to reduce her award to the $7,500 verdict.

As the majority court points out, the defendant raised the defense that the plaintiff was negligent, and he had the burden of proof on this issue. The trial judge ruled the defendant met his burden.

The following evidence was presented at trial. Both parties were driving their vehicles at night on a one-lane road, each traveling from opposite directions. The parties were negotiating a curve when the collision occurred. Plaintiff said that she had seen defendant's headlights from a distance before entering the curve, and had slowed down. The defendant said that, because he had dropped a cigarette and had taken a "split second" to look down to pick it up, he saw plaintiff's car lights only when his U-Haul truck hit plaintiff's four-door Lincoln Town Car. Damage appeared on the left front of both vehicles. Plaintiff and her passenger testified plaintiff had pulled her car to the right into a ditch so as to avoid

the defendant's truck. The investigating officer said that the road was wide enough for both vehicles to pass each other at that point in the road. He also testified that there was no evidence the defendant had been speeding or driving "wild."

In requesting a directed verdict, plaintiff argued there was no proof that she had been negligent. Defendant countered by saying plaintiff admitted having seen defendant's lights in the distance. Based on this fact combined with the investigating officer's testimony, the trial judge denied plaintiff's directed verdict motion. The trial judge ruled that the jury could find that plaintiff may not have had proper control of her car or was not abiding by the rules of the road at the time of the accident.

We pointed out in *Barger* v. *Farrell*, 289 Ark. 252, 711 S.W.2d 773 (1986), how rare and difficult it is before a verdict can be directed in a plaintiff's behalf. In fact, my research reveals no cases involving claims of negligence where a plaintiff's request for directed verdict has been sustained. The *Barger* court did cite two examples where a plaintiff's directed verdict was upheld, *Plunkett* v. *Winchester*, 98 Ark. 160, 135 S.W. 860 (1911), and *Arkansas Real Estate Co., Inc.* v. *Fullerton*, 232 Ark. 713, 339 S.W.2d 947 (1960), but in these cases, the defendants admitted facts in their pleadings and proof showing the plaintiffs to be entitled to the relief sought, and there was no question left for the jury to decide. Here, such is not the case. In fact, plaintiff's case was fully contested and, after hearing all the evidence, the trial court concluded plaintiff's motion for directed verdict should be denied.

A recent example where this court reversed the granting of a directed verdict in the plaintiff's behalf was in *Fuller* v. *Johnson*, 301 Ark. 14, 781 S.W.2d 463 (1989). There, the defendant died prior to trial, and no evidence was offered in his behalf. However, the defendant had filed an answer denying the plaintiff's allegations of negligence. In reversing the trial court's directed verdict for plaintiff, we held that, where the allegations of the [plaintiff's] petition are denied by the answer and the plaintiff offers oral evidence tending to support those allegations, the defendant is entitled to have the jury pass upon the credibility of such evidence even though he should offer no evidence.

Because plaintiff here sought a directed verdict, part of the

formula for our review is the rule that, only when the proof is so clear, convincing and irrefutable that no other conclusion can be reached by reasonable men should the issue be taken from the jury and decided by the court. *Spink* v. *Mourton*, 235 Ark. 919, 362 S.W.2d 665 (1962). In *Barger*, this court said the following when explaining why it affirmed the trial court's rejection of the plaintiff's motion for directed verdict:

> The burden was not on the defendant, but was on the plaintiff to make out the case stated in his petition. In a case where the allegations of the petition are denied by the answer, and the plaintiff offers oral evidence tending to support the allegations of the petition, the defendant is entitled to have the jury pass upon the credibility of such evidence even though he should offer no evidence himself. The court has no right to tell the jury that it must believe the witnesses. The jury, in the first instance, is the sole judge of the credibility of the witnesses and of the weight and value of their evidence, and may believe or disbelieve the testimony of any one or all of the witnesses, though such evidence be uncontradicted and unimpeached. 289 Ark. at 255-56, 711 S.W.2d at 775.

Here, the jury could have believed or disbelieved all or any part of the evidence each party presented. *See also Weber* v. *Bailey*, 302 Ark. 175, 787 S.W.2d 690. In view of the above facts and law, I am of the opinion the trial court correctly denied plaintiff's directed verdict.

HAYS and CORBIN, JJ., join this dissent.

L. D. GIBSON *v.* CITY OF TRUMANN, Arkansas and Mayor David Gossett

92-474 845 S.W.2d 515

Supreme Court of Arkansas
Opinion delivered January 25, 1993

L.D. Gibson, pro se.

John Bartlett, for appellees.

ROBERT H. DUDLEY, Justice. Trumann is a city of the first class that has the mayor-council form of government. The council is composed of ten aldermen. In 1992, five of the aldermen voted in favor of an appropriation ordinance for the city's fiscal year, and five voted against it. The mayor broke the tie by casting his vote in favor of the ordinance and declared that the ordinance was adopted. Appellant, L.D. Gibson, filed this suit for declaratory judgment and sought to have the mayor's vote declared void, the ordinance declared invalid, and an injunction against any expenditures pursuant to the ordinance. The chancellor ruled that the mayor's vote was authorized by statute and that the ordinance was therefore validly adopted. We affirm the ruling.

Act 1 of 1875 was a comprehensive act providing for the establishment of municipal governments within this State. Sec-

tion 51 of Act 1, in the material part, provided: "The Mayor shall be *ex-officio* President of the Council and shall preside at its meetings during the term for which he shall have been elected, and in case of a tie he shall have the casting vote." In 1981, the General Assembly passed an act which provides for a mayor's vote at times other than a tie. In the material part it provides that the mayor "shall have a vote when the Mayor's vote is needed to pass any ordinance, by-law, resolution, order or motion." Ark. Code Ann. § 14-43-501 (b)(1)(B) (1987).

In order to pass any type of ordinance, a majority of the "whole number of members elected to the council" is required. Ark. Code Ann. § 14-55-203 (1987). The parties agree this language would include the mayor since he is an *ex officio* member of the council. However, in order to pass an ordinance for the appropriation of money "the concurrence of a *majority of the aldermen* of any municipal corporation" is required. Ark. Code Ann. § 15-55-204 (1987) (emphasis added). The appellant seizes upon the difference in the language of the two statutes and contends that since the mayor is not an *alderman*, he cannot vote on appropriation ordinances and that the General Assembly, by the 1981 amendment, did not intend to give the mayor a vote as an *alderman* on appropriation ordinances.

The primary goal in the interpretation of statutes is to determine and then give effect to the intent of the General Assembly. *Sanders* v. *State*, 310 Ark. 630, 839 S.W.2d 518 (1992). In interpreting statutes we give words their usual and ordinary meaning. *Bob Cole Bail Bonds, Inc.* v. *Howard*, 307 Ark. 242, 819 S.W.2d 684 (1991). Under the 1875 act the mayor was limited to voting "in case of a tie." The 1981 act, codified as Ark. Code Ann. § 14-43-501 (b)(1)(B) (1987), expanded the occasions on which the mayor can vote to "*when the Mayor's vote is needed*" to pass "*any*" type of ordinance. (Emphasis added.) By giving the words of the 1981 act their usual and ordinary meaning, it becomes obvious that the General Assembly intended for the 1981 act, Ark. Code Ann. § 14-43-501 (b)(1)(B) (1987), to amend section 51 of Act 1 of 1875 to allow the mayor to vote whenever his vote is needed to pass any type of ordinance. Section 1 of the 1981 act expressly provides that it amends "Arkansas Statute 19-1910 (4th to 7th sentences in part of Section 51 of Act 1 of 1875)," and section 2 of the same act repeals "all laws and

parts of laws in conflict with this Act." It is without question that the General Assembly had the authority to amend its earlier act and to repeal any laws in conflict with the new act.

The appellant argues that even though the 1981 act, Ark. Code Ann. § 14-43-501, amends Section 51 of Act 1 of 1875, it does not expressly repeal Ark. Code Ann. § 15-55-204 (1987), which requires a "majority of the aldermen" to pass an appropriation ordinance. Again, we must give the words their ordinarily and usually accepted meaning. The 1981 act allows the mayor to vote whenever his vote is needed to pass any type of ordinance. The words "when the Mayor's vote is needed" are not limited and would apply any time the mayor's vote is needed, and likewise, the words "any ordinance" are not limited and would apply to any type of ordinance, including an appropriations ordinance. We have no hesitancy in holding that the 1981 act repealed that part of the 1875 act that required a majority of the "aldermen."

The appellant contends that the foregoing construction of the 1981 act is inconsistent with our case of *Thompson* v. *Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984). In that case we were not deciding whether a 1981 statute could amend a section of an 1875 statute. Rather, we were construing the language of Amendment 7 to the Constitution of Arkansas. The amendment provides in part: "No measure approved by a vote of the people shall be amended or repealed . . . by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the *members elected to . . . the City Council.*" (Emphasis added.)

In *Younts* we construed the amendment to mean just what it says, a vote of two-thirds of all the members elected to the city council is necessary to amend a measure approved by a vote of the people. In this case we are not construing that amendment or that language, but rather whether the 1981 statute was intended to amend a section of the 1875 statute and to repeal by implication another part.

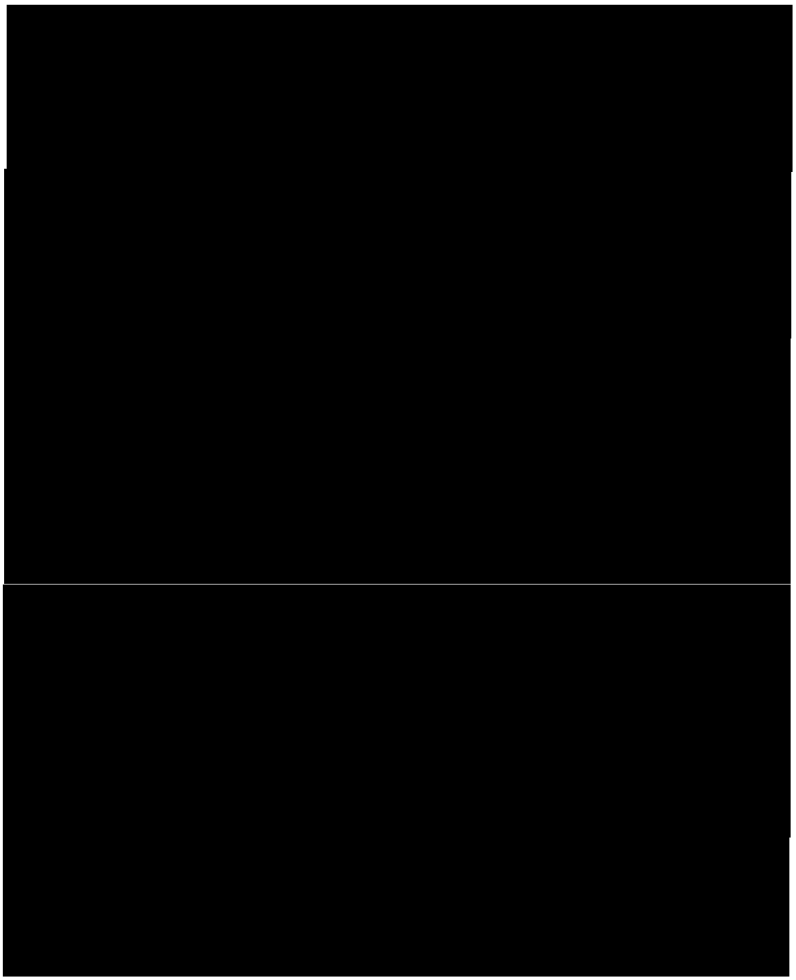
In sum, the 1875 act provided, "in case of a tie he shall have the casting vote." The 1981 amendment provides the mayor "shall have a vote when the Mayor's vote is needed to pass any ordinance." The chancellor correctly ruled that the mayor could break the five-to-five tie vote to pass the appropriation ordinance.

Affirmed.

Betty D. TULLOCK *v.* Gareth ECK, M.D., et al.

92-340 845 S.W.2d 517

Supreme Court of Arkansas
Opinion delivered January 25, 1993
[Rehearing denied March 1, 1993.]



F. Lewis Steenken and *Miller, Nash, Wiener, Hager & Carlsen*, by: *William H. Walters*, for appellant.

Davis, Cox & Wright, by: *Kelly Carithers*, for appellee.

DAVID NEWBERN, Justice. This is a medical malpractice case. The appellant, Betty Tullock, sued the appellee, Dr. Gareth Eck, along with another physician and the medical center in which they work. Ms. Tullock contended Dr. Eck negligently prescribed estrogen on November 30, 1987, and that her taking of the drug contributed to her advanced state of breast cancer diagnosed in March 1990. Dr. Eck was awarded summary judgment on the ground that the two-year statute of limitations had expired. Ms. Tullock argued that her taking the medication prescribed by Dr. Eck constituted a continuous course of treatment and the last allegedly negligent act occurred when she finished taking the medication in May 1989, less than two years before suit was filed. The summary judgment order has been properly certified as final pursuit to Ark. R. Civ. P. 54 (b). We agree with the Trial Court's conclusion that the continuous

treatment doctrine did not toll the statute of limitations, and thus summary judgment in favor of Dr. Eck was proper.

Affidavits, discovery documents, pleadings, and exhibits revealed these facts. Dr. Eck performed gall bladder surgery on Ms. Tullock November 2, 1987. On November 10, 1987, Ms. Tullock, in the course of a post-operative examination, reported to Dr. Eck a mass in her breast. Dr. Eck recommended a mammogram and biopsy, and a mammogram was performed. The mammogram report confirmed the mass but did not show the presence of cancerous cells.

According to Dr. Eck, when Ms. Tullock returned for a second post-operative visit November 30, 1987, he informed her that the mammogram was essentially negative but repeated that a biopsy of the mass was indicated. Ms. Tullock declined to have a biopsy and denies having been fully informed of the risks and alternatives concerning her choice with respect to a biopsy in 1987.

A subsequent post-operative visit was scheduled for December 14, 1987. Dr. Eck states it was his intention to discuss further with Ms. Tullock the need for a biopsy at that meeting. His office records show that Ms. Tullock called to cancel the appointment and did not reschedule it. While Ms. Tullock acknowledges she was to return, she states she did not do so because she had been told her gall bladder situation was healed, and she had been led to believe the breast mass was benign.

At the November 30, 1987, visit Dr. Eck wrote a prescription for Ms. Tullock for the drug Premarin, an estrogen supplement, which Ms. Tullock filled that day. Hospital records compiled subsequently when Ms. Tullock underwent a mastectomy showed she had been taking estrogen since 1973. Dr. Eck's prescription permitted refills for one year. She refilled the prescription on June 9, 1988, and November 10, 1988, thus providing sufficient medication to last into May 1989, well within the two years of the filing of this suit on December 11, 1990. A pharmacist called Dr. Eck's office for authorization of an additional refill on May 9, 1989, and it was refused.

In June 1989 Ms. Tullock visited another doctor who did not

perform diagnostic treatment on the breast mass but continued her estrogen therapy. The same doctor diagnosed a malignant infiltrating ductal cell breast cancer in March 1990. Ms. Tullock's next direct contact with Dr. Eck occurred on March 30, 1990, when after that diagnosis, she returned to him for the biopsy.

In the process of treatment, the cancer was found to be estrogen dependent, and Ms. Tullock argued that Dr. Eck's prescription of estrogen in the face of the undiagnosed mass presenting at the time of the examination was negligence. She alleged Dr. Eck was also negligent in his acts and omissions related to the diagnosis and treatment of her cancer, thus contributing to the loss of an opportunity for a cure and significantly shortening her life expectancy.

1. Summary Judgment

a. Standard of review

The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Cordes* v. *Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). All proof submitted must be viewed in a light most favorable to the party resisting the motion and any doubts and inferences must be resolved against the moving party.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ark. R. Civ. P. 56(c). While there might well have been disputed issues of negligence had this case gone to trial, the only issue with which we are concerned is whether the statute of limitations was tolled by continuous treatment. As to the latter, there is no factual dispute. The question is thus whether Dr. Eck was entitled to judgment as a matter of law.

b. Statute of limitations

If a physician is negligent in treating a patient but the patient continues to be treated by the physician for the condition which was the object of the negligent act or treatment, the patient

should not be required to interrupt the treatment to bring suit against the physician because a statute of limitations is about to run. That is the most often stated rationale for the "continuous treatment doctrine" which tolls the statute of limitations until treatment is discontinued. *See, e.g., Lane* v. *Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988); *Rountree* v. *Hunsucker*, 833 S.W.2d 103 (Tex. 1992).

We have found no authority to support the conclusion that a patient's continued ingestion of medicine prescribed by a physician is enough to establish an on-going course of treatment for the purpose of applying the continuous treatment doctrine. We find only authority suggesting the contrary. *See, Fleishman* v. *Richardson-Merrill, Inc.*, 226 A.2d 843 (N.J. Super. 1967); *Parrott* v. *Rand*, 511 N.Y.S.2d 57 (A.D.2 Dept. 1987); *Bernardo* v. *Ayerest Laboratories*, 470 N.Y.S.2d 395 (A.D.1 Dept. 1984) and *Millbaugh* v. *Gilmore*, 30 Ohio St.2d 319,285 N.E.2d 19 (1972); *Rountree* v. *Hunsucker, supra.*

All of these cases from other jurisdictions are distinguishable, some of them very significantly so. None of them is precisely like the case before us now combining (1) the allegedly negligent prescription of a drug which allegedly directly caused injury with (2) a very strict statute of limitations limiting action to two years from the date of a wrongful "act complained of and no other time." We have found no case just like this one where the question is whether the final "treatment" ("act") occurred the date the prescription was issued by the physician or the last time the medicine was taken by the patient under the aegis of that prescription. We thus find it necessary to go our own way, looking to the Arkansas statute and the two cases in which we have applied the continuous treatment doctrine in conjunction with it.

The statute is Ark. Code Ann. § 16-114-203 (1987). Here are its relevant words:

> (a) Except as otherwise provided in this section, all actions for medical injury shall be commenced within two (2) years after the cause of action accrues.
>
> (b) The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time. . . .

Ms. Tullock argues that the actions of Dr. Eck in failing to biopsy the mass, prescribing estrogen, and failing to provide the requisite follow-up care fall within the continuous treatment doctrine. We recognized and applied the doctrine first in *Lane* v. *Lane, supra.*, and again in *Taylor* v. *Phillips*, 304 Ark. 285, 801 S.W.2d 303 (1990).

In the *Lane* case, narcotic injections given by Dr. Lane to Ms. Lane, his wife, over a long period of time resulted in scarring and drug addiction. Dr. Lane pleaded the statute of limitations, and the Trial Court refused to bar the claim though the initial injurious behavior occurred more than two years before suit was filed. We affirmed, quoting a description of the continuous treatment doctrine from 1 D. Louisell and H. Williams, *Medical Malpractice*, § 13.08 (1982)(footnotes omitted), as follows:

> [I]f the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated — unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

That description has two fundamental elements. There must be "treatment," which "is a continuing course." That requirement is stated conjunctively with the second element, "the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care." Without the former element, it might be thought that a physician's omission of treatment where there is a duty of care could toll the statute of limitations on the basis of continuation of negligence or tortious conduct. We were very careful, however, not to adopt, and to point out that we had specifically rejected, the so-called "continuing tort" theory of tolling the statute of limitations as inconsistent with the General Assembly's intent in stating that limitations begin to run "the date of the wrongful act complained of and no other time."

"Continuous treatment" is distinguishable from "continu-

ing tort." The cases in which we rejected the continuing tort doctrine are *Treat* v. *Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986); *Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); and *Williams* v. *Edmondson*, 257 Ark. 837, 250 S.W.2d 260 (1975). See also Note, Torts—Limitations on Actions—Arkansas Adopts Continuous Treatment Rule to Toll State of Limitations in Medical Malpractice Actions, 11 U.A.L.R. L. J. 405 (1989).

In the *Owen* and *Treat* cases the appellants argued that a single negligent act of a physician, a misdiagnosis for example, was a continuing wrong and the statute of limitations would not begin to run until the error was discovered, on the premise that the effect of the wrong was continuous. We declined to adopt that theory, holding the cause of action to accrue at the time of the wrongful *act*. We said to hold otherwise would, in effect, apply the "discovery of injury rule" to our malpractice statute of limitations, which would change the time of the accrual of a cause of action from the time of the act to the date of discovery of the injury. We declined to reach such a result which would have been directly contrary to the legislative intent plainly expressed that the limitation begins to run from the "date of the wrongful act complained of and no other time."

In contrast to the so-called continuing tort theory, based on a single negligent act with on-going injury, the continuous treatment doctrine becomes relevant when the medical negligence consists of a negligent act, followed by a continuing course of treatment for the malady which was the object of the negligent treatment or act. That obviously occurred in the *Lane* case.

In *Taylor* v. *Phillips, supra*, the issue was somewhat closer. Dr. Phillips had allegedly been negligent in applying a metal brace to Mr. Taylor's broken jaw more than two years before suit was filed. The brace was not removed until within two years of the filing. Mr. Taylor last consulted Dr. Phillips about his condition on November 4 or 5, 1987. He returned to Dr. Phillips's office, however, December 8, 1987, and was seen by Dr. Phillips's partner, Dr. Modelevsky. On December 9, 1987, Dr. Modelevsky consulted with Dr. Phillips, and they agreed on further surgery involving a bone graft. Suit was filed October 18, 1989. The

majority opinion stated that the two-year period began running December 9, 1987. The opinion stated this was "clearly . . . a continuing course of treatment."

Dr. Eck's allegedly negligent conduct (act) occurred November 30, 1987, when he wrote the prescription. Unlike Ms. Lane and Mr. Taylor, Ms. Tullock had no further contact, direct or indirect, with the doctor with respect to the condition of her breast until the cancer diagnosis had been made by another physician and she returned to Dr. Eck for a biopsy March 30, 1990, more than two years after the alleged negligence occurred. She does not allege any negligence occurred on the occasion of the biopsy or thereafter.

If we were free to adopt the continuing tort theory we might hold that Dr. Eck was not entitled to summary judgment as a matter of law. As we explained in the *Lane* case, however, we feel constrained by the statute in that respect, and if the public policy thus expressed is to be altered, it is up to the General Assembly to do it. The continuous treatment doctrine does not apply in the circumstances of this case, and thus we must affirm the Trial Court's decision on that point.

c. Constitutionality

Ms. Tullock argues for the first time on appeal that the malpractice limitation is unconstitutional as applied in this case. This argument was not raised before the Trial Court ruled on the motion for summary judgment. It is thus waived under the well-settled rule that even constitutional arguments are waived on appeal unless raised at trial. *Smith* v. *City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991).

Affirmed.

GLAZE and BROWN, JJ., dissent.

TOM GLAZE, Justice, dissenting. I respectfully dissent. The negligence attributed to Dr. Eck occurred on November 30, 1987, when he prescribed estrogen for Ms. Tullock, although by Tullock's story, Dr. Eck knew at the time that Tullock had a mass in her breast, she had not had a biopsy and she had not been informed of the risks with respect to not having a biopsy. When Tullock saw a different doctor in June of 1989, she discovered that

the mass in her breast was malignant and that the cancer was estrogen dependent. She filed suit against Dr. Eck in December of 1990, which was about three years, one month after Dr. Eck's purported negligence in November of 1987. The statute of limitations for medical malpractice is two years.

Obviously, Dr. Eck's negligence, if any, is barred by the two-year limitation provision unless the facts show Tullock was under Dr. Eck's continued treatment. *Taylor* v. *Phillips*, 304 Ark. 285, 801 S.W.2d 303 (1990); *Lane* v. *Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988). Under such facts, the statute of limitations is tolled until treatment is discontinued.

The facts must be viewed in Ms. Tullock's favor. *See Cordes* v. *Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). In the circumstances of this case, the issue becomes whether Ms. Tullock's continued ingestion of estrogen prescribed by Dr. Eck was continuous-physician treatment which tolled the two-year limitation provision. If so, her suit is timely since she continued taking estrogen until Dr. Eck refused to authorize further refills in June of 1989 when Tullock's prescription expired. On November 30, 1987, Dr. Eck had given Tullock a prescription for estrogen which was refillable in quantities sufficient to provide treatment for at least a year and four months. Tullock obtained those refills on June 9, 1988, and November 10, 1988. I submit Dr. Eck's treatment of Tullock terminated in June 1989, when he refused further medicinal care of Tullock or, for that matter, any type medical care of her.

Stedman's Medical Dictionary, Fifth Lawyers' Edition, defines the term treat as "to manage a disease by medicinal, surgical, or other measures; to care for a patient medically or surgically." And treatment is defined in Stedman's as "medical or surgical management of a patient." In the instant case, Tullock could not have received estrogen without Dr. Eck's authorization. Obviously, in managing Tullock's health and medicinal needs, Dr. Eck exercised his discretion to give her estrogen but later he chose to take that medication from her by refusing any further refills.

The majority opinion cites no cases in point. For example, the case of *Bernado* v. *Ayerest Laboratories*, 470 N.Y.S.2d 395 (A.D. 1 Dept. 1984), held the continuous treatment doctrine did

not apply, but there, the patient undertook self treatment by continuing use of a drug prescribed many years before — long after the prescribing doctor had discontinued treatment. No self treatment exists here. Tullock's position is that she never left Dr. Eck's care. In fact, she had returned to him after her malignancy was diagnosed so Dr. Eck would perform the surgery. An insight as to her continuing treatment by Dr. Eck is Eck's office manager's testimony which indicated that Tullock was a returning patient in March 1990, her file had not been purged and the file was coded as a "periodic reexamination." One physician, Dr. Paul Blaylock, averred that, in his opinion, Dr. Eck's relationship did not end until April 1990, or at least until July 1989 when her prescription for estrogen ran out. In further support of her position, Tullock said that she did not go to any other doctor for estrogen or treatment of any kind until she saw a Dr. Johnson when her cancer was diagnosed. At the minimum, the proof here unquestionably raises a material fact issue as to whether Dr. Eck continued his treatment of Tullock to July 1989 or to April 1990. Either date would make timely the complaint Tullock filed in December 1990.

The majority opinion also mentions *Millbaugh* v. *Gilmore*, 285 N.E.2d 19 (Ohio 1972), where the court held the continuing course of treatment doctrine did not apply where the patient secured a refill of a prescription without the knowledge of the physician and after the physician-patient relationship had ended. Clearly, that is not the situation here.

The other cases cited by the majority are likewise distinguishable. In fact, the rationale related in *Rowntree* v. *Hunsucker*, 833 S.W.2d 103 (Tex. 1992), seems more to support Tullock's, not Dr. Eck's, position. In *Rowntree*, the doctor prescribed Sectrol as a medication for Hunsucker's hypertension. After some visits to the doctor and getting refills, the doctor gave Hunsucker a prescription for Sectrol for a six-month period. About eight months later, she suffered a stroke. The Texas Supreme Court stated the controlling issue for limitation purposes was whether Hunsucker's taking medication on a prescription that the doctor agreed to refill constitutes "a course of treatment" absent any other concomitant medical care, e.g., office visits or related diagnostic services. The Texas court rejected the doctor's assertion that his last examination of a

patient was the triggering event for the statute of limitations in a medical malpractice suit. The court concluded instead that there are some situations in which the *statute would run from the date of the last drug treatment*, if the course of that treatment is the direct cause of the injury. Because Hunsucker failed to allege the drug prescribed by the doctor actually caused Hunsucker harm, it declined to use the last drug treatment to toll the statute.

Here, Tullock's drug treatment ended sometime after March of 1989, and before she sought to renew her prescription in June 1989. In either case, she had two years to bring suit — which she did — to allege that the estrogen she took could have caused the growth of a malignancy she now experiences. In this respect, Tullock specifically alleges here medical condition required a continuous course of monitoring and treatment, but her breast cancer was an estrogen-dependent tumor worsened by Dr. Eck's treatment with estrogen medication. Dr. Blaylock opined the estrogen medication probably aggravated Tullock's underlying medical condition.

In my view, this case has many factual determinations yet to be decided. Dr. Eck's management of Ms. Tullock's medicinal needs and health care clearly, in my estimation, constitute continuing treatment. That being so, I would reverse this cause and return it for further proceedings.

ROBERT L. BROWN, Justice, dissenting. This is a case of summary judgment granted on the basis that Dr. Eck's alleged negligence occurred more than two years prior to the filing of Betty Tullock's complaint. The majority affirms the summary judgment. I disagree.

The facts are that Dr. Eck was aware of a lump in Betty Tullock's breast and recommended a mammogram in November 1987. On November 30, 1987, Dr. Eck wrote a prescription for the drug premarin, an estrogen supplement. Tullock refilled the prescription twice in 1988, pursuant to Dr. Eck's authorization, the last time being November 10, 1988. We can assume for purposes of the motion that she continued taking premarin after refilling the prescription a second time.

Dr. Eck was negligent in prescribing premarin for a patient with a mass in her breast. In March 1990, Tullock was found to

have breast cancer which was estrogen-dependent. She filed her complaint against Dr. Eck for medical malpractice on December 11, 1990.

The majority correctly quotes the limitation statute for medical malpractice that "The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time." Ark. Code Ann. § 16-114-203 (1987). A wrongful act, however, and specifically a negligent act, can be an act of commission or omission. *National Fire Ins. Co.* v. *Yellow Cab Co.*, 205 Ark. 953, 171 S.W.2d 927 (1943). For purpose of summary judgment, we must assume that a negligent act was committed, not only by the prescription but by the failure to cancel the prescription or to advise Tullock of the formidable consequences of estrogen ingestion in her condition.

This is not a case of self-prescription by Tullock over an extended period of time. It is a case where the doctor, with knowledge of the patient's condition, negligently prescribed an estrogen supplement for that patient and then negligently failed to stop the prescription.

It was the failure to terminate the prescription that tolls the statute of limitations; that act of omission occurred within two years of filing the complaint. At least, a material question of fact is involved here regarding the failure to terminate the prescription, and reasonable minds could differ as to when Tullock's cause of action accrued. *See McGuire* v. *Ortho Pharmaceutical Corp.*, 60 Ohio App. 3rd 54, 573 N.E.2d 199 (1989) (reversed summary judgment where statute of limitations applied to complaint of vision loss due to medication). I would reverse the summary judgment on the basis that this material question of fact has not been resolved.

James ODUM *v.* STATE of Arkansas

CR 92-839 845 S.W.2d 524

Supreme Court of Arkansas
Opinion delivered January 25, 1993
[Rehearing denied March 1, 1993.*]

McArthur & Finkelstein, by: *William C. McArthur*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

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*Holt, C.J., not participating.

TOM GLAZE, Justice. Amy Coy's body was discovered near De Valls Bluff, and appellant was later arrested and charged with capital murder. Appellant appeals from his conviction of first degree murder and his forty-year sentence. He raises five points of error, but none have merit. Therefore, we affirm.

The state's case against the appellant consisted almost entirely of testimony from Sylvia Proffitt. Proffitt testified she told the police she had witnessed the appellant shoot Coy and afterwards she helped him hide her body. Proffitt further related that she explained to the police that she and Coy had worked as prostitutes for the appellant, and that appellant had a fight with Coy and shot her. Because Proffitt was afraid the appellant would shoot her, she said she helped the appellant dispose of Coy's body. Proffitt was not charged with any crime. During the investigation, the police found traces of blood on a pair of jeans identified as belonging to the appellant, on a black sweater belonging to Proffitt, and in the house where Proffitt said the murder occurred. However, the police were unable to positively identify the blood as belonging to the victim.

In his first issue on appeal, the appellant argues that the trial court erred in not ruling that Proffitt was an accomplice as a matter of law. We do not address the merits of this argument, because the appellant did not request such a ruling below. Instead, at appellant's attorney's request, the trial judge gave the accomplice jury instruction over the prosecutor's objection. Because appellant received the only relief he requested, he has no basis upon which to raise the issue on appeal. *Sweat* v. *State*, 307 Ark 406, 820 S.W.2d 459 (1991). Likewise, we need not address the appellant's second argument that there was insufficient evidence to corroborate Proffitt's testimony, because corroboration is only necessary if Proffitt had been found to be an accomplice.

We can also summarily dismiss the appellant's third issue that the trial court erred in instructing the jury on first degree murder. This court has repeatedly held that when one is charged with capital felony murder, the judge must also instruct the jury on first degree murder. *See Hill* v. *State*, 303 Ark. 462, 798 S.W.2d 65 (1990); *Rhodes* v. *State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Relying on *United States* v. *Standefer*, 948 F.2d 426 (8th Cir. 1991), the appellant next argues that the trial court erred in failing to dismiss the case on the basis of double jeopardy. Appellant submits his first trial ended in a mistrial because of improper questioning by the prosecutor, and in *Standefer*, the federal court held that when governmental misconduct was intended to goad the defendant into moving for a mistrial, a defendant can raise the bar of double jeopardy to a second trial. The appellant here, however, has failed to make any of the first trial a part of the record in this appeal. Thus, we are unable to review the governmental misconduct to determine whether it rises to the level required in *Standefer*. As this court has stated numerous times, it is the appellant's burden to produce a record exhibiting prejudicial error. *See, e.g., Sullinger* v. *State*, 310 Ark. 690, 840 S.W.2d 797 (1992).

In his final issue, the appellant argues that the trial court erred in denying his motion to dismiss on speedy trial grounds. Under A.R.Cr.P. Rule 28.2(c), when a defendant is to be retried following a mistrial, the twelve-month period for trial shall commence running from the date of mistrial. Appellant argues that because the mistrial resulted from the prosecutor's actions, this rule should not apply and the speedy trial time period should commence at the time of his arrest. From the plain reading of Rule 28.2(c), there is no such exception nor does the appellant cite the court to any authority supporting his argument.

Applying Rule 28.2(c) to the present facts, a mistrial was declared in the appellant's first trial on November 22, 1991, and appellant's second trial began on April 1, 1992. The appellant was retried within five months from the time of his first trial, clearly well within the twelve month speedy trial period. In sum, we find no merit in the appellant's argument.

For the reasons stated above, we affirm.

HOLT, C.J., not participating.

Herbert Fred BRENK *v.* STATE of Arkansas

CR 91-182 847 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered January 25, 1993

Larry Dean Kissee and *Tom Garner*, for appellant.

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

DONALD L. CORBIN, Justice. On August 23, 1990, a cooler was found floating in Lake Norfork, Baxter County, Arkansas. It contained cement and the torso of a white female severed at the upper thighs and lower back. The Arkansas State Police and the Baxter County Police conducted an investigation which led them to believe the torso as that of Lou Alice Brenk. Appellant, Herbert Fred Brenk, who was Lou Alice Brenk's husband was a suspect. On September 10, 1990, Albert Roork, Chief of Police for the City of Salem, who was aware of the investigation and that appellant was a suspect had a warrant issued for appellant's arrest for an unpaid DWI fine from 1988. Before arresting appellant on the warrant, Chief Roork contacted, David Lafferty of the Baxter County Police who was involved with the investigation of the discovery of the cooler, to make sure that his arrest of appellant would not interfere with their investigation. Officer Lafferty relayed this message to Bill Beach, who was also investigating the discovery of the torso. Investigator Beach told Officer Lafferty to tell Chief Roork to arrest appellant if he had a valid arrest, but not to do so on behalf of the Baxter County Police. Officer Lafferty relayed this message to Chief Roork. Chief Roork arrested appellant at the home of Lonnie Hodges. At the time of his arrest, appellant had a blood alcohol content of .08. Appellant was on probation in Fulton County for theft/shoplifting at the time of his arrest. A condition of appellant's probation was that he not use or have in his possession any intoxicating beverages. Since appellant's blood alcohol content violated a condition of his probation, Chief Roork notified appellant's probation officer, Billy Benton, and Mr. Benton filed a petition to revoke appellant's probation. Mr. Benton advised appellant that he would need an attorney for the revocation hearing. Appellant requested that his attorney, Tom Garner, be present for the

hearing. Mr. Benton informed the sheriff's department that Mr. Brenk wanted an attorney. On September 12, 1990, the Sheriff of Fulton County, Paul Martin, informed Tom Garner that appellant wanted to talk to him.

On September 11, 1990, the torso was identified as that of Lou Alice Brenk and suspicion settled on appellant, her husband, as the prime suspect. On September 12, 1990, the Baxter County Police, Bill Beach, Lieutenant Frame, and Sergeant Alman, interviewed appellant at the Fulton County Jail, where he was still being held for failure to pay his DWI fine and pending a hearing on the petition to revoke probation. At that time, appellant consented to talk to the Baxter County officers about the disappearance of his wife, Lou Alice. Appellant answered several questions, but indicated he would like an attorney when the officers questioned him about his ownership of the cooler in which Lou Alice's remains were found, at which point the interview ceased.

Appellant was charged with capital murder in connection with the death of Lou Alice Brenk on September 13, 1990, and a warrant was issued for his arrest that same day. Appellant's counsel also entered their appearance on September 13, 1990, and formally requested that he not be interviewed without their permission. A jury trial was held June 17 through July 1, 1991, at which appellant was found guilty of capital murder and sentenced to death by lethal injection by a jury in connection with the death of his wife Lou Alice Brenk. Appellant appeals his conviction on eleven (11) grounds. Our jurisdiction is proper under Ark. Sup. Ct. R. 29(1)(b).

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT

We treat a challenge to the denial of a motion for directed verdict as a challenge to the sufficiency of the evidence and address it first since the double jeopardy clause precludes a second trial when a conviction in a prior trial is reversed solely for lack of evidence. *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). We must decide this issue on appeal even though the case is being reversed and remanded on other grounds. *Moore* v. *State*, 297 Ark. 296, 761 S.W.2d 894 (1988). "In considering the issue,

we disregard other possible trial errors." *Id.* at 301, 761 S.W.2d at 897.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, whether direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion and conjecture. *Lukach*, 310 Ark. 119, 835 S.W.2d 852. In determining the sufficiency of the evidence, we need only ascertain that evidence most favorable to appellee and it is permissible to consider only that testimony which supports the verdict of guilty. *Id.; Moore*, 297 Ark. 296, 761 S.W.2d 894.

At trial, evidence was introduced that appellant owned the cooler in which the remains of his wife were found. Appellant had access to the saw which was determined to have been used to cut up Mrs. Brenk's body. Two people who had been in jail with appellant testified at trial. One of these people, Ted Ullman, testified that appellant admitted to killing his wife and the other, William Lemmons, testified that appellant said that if he had it to do over again he'd make sure he put the portion of his wife's body that was found with the other portions so he wouldn't get caught. Several witnesses testified that they asked appellant about Lou Alice's whereabouts at the time the coroner testified she was already dead and he told them differing stories about where she was. Appellant told some people that Lou Alice had gone to visit her daughter and others that she had left him for another man, but her daughter never saw Lou Alice and reported Lou Alice missing after it became clear that no one in the family knew where Lou Alice was. In his interview with the police of September 12, 1990, appellant said his wife left him on August 24 and he saw her again on August 31 when she returned, gave him some money and took all her clothes. Appellant also told the police that on September 9, he received a note from Lou Alice at their trailer telling him they were through and she wanted a divorce. Appellant also told the police that Lou Alice had taken the rest of her things at that time. Lying about Lou Alice's whereabouts at a time when she was clearly dead indicates a consciousness of guilt on the part of appellant and attempts to cover up a crime are admissible. *See Kellensworth* v. *State*, 276 Ark. 127, 633 S.W.2d 21 (1982); *Flowers* v. *State*, 30 Ark. App.

204, 785 S.W.2d 242 (1990). This constitutes substantial evidence from which the jury could have concluded appellant murdered his wife, Lou Alice Brenk.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS SEPTEMBER 12, 1990, STATEMENT

Appellant claims the statement he made to the Baxter County Police on September 12, 1990, is inadmissible for two reasons. First, appellant claims his arrest by Chief Roork on failure to pay a DWI fine was pretextual and the statement obtained from him by the Baxter County Police, on September 12, 1990, while he was in the Fulton County Jail on that charge was the "fruit of the poisonous tree" and was inadmissible. Second, appellant had been advised by his probation officer, Billy Benton, that he would need counsel for his revocation hearing and had requested counsel for that purpose. Appellant argues that this request invoked both his Fifth and Sixth Amendment rights to counsel, prohibiting the use of any in custodial statement made by him after that request without the presence of counsel. We disagree with both of appellant's contentions.

Pretext is a matter of the arresting officer's intent, which must be determined by the circumstances of the arrest. *Richardson* v. *State*, 288 Ark. 407, 706 S.W.2d 363 (1986). Here, Chief Roork testified at a pretrial hearing that he arrested appellant because he knew appellant was being investigated, knew appellant owed almost $500.00 on a DWI, and was aware appellant had been selling things and had turned off his electric service. Therefore, Chief Roork testified that he was afraid appellant would flee the area and the city would be unable to collect its fine. Chief Roork testified that appellant could have gotten out of jail by paying the fine and posting a bond for his revocation hearing. Credibility of the witness is a matter for the trier of fact and such determinations will not be disturbed on appeal when there is substantial evidence to support the factfinder's conclusion. *Atkins* v. *State*, 310 Ark. 295, 836 S.W.2d 367 (1992). Additionally, there is no indication in the record that Chief Roork or the Salem City Police attempted to question appellant about the disappearance of his wife, the cooler, or any other related matter. The Baxter County Police, who were

investigating the cooler, specifically told Chief Roork not to arrest appellant on their behalf, but to arrest him if he had a valid warrant. Also, it was not until one day after appellant's arrest for failure to pay his DWI fine that the torso was identified as that of Lou Alice Brenk and not until two days after his arrest for the DWI charge that appellant was questioned by the Baxter County Police. On these facts, we do not find the arrest was clearly pretextual.

Appellant also contends his request to his probation officer for counsel to represent him at his revocation hearing invoked his Fifth Amendment right to counsel such that any statement he made without the presence of counsel should not be used at trial. In the recent case *McNeil* v. *Wisconsin*, ___ U.S. ___, 111 S. Ct. 2204 (1991), the Supreme Court held an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the right to counsel derived by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), from the Fifth Amendment's guarantee against compelled self-incrimination. As in the *McNeil* case, appellant invoked his Sixth Amendment right to counsel for a judicial proceeding unrelated to the present charge, but did not make any indication that he only wished to deal with the police through counsel and, therefore, did not invoke his Fifth Amendment right to counsel. The Sixth Amendment right to counsel is case specific. Appellant's request for counsel to represent him at the revocation hearing applied only to the revocation matter and not to any other potential charges. Since appellant did not invoke his Fifth Amendment right to counsel by indicating that he wished to deal with the police only through counsel, the *Edwards* rule which appellant cites does not apply. *Edwards* v. *Arizona*, 451 U.S. 477 (1981). We find appellant's September 12, 1990, statement was properly admitted under *McNeil*. *McNeil*, ___ U.S. ___, 111 S. Ct. 2204. The interview properly ceased at the point appellant indicated he did not wish to communicate with the police without the assistance of counsel.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS EVIDENCE WHICH WAS SEIZED PURSUANT TO VARIOUS SEARCH WARRANTS

Appellant objects to the introduction of evidence seized pursuant to three search warrants, which he claims are invalid. Appellant claims there were insufficient facts presented to any of the magistrates to establish reasonable cause for the issuance of any of the warrants, the warrant issued by Judge Judith Bearden was defective because she did not have authority to issue warrants in Baxter County, and the search by the police of appellant's trailer, van, the 1974 Buick and adjacent block building on October 9, 1990, was an unauthorized nighttime search. Lastly, appellant contends all the evidence seized from any of the searches was a result of his pretextual and illegal arrest and should be suppressed as "fruit of the poisonous tree."

We have already determined that appellant's arrest on the DWI fine was not pretextual. Therefore, we need only address appellant's other arguments.

Appellant claims there were insufficient facts presented to any of the magistrates to establish reasonable cause for the issuance of any of the warrants. We find there was probable cause established to search appellant's home, trailer, and vehicles. The affidavit attached to each search warrant was identical. They each established the remains were about three weeks old, had been identified as Lou Alice Brenk, appellant had told several people he wished to kill his wife during the past two years, and appellant had been telling different stories about Lou Alice's whereabouts for approximately the time period from which the body part was found to the present. Appellant had also said that he "wanted to throw his wife over the bridge" and that she was so heavy and big he needed help to "get her down to a size so he could handle."

> The task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the

> [judge] had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Illinois v. *Gates*, 462 U.S. 213, 238-39 (1983). Clearly, a crime was committed and it is logical that if appellant killed his wife, cut her up, put her torso in a cooler filled with cement and tossed it into the lake, evidence of this crime would probably be found where he was living, on property he owned, and in the vehicles he drove. This certainly is a substantial basis for concluding there was probable cause to issue a search warrant for appellant's home, property, and vehicles.

Appellant also contends the warrants are invalid because they fail to indicate a specific time the criminal activity took place. The affidavit does indicate that the torso was found August 23, 1990, and had been exposed to postmortem decomposition for a period of time not exceeding three (3) weeks. We think this is a sufficient indication of the time when the crime was committed.

Appellant's only challenge to the search warrant issued by Judge Jim Short on September 11, 1990, was that the affidavit failed to establish probable cause, failed to establish the time during which the criminal activity occurred, and failed to establish that evidence of the crime would be found in appellant's white frame house in Salem, Arkansas. As we have discussed above, the affidavit attached to the warrant was sufficient to establish probable cause, establish the time during which the criminal activity occurred, and establish that evidence of the crime would likely be found in appellant's house.

Appellant contends the warrant issued by Judge Bearden on September 11, 1990, was invalid because Judge Bearden was a Municipal Judge of Marion County without a written exchange agreement pursuant to Ark. Code Ann. § 16-17-206 (Supp. 1991) valid in Baxter County and, therefore, had no jurisdiction to issue a search warrant in Baxter County. Appellant's construction would have us limit the ability of a judge to issue a warrant to affect only property in the county in which the judge has jurisdiction. Section 16-17-206 is not applicable. The statute which controls a judicial officer's ability to issue a search warrant is Ark. Code Ann. § 16-82-201 (1987). It provides in pertinent part: "A search warrant may be issued by any

judicial officer of this state only upon affidavit sworn to before a judicial officer which establishes the grounds for its issuance." Ark. Code Ann. § 16-82-201(a). The applicable statute does not give any indication that the jurisdiction of a judicial officer in issuing search warrants is limited to the county in which the judicial officer was elected or appointed. In fact, it expressly provides that a search warrant may be issued by *any* judicial officer. We refuse to find that judicial officers are limited to issuing search warrants only in the counties in which they were elected or appointed and, therefore, find that the search warrant issued by Judge Bearden was valid.

Appellant next contends that the evidence seized as a result of the search warrant issued by Judge Crain on October 8, 1990, should be excluded because the warrant did not authorize a nighttime search and a nighttime search was conducted. Appellant is correct that the search warrant executed by Judge Crain did not authorize a nighttime search. However, we have said that as long as a search is begun before 8:00 p.m. and is concluded as soon thereafter as feasible, the search does not violate the ban against nighttime searches. *Brothers* v. *State*, 261 Ark. 64, 546 S.W.2d 715 (1977). This search was initially begun on October 8, 1990, at 5:15 p.m. and terminated at 8:00 p.m. The warrant was extended by Judge Crain to October 9, 1990, and a search was begun at 3:15 p.m. until 5:15 p.m., a break was taken and the search recommenced at 8:00 p.m. and lasted until 9:50 p.m. This does not violate our prohibition against nighttime searches. The original search on October 9, 1990, was begun at 3:15 p.m. and the additional search was commenced at 8:00 p.m. This was a continuation of the earlier search, it was not a new search. Since the initial search on October 9, 1990, was begun before 8:00 p.m. and ended as soon thereafter as feasible, 9:50 p.m., the ban against nighttime searches was not violated.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY CONCERNING VARIOUS LUMINOL TEST RESULTS

Appellant claims it was error for the trial court to admit the results of luminol testing under the relevancy approach of the Uniform Rules of Evidence we adopted in *Prater* v. *State*, 307

Ark. 180, 820 S.W.2d 429 (1991). This relevancy approach was expressly adopted by this court after the conclusion of appellant's trial. The trial court denied appellant's pretrial motion to exclude the results of the luminol testing done by the state's expert witness, Donald Smith, finding it admissible under the *Frye* standard as a scientifically recognized test for a number of years. *See Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923). While the evidence may well be admissible under the *Frye* standard, "[t]his court has never adopted the *Frye* standard even though we signaled it as 'see' in a per curiam opinion. *See Dumond*, v. *State*, 294 Ark. 379, 743 S.W.2d 779 (1988)." *Prater*, 307 Ark. 180, 185, 820 S.W.2d 429, 431. Instead, we recently adopted the more liberal standard based upon the relevancy approach of the Uniform Rules of Evidence. *Id.*

Under *Prater*, the trial court is required to

> conduct a preliminary inquiry which must focus on (1) the reliability of the novel process used to generate the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse or mislead the jury, and (3) the connection between the novel process evidence to be offered and the disputed factual issues in the particular case. [Citation omitted.]
>
> Under this relevancy approach, reliability is the critical element. . . . The relevancy approach, unlike the *Frye* standard, permits, but does not require, a referendum by the relevant scientific community to determine the reliability of the technique. Many times that factor alone will determine the issue. On the other hand, courts may look to a number of other factors which bear upon reliability. These include the novelty of the new technique, its relationship to more established modes of scientific analysis, the existence of specialized literature dealing with the technique, the qualifications and professional stature of expert witnesses, and the non-judicial uses to which the scientific techniques are put. [Citation omitted.]
>
> The frequency of erroneous results produced by a novel scientific technique is an important component of reliability. . . .

> . . . [as is] proof of the use of the correct protocol during the specific test.
>
> . . . .
>
> After assessing the reliability of the evidence, the trial court must also weigh any danger that the evidence might confuse or mislead the jury. . . .
>
> This Rule 702 determination of whether the evidence might confuse or mislead the jury is separate from a Rule 403 weighing. Under the relevancy approach, the proponent of the evidence must first prove that it is reliable and will not confuse or mislead the jury. If the court rules that it is admissible under Rule 702, the opponent of the evidence might then object to it on the basis that its probative value is outweighed by unfair prejudice, or it is a waste of time, or it is needless presentation of cumulative evidence. A.R.E. Rule 403.
>
> The third general consideration under the Rule 702 relevancy analysis is whether the proposed expert testimony is sufficiently tied to the facts of the case to aid the trier of fact in resolving the dispute. The proponent of the evidence must show the trial court precisely how the expert's testimony is relevant and helpful to the case. Failure to make this proof is a sufficient ground to exclude the evidence.

Prater, 307 Ark. at 186-190, 820 S.W.2d at 431-34.

We have not previously decided whether the results of luminol testing can be admitted at trial. The issue was raised in *Larimore* v. *State*, 309 Ark. 414, 833 S.W.2d 362 (1992), but we did not address it because we could not determine from the briefs which part of the luminol testing had been admitted at trial or why this was alleged to be error. The issue has been sufficiently presented to us in the instant case for our consideration.

Luminol testing was done of appellant's trailer, his car, his van, and the block building behind his trailer. The luminol testing was conducted by Donald Smith, criminalist for the Arkansas State Crime Lab. Appellant filed a motion in limine to prohibit introduction of the results of the luminol testing. This motion was

denied and appellant renewed his objection to this evidence at the time it was admitted. Several photographs showing the results of the tests on these areas were admitted at trial and Mr. Smith testified in detail about the results of the luminol tests he conducted, indicating on drawings of the building, trailer and car where he obtained positive reactions.

We find the admission of this evidence was error. As the state's witness, Donald Smith, and appellant's witness at the hearing on the motion in limine, Robert Briner, both testified, and as appellee concedes in its brief, luminol is only a preliminary test which indicates the *possible* presence of blood. Evidence presented at the hearing on the motion in limine established that luminol testing is unable to indicate the definite presence of blood, much less determine whether any possible blood present is human or animal. Luminol testing is done by spraying a luminol reagent on the item or in the area to be tested. Luminol reacts with certain metals and vegetable matter as well as blood, animal and human to give off a light blue luminesce similar to a luminescent watch dial. It is impossible to tell without follow up testing which of the possible reactants is causing the reaction. Further testing is necessary to determine whether what caused the reaction is actually blood and whether, if blood, it is animal or human blood. Luminol testing, without any additional testing, is unreliable to indicate the presence of human blood. Additionally, luminol is not time specific. That is, a reaction will occur even many years after a reacting substance has been in place, so it is impossible to tell how long the substance that is causing the reaction has been in place.

[redacted] In this case, very little additional testing was done to determine whether the substances causing the luminol reaction were human blood since a minute amount of blood was actually found. The only samples which could be found and which tested positive for human blood consisted of a small speck of blood found on the back of a kitchen drawer, and an area of blood about one millimeter square found on the inside of one of appellant's pairs of jeans. The blood samples were so small that the testing could only establish that the sample tested was human blood and could not establish the blood type of the samples or connect the samples in any way with the victim, Lou Alice Brenk, or appellant. A bedsheet found in the bedroom of appellant's trailer tested

positive for the presence of blood, but the results of the test used to establish whether blood is human were negative. Given the lack of follow-up testing, the results of the luminol test, which are presumptive only, had no probative value and did nothing to establish the likelihood of the presence of Lou Alice Brenk's blood, or even human blood, in the trailer, the block building, appellant's car, or on any of the other items tested where follow-up testing was not able to confirm the presence of human blood, much less blood of the same blood type as Lou Alice Brenk. *State* v. *Moody*, 573 A.2d 716 (Conn. 1990). Since we have determined that luminol tests done without follow-up procedures are unreliable to prove the presence of human blood or that the substance causing the reaction was related to the alleged crime, we find it was error for the trial court to admit the evidence of luminol testing done by Mr. Smith where there was no follow-up testing done to establish that the substance causing the luminol reaction was, in fact, human blood related to the alleged crime. *See Moody*, 573 A.2d 716 (Conn. 1990); *see also Lee* v. *State*, 545 N.E.2d 1085 (Ind. 1989); *cf. Commonwealth* v. *Yesilciman*, 550 N.E.2d 378 (Mass. 1990).

Additionally Don Smith was allowed to testify that in his opinion the results of the luminol testing were caused by blood, the luminol pictures and testimony by Mr. Smith gave the impression of a bloodbath and cleanup occurring in the trailer and block building behind the trailer that was highly prejudicial. Mr. Smith testified that although he was not aware of any literature dealing with establishing the substance causing the luminol to react based on the type of reaction, he felt he was able to do so. There is no indication in the record that personal observation of the results of the luminol testing is a reliable or accepted way to establish that the reaction was caused by blood and not one of the other substances which react with luminol. We think it was error to allow the photos into evidence and to allow Mr. Smith to testify about the other areas where reactions occurred, but photos were not introduced, and to allow Mr. Smith to testify that he thought that the reactions indicated the presence of blood without adequate follow-up testing having been done to establish that what caused the reactions was, in fact, blood. This was likely to be misleading and confusing to the jury such that even the cross-examination establishing that what caused the

reaction in the photos and the areas where no photos were introduced was only possibly blood cannot cure the prejudice that certainly resulted.

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO MAKE IMPROPER REMARKS IN HIS CLOSING STATEMENT REGARDING THE DEFENDANT'S BURDEN OF PROOF

The trial court has a wide latitude of discretion in controlling the argument of counsel. *Powell* v. *State*, 270 Ark. 236, 605 S.W.2d 2 (1980). Appellant argued in closing that the identification method used by the state to determine the torso found in the cooler was that of Lou Alice Brenk was unreliable. It was not an abuse of discretion for the trial court to allow the prosecutor to argue, in reply, that appellant had the opportunity, not the obligation, to get an expert to dispute the findings of the state's expert.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE TESTIMONY OF JACKIE BRENK

Appellant made a pre-trial motion to exclude the testimony of his ex-wife, Jackie Brenk, who had divorced him in 1985. The trial court allowed her to testify. At trial, Jackie Brenk testified that appellant had threatened her when they were married, had tried to kill her, and had told her he would kill her, cut her body to pieces, and scatter the pieces from Mammoth Springs, Arkansas, to Louisiana so that no one would ever find her. Jackie Brenk testified appellant threatened her several times in the late 1970's and early 1980's. Appellant argues this testimony should have been excluded because it was evidence of prior bad acts of the defendant and did not fall under Ark. R. Evid. 404(b). While appellant's threats against his ex-wife are undoubtedly "prior bad acts," they are admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Given the similarity of the circumstances of Lou Alice Brenk's death and the specific threats made by appellant to Jackie Brenk, although several years earlier, these threats were admissible to show appellant's "intent, plan, and identity." *See Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert denied*, 484 U.S. 872 (1987); *Lee* v. *State*, 545

N.E.2d 1085 (Ind. 1989).

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE TESTIMONY OF KATHLEEN EATON

Appellant next contends that testimony by Kathleen Eaton that she saw Lou Alice Brenk come into the post office "beat up" should also have been excluded as a prior act of misconduct. Kathleen Eaton did not testify that appellant had beaten Lou Alice. Ms. Eaton simply testified that she knew there was trouble between Lou Alice and Herbert Brenk and that one day Lou Alice came into the post office and she was "beat up." Ms. Eaton's testimony does not imply that appellant caused Lou Alice to be beaten, therefore it is not excludable as a prior bad act under Ark. R. Evid. 404(b) as appellant contends. Also, several other witnesses testified, without objection, that they had observed Lou Alice Brenk with bruises and black eyes. Since essentially the same evidence was admitted without objection, any potential error in allowing Ms. Eaton to testify to essentially the same facts was harmless. *Orr* v. *State*, 288 Ark. 118, 703 S.W.2d 438 (1986).

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO HEARSAY EVIDENCE

Appellant contends it was error for the trial court to allow Dr. Rose to testify as to what his colleagues said regarding the number of points needed for an identification because it is hearsay. 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." Ark. R. Evid. 801(c) (1987). The alleged hearsay appellant objects to occurred when Dr. Rose was asked "[w]hy did you pick 14 as a point of identification?" Dr. Rose's response was:

> Well, colleagues that do the same kind of work in forensic osteology, one in discussing techniques said that he liked —
>
> . . . .
>
> One colleague says that he likes to have eight points

> similarity, another colleagues [sic] says 10 points similarity. I myself have never developed a magic, sort of magic, number, if you will. But I always make sure that you see these two previous numbers that I've been told my colleagues use, and these are major anatomical features, all 14 of these are. These are very large portions of the bone. And it was at that point that I was satisfied.

As is clear from the question and Dr. Rose's answer, Dr. Rose was simply explaining why he used 14 identification points and not that his other colleagues actually use eight (8) or ten (10) identification points. *See Richmond* v. *State*, 302 Ark. 498, 791 S.W.2d 691 (1990). Since this testimony was not hearsay, it was not inadmissible hearsay as appellant claims.

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE TESTIMONY OF TWO SURPRISE WITNESSES

Appellant objects to the introduction of the testimony of two witnesses, William Lemmons and Ted Ullman, both of whom were incarcerated with appellant and who testified about incriminating statements made by appellant while he was in jail awaiting trial. These witnesses came forward during the trial and the trial court granted a five-day continuance for the defense to interview the newly discovered witnesses. Appellant claims the testimony of these witnesses should not have been allowed because appellant had based his entire case around the fact that no confession existed and was not able to prepare for this testimony or restructure his case. Since a new trial has been granted on other grounds, this argument is moot. Appellant will have had plenty of time to restructure his case for a new trial and to change his defense, if necessary, before his new trial begins.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE COMPARISONS OF A LOST X-RAY

Appellant contends that Dr. Rose should not have been allowed to testify regarding the use of an original X-ray of Lou Alice Brenk which he used to make comparisons to the torso in order to make an identification. The original X-ray was lost, but Dr. Rose had made slides of the original which were used at trial.

The following exchange occurred at trial:

> [PROSECUTION]: For the record, Your Honor, the defense having rested, I would, at this point raise the issue with respect to earlier objections about the issues related to the X-rays and the evidence that was introduced through Dr. Rose. There were certain objections made that were based on the apparent misplacing of the one original X-ray after the identification process by Dr. Rose. Part of Wednesday's delay in the proceedings was to make sure that the defense, which were furnished with Dr. Rose's slides at the conclusion of the testimony on Tuesday, had an opportunity to submit those slides to Dr. Kearns, their identified expert, and have him review those slides and make a determination, based on that, as to whether to have him testify as an expert, and any issues that he would see in that. I would note that defense has now rested, and they've chosen not to call Dr. Kearns. Furthermore, I would note for the record that I have called Dr. Kearns and received, through him, his stated opinion that the examination by Dr. Rose and Ms. Murray appeared to him valid and well based from the evidence, that the slides were clear and gave an adequate basis for a determination of the identification that they made. That he saw no points of disagreement with their findings, and that he said, of course, he would like to have seen the original X-ray, but it was not necessary, in any sense, to reach the conclusion that Dr. Rose and Ms. Murray reached. Furthermore, he said that he thought that the original X-ray would have only provided him a better basis to confirm the identification, and would not have been, in any way, helpful to challenge the identification made by Dr. Rose and Dr. [sic] Murray. I think that's a fair and accurate summary of Dr. Kearns's statement to me, and in the absence of him being called as a defense witness, I would submit that the issues raised initially by the defense with regard to questions about the X-rays, the one missing X-ray and the use of the slides, I think have been effectively withdrawn. If there is still a significant question on the defense's part, I would submit that we jointly subpoena Dr. Kearns and let him address the evidence in testimony.

THE COURT: Says the defense?

[DEFENSE]: Your Honor, part of what [the prosecution] said is true. To my knowledge, Dr. Kearns would not, he didn't say could not, dispute the findings of Dr. Rose and Ms. Murray. We were told that he would like to see the original X-rays and he would make an opinion. He didn't know if it would make any difference if he did see the original X-rays.

THE COURT: If the defense intends, for purposes of an appeal, to pursue the issue about the X-ray not being presented and about you not being able to prepare an adequate defense, then I want Dr. Kearns to come testify in this case. Apparently [the prosecution] understood Dr. Kearns one way, and you're suggesting that you understood Dr. Kearns another way.

[DEFENSE]: I believe what [the prosecution] said is basically what I got, just more elaborate. I don't know. It could have been a longer conversation.

THE COURT: If there's any substantial dispute or objection being made, then I think it would be appropriate to try to get Dr. Kearns here first thing Monday morning. I'm going to leave it up to defense. What's your response? Do you want Dr. Kearns here on Monday?

[DEFENSE]: No, we don't.

Appellant waived his right to object to the loss of the original X-ray by not calling Dr. Kearns, or anyone else, to testify that the original was necessary for identification or that Dr. Rose and Ms. Murray's identification could not be disputed without the original.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO HEARSAY TESTIMONY BY LOY CHESHIRE

Appellant contends it was error for the trial court to allow Loy Cheshire to testify that Lou Alice Brenk was crying and when he asked her "Lou, what's the matter, Honey?" she had said to him "[h]e's going to kill me, Dink." The trial court allowed this as a present sense impression showing Lou Alice's fear. Trial

courts have a wide latitude of discretion in the admission of evidence. We do not reverse absent an abuse of that discretion. We do not find that the trial court abused its discretion in this instance. This statement falls under Ark. R. Evid. 803(3), which states:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

CONCLUSION

We find the trial court erred in admitting the results of the luminol testing done by Donald Smith in the absence of follow-up testing to confirm the substances causing the reaction were human blood related to the victim or the crime. On all other grounds, we affirm. Therefore, we reverse and remand for proceedings consistent with this opinion.

HAYS and BROWN, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. I would affirm the conviction and judgment.

I am not willing at this juncture to exclude luminol testing as irrelevant in every instance where the presence of human blood is not confirmed. That is what the majority opinion does. I believe that the test is probative as a preliminary screen for the presence of blood, which is exactly what it was used for in this case.

No one contends that luminol testing is conclusive for human blood or that it does not show positive for other substances and even some metals. But these points were explored on cross-examination by defense counsel and argued to the jury. Thus, it becomes a matter of what weight to accord the test rather than its admissibility. *Commonwealth* v. *Yesilciman*, 406 Mass. 736, 550 N.E.2d 378 (1990).

The Massachusetts Supreme Judicial Court addressed this point in *Yesilciman*. In that case, it could not be determined whether occult blood found in the defendant's car and on his

clothing was human or animal; nor could the age of the blood be ascertained. The court observed that evidence is not rendered prejudicial merely because it is inconclusive. The court further pointed out that the defendant's counsel had extensively argued the speculativeness of the testing. It then concluded that the weight to be given the test was a matter for the jury.

So should it be in this case. I would affirm the admission of this evidence and let the jury assess its value.

HAYS, J., joins.

Ricky FRANKLIN *v.* STATE of Arkansas

CR 92-685 845 S.W.2d 525

Supreme Court of Arkansas
Opinion delivered January 25, 1993

Beverly C. Claunch, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Ricky Franklin, was charged with thirty-two (32) counts of burglary (Class B

felonies), two (2) counts of theft of property (Class C felonies), and twenty-two (22) counts of theft of property (Class A misdemeanors), in Cleburne County in connection with three series of burglaries occurring in that county in December 1990, February 1991, and July 1-2, 1991. A jury trial was held on February 27, February 28, and March 2, 1992. At the trial, a directed verdict was granted on twenty-seven (27) of the counts, including all the charges concerning burglary and theft of property alleged to have occurred in December and February and one of the burglary charges alleged to have occurred in July. The remaining twenty-eight (28) charges, sixteen (16) counts of burglary (Class B felonies), two (2) counts of theft of property (Class C felonies), and ten (10) counts of theft of property (Class A misdemeanors), were submitted to the jury, which found appellant guilty on all charges. Appellant was sentenced to twenty years and a $10,000.00 fine on each Class B felony, ten years and a $5,000.00 fine on each Class C felony, and one year and a $1,000.00 fine on each Class A misdemeanor. The court ruled that the sentences on the sixteen (16) burglaries (Class B felonies) would run consecutively and the sentences on the theft of property charges would run concurrently with the sentences on the burglary charges, resulting in a sentence of three hundred and twenty (320) years in the Arkansas Department of Correction. Our jurisdiction is proper pursuant to Ark. Sup. Ct. R. 29(1)(b) (1987).

On appeal, appellant argues the evidence was insufficient to support the verdict for five (5) of the charges, there was insufficient corroboration of accomplice testimony to support the verdict as to all the charges, and a sentence of three hundred and twenty (320) years constitutes cruel and unusual punishment and is disproportionate to the crimes of which appellant was convicted.

THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE RELATING TO THE BURGLARY AND THEFT OF PROPERTY OF GLENDA TURLEY PRINTS, THE BURGLARY OF SYNERGY GAS, THE BURGLARY OF SHEAR PERFECTION, AND THE BURGLARY OF J & B TIRE DO NOT SUPPORT THE JURY VERDICT BECAUSE THERE WAS NO EVIDENCE TO SHOW COMMISSION OF

A CRIME OR TO CONNECT APPELLANT TO COMMISSION OF A CRIME AT THESE LOCATIONS.

Appellant claims there was insufficient evidence to prove commission of a crime at Glenda Turley Prints, Synergy Gas, Shear Perfection, or J & B Tire or to connect him to commission of a crime at Glenda Turley Prints, Synergy Gas, Shear Perfection, or J & B Tire. In reviewing the sufficiency of the evidence on appeal, this court looks at the evidence in the light most favorable to the appellee and affirms the judgment if there is any substantial evidence to support the jury's verdict. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining whether there is substantial evidence to support the jury's verdict, it is permissible to consider only the testimony that tends to support the verdict of guilt. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986). Testimony regarding other charges, which were charged in the same information, may be considered especially if the offenses were all part of a common scheme or plan and were ultimately part of the same transaction. *Young* v. *State*, 269 Ark. 12, 598 S.W.2d 74 (1980).

"A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201 (1987). A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person, with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a) (Supp. 1991).

The following evidence was introduced a trial and is relevant to all five counts. A statement of one of the alleged accomplices, Jimmy Mayfield, was admitted at trial. In the statement, Mr. Mayfield said he, Rick Franklin, and Carl Rader broke into "the bowling alley, a row of businesses by the bowling alley, a catfish place where we got something to eat, and the electric company where we peeled the safe." Mr. Mayfield testified that he stole a Remington microscreen razor from one of the businesses and a sword letter opener from another. Mr. Mayfield and Mr. Rader both testified at trial that they committed a series of burglaries and thefts with appellant on July 1-2, 1991. They both testified

appellant put the items they stole and the things they used in the burglaries on July 2, 1991, in the ceiling of their motel room, Room 20, at the Arkansas Inn, when they realized the police were outside. Officer Baugh testified that appellant, Brenda Franklin, Mr. Mayfield, and Mr. Rader were picked up at Room 20 of the Arkansas Inn and questioned on July 2, 1991. Mr. Mayfield and Mr. Rader testified they went back to the Arkansas Inn with appellant on July 11, 1991, to retrieve the items they had left in the ceiling. They testified they tried to get in through the window, but someone was staying in the room and scared them off. Butch Wilson testified he was staying in Room 20 at the Arkansas Inn on July 11 when he was awakened by someone tampering with the window. Mr. Wilson got up and pulled back the curtain, he said he saw three men in masks at the window and they ran off when they saw him. Mr. Wilson called the motel manager and the police. The police searched the room and found many items in the ceiling, including tools, masks, gloves, a pair of tennis shoes, and several items taken from the businesses burglarized on July 2, 1991, including a Remington microscreen razor and a sword letter opener. On July 16, 1991, Mr. Mayfield and Mr. Rader were arrested trying to rent a room at the Arkansas Inn. Mr. Mayfield testified that they had come back to the Arkansas Inn, at appellant's direction, to recover the items left in Room 20. Both Mr. Mayfield and Mr. Rader identified items recovered from the ceiling as items used in the burglaries and thefts they committed with appellant. Additionally, Randy Sherrill, who was in a jail cell with appellant, testified that appellant told him he had committed a string of burglaries on Highway 25 North.

Appellant contends there is insufficient evidence to prove commission of a crime at Glenda Turley Prints, burglary and theft, or to connect appellant to commission of a crime, burglary and theft, at Glenda Turley Prints. In addition to the evidence that is relevant to all charges, Shannon King of Glenda Turley Prints testified that on the morning of July 2, 1991, the change drawer was missing from its usual location and was found in the employee break room with about twenty dollars missing. She also testified that Glenda Turley Prints was located in the immediate area of other businesses that had been burglarized the same night. This constitutes substantial evidence from which the jury could have determined Glenda Turley Prints was the victim of burglary

and theft on July 2, 1991, and appellant was one of the perpetrators.

Appellant next contends there was insufficient evidence to prove commission of a crime, burglary, at Synergy Gas or to connect him to commission of a crime, burglary, at Synergy Gas. In addition to the evidence that is relevant to all charges, Jackie Huff, branch manager for Synergy Gas, testified that on July 2, 1991, his branch at 1130 Highway 25 North was broken into, a safe at that location was "damaged to the point of no repair," and the business was ransacked, but no money was taken. There was also evidence that a string of businesses on Highway 25 were all the victims of burglary or theft, or both, discovered on July 2, 1991. This constitutes substantial evidence from which the jury could have concluded a burglary occurred at Synergy Gas and appellant was one of the perpetrators.

Appellant claims there is no evidence a crime, burglary, was committed at Shear Perfection or that he was involved in a crime, burglary, committed at Shear Perfection. In addition to the evidence relevant to all charges, Mr. Hipps, the owner of the building where Shear Perfection is located, testified that the door to Shear Perfection was open and it had pry marks on it on the morning of July 2, 1991, but he didn't know if anything was taken. Mr. Hipps also owns the Carpet Barn which is located in the same building as Sheer Perfection. The door to the Carpet Barn was also pried open and there were some rolls of coins taken from the Carpet Barn. This constitutes substantial evidence from which the jury could have concluded a burglary occurred at Shear Perfection and appellant was one of the perpetrators.

Appellant contends there is no evidence a crime, burglary, was committed at J & B Tire and there was no evidence to link appellant with any crime, burglary, occurring at J & B Tire. In addition to the evidence that is relevant to all charges, Tim Rockwell, who works at J & B Tire, testified that on July 2, 1991, there were signs of forced entry into the building and the cash register drawer had been tampered with, but nothing had apparently been taken. This is sufficient to establish a burglary had taken place and appellant was a perpetrator.

THERE IS INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT BECAUSE THERE WAS INSUFFICIENT CORROBORATION OF THE TESTIMONY OF THE ACCOMPLICES.

The testimony of an accomplice, standing alone is insufficient to support a felony conviction. Ark. Code Ann. § 16-89-111(e) (1987); *Johnson* v. *State*, 303 Ark. 12, 792 S.W.2d 863 (1990). Accomplice testimony must be corroborated by other evidence tending to connect the defendant with the commission of the offense. *Id.* The corroborating evidence must be sufficient, standing alone, to establish the commission of the offense and to connect the defendant with it. *Daniels* v. *State*, 308 Ark. 53, 821 S.W.2d 778 (1992). But, the corroboration need not be substantial enough in and of itself to sustain a conviction. *Rhodes* v. *State*, 280 Ark. 156, 655 S.W.2d 421 (1983). The corroborating evidence may be circumstantial, as long as it is substantial. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988). Also, when the testimony of an accomplice is corroborated as to particular material facts, the factfinder can infer the accomplice spoke the truth as to all. *Orsini* v. *State*, 281 Ark. 348, 665 S.W.2d 245, *cert. denied*, 105 S. Ct. 162 (1984); *Olles & Anderson* v. *State*, 260 Ark. 571, 542 S.W.2d 755 (1976).

Here, there was corroborating evidence in that the items stolen from the businesses were found in the motel room. Mr. Wilson corroborated Mr. Mayfield's account of the July 11, 1991, attempt to retrieve the items hidden in the ceiling of Room 20 at the Arkansas Inn. Mr. Mayfield testified he stole a Remington microscreen razor at one of the businesses. Mr. Logan testified an electric razor was taken from his business, Logan's Builders Supply, and identified the razor recovered from the motel ceiling as the one taken from Logan's Builders Supply. Mr. Mayfield testified they ate at one of the businesses and, William R. Brown, Jr., owner-manager of Mr. B's Catfish, testified that on July 2, 1991, he discovered someone had broken into his restaurant during the night and had made food on the grill and taken money from the cash register and a purse left in the restaurant. This corroborating evidence is sufficient to allow the jury to believe all of Mr. Mayfield's testimony.

Evidence other than accomplice testimony also establishes

crimes were committed and connects appellant to the crimes. The business owners and employees of the various businesses testified that on the morning of July 2, 1991, they discovered that their businesses had been broken into and, in most instances, items taken. Randy Sherrill testified appellant admitting having committed the crimes. Appellant was detained and questioned on July 2, 1991, leaving the room where the items used in commission of the crimes and items taken from the businesses were found in the ceiling.

APPELLANT'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS DISPROPORTIONATE TO THE CRIMES OF WHICH HE WAS CONVICTED.

Appellant did not preserve this issue for appeal. At the sentencing, appellant said: "defendant would request that the sentences be imposed concurrently. We feel like those sentences are excessive, given the proof in the case." This was prior to the court deciding whether the sentences should be served concurrently or consecutively. No objection was made to the court's ruling that some of the sentences should be served consecutively, resulting in a total sentence of 320 years. Nor was the court apprised that appellant considered imposition of a sentence of 320 years for conviction of 28 charges of burglary and theft of property cruel and unusual punishment. We do not consider arguments raised for the first time on appeal. *Mays* v. *State*, 303 Ark. 505, 798 S.W.2d 75 (1990).

Affirmed.

Johnny Lewis THOMAS *v.* STATE of Arkansas

CR 92-871 846 S.W.2d 168

Supreme Court of Arkansas
Opinion delivered January 25, 1993

Daniel D. Becker and *Terri L. Harris*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Johnny Lewis Thomas, appeals a judgment of the Garland Circuit Court convicting him of rape and kidnapping. Appellant was sentenced to life in prison on the rape charge and forty years on the kidnapping charge. As his sole point for reversal of the judgment, he contends the trial court erred in denying his motion for directed verdict on the kidnapping charge. We find no error and affirm.

At the close of the state's case, appellant moved for a

directed verdict on the kidnapping charge arguing there was insufficient evidence that appellant deprived the victim of more of her liberty than was necessary for him to commit the rape. Appellant emphasized the fact that the victim voluntarily entered his car. The trial court denied appellant's motion concluding there was sufficient evidence indicating that the restraint on the victim's liberty was greater than that which the state was obligated to prove on the rape charge. The trial court likewise denied appellant's motion for directed verdict made at the close of all evidence.

We treat a challenge to the denial of a motion for directed verdict as a challenge to the sufficiency of the evidence. *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict; substantial evidence must be forceful enough to compel a conclusion one way or the other beyond mere suspicion and conjecture. *Id.* On appellate review, it is only necessary for us to ascertain that evidence which is most favorable to appellee and, if there is substantial evidence to support the verdict, we affirm. *Id.*

As viewed most favorably to the state, the evidence reveals that at approximately 7:25 a.m. on October 14, 1991, the fifteen-year-old victim was waiting at the bus stop for a ride to Hot Springs High School. As she was waiting, a car approached her. Appellant was driving the car. Appellant's son, Robert Thomas, and appellant's nephew, Melvin Newman, were passengers in the car. The victim knew Robert Thomas from school. The three men offered the victim a ride to school and the victim accepted. The victim then voluntarily joined Melvin Newman in the back seat of the car.

All three passengers testified that appellant was going to drive both Robert Thomas and the victim to school. However, appellant drove past the turn he should have made to reach the school. When the victim questioned appellant's route to the school, he told her he was going the back way. Appellant then steered the car down a dirt road. All three passengers requested that appellant go to the school. Appellant ignored these requests. The victim began to cry because she was scared.

The victim stated there were no houses, only woods, around

the dirt road. She was not sure of the length of the drive, but stated it could have been about ten minutes. She stated that when appellant was driving down the dirt road, she was scared and attempted to get out of the car. Appellant also told her he would kill her if she did not stop hitting and kicking him.

Appellant stopped the car and ordered his son and his nephew to get in the back seat. The victim got out of the car and was standing outside the front passenger door when appellant stripped her of her clothing. Appellant began kissing and fondling the victim while the two males were in the back seat of the car. Appellant then ordered them to leave because "he did not need an audience," but to return to the car on his demand. Appellant then threatened the victim with a knife and raped her.

Appellant's son and nephew corroborated the victim's testimony. They both testified that Robert Thomas and the victim requested appellant to turn the car around and take them to school. Robert Thomas stated the victim was nervous and crying while riding down the dirt road. Both boys also testified they were either crying or almost crying during the incident.

In the present case, to prove kidnapping the state must show that appellant restrained the victim so as to interfere substantially with her liberty with the purpose of engaging in sexual contact. Ark. Code Ann. § 5-11-102(a)(4) (1987). We have interpreted this statute as requiring the restraint of the victim's liberty to exceed that restraint which is normally incidental to the rape. *Summerlin* v. *State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Appellant specifically contends the state failed to show that he restrained the victim in excess of the restraint that was incidental to the rape. He relies heavily on *Shaw* v. *State*, 304 Ark. 381, 802 S.W.2d 468 (1991).

In *Shaw*, the victim agreed to attend a business dinner with Shaw and voluntarily entered Shaw's car. Instead of going to dinner, Shaw drove to a liquor store. Under false pretense, Shaw then drove to a rural camp site where he threatened his victim with a gun and raped her on the tailgate of his truck. According to the *Shaw* majority opinion, it was not until Shaw pulled the gun on her that the victim revoked her consent to Shaw's actions. Based on those facts, this court held there was no substantial

interference with the victim's liberty to warrant a separate conviction for kidnapping.

Shaw is not controlling of the present case because the facts, although somewhat similar, are distinguishable. It is true that both victims voluntarily entered their rapists' automobiles. But this is where the similarity ends. In *Shaw*, the victim continued to consent to her rapist's actions when he deviated from the agreed-upon destination. For example, when Shaw wanted to go to a liquor store instead of eating dinner, the victim consented. Again, when Shaw deviated from his plan of doing some work by driving to a rural camp site, the victim consented. However, unlike the victim in *Shaw*, the victim in the present case began to revoke her consent to her rapist's actions as soon as it became apparent he was not driving her to school — the agreed-upon destination. Thus, from the point at which appellant missed the turn to the school, appellant restrained the victim. He kept her in the car while she was kicking and hitting him and pleading with him to take her to school. He drove her at least ten minutes from the City of Hot Springs to a wooded area and raped her there. We hold such actions resulted in more restraint of the victim than would be normally incidental to the rape.

In reaching our conclusion, we emphasize the fact that appellant continued to remove the victim from the point of their initial contact after she expressed a desire to be returned to the agreed-upon destination. Appellant did not rape the victim at the point of initial contact as was the case in *Summerlin*, 296 Ark. 347, 756 S.W.2d 908, nor at the point where the victim revoked her consent to appellant's actions as was the case in *Shaw*, 304 Ark. 381, 802 S.W.2d 468.

The chancellor did not err in denying appellant's motion for directed verdict on the kidnapping charge. The foregoing evidence is substantial and shows the restraint on the victim's liberty to have exceeded that which was incidental to the rape.

The record has been examined 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.

The judgment is affirmed.

Tommy DIXON *v.* STATE of Arkansas

CR 92-963 846 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered February 1, 1993
[Rehearing denied March 8, 1993.]

Henry & Mooney, by: *Wayne Mooney*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y

Gen., for appellee.

ROBERT H. DUDLEY, Justice. The jury found appellant guilty of first degree murder. There was substantial circumstantial evidence to prove that he ran over his wife more than twice with his automobile, and there was no reversible trial error. Accordingly, we affirm the judgment of conviction.

The conviction was based upon circumstantial evidence. The appellant recognizes that circumstantial evidence can constitute substantial evidence, *see Hill* v. *State*, 299 Ark. 327, 773 S.W.2d 424 (1989), but questions whether there was substantial evidence of his guilt, and, even if there was substantial evidence of his guilt, argues that it did not exclude every other reasonable hypothesis as is required in cases of circumstantial evidence. *See Bennett* v. *State*, 308 Ark. 393, 825 S.W.2d 560 (1992). He contends that it is reasonable to hypothecate that Jackie Shempert was the murderer. As a result of the argument, we must set the evidence out in some detail.

Five days after the victim's death, appellant gave the police a statement in which he said that on the night of his wife's death he and his wife got into an argument while they were at the Starlight nightclub near Bondsville in Mississippi County. He said he was intoxicated, but drove their automobile as they left the nightclub. He drove the car only a short distance when his wife began scratching and clawing him. He said he had to hit her in the mouth and grab her hair to restrain her. He stated that he felt the car swerve as she jumped out of the car. He said he drove the car an additional seventy-five yards and then backed the car and found her beside the road.

Separate evidence established that appellant's automobile was blue in color and that the victim was wearing a black sweater. Even though it was below freezing, the victim was not wearing a coat or shoes.

Herbert Ainsworth testified that at, or shortly after, midnight he was a passenger in John Murphy's vehicle as they were driving in an easterly direction on their way to the Starlight club when he saw a dark colored car on the side of the road. The dark colored car was headed west, which was the direction appellant and the victim would have driven. After passing the dark colored

car Ainsworth saw someone crawling beside the road. That person had on a black sweater and pants. He saw the dark colored car's brake lights come on and then saw its back-up lights come on. He thought either a fight had occurred, or else the person crawling was drunk. He and Murphy decided to continue east to the club. While travelling to the club, Ainsworth saw a car driven by Jackie Shempert going in the opposite direction, or west.

John Murphy gave much the same testimony. He saw the person crawling beside the road and did not think that person was hurt. He saw the brake lights on the parked car and then saw its back-up lights come on. He testified that the dark colored car had bright back-up lights. He thought that the dark colored car might be backing up to pick up a drunk. They went to the club and returned a short time later.

Lori Hill testified that she and Jackie Shempert had been at the Starlight club and were in Shempert's car on their way home. They were headed west. Lori Hill saw a body beside the road. Shempert immediately began to turn the car around, and, while doing so, a car driven by Archie Ohler approached. Ohler was in his lane headed east toward the Starlight club and stopped immediately. Lori Hill testified that Shempert and Ohler got out of the two vehicles, looked at the body, and Shempert said, "It's Shelia Dixon," and "Let's go to my brother's house and call 911 from there." Hill testified that she and Shempert went to Shempert's house and called the police.

Archie Ohler testified that he was on his way to the nightclub when he saw the victim's body on the opposite side of the road. Her legs were in the roadway while the upper part of her body was off the road. He stopped and turned his car so that his headlights shined on the victim's body.

Ohler testified that while he was maneuvering his car to get his car lights on the body, Shempert and Hill completed their turnaround and returned. He stated that they did not see any other vehicles. As Ohler and Shempert looked at the horribly battered body, appellant drove up, and ran over the victim's leg. Ohler testified that appellant "seemed to come up out of nowhere." Appellant, who was drunk, said someone had run over his wife.

Deputy Sheriff Jones testified that he responded to the call. When he arrived, the appellant was there and said that he and his wife had been arguing and that he let her out of the car, drove about one hundred yards, turned around, and came back to get her but found that someone had run over her. The victim's shoes were found in appellant's car, as well as a large amount of hair that appeared to be from her head. Stains that appeared to be blood were found in the front seat and on the right rear wheel and tire, the right rear quarter panel, and the right rear wheel well of appellant's car. Fresh scratches were found on the lower part of the front bumper. The victim's purse was found in the trunk of the car. It contained a letter to the appellant that stated she was suing him for divorce because, "This is hell on earth for me. I need out and away from you. Tommy, you're too, too rough for me. . . ." The officers examined the other vehicles at the scene, but none of them showed any evidence that they had struck the victim. Shempert had left earlier to call the police, and his car was not there to be examined at the time. The police examined it two days later, and there was no evidence that it had struck the victim.

Dr. Violet Hnilica, the forensic pathologist from the Medical Examiner's office, testified that the victim suffered multiple injuries in four different areas of her body and that the pattern of abrasions indicated the victim "had been run over probably more than twice." Dr. Hnilica further testified that the victim's injuries were inconsistent with falling out of a car.

The foregoing constitutes substantial evidence that the victim was killed by being run over more than twice by an automobile. Appellant had a motive and the opportunity to kill the victim. If the victim had intended to voluntarily get out of the car, it is unlikely that she would have gotten out barefooted and without a coat in the freezing cold weather. The hair and blood in the car is evidence of a violent struggle. If the victim had only fallen from the passenger side door, and appellant had only accidentally run over her, it would not have damaged the lower part of the front bumper. The testimony of Ainsworth and Martin is substantial circumstantial evidence that, at the time they saw the dark colored car, appellant applied his brakes and put his vehicle in reverse to back over the victim. Appellant's vehicle is the only vehicle that showed evidence of running over the victim. All of the testimony taken together constitutes substantial

circumstantial evidence of appellant's guilt.

Appellant also contends it is reasonable to hypothecate that Shempert is the one who ran over the victim. The argument is without basis. Lori Hill's testimony and the physical evidence that Shempert's vehicle had not struck anyone negates such a hypothesis. Accordingly, we hold there is substantial evidence to support the conviction.

Appellant did not object to some photographs being admitted into evidence. He now argues that we should reverse and remand because the trial court erred in not excluding the photographs on its own motion. We summarily reject the argument because we have repeatedly said that we do not have the "plain error" rule in this State. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Appellant's final argument is that the trial court erred in admitting into evidence the letter to the appellant that was found in the victim's purse. The objection at trial was based only on relevancy. A trial court's decision regarding relevancy is entitled to great weight and will be reversed only if the court abused its discretion. *Walker* v. *State*, 301 Ark. 218, 783 S.W.2d 44 (1990). The trial court ruled the letter was relevant because it showed motive. Although the State is not required to prove motive, it may introduce evidence showing all of the circumstances that explain the act, illustrate the accused's state of mind, or show a motive for the crime. *Richmond* v. *State*, 302 Ark. 498, 79 S.W.2d 691 (1990).

Affirmed.

Cathryn Chadwick YATES *v.* Floyd Andrew STURGIS and Vanessa Sturgis

92-281 846 S.W.2d 633

Supreme Court of Arkansas
Opinion delivered February 1, 1993
[Rehearing denied April 19, 1993.*]

*Hays, Glaze, and Corbin, JJ., would grant rehearing.

Howard C. Yates, for appellant.

McMillan, Turner & McCorkle, by: *F. Thomas Curry*, for appellees.

ROBERT H. DUDLEY, Justice. Cathryn Chadwick Yates, appellant, and Floyd and Vanessa Sturgis, appellees, own adjoin-

ing tracts of land inside the City of Arkadelphia. Appellant Yates alleges that part of her tract is landlocked, or, in other words, blocked from the nearest city street by the appellees' tract. She filed a petition in the County Court of Clark County, pursuant to Ark. Code Ann. § 27-66-401 (1987), to establish a private road across appellees' tract. The county court held that it was without jurisdiction to open a private road within the city limits and dismissed the petition. Appellant appealed to the circuit court. The circuit court affirmed the ruling of the county court and held that the City Council and the City Planning Commission were the sole authorities authorized to open streets within a city. We have taken jurisdiction of this case of first impression and reverse and remand.

■ Article 7, section 28 of the present Constitution of Arkansas, in the material part, provides: "The county courts shall have *exclusive original jurisdiction* in all matters relating to county taxes, *roads*, bridges, ferries,. . . ." (Emphasis added.) Our earlier state constitutions also placed jurisdiction of county roads under the county court. *See, e.g.*, Ark. Const. of 1836, art. VI, § 9; *Roberts* v. *Williams*, 15 Ark. 43 (1854). In *Sanderson* v. *Texarkana*, 103 Ark. 529, 146 S.W. 105 (1912), we said that the above-quoted provision in the current constitution gives the county court jurisdiction over all public roads in the county and that means the county court also has jurisdiction over streets within a city. We wrote: "The streets of a municipality are public roads of the county, of which the municipality is a component part. While streets do not include roads, yet roads do include streets." *Id.* at 533, 146 S.W. at 107.

As implementing legislation to a prior constitution, the General Assembly, in 1871, provided that the county court may exercise the power of eminent domain to allow access to a landlocked tract. The statute, Ark. Code Ann. § 27-66-401 (1987), in the material part, provides:

> When the lands . . . of any owner [are] so situated as to render it necessary to have a private road from such lands . . . over the lands of any other person and the other person refuses to allow that owner the private road, then it shall be the duty of the county court . . . [to determine whether such a private road is necessary and, if it is

necessary, to exercise the power of eminent domain at the expense of the person seeking the road].

Throughout the years we have construed our present state constitution and the above-quoted statute to give the county court the power of eminent domain to allow access to landlocked tracts. *See, e.g., Dowling* v. *Erickson*, 278 Ark. 142, 644 S.W.2d 264 (1983); *Bowden* v. *Oates*, 248 Ark. 577, 452 S.W.2d 831 (1970); *McVay* v. *Stupenti*, 227 Ark. 224, 297 S.W.2d 769 (1957); *Pippin* v. *May*, 78 Ark. 18, 93 S.W. 64 (1906). Before 1871, the precursor statute, Chapter 140, section 62 of The Digest of the Statutes of Arkansas of 1846, provided, "Any person desirous of having a wagon road laid out, for his convenience, from the dwelling house . . . of such person, to any public road . . . shall present a petition to the county court. . . ." Correspondingly, we held that this precursor statute, in implementation of the earlier constitutions, also authorized the county court to exercise the power of eminent domain to open roads to landlocked areas. *Roberts* v. *Williams*, 15 Ark. 43 (1854).

Article 2, section 23 of the state constitution provides, "The State's ancient right of eminent domain . . . is herein fully and expressly conceded," and we have held that the procedure for exercising the power is a matter of legislative regulation. *Cannon* v. *Felsenthal*, 180 Ark. 1075, 24 S.W.2d 856 (1930). In sum, the General Assembly was within its province in authorizing the county court to exercise the power of eminent domain to give access to landlocked tracts, and it clearly did so in Ark. Code Ann. § 27-66-401 (1987).

At the same time, Article 12, section 3 empowers the General Assembly to provide for the organization of cities and towns, and the General Assembly may confer on cities and towns the power and supervision of streets within their boundaries. *Sanderson* v. *Texarkana*, 103 Ark. 529, 146 S.W. 105 (1912). The first legislature that assembled after the adoption of the present constitution enacted the statute codified as Ark. Code Ann. § 14-301-101 (1987), which provides that the city council shall: "(1) Have the care, supervision, and control of all the public highways, bridges, streets, alleys, public squares, and commons within the city; and (2) Cause those public highways, bridges, streets, alleys, public squares, and commons to be kept open and

in repair, and free from nuisance."

In this case both the county court and the circuit court held that Ark. Code Ann. § 14-301-101 (1987), quoted above, divested the county court of jurisdiction to open roadways to landlocked tracts located within city limits.

One of the chief objectives of incorporating a municipality is to give the executive and legislative branches of the municipality control and supervision over the streets within the municipal limits and to charge those branches of municipal government with the duty to plan and keep and maintain the streets in suitable and safe condition. Neither the constitution nor the applicable statutes contemplate both the county court and the municipality having the executive and legislative control and supervision over the streets within the city. *Sanderson* v. *Texarkana*. Clearly, the control and supervision of streets within the municipality is given to the executive and legislative branches of the municipality. No street within the city may be dedicated to the city until accepted and confirmed by a municipal ordinance specially passed for that purpose. Ark. Code Ann. § 14-301-102 (1987).

However, the statute giving the executive and legislative branches of the municipality supervision and control of the streets has not taken jurisdiction from the county court for three distinct reasons. First, the constitution gives jurisdiction to the county court. An act of the legislature could not change that jurisdiction. Second, no other court is given jurisdiction by the constitution to exercise the power of eminent domain in cases such as the one at bar. Under the trial court's ruling a person inside the city would not have any judicial relief, while a person outside the city would. Neither the constitution nor the statutes contemplate such a denial of equal protection. Article 7, section 28 provides, "The county courts shall have *exclusive original jurisdiction in all matters relating to county . . . roads. . . .*" (Emphasis added.) The applicable statute, Ark. Code Ann. § 27-66-401 (1987), gives the county court the power of eminent domain to create a road, "[w]hen the lands . . . *of any owner* is so situated." (Emphasis added.) Neither the constitution nor the statute limit applicability of the proceeding to the unincorporated geographic area of the county. Third, there is no real conflict

between the county court's jurisdiction to exercise the power of eminent domain to give the owner of a landlocked tract a private roadway out of his land and a statute giving municipalities the control and supervision of city streets. Section 27-66-401 of the Arkansas Code Annotated of 1987 authorizes the county to establish a "private" road out of the landlocked tract, and, while it may be a public road in the sense that anyone who has occasion to use the road may do so, *Dowling* v. *Erickson*, 278 Ark. 142, 644 S.W.2d 264 (1983), it is still a private road, and the individual who petitions county court for the establishment of a private road out of a landlocked tract is responsible for the maintenance of that private road. *Carter* v. *Bates*, 142 Ark. 417, 218 S.W. 838 (1920). Quite differently, a city does not have to accept the control and supervision and concurrent cost of maintenance of a city street unless it chooses to do so. *See* Ark. Code Ann. § 14-301-102 (1987).

The circuit court also held that it would amount to a violation of the separation of powers doctrine to allow the county court to exercise jurisdiction within the city. We summarily dispose of the contention by reciting that the constitution gives the county "exclusive original jurisdiction" of county roads. In *Road Improvement District No. 1* v. *Glover*, 89 Ark. 513, 117 S.W. 544 (1909), we clearly affirmed the plain language in the constitution relative to the exclusive jurisdiction of the county court over roads. There simply is no violation of the separation of powers doctrine.

The circuit court also held that the petition in this case amounted to an unconstitutional use of the power of eminent domain. While we have held to the contrary, *Dowling* v. *Erickson*, 278 Ark. 142, 644 S.W.2d 264 (1983), we do not address the issue. The county court held that it did not have jurisdiction to hear the case, and the circuit court affirmed that holding. Therefore, the trial court never determined the merits of the use of the power of eminent domain, and we will not do so in an advisory capacity.

Reversed and remanded for proceedings consistent with opinion.

GLAZE, CORBIN, & BROWN, JJ., dissent.

ROBERT L. BROWN, Justice. The majority opinion holds that county judges can open roads within the city limits of an incorporated municipality without city permission or even city involvement. I disagree that that is the law.

There is no doubt that the 1874 Arkansas Constitution gave county courts exclusive original jurisdiction over county roads. Ark. Const. art. 7, § 28. In addition, four years prior to the adoption of the 1874 Constitution, the General Assembly enacted Act 26 of 1871, now codified as Ark. Code Ann. § 27-66-401 (1987), which provided that county courts could authorize private roads for landlocked persons to run over the lands of others in order to access public roads. Subsequent case law by this court, however, made it clear that Act 26, though referencing private roads, in actuality empowered county courts to establish public roads because anyone who had occasion to use the roads might do so. *Dowling* v. *Erickson*, 278 Ark. 142, 644 S.W.2d 264 (1983); *Bowden* v. *Oates*, 248 Ark. 577, 452 S.W.2d 831 (1970); *McVay* v. *Stupenti*, 227 Ark. 224, 297 S.W.2d 769 (1957); *Pippin* v. *May*, 78 Ark. 18, 93 S.W.2d 64 (1906).

One year after the adoption of the 1874 Constitution, the General Assembly enacted Act 1, which endowed the cities with authority to open streets within their boundaries. Act 1 of 1875, §§ 18 and 30, now codified as Ark. Code Ann. §§ 14-54-601 (1), 14-301-104 (1987). The exclusive power of the cities to open their streets has remained inviolate for over a century. Indeed, this Court long ago recognized the superior power of the cities to operate within their boundaries. *See Sanderson* v. *Texarkana*, 103 Ark. 529, 146 S.W.2d 105 (1912). The majority cites *Sanderson* for the proposition that city streets are public roads of the county. Carried to its logical conclusion, this means that county courts could assert exclusive jurisdiction over city streets at any time under Article 7, § 28. Such a conclusion would render horrendous results.

In *Sanderson*, we clarified the role of the city and the county with respect to public roads:

> It is hardly to be supposed that it was the intention of any enactment, either of the Constitution or of the Legislature, to authorize two agencies with co-ordinate power to have control and supervision over the streets of a city when the

> effect might be to enable each to thwart the other and to play at cross purposes. And so the first Legislature that assembled after the adoption of the Constitution granted to municipal councils the power to lay out, open, establish, improve and keep in repair the streets within their corporate limits. Kirby's Digest, § 5456. By virtue of the constitutional provision authorizing the organization of municipal corporations by the Legislature, and the immediate legislation had thereafter, the supervision over public highways or streets within cities and towns was confided to the authorities of the municipalities, and by the constitutional provisions of section 28, article 7, and legislative enactments thereunder, the jurisdiction over highways or the roads in the county outside of municipalities was confided to the county court. Both the streets in municipalities and the highways outside of them are public roads. . . .

103 Ark. at 534, 146 S.W.2d at 107. We thus stated that the Arkansas Constitution (and specifically Article 12, § 3) gave the General Assembly the authority to open public roads inside the city, and the county retained that authority in unincorporated areas. The jurisdictional lines appeared clear until this decision.

Now this Court has taken the position that county judges may open public roads within city limits under the authority of Act 26 of 1871 and Article 7, section 28, of the Arkansas Constitution. The majority concludes in this fashion in the face of the municipal street legislation enacted as part of Act 1 of 1875 under the authority of Article 12, § 3 of the Arkansas Constitution, and despite the fact that there has been no case in this court over the past one-hundred eighteen years where the county courts attempted to exercise such an extraordinary power.

The cases, and they are legion, have all concerned the opening of roads for landlocked persons in rural areas and unincorporated parts of the county. *See Bean* v. *Nelson*, 307 Ark. 24, 817 S.W.2d 415 (1991) [adjacent 40-acre tracts of land]; *Attaway* v. *Davis*, 288 Ark. 478, 707 S.W.2d 302 (1986) [12-acre tract]; *Armstrong* v. *Harrell*, 279 Ark. 24, 648 S.W.2d 450 (1983) [Mayflower School District]; *Dowling* v. *Erickson, supra*, [appellant's land completely surrounded by appellee's land];

Ahrins v. *Harris*, 250 Ark. 938, 468 S.W.2d 236 (1971) [7-acre and 172-acre tracts near Palarm Creek in Faulkner County]; *Bowden* v. *Oates, supra*, [land near county road in Pope County]; *Riggs* v. *Bert*, 245 Ark. 515, 432 S.W.2d 852 (1968) [best use of land for grazing cattle]; *Armstrong* v. *Cook*, 243 Ark. 230, 419 S.W.2d 308 (1967) [adjoining farm lands]; *McVay* v. *Stupenti, supra*, [lands along a drainage canal west of Marion]; *White* v. *Grimmett*, 223 Ark. 237, 265 S.W.2d 1 (1954) [outlying lands in Pulaski County]; *St. Louis-San Francisco Ry. Co.* v. *Logue*, 216 Ark. 64, 224 S.W. 2d 42 (1949) [property "near Fayetteville"]; *Parrott* v. *Fullerton*, 209 Ark. 1018, 193 S.W.2d 654 (1946) [two adjacent 40-acre tracts of land]; *Roth* v. *Dale*, 206 Ark. 735, 177 S.W.2d 179 (1944) [40-acre tracts]; *Mohr* v. *Mayberry*, 192 Ark. 324, 90 S.W.2d 963 (1936) [private road sought across 9-acre farm to connect 30-acre farm with Highway 27 near Mt. Ida]; *Houston* v. *Hanby*, 149 Ark. 486, 218 S.W. 838 (1921) [small farm in Madison County]; *Carter* v. *Bates*, 142 Ark. 417, 218 S.W. 838 (1920) [proposed road ran through field that was valuable for cultivation]; *Pippin* v. *May, supra*, [80 acres in St. Francis County]; *see also Powell* v. *Miller*, 30 Ark. App. 157, 785 S.W.2d 37 (1990) [25-acre tract of land in Washington County]. Two additional cases give no indication of the character of the locale, but there is no suggestion in either decision that the road was authorized within city limits. *Castleman* v. *Dumas*, 279 Ark. 463, 652 S.W.2d 629 (1983); *Ricci* v. *Poole*, 253 Ark. 324, 485 S.W.2d 728 (1972).

The decision today has the potential for wreaking havoc on city planning. It most certainly opens the door to myriad requests to county courts for improved access within city limits. Ms. Yates's remedy should lie with her city council — not the county judge.

I would affirm the circuit court and hold that the county courts are without jurisdiction to open public roads inside a municipality.

GLAZE and CORBIN, JJ., join.

Lee E. CATER *v.* Helen B. CATER

92-485 846 S.W.2d 173

Supreme Court of Arkansas
Opinion delivered February 1, 1993

Lyons & Emerson, by: *Scott Emerson*, for appellant.

Reid, Burge, Prevallet & Coleman, for appellee.

STEELE HAYS, Justice. This is an appeal from a jury verdict which awarded Helen Cater compensatory damages in the amount of $20,000.00 and punitive damages of $350,000 as a result of a beating allegedly inflicted by her husband, Lee Cater, while their divorce action was pending. For reversal, Lee Cater contends that the trial court erred in refusing to grant his motions for summary judgment and for a directed verdict on the premise that Mrs. Cater is attempting to recover both in circuit court and in chancery court for the injuries she sustained. Mr. Cater also claims a new trial should be ordered because the jury acted with extreme passion and prejudice in its award. We find no error and affirm.

After nearly thirty years of marriage, Helen Cater filed suit for divorce on grounds of general indignities. She sought an equitable division of assets, alimony and attorney's fees. While the divorce action was pending, she maintains that Mr. Cater, in violation of earlier restraining orders, accosted her at her home and beat her severely. As a result of the beating, Lee Cater was convicted of battery in the first degree, fined $10,000.00, and sentenced to five years in prison. That conviction was affirmed by the Arkansas Court of Appeals.

In addition to the divorce and criminal actions, Mrs. Cater filed this civil action in circuit court seeking compensatory and punitive damages for the torts of assault, battery, and outrage. She also amended her divorce complaint and asserted "cruel and barbarous treatment" as additional grounds for divorce. The divorce hearing was held and a decree was entered. The court awarded her attorney's fees and directed that all of the marital and entirety property be sold, with the proceeds divided equally, after first surcharging Mr. Cater's portion with the value of assets he had concealed or transferred while the divorce action was pending. Mrs. Cater has appealed the divorce decree, but has been unable to prosecute that appeal because Mr. Cater filed a Chapter 13 Bankruptcy petition. Motions to dismiss that petition filed by the trustee and by Mrs. Cater are pending.

Mr. Cater filed a motion for summary judgment in the present circuit court action based upon res judicata, collateral estoppel, the election of remedies doctrine and double recovery.

He contended she was attempting to recover twice for the alleged beating by pursuing claims for alimony and an inequitable distribution of the marital property in chancery court while pursuing damages in circuit court. The motions for summary judgment and for a directed verdict were denied.

The argument now raised is based on the theory that Mrs. Cater attempted to obtain a double recovery by seeking compensation in both the divorce action and the instant case. Procedurally, the denial of the motion for summary judgment is not an appealable order even after there has been a trial on the merits. *See Sutter* v. *King*, 310 Ark. 681, 839 S.W.2d 218 (1992); *Elliott* v. *Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991); *Rick's Pro Dive N' Ski Shop, Inc.* v. *Jennings-Lemon*, 304 Ark. 671, 803 S.W.2d 934 (1991).

Also, we have stated that a spouse having a cause of action in tort is not required to bring that action in the divorce case and can pursue the claim in circuit court. *See Bruns* v. *Bruns*, 290 Ark. 347, 719 S.W.2d 691 (1986); *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986).

Lee Cater also asserts that Helen Cater amended her divorce complaint after the beating and requested alimony and more than fifty percent of the parties' property. However, this "Third Amended Complaint and Motion" was not abstracted or included in the record. Therefore, it is impossible for us to consider this contention.

A closer analysis of the facts reveals that Mrs. Cater did not attempt to recover twice for her injuries. Before either case was tried, she sought permission from the chancellor to prosecute her tort action for personal injuries in circuit court. Without objection from Mr. Cater, the chancellor entered an order stating that the chancery court would not take jurisdiction of the tort claims in order that she could pursue them in circuit court.

Also, Mrs. Cater made it clear before, during and after the trial of the divorce action that she was not attempting to litigate her tort claims in that suit and was not seeking any of the relief in the divorce case being sought in circuit court. For example, at the divorce hearing, she offered as evidence an updated list of medical expenses showing that she had incurred total medical expenses of

$8,487.61. When opposing counsel objected, the chancellor inquired about Mrs. Cater continuing to pursue her separate tort claim. Her attorney stated on the record that the medical expenses were being offered only to show fault and that she was not asking for damages in the divorce action.

Even though Mrs. Cater did not try to recover medical expenses in the divorce case, the chancellor included a provision in the divorce decree requiring Mr. Cater to pay her medical bills not covered by medical insurance which were attributable to the beating. To prevent double recovery, the chancellor ruled the medical expenses would be disallowed if Mrs. Cater elected to pursue her claim for medical expenses in circuit court and she would not be barred by res judicata if she did so. Mrs. Cater went a step further by later filing a formal written pleading entitled "Request and Election to Pursue Claim for Medical Expenses in Circuit Court."

Mr. Cater's arguments regarding the doctrines of election of remedies, res judicata and collateral estoppel are without merit because they are not applicable to this case. The doctrine of election of remedies applies to remedies, not to causes of action. *Henderson Methodist Church* v. *Sewer Improvement Dist., No. 142*, 294 Ark. 188, 741 S.W.2d 272 (1987). Simply, it bars more than one recovery on inconsistent remedies. There is no requirement that a plaintiff choose only one cause of action. *Westark Specialties, Inc.* v. *Stouffer Family Ltd. Partnership*, 310 Ark. 225, 836 S.W.2d 354 (1992); *White* v. *Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992). This doctrine is not relevant here because the remedies sought in the two actions were entirely consistent; they did not arise out of a single cause of action; and there is no precedent which requires Helen Cater to choose between the divorce action or money damages.

The doctrines of res judicata and collateral estoppel likewise have no application. Res judicata or claim preclusion bars another action by plaintiffs or their privies against defendants or their privies on the same claim or cause of action where there has been a valid and final judgment rendered on the merits by a court of competent jurisdiction. *Robinson* v. *Buie*, 307 Ark. 112, 817 S.W.2d 431 (1991); *Daley* v. *City of Little Rock*, 36 Ark. App. 80, 818 S.W.2d 259 (1991). The doctrine bars not only

the relitigation of claims which were actually litigated in the first suit, but those which could have been litigated. *Toran* v. *Provident Life & Accident Co.*, 297 Ark. 415, 764 S.W.2d 40 (1989). Collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit. *Robinson* v. *Buie*, 307 Ark. 112, 817 S.W.2d 431 (1991). Moreover, res judicata and collateral estoppel are only applicable when the party against whom the earlier decision is being asserted had a fair and full opportunity to litigate the issue in question. *Bailey* v. *Harris Brake Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 916 (1985).

These doctrines are not available here because Helen Cater's causes of action for divorce and for personal injuries are two separate cases. The claim for damages was not litigated in the divorce action. Also, the chancellor did not render a decision on the merits as to damages because he ruled that he would not take jurisdiction over the tort. Further, these doctrines do not bar a subsequent action where a court has made an express reservation of rights as to future litigation in an earlier action or where a party was actually prohibited from asserting a claim in the earlier action. *See Miles* v. *Teague*, 251 Ark. 1059, 476 S.W.2d 245 (1972). Therefore, the rulings of the trial court were correct because there was no attempt to litigate the tort claim in the divorce action nor to recover twice monetarily for the injuries sustained.

As his final point of appeal, Lee Cater argues that the award of $350,000.00 in punitive damages should shock the conscience of the court and reflects passion and prejudice by the jury in reaching its verdict. He claims that a verdict which is 17.5 times the amount of the compensatory damages awarded is excessive.

We have said numerous times that there is no fixed standard for the measurement of punitive damages and the amount lies largely within the discretion of the jury on due consideration of the attendant circumstances. *Interstate Freeway Services, Inc.* v. *Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992); *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972). Such damages constitute a penalty and must be sufficient not only to deter similar conduct on the part of the same tortfeasor, but they must be sufficient to deter any others who

might engage in similar conduct. *Warhurst* v. *White*, 310 Ark. 546, 838 S.W.2d 350 (1992); *Viking Insurance Co.* v. *Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

Because we review each case on its own facts, we cannot say the punitive damages award of $350,000.00 is unwarranted under the circumstances. There was proof that Lee Cater threatened Helen Cater several times and finally went to her home and waited for her to return; that when she got out of her car, she was knocked down and severely beaten. As a result, she sustained serious injuries: shattered bones in her face, broken ribs, a hematoma to the back of her head, multiple contusions, abrasions and lacerations and injuries to her foot and leg. Mrs. Cater underwent reconstructive surgery and will probably have surgery in the future. There is a possibility that she will be permanently impaired. It is understandable that the jury might wish to punish such conduct and deter others from similar acts. In short, the award does not shock our conscience or demonstrate passion or prejudice on the part of the jury.

Affirmed.

MONROE AUTO EQUIPMENT COMPANY *v.* The Honorable Graham PARTLOW, the Honorable Howard Templeton and the Honorable Rice Van Ausdall; Chancellors Second Chancery Circuit

92-792 846 S.W.2d 637

Supreme Court of Arkansas
Opinion delivered February 1, 1993

Fulkerson, Todd & Broadaway, P.A., by: *Michael Todd* and *Branch, Thompson and Philhours*, by: *Robert F. Thompson*, for petitioners.

Winston Bryant, Att'y Gen., by: *Sarah Lewis*, Asst. Att'y Gen., for respondents.

STEELE HAYS, Justice. This is an original action for a writ of prohibition. Our jurisdiction exists pursuant to Ark. Const. art. 7, §§ 4 and 5. Petitioners are two corporate employers operating in Greene County, Arkansas. Respondents are three chancery judges serving the Second Judicial District of Arkansas, encompassing Greene County. On April 1, 1991, respondents issued an administrative order affecting the procedure to be followed by employers remitting child support payments for certain of their employees subject to income withholding. The order reads:

> All child support payments made by an employer for an employee under income withholding are ordered to make the checks payable to the custodial parent, those checks are to then be forwarded to the circuit clerk's office for distribution to the proper person or agency.

Contending the order conflicts with federal and state law, petitioner Monroe Auto Equipment Company filed a petition for quo warranto in this court in July, 1991. That request was denied without prejudice to a later appeal. A similar petition by Darling Store Fixtures was also denied.

Petitioners next filed an action in the Circuit Court of Greene County for declaratory judgment to declare the administrative order void and unenforceable as being in conflict with 42 U.S.C.A. § 666(b)(6)(B) (West 1991) and Ark. Code Ann. §§ 9-14-222(d)(9) and 9-14-228(b) (1987). The chancellors answered the complaint through their counsel, the Attorney General. Petitioners then moved for summary judgment and the circuit court granted summary judgment on their behalf. That development prompted two steps by the respondents — they filed notice of appeal to this court and issued a new administrative order essentially indistinguishable from the first. When this action in prohibition was filed we granted a temporary stay of the administrative order and asked the parties to submit their briefs. While that was in progress, respondents filed the record in their appeal from the declaratory judgment and moved to stay the briefing schedule, asserting that the issues in their appeal corresponded with the issues in this action for prohibition. Petitioners concurred in that request and we granted the motion.

Returning to the case at hand, petitioners pose four arguments for prohibition:

I.

The Respondents' Conduct Constitutes An Impermissible Collateral Attack On The Court's Judgment.

II.

The Respondents Waived Any Objection To Jurisdiction By Failing To Move to Transfer Or Object To The Circuit Court's Action.

III.

Jurisdiction To Determine The Legality Of A Local Rule Has Not Been Specifically Assigned Nor Do The Chancery Courts Have Subject Matter Jurisdiction To Issue Local Rules.

IV.

The Petitioners Have No Adequate Remedy To Protect Their Rights In This Context.

We decline to address these arguments, as it appears they are formulated in the pending appeal and can be more appropriately addressed in that action than in this. That being so, it cannot be said there is no other adequate or appropriate remedy but prohibition. *Street* v. *Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975). A writ of prohibition is an extraordinary writ and is granted only when the lower court is wholly without jurisdiction, there are no disputed facts, there is no adequate remedy otherwise, and the writ is clearly warranted. *Miller* v. *Lofton*, 279 Ark. 461, 652 S.W.2d 627 (1983); *Henderson* v. *Dudley*, 279 Ark. 697, 574 S.W.2d 658 (1978). Our cases suggest that writs of prohibition are prerogative writs, extremely narrow in scope and operation; they are to be used with great caution and forbearance. *Wade* v. *State*, 264 Ark. 320, 571 S.W.2d 231 (1978). They should issue only in cases of extreme necessity. *Smith* v. *Burnett*, 300 Ky. 249, 188 S.W.2d 840 (1945).

A characteristic of prohibition is that it does not lie as a matter of right but as a matter of sound judicial discretion. *Karraz* v. *Taylor*, 259 Ark. 699, 535 S.W.2d 840 (1976). Finally, prohibition is never granted to prevent an inferior tribunal from exercising its jurisdiction erroneously, only where such tribunal is wholly without jurisdiction. *Jones* v. *Coffin*, 96 Ark. 332, 131 S.W. 873 (1910).

In light of those settled canons of the law applicable to prohibition, petitioners have not satisfied us that the issuance of this order, whatever might be said of its propriety or validity, affecting the collection of child support, is a usurpation of jurisdiction by the respondents, or that the issues common to these two proceedings are more appropriate to prohibition than to appeal. Accordingly, we deny the writ and dissolve the temporary stay.

Lorene HOLLINGSWORTH and Don Gore *v.* FIRST NATIONAL BANK AND TRUST COMPANY of Rogers, Arkansas, and James Robert Kelly

92-435 846 S.W.2d 176

Supreme Court of Arkansas
Opinion delivered February 1, 1993

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

Matthews, Campbell & Rhoads, by: *David R. Matthews*, for appellees.

TOM GLAZE, Justice. Appellants, Lorene Hollingsworth and Don Gore, brought this malicious prosecution and tort of outrage case after having prevailed in an earlier federal lawsuit where the appellees claimed appellants had violated the federal "RICO" statutes. In that federal action, appellees alleged the appellants were involved in racketeering activities by laundering illegal funds, committing mail fraud and criminal enterprise, misusing credit card numbers, forging documents and other similar fraudulent conduct. The federal court had allowed the appellees to obtain a prejudgment attachment, but subsequently set it aside. At trial, Gore was granted a directed verdict, but the federal judge allowed Hollingsworth's case to go to the jury, which returned a verdict in her favor. In filing their complaint in this state action, appellants, among other things, set out the "RICO" allegations the appellees had previously alleged against appellants, stated the appellants had been absolved of those allegations and further asserted the appellees had commenced the federal action maliciously and without probable cause. They also complained appellees were liable for the tort of outrage because appellees' actions were extreme and outrageous beyond the bounds of decency. Appellees moved under ARCP Rule 12(b)(6) to dismiss appellants' state action, alleging appellants' complaint failed to state facts upon which relief can be granted. The trial court agreed, and appellants appeal the trial court's ruling.

Arkansas has adopted a clear standard to require fact pleading: " a pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief . . ." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged. *Rabalaias* v. *Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. *Id*; ARCP Rule 8(f).

As mentioned above, appellants seek damages against appellees for malicious prosecution and the tort of outrage. The elements necessary to show the tort of malicious

prosecution are the following: 1) a proceeding instituted or continued by the defendant against the plaintiff; 2) termination of the proceeding in favor of the plaintiff; 3) absence of probable cause for the proceedings; 4) malice on part of the defendant; and 5) damages. *Miles* v. *Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988). To establish liability for the tort of outrage, the following four elements are needed: 1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; 2) the conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community"; 3) the actions of the defendant were the cause of the plaintiff's distress; and 4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Deitsch* v. *Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

Here, appellants' complaint falls short of pleading a cause of action for malicious prosecution because they failed to plead sufficient facts to show either malice or lack of probable cause. Malice has been defined as "any improper or sinister motive for instituting the suit." *Cordes* v. *Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). Probable cause for prosecution must be based upon the existence of facts or credible information that would induce the person of ordinary caution to believe the accused person to be guilty of the crime for which he is charged. *Id.* Ordinary caution is a standard of reasonableness, which presents an issue for the jury when the proof is in dispute or subject to different interpretations. *Id.*

In their complaint, the appellants mention no facts bearing on the background for appellees having filed the RICO action. Appellants merely allege they prevailed against appellees' allegations which is not the same as saying appellees had no probable cause to file the action the first place. Concerning appellant Hollingsworth, the federal court obviously ruled sufficient evidence had been presented to send her case to the jury. Such a ruling itself indicates probable cause accompanied the RICO action that the appellees filed against her. Regardless, the appellants' merely stating that the appellees' actions were malicious is not sufficient to meet the pleading requirements under ARCP Rule 8(a)(1). The only facts the appellants set out in the

complaint were that Hollingsworth had been served while she was working at a school in front of some of her students and this manner of service was used to embarrass and humiliate her. Again, such an allegation has little to do with whether appellees had probable cause to bring the earlier RICO action against appellants. Likewise, the appellants failed to plead any facts to support their cause of action for tort of outrage besides merely stating in summary fashion that the appellees' actions were "extreme and outrageous beyond the bounds of decency." Accordingly, we uphold the trial court's decision to dismiss appellants' complaint.

One last point needs to be addressed. The court's order in the present case was silent as to whether the appellants' complaint was dismissed with or without prejudice. When a complaint is dismissed under Rule 12(b)(6) for failure to state facts upon which relief can be granted, the dismissal should be without prejudice. *Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984). The plaintiffs then have the election to either plead further or appeal. *Id.* In *Arkhola Sand & Gravel Co.* v. *Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987), the trial court dismissed the appellant's complaint without any mention of prejudice to Arkhola. Arkhola then had the election to plead further or appeal. Arkhola appealed, and therefore it waived its right to plead further and the complaint was dismissed with prejudice. Likewise, in the present case the appellants chose to appeal rather than plead further, thus the appellants' complaint is dismissed with prejudice.

Bryan CAMPBELL *v.* STATE of Arkansas

92-455 846 S.W.2d 639

Supreme Court of Arkansas
Opinion delivered February 1, 1993

William R. Simpson, Jr., Public Defender, by: *Tammy Harris*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Clementine Infante*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. On December 31, 1991,

appellant, Bryan Campbell, was involuntarily admitted to the Arkansas State Hospital. On January 8, 1992, a petition to involuntarily commit appellant was filed. A hearing was held on January 10, 1992, at which the court held appellant should be committed to the Arkansas State Hospital or Western Arkansas Counseling and Guidance Center for a period not to exceed forty-five (45) days. An order setting forth the court's holding was filed on January 10, 1992. The court order expired on February 23, 1992. On appeal, appellant argues the court committed error by not dismissing the commitment proceedings against him pursuant to Ark. Code Ann. § 20-47-210 (Repl. 1991) and the court violated his constitutionally vested liberty interest by not dismissing the proceedings against him. We do not address appellant's second argument as appellant failed to raise this issue below. We do not consider even constitutional issues that are raised for the first time on appeal. *Ussery* v. *State*, 308 Ark. 67, 822 S.W.2d 848 (1922). Since this case involves the interpretation of an act of the General Assembly, our jurisdiction is proper pursuant to Ark. Sup. Ct. R. 29(1)(c).

Normally, this case would not be subject to review because it is moot, but appellant asks us to decide the case anyway claiming it "presents a question that is capable of repetition, yet evading review", *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-19 (1974) (quoting *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911)), and cases of this type "tend[] to become moot before litigation can run its course", *Campbell* v. *State*, 300 Ark. 570, 572, 781 S.W.2d 14, 15 (1989), since the commitment periods contained in the applicable statutes are seven (7), forty-five (45), and one hundred eighty (180) days.

We do not ordinarily decide issues which are moot, but "when a case involves the public interest, or tends to become moot before litigation can run its course, or a decision might avert future litigation, we have, with some regularity, refused to permit mootness to become the determinant." *Campbell*, 300 Ark. at 572, 781 S.W.2d at 15 (citations omitted). This case "is moot in the sense that we cannot now afford appellant any relief, but it is not moot in the sense that it is important to decide a practical question of great public interest." *Id.* As appellant points out, the involuntary commitment statutes provide for only short term involuntary commitment such that most persons committed

under these statutes will have been released before their appeals can be decided. Whether a person can be held involuntarily when the petition for involuntary commitment is not filed within the time provided in the statute is a practical question of great public interest. For that reason, we address appellant's substantive argument.

The following constitutes the chronological development of appellant's confinement and the court action leading to this appeal.

Tuesday, December 31, 1991	Appellant's initial confinement 6 p.m.
Wednesday, January 1, 1992	Holiday, excluded by statute
Thursday, January 2, 1992	24 hours/1 day
Friday, January 3, 1992	48 hours/2 days
Saturday, January 4, 1992	excluded by statute
Sunday, January 5, 1992	excluded by statute
Monday, January 6, 1992	72 hours/3 days
Tuesday, January 7, 1992	96 hours/4 days
Wednesday, January 8, 1992	117 3/4 hours/5 days 3:45 p.m. petition filed
Thursday, January 9, 1992	6 days
Friday, January 10, 1992	7 days/45 day commitment order

Appellant argues that section 20-47-210(a)(1) requires that a petition be filed in the probate court of the county in which the person resides or is detained within seventy-two (72) hours of his detention, excluding weekends and holidays, and since the petition was not filed within seventy-two (72) hours, the petition should have been dismissed. We agree.

Section 20-47-210(a)(1) provides in pertinent part:

> A petition, as provided in § 20-47-207, *shall* be filed in the probate court of the county in which the person resides or is

> detained within seventy-two (72) hours, excluding weekends and holidays, and a hearing, as provided in § 20-47-209(a)(1) shall be held[.] [Emphasis added.]

"[W]e have held that the word 'shall,' when used in a statute, means the legislature intended mandatory compliance unless such an interpretation would lead to absurdity." *Baumer* v. *State*, 300 Ark. 160, 163, 777 S.W.2d 847, 849 (1989). The petition should have been filed within seventy-two (72) hours and since the legislature intended mandatory compliance, we find failure to file the petition within seventy-two (72) hours, excluding weekends and holidays, requires dismissal of the petition. *Garrett* v. *Andrews*, 294 Ark. 160, 741 S.W.2d 257 (1987), *cert. denied sub nom. Andrews* v. *Adams*, 487 U.S. 1219 (1988) (ten day filing limit in election contest jurisdictional, failure to comply requires dismissal). The court lacked jurisdiction to decide the petition, which was filed outside the statutory time limit, and thus erred by committing appellant for a period not to exceed forty-five (45) days. Since the forty-five (45) day period has already run, we cannot remedy this error by ordering appellant to be released, but we do order that the decision of the trial court be reversed and dismissed and record of appellant's involuntary commitment pursuant to the court's order be removed from his record at the Arkansas State Hospital.

Reversed and dismissed.

Ronnie HAYES a/k/a Ronnie Haynes *v.* STATE of Arkansas

CR 92-1163 846 S.W.2d 182

Supreme Court of Arkansas
Opinion delivered February 1, 1993

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

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant, Ronnie Hayes a/k/a Ronnie Haynes, appeals from convictions for aggravated robbery and theft of property. His appeal is premised on two grounds: the unreliability of a photo lineup at police headquarters which, he contends, tainted an in-court identification at trial, and the failure of the trial court to reduce the theft charge to a misdemeanor on the basis of the amount proven. We hold that neither point has merit, and we affirm.

On May 5, 1991, a person later identified as Haynes entered a Pizza Inn in Little Rock and went to the back of the restaurant with a drawn gun. The manager asked if he could help him, and the man, clad in gray shorts and a gray flannel sweatshirt, announced, "This is a robbery." He then told Tim Moore, an employee, to open the cash register. When he was unable to do so, a manager trainee, William Blankenship, came over to the register and opened it. The room was illuminated with fluorescent lighting, which allowed both Moore and Blankenship to see the robber's uncovered face for several minutes. Blankenship later testified that approximately $200 to $300 was taken.

Four days later on May 9, 1991, Blankenship saw the person who robbed the restaurant on television and said he became "unglued." He telephoned the Little Rock Police Department and disclosed the fact that the person on television had been the robber. The following day, May 10, 1991, Blankenship went to

police headquarters and viewed a photo spread, from which Blankenship identified Haynes as the culprit. The next day, on May 11, 1991, Moore also viewed a photo lineup and identified Haynes as the man who had robbed the restaurant.

Haynes was charged with aggravated robbery and theft of property and later on was charged as an habitual offender. Subsequently, he moved to suppress any in-court identification by witnesses who had previously identified him "by the use of impermissibly suggestive photo spreads and lineups." The motion was denied. When it was renewed at trial, together with a motion to reduce the theft of property charge to a misdemeanor, the trial court denied both motions.

At the ensuing jury trial, both Moore and Blankenship identified Haynes as the robber. Haynes was convicted of aggravated robbery and theft of property and was sentenced, as an habitual offender, to concurrent sentences of life (aggravated robbery) and twenty years (theft of property).

Haynes first contends that the trial court erred in failing to suppress the photo spread identifications by witnesses Tim Moore and William Blankenship, which, according to his theory, impermissibly tainted the in-court identifications. We have held that 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. *Dixon* v. *State*, 310 Ark. 460, 839 S.W.2d 173 (1992). In determining whether an in-court identification is admissible, the court looks first at whether the pretrial identification procedure was unnecessarily suggestive or otherwise constitutionally suspect. *Van Pelt* v. *State*, 306 Ark. 624, 816 S.W.2d 607 (1991). It is the appellant's burden to show that the pretrial identification procedure was suspect. *Id.*

Reliability is the linchpin in determining the admissibility of identification testimony. *Dixon* v. *State, supra.* We do not inject ourselves into the process of determining reliability unless there is a very substantial likelihood of irreparable misidentification. *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992). The following factors are considered in determining reliability: (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

pretrial 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 pretrial identification procedure. *Van Pelt* v. *State, supra; Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988). Even if the technique is impermissibly suggestive, testimony concerning the identification is admissible if the identification is reliable. *Bishop* v. *State, supra.* Finally, the credibility of identification testimony is for the jury to decide. *Dixon* v. *State, supra.*

Haynes argues that Moore's identification was unreliable because he did not give the police a description of the robber immediately after the crime and could not estimate how much time elapsed during the robbery. The appellant also points to an apparent inconsistency in Moore's testimony and the testimony of a police officer concerning a second officer's presence during Moore's examination of the photographs. Further, he contends that Moore's inability to describe the police officer who showed him the photographs underscores that his identification skills were lacking.

Similarly, Haynes argues that Blankenship's identification was unreliable because he became "unglued" when he saw the person he believed had robbed the restaurant on television. Then, when he viewed the photo spread at the police station, he stated that he believed that the police officer told him that the person who had been on television was also in the lineup. (The police officer involved disputed that fact.) Also, Blankenship testified that he had poor eyesight, and at a pretrial hearing, he had difficulty identifying the appellant because of his cleaner and better-groomed appearance.

The trial court correctly found that the identifications at the two photo lineups were reliable. Both Moore and Blankenship had the opportunity to observe the appellant, whose face was in plain view under fluorescent lights, at the time of the criminal act. Both witnesses were positive about their photo spread identifications. Indeed, Moore testified that he was able to make an identification in "a matter of seconds," and Blankenship avowed that he was certain that the person he selected from the photo lineup was the person who robbed him. No other person was

identified by the witnesses, and neither Moore nor Blankenship failed to identify the appellant on any prior occasion, although Blankenship did have some hesitancy with identification during a pretrial hearing due to Haynes's groomed, and therefore changed, appearance. Finally, less than a week passed between the criminal act and the identifications by Moore and Blankenship at the photo lineups.

As for the police officer's possibly informing Blankenship that the person he saw on television was included in the photo spread, the Arkansas Court of Appeals has held that for the police merely to tell a witness that a suspect is in a lineup is not absolutely impermissible. *Freeman* v. *State*, 6 Ark. App. 240, 640 S.W.2d 456 (1982); *citing U.S.* v. *Gambril*, 449 F.2d 1148 (D.C. Cir. 1971); *see also Forgy* v. *State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985). A witness, reasoned the court of appeals, must realize that he would not be asked to view a lineup if a suspect was not present. *Id.* What the witness is told may be only one factor to consider in reviewing the total surrounding circumstances. *Id.* Moreover, this court has treated a similar irregularity as a credibility factor. *See Frensley* v. *State*, 291 Ark. 268, 724 S.W.2d 165 (1987). In *Frensley*, we held that a lineup was not unduly suggestive though the five victims knew a suspect was in custody when they viewed the lineup and made their identifications. That approximates the circumstances in this case where one witness said that he believed he was told the suspect would be in the photo spread.

Under the standards of *Van Pelt* v. *State, supra*, we held that the identification of the appellant at trial by both witnesses was reliable and not tainted or otherwise impermissibly affected by the prior photo lineups.

Haynes's second argument is that the evidence was insufficient to convict him of theft of property because the state offered no evidence of the value of the property stolen other than Blankenship's general estimate that "approximately two to three hundred dollars" was taken. The appellant contends that the state's felony charge for theft of property, therefore, failed due to the absence of substantial supporting evidence.

A motion for directed verdict, although lodged at the close of the state's case, was not made at the conclusion of

Haynes's evidence. Such a failure precludes review by this court, and we have so held repeatedly. *See, e.g., Crow* v. *State*, 306 Ark. 411, 814 S.W.2d 909 (1991); *Ferrell* v. *State*, 305 Ark. 511, 810 S.W.2d 29 (1991); *Andrews* v. *State*, 305 Ark. 262, 807 S.W.2d 917 (1991).

The record has been examined 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.

Ronnie HAYNES *v.* STATE of Arkansas

CR 92-1067 846 S.W.2d 179

Supreme Court of Arkansas
Opinion delivered February 1, 1993

William R. Simpson, Jr., Public Defender, by: *Kent C. Krause*, Deputy Public Defender, for appellant.

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

ROBERT L. BROWN, Justice. Ronnie Haynes appeals from three felony convictions for rape, robbery, and theft and argues that the prosecutor commented on parole in her closing argument during the penalty phase of the trial. He further contends that the circuit court erred in resentencing him on his Rule 37 petition after his prior felonies had been reversed by this court. We hold that no prejudice occurred, and we affirm.

On June 11, 1991, an information was filed charging Haynes with rape, aggravated robbery, and theft of property in connection with a May 3, 1991 attack upon the victim in this case. The information was subsequently amended to add a habitual-offender charge. This matter was tried, and the jury returned a verdict of guilty on all offenses. During the penalty phase of the trial, the prosecutor argued that she was asking the jury for the

maximum penalty on all offenses because "we don't know how long life is, but we do know how long 500 plus years is." Haynes moved for a mistrial claiming that the prosecutor was commenting on parole. The court denied the motion. The jury thereafter sentenced appellant to two life sentences for rape and robbery, to run consecutively, and a forty-year sentence for theft, to run concurrently. The following events then transpired:

- On June 9, 1992, judgment was entered.

- On June 10, 1992, Haynes filed a *pro se* motion entitled Motion for a New Trial which was filed pursuant to Rule 37 and which asserted ineffective counsel as the sole ground for relief.

- On June 15, 1992, this court reversed the prior convictions that formed the basis for Haynes's habitual-offender status. *Haynes* v. *State*, 309 Ark. 583, 832 S.W.2d 479 (1992).

- On June 25, 1992, Haynes filed a notice of appeal from his rape, robbery, and theft convictions.

- On July 16, 1992, Haynes filed a Rule 37 Petition seeking to set aside the judgments and dismiss on double jeopardy grounds or, in the alternative, for a new trial.

The Rule 37 Petition filed on July 16, 1992, was heard by the circuit court on August 11, 1992, and denied. Haynes was then resentenced by the court and received life imprisonment for rape, twenty years for aggravated robbery, and ten years for theft of property, to run consecutively.

Haynes first contends that the trial court erred in failing to grant his motion for mistrial because the prosecutor referred to parole by implication during her closing argument in the penalty phase. He argues that the fact that the jury returned such a harsh sentence is evidence of the resulting prejudice. His position is further bolstered, he contends, by the fact that the jury, during its deliberations, sent the court a note questioning at what point Haynes would be eligible for parole after receiving a life sentence.

The state raises as a preliminary argument lack of jurisdiction in this court because there was no timely notice of appeal

given. Specifically, the state argues that after judgment was entered, Haynes filed a *pro se* motion for new trial. Prior to the date the motion for new trial was deemed denied, Haynes filed a notice of appeal. Therefore, according to the state, the notice of appeal was ineffective under Ark. R. App. P. 4(c), and no valid appeal was taken.

The state's argument is without merit. Though styled as *pro se* motion for new trial, it cannot be seriously contended that the motion was anything other than one for Rule 37 relief. The motion refers to Rule 37 as its authority and all of its allegations concern the collateral issue of ineffective counsel. In determining what a motion is, we look to content and substance — not to titles. *Cornett* v. *Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987); *see also Chambers* v. *State*, 304 Ark. 663, 803 S.W.2d 932 (1991) (per curiam). Because the motion was not in fact one for a new trial, the notice of appeal filed on June 25, 1992, effectively preserved the issue of the prosecutor's argument for our review.

Turning to the merits, we have held that neither the trial court nor counsel should comment on parole. *See Simmons* v. *State*, 278 Ark. 305, 645 S.W.2d 680 (1983). The rationale for this rule was announced in *Andrews* v. *State*, 251 Ark. 279, 472 S.W.2d 86 (1971), where we stated that parole should not be discussed because the jury would be inclined to impose excessive punishment in order to compensate for early release.

The prosecutor's comment regarding life and five hundred years certainly raises suspicions about the intent behind the remark. Nonetheless, we are not prepared to state with certainty that it was a comment on parole sufficient to invoke the drastic remedy of a mistrial. A mistrial is only granted when there has been an error so prejudicial that justice cannot be served by continuing the trial. *See Magar* v. *State*, 308 Ark. 380, 826 S.W.2d 221 (1992); *Muhammed* v. *State*, 27 Ark. App. 188, 769 S.W.2d 33 (1989). In such cases, the trial court is granted considerable discretion in determining whether to grant a motion for mistrial, and only when this court determines that the trial court abused its discretion will a decision to deny a motion for mistrial be reversed. *Dixon* v. *State*, 310 Ark. 460, S.W.2d (1992).

We note that Haynes argues that the trial court

should have given a curative instruction. This argument suggests that a remedy less drastic than a mistrial might have been invoked, yet Haynes did not avail himself of this lesser remedy. It was his burden to request curative relief, and his failure to request a limiting instruction cannot inure to his benefit on appeal. *Sullinger* v. *State*, 310 Ark. 690, 840 S.W.2d 797 (1992). Furthermore, if anything, an argument that he was entitled to a curative instruction undermines his argument that the error was so pronounced that only a mistrial could have rectified the situation.

In sum, we cannot say under these facts that the circuit court abused its discretion in refusing to grant a mistrial.

For his second point, Haynes objects to the resentencing by the circuit court pursuant to his Rule 37 petition and argues that he was entitled to dismissal of the charges as double jeopardy or, in the alternative, resentencing by a jury. Rule 37, however, is not properly before the court because an appellant can not simultaneously pursue a direct appeal and Rule 37 relief. Ark. R. Crim. P. 37.2(a); *see also Westbrook* v. *State*, 286 Ark. 192, 691 S.W.2d 123 (1985). If a conviction is appealed, the circuit court is not to entertain a Rule 37 proceeding while that appeal is pending. Ark. R. Crim. P. 37.2(a); *see also Edwards* v. *City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989). The circuit court erred in addressing the Rule 37 petition prematurely, and we will not consider the issue raised in a Rule 37 petition at this juncture.

The record has been examined 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.

The SEBASTIAN COUNTY CHAPTER OF THE AMERICAN RED CROSS *v.* Wanda WEATHERFORD

92-403 846 S.W.2d 641

Supreme Court of Arkansas
Opinion delivered February 1, 1993

Hardin, Jesson, Dawson & Terry, by: *Rex M. Terry*, for appellant.

Oscar Stilley, for appellee.

ROBERT L. BROWN, Justice. This case concerns the Freedom of Information Act, and the appeal presents a single issue for consideration: whether a ground lease between the City of Fort Smith and the appellant, the Sebastian County Chapter of the American Red Cross, wherein the City charges Red Cross a one-

dollar-per-year lease payment, qualifies as support by public funds. The circuit court found that it did. We hold that the finding was clearly erroneous, and we reverse and remand.

At the meeting of the Fort Smith Board of Directors on December 6, 1983, a resolution was adopted authorizing a lease agreement between the City and the Red Cross. The agreement provided that the City would lease a lot to the Red Cross for a period of thirty years with an annual rental fee of one dollar. It further provided that the Red Cross would commence construction of a building for its offices and that the building would revert to the City upon the expiration of the lease.

On January 8, 1992, the appellee, Wanda Weatherford, directed a request to the Red Cross, seeking an opportunity to "inspect and copy all non-privileged documents" in its possession. The Red Cross denied the request, and Weatherford filed a petition for disclosure under the Arkansas Freedom of Information Act on the basis that the lease constituted public funding. She also contended that the American Red Cross received federal funding, but no proof of that fact was presented to the circuit court.

The Red Cross answered and asserted that the building was constructed on the leased property at its own expense and that at the expiration of the lease term the building and improvements would become the property of the City. The Red Cross also emphasized that it was not a public agency or an organization "wholly or partially supported by public funds or expending public funds" within the meaning of Ark. Code Ann. § 25-19-103 (Repl. 1992). Further, the Red Cross contended that Weatherford was using the FOIA as a replacement for discovery related to a civil action it had pending against certain Red Cross officials.

At a subsequent hearing, the parties stipulated that, standing alone, $1.00 per year would be less than a reasonable rental value for the leased property. Also at the hearing, reference to a 1979 appraisal was introduced establishing the value of three lots, one-half of which constitutes the leased land in question, at $62,500. Counsel for Red Cross argued that the lease was an

arms-length transaction[1] in that the City would ultimately gain the constructed Red Cross building valued at $60,000 in 1983 and the public had the use of the conference room in the building. He also argued that the one-dollar-per-year rental payment did not qualify as support by public funds. Following the hearing, the circuit court entered an order in which it first recognized that the lease required the Red Cross to build a building and that the public might obtain substantial benefit from the lease. The court then found that the fair market value of the leased property was "substantially more than $1 per year" and that the lease constituted a partial support by public funds, or an expenditure of public funds under § 25-19-103. Accordingly, the court ordered the Red Cross to open its non-exempt records for inspection pursuant to the FOIA.

The Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101 — 25-19-107 (Repl. 1992), was originally enacted as Act 93 of 1967. The legislative intent behind the FOIA is stated at Ark. Code Ann. § 25-19-102 (Repl. 1992):

> It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.

We have stated repeatedly that the FOIA should be liberally construed in order to accomplish the Act's laudable purposes. *See, e.g., Bryant* v. *Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992); *City of Fayetteville* v. *Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); *North Central Assoc. of Colleges & Schools* v. *Troutt Bros. Inc.*, 261 Ark. 379, 548 S.W.2d 825 (1977); *Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). We have also remarked that we are aware of the need for a balancing of interests to give effect to the intent of the General Assembly,

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[1] At oral argument before this court, counsel for Red Cross also acknowledged that the Red Cross was receiving what amounted to an indirect benefit from the City by virtue of the one-dollar-per-year lease payment.

and we do so with a common sense approach. *Bryant* v. *Mars, supra; Simmons First Nat'l Bank* v. *Liberty Mut. Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984).

The FOIA opens to inspection and copying "all public records." Ark. Code Ann. § 25-19-105(a) (Repl. 1992). As defined by Ark. Code Ann. § 25-19-103(1) (Repl. 1992), "public records" means writings and other documentation "required by law to be kept or otherwise kept, and which constitute a record of the performance of lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, *or any other agency wholly or partially supported by public funds or expending public funds.*" (Emphasis supplied.)

The issue in this appeal has been narrowly drawn by the parties and the circuit court, that is, what constitutes support by public funds? We focus first on the term "public funds," which is not defined in the FOIA. The definition given in *Black's Law Dictionary*, 6th ed. (1990), is "Moneys belonging to government, or any department of it, in hands of public official." Case law cited by *Black's* in support of this definition is relevant to the present case. *See Droste* v. *Kerner*, 217 N.E.2d 73 (Ill. 1966). In *Droste*, a taxpayer attacked the Illinois legislature's conveyance of land submerged beneath Lake Michigan to U.S. Steel on the basis of a statute that prohibited the "disbursement" of "public funds" and "public moneys" by state officials. The Illinois Supreme Court affirmed the trial court and rejected the taxpayer's attempt to translate 194.6 acres of land into "public funds." The court concluded that "the legislature could not have contemplated real estate when it referred to public funds, nor may this court torture the meaning of the words employed to arrive at that result." 217 N.E.2d at 78-79.

This court has dealt with several instances in which private entities have received public funds, and in those cases we have applied the FOIA. *See City of Fayetteville* v. *Edmark, supra; North Central Ass'n of Colleges & Schools* v. *Troutt Bros, Inc., supra; Rehab. Hospital Services Corp.* v. *Delta-Hills Health Systems, Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). In *City of Fayetteville* v. *Edmark, supra*, outside attorneys were employed and paid by the City for their work. Records in their

possession were held to be subject to FOIA disclosure, in part because they had been hired in lieu of the city attorney and paid with public funds.

An earlier case, *North Central Ass'n of Colleges & Schools* v. *Troutt Bros, Inc., supra*, involved a suit over the exclusion of a reporter from a state meeting of the North Central Association of Colleges and Schools, an organization that sets educational standards and policies for colleges and secondary schools. Dues from the Arkansas schools supported the NCA. Although the association was a private, nonprofit corporation, a factor stressed by this court in applying the FOIA was that over 90% of the money contributed by Arkansas schools to the NCA was public money.

In still another case, the Delta-Hills Health Systems Agency, Inc. had been created under federal law to assist the Arkansas State Health Planning and Development Agency in the regional review of certain proposed changes in health care. *Rehab Hospital Services Corp.* v. *Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 400, 687 S.W.2d 840, 842 (1985). The primary source of funding for the Delta-Hills HSA was the federal government, which we held to be public funding. Because of this, we concluded that Delta-Hills HSA, though a private, nonprofit corporation, was subject to the FOIA.

All of these cases dealt with direct public funding of some sort as the catalyst for the application of the FOIA. None of these cases expanded the term "public funds" to embrace an indirect benefit conveyed by government upon a private organization.

In the present case, we are mindful that under the Lease Agreement the City will at some point fall heir to the Red Cross building and, thus, receive the benefit of this improvement and that in the interim the public has use of the Red Cross conference room. However, we do not decide this case on that basis. The plain language of the FOIA confirms that the General Assembly intended that direct public funding be required. As previously noted, the FOIA applies to private entities "supported wholly or in part by public funds." Had the General Assembly intended to extend the FOIA to private organizations that receive any form of government assistance or subsidy, no matter how indirect, it would not have used the words "supported . . . by public funds"

to describe the nature of support necessary to trigger the Act.

Refusal to read indirect government benefits or subsidies into the term "public funds" is not at odds with a liberal construction of the FOIA. Were we to construe "public funds" to include an entirely separate and new category of government support, we would be amending the FOIA to expand its application significantly. For example, the Arkansas Code contains statutes designed as incentives to induce businesses to locate in the state. Arguably, the use of such devices for industrial development or other purposes constitutes indirect public support. Did the General Assembly, without saying so, intend the application of the FOIA to all private organizations which receive some government benefit, no matter how minor? We think not.

We, therefore, adopt a common sense approach, as we did in *Bryant* v. *Mars, supra*, and give the term "public funds" its plain and ordinary meaning which is best evidenced by *Black's Law Dictionary* and the definition "moneys belonging to government." Here, no payment of government moneys was made to the Red Cross and the concomitant application of the FOIA should not transpire. In deciding as we do, we resist the temptation to legislate judicially. *See Ragland* v. *Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). We do, however, recognize that all records pertaining to the Lease Agreement between the City and the Red Cross were available to Weatherford through an FOIA request to the City.

Reversed and remanded for an order consistent with this opinion.

DUDLEY, J., dissents.

ROBERT H. DUDLEY, Justice. The plaintiff-appellee, Wanda Weatherford, filed a request of the defendant-appellant, Sebastian County Chapter of the American Red Cross, to "inspect and copy all non-privileged documents" in its possession. The request was filed under the authority of the Arkansas Freedom of Information Act. The local chapter denied the request. The plaintiff-appellee field suit in circuit court for the information.

The Arkansas Freedom of Information Act gives a citizen the right of access to public records. Ark. Code Ann. § 25-19-105 (1987). "Public records" are the records of any organization that

is "wholly or *partially supported by public funds*." Ark. Code Ann. § 25-19-103 (1) (1987) (emphasis added).

The trial court held that the local chapter received a subsidy from the City of Fort Smith, and, since it was partially supported by public funds, the chapter was under an obligation to disclose its non-privileged records. The majority opinion reverses the trial court's ruling and, for all practical purposes, dismisses the request.

In 1983, the City of Fort Smith leased a lot to the Sebastian County Chapter of the American Red Cross for thirty years for one dollar per year. It is undisputed that the fair rental value of the lot is substantially more than one dollar per year. Thus, it is without dispute that the City has been and will continue to *partially support* the local chapter of the Red Cross. The majority opinion holds that the partial support provided by the City is not in the form of *public funds* because it is only an "indirect benefit," and it is not "money."

The subsidy given to the local chapter is not an "indirect benefit." It is direct. Nothing more need be said.

The majority opinion construes the statutory phrase "public funds" to exclude a governmental subsidy by rental value. The majority opinion does so by holding that the phrase "wholly or partially supported by public funds" means wholly or partially supported by "moneys belonging to the government."

Without question, the word "public" is inclusive of government property. The only question is whether the word "funds" includes a subsidy by rental value. The answer to the question is found in our rules of statutory interpretation. The primary goal in the interpretation of statutes is to determine and to give effect to the intent of the General Assembly. *Sanders* v. *State*, 310 Ark. 630, 839 S.W.2d 518 (1992). In determining that intent we give words their usual and ordinary meaning. *Bob Cole Bail Bonds, Inc.* v. *Howard*, 307 Ark. 242, 819 S.W.2d 684 (1991). Finally, we have stated repeatedly that the Freedom of Information Act should be liberally construed in order to accomplish the act's laudable purpose. *See, e.g., Bryant* v. *Mars*, 304 Ark. 179, 801 S.W.2d 275 (1990). An examination of the facts of this case in the light of the above rules of construction reveals the fault in the

majority opinion.

Legislative Intent

Under the rationale of the majority opinion, if a governmental entity gives a $1,000 bill to another organization, that other organization must disclose its relevant records. However, if the governmental entity gives millions in value to subsidize another organization, that organization does not have to disclose its relevant records. These exempt subsidies might be in the form of goods or labor or services, or in the form of a check or warrant or draft or bond, or in the form of a conveyance or lease of either personal or real property—anything so long as it is not "money." Such a rationale is not at all in keeping with the legislative intent.

The Usual And Ordinary Meaning of Words

If one were to ask an ordinary person, "Where do you keep your funds?", the answer might be, "In the bank," or it might be, "Partly in stocks, partly in bonds, some real estate, and some cash." Funds in the bank are only a credit. A credit is not money. Having one's funds in stocks and bonds would also be having one's funds in something other than money. "Funds" is the plural of "fund." Fund means a quantity of material resources maintained or available as a source of supply. Websters International Dictionary 920 (3d ed. 1961). On the other hand the word "money" has a more limited definition. Money means a medium of exchange. Websters International Dictionary 1458 (3d ed. 1961); *See also Quinn-Moore* v. *Lambert*, 272 Ark. 324, 614 S.W.2d 230 (1981). The dollar is the monetary unit that constitutes the medium of exchange in the United States. Thus, the majority opinion limits the meaning of the phrase "partially supported by public funds," to partially supported by United States dollars. In short, the majority opinion does not give the word "funds" its usual and ordinary meaning.

Construction To Accomplish Act's Purpose

In this case the City, over the period of the lease, has given and will give to the local chapter the fair rental value of the lot that exceeds one dollar per year. The amount of this gift is monetarily determinable. It is a subsidy that causes a depletion of the public funds just as certainly as if the subsidy were by dollar

bills. A construction that gives meaning to the laudable purposes of the Act would require disclosure by an organization that is partially supported by public services, or goods, or property, just as surely as it does one supported by public dollars.

Accordingly, I dissent.

Frank GIACONA *v.* STATE of Arkansas

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Supreme Court of Arkansas
Opinion delivered February 1, 1993

Craig Lambert, for appellant.

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

PER CURIAM. Appellant was convicted of a felony. He filed a motion for a new trial. The trial court did not rule on the motion within thirty days, and appellant did not give a notice of appeal at that time. Some months later the trial court denied the motion, and appellant gave notice of appeal within thirty days of the ruling. The court of appeals dismissed the appeal for failure to give a timely notice of appeal. *Giacona* v. *State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992). Appellant has filed a petition for review in this court.

We deny the petition for review, but take this opportunity to repeat that Arkansas Rule of Appellate Procedure 4(c) applies to criminal cases. It provides that when post-trial motions are filed, the time for appeal runs from the entry of the order granting or denying the 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.*" (Emphasis added.)

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